THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

*****

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2019 - VOL. XI
(NOVEMBER)

PAGES 1 TO 1491

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

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(2019)11ILR A1

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.10.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I , J.

U/S 482/378/407 No. 914 of 2004

Dr. Dev Nath Verma ...Applicant
Versus
State Through C.B.I./ Sic-Iv/Lucknow ...Opposite Party

Counsel for the Applicant:
Sri Nandit Srivastava.

Counsel for the Opposite Party:
Sri Bireshwar Nath, Govt. Advocate, Sri Rishad Murtaza

A. Criminal Law-Code of Criminal Procedure, 1973 – Section 482 - Practice and Procedure - Perpetuation of interim orders-is denial of justice which does not augur well for the justice delivery system. (Para 8)

B. Criminal Law-Code of Criminal Procedure, 1973 - Discharge Application – Scope- Section 239 Cr.P.C - Charge sheet against the petitioner under Sections 420, 467, 468, 471 and under Sections 182/211 IPC by the C.B.I - Evidence against petitioner of having filed forged documents and making false averments in Writ Petition instituted on false charge – At this stage, the Trial court is not required to examine and consider the evidence and material on record in detail or to form a final opinion. Only requirement is to form an opinion whether, prima facie, case raising strong suspicion against the petitioner for commission of the offence is made out or not- If the trial court is of the opinion that there is sufficient material and evidence on record, that raises a strong suspicion against the accused of commission of the offence and proceed for framing of the charge. (Para 23,24,30)

At present, it cannot be said that there is no evidence or material on the basis of which no prima facie case against the accused is made out to raise strong suspicion of his involvement in the commission of the offence. (Para 31)

Criminal Application accordingly dismissed. (E-3)

List of cases cited:-
1. Arjan Singh & ors. Vs Hazara Singh, (1980) SCC (Cri) 309

2. Dilawsar Balu Kurane Vs St. of M.H., (2002) SCC (Cri) 310

3. Sajjan Kumar Vs C.B.I. (2010) 9 SCC 368

4. St. of Tamil Nadu by Inspector of Police Vigilance & Anti-corruption Vs N. Suresh Rajan & ors., (2014) 11 SCC 709

5. Amit Kapoor Vs Ramesh Chander & anr., (2012) 9 SCC 460

6. St. by the Inspector of Police, Chennai Vs S. Selvi & anr., (2018) 13 SCC 455

7. Asim Sharif Vs National Investigation Agency, (2019) 7 SCC 149

8. Tarun Jit Tejpal Vs St. of Goa & ors.: (2019) SCC OnLine SC 1053

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. The present petition under Section 482 Cr.P.C. has been filed for quashing of the proceedings in Criminal Case no.5 of 2002 (State Vs. Dr. Dev Nath verma) pending in the court of Special Judicial Magistrate, Pollution and CBI, Lucknow and for setting aside the order dated 2.4.2003 passed by the Special Judicial Magistrate, Pollution and

CBI, Lucknow rejecting the application for discharge filed by the petitioner as well as the order dated 27.2.2004 passed by the revisional court rejecting the revision filed against the order dated 2.4.2003.

2. Before coming to the merit of the case, some startling facts, which are borne out from the record, are required to be mentioned in the present case. This Court during vacation on 3.6.2004 issued notice on this petition and fixed 19.7.2004 as the next date for hearing on admission. It was also directed that till the date fixed in the case, charge should not be framed. Counter affidavit was filed by the C.B.I. and three days' time was granted for filing rejoinder affidavit. Vide order dated 19.7.2004, it was directed that the matter to be listed in the next week. However, the interim order dated 3.6.2004, which was limited till the next date of listing i.e. 19.7.2004, was not extended. The case was listed on 26.7.2004, but no order was passed. Thereafter, the case was not listed for almost an year and, therefore, the C.B.I. filed an application on 22.7.2005 for listing the present case for hearing. This Court vide order dated 25.7.2005 directed the case to be listed in the second week of August, 2005 and, disposed of the said application. On 11.8.2005 the case was listed, but no order was passed. Similar was the case on 8.11.2005. The C.B.I. thereafter, again moved an application on 16.2.2006 for listing of the case for hearing. This Court disposed of the said application on 20.2.2006 directing the case to be listed in the week commencing 27.2.2006. The case was listed on 28.2.2006, but no order was passed. The C.B.I. again moved an application on 6.9.2006 for listing the case at an early date. This Court vide order dated 8.9.2006 directed the matter to be listed in the next week. On 15.9.2006 the case was listed, but no order was passed. The C.B.I. thereafter, moved fourth application for listing of the case on 13.11.2006. This Court vide order dated 15.11.2006 noted that after 15.9.2006 the case was not listed and, therefore, directed the case to be listed in the last week of November, 2006. The case was listed on 29.11.2006, but no order was passed. On 16.3.2007 the C.B.I. moved fifth application praying for listing of the case for hearing at an early date. This Court vide order dated 19.3.2007 disposed of the said application directing the matter to be listed on its own turn. Thereafter, the matter was listed on 19.4.2007, but no order was passed. On 8.2.2008 the C.B.I. moved another application for listing of the case for hearing. The case was listed on 15.2.2008, but no order was passed. The C.B.I. again moved an application on 11.4.2008 for listing of the case for hearing, but none was present, therefore, vide order dated 21.4.2008 the case was directed to be listed in usual course. The case was listed on 4.7.2008, but no order was passed.

3. The C.B.I. thereafter, filed an application on 2.7.2008 for dismissal of the case. It was submitted by the C.B.I. that there were sufficient oral and documentary evidence available against the petitioner and, no case for quashing of the proceedings was made out. This application was listed on 1.8.2008, but no order was passed on the said application. On 1.9.2008 when the application for dismissal and the petition were listed before the Court, learned counsel for the petitioner sent illness slip to get the matter adjourned. On request of learned

counsel for the C.B.I. the matter was directed to be listed in the next week. On 8.9.2008, the case was directed to be listed on the next date i.e. 9.9.2008 for hearing on the application for dismissal. On 9.9.2008 rejoinder affidavit was filed on behalf of the petitioner and, the learned counsel for the petitioner and the learned counsel for the C.B.I. were heard. Learned counsel for the petitioner, however, prayed for some time to file typed copy of the impugned order and, the Court directed that the matter to be listed in the next cause list to enable learned counsel for the petitioner.

4. The case was listed on 19.9.2008, but no order was passed. The C.B.I. thereafter, moved another application on 2.12.2008 for listing of the case as well C.M. Application No.52696 of 2009 for dismissal of the petition. This Court vide order dated 4.12.2008 directed the case to be listed on 11.12.2008. On 11.12.2008 when the application for dismissal was listed, no one appeared on behalf of the petitioner, however, learned counsel for the C.B.I. was present and the Court, therefore, directed that the matter to be listed in the next week. On 18.12.2008, the Court again directed the matter to be listed in the next month. On 9.1.2009, the matter was listed and, no one appeared on behalf of the petitioner, however, learned counsel for the C.B.I. was present. This Court directed the matter to be listed in the next week. On 16.1.2009, a request was made for listing the matter in the next week and, the case was directed to be listed in the next week. Again on 23.1.2009 and 30.1.2009, no orders were passed. On 17.4.2009 learned counsel for the petitioner again sought adjournment on the ground of his illness and, the case was adjourned and, it was directed to be listed in the next week. On 23.4.2009, the case was directed to be listed on 27.4.2009 before appropriate Bench. On 27.4.2009, learned counsel for the petitioner was on sanctioned leave. Learned counsel for the C.B.I. was present and the case was adjourned and, the matter was directed to be listed in the next week. On 6.5.2009, no order was passed. On 28.7.2009, this Court directed that the matter to be listed on 18.8.2009. From the aforesaid order-sheet, it is evident that the interim order, which was initially granted on 3.6.2004, was limited only upto 19.7.2004 and, thereafter, the said interim order was not extended. However, on 19.8.2009, the Court directed the matter to be listed in the next cause list and directed that the interim order, if any, should continue till then. The case was listed on 31.8.2009. However, on request of learned counsel for the petitioner, the case was directed to be listed on 2.9.2009, but interim order was not extended. On 2.9.2009, it appears that there was not enough time left with the Court to take up the matter and, on the request of learned counsel for the C.B.I. the case was directed to be listed in the next week. On 11.9.2009, the matter was directed to be listed in the next cause list. Thereafter, the case was listed on 10.11.2009, but no order was passed. Similarly, the case was listed on 7.4.2010, 10.2.2011 and 21.2.2011, but no orders were passed. On 21.2.2011, learned counsel for the petitioner sought adjournment on the ground that he was on sanctioned leave up 23.3.2011. Accordingly, the matter was directed to be listed on 24.3.2011 before appropriate Court. It was specifically stated that the interim order granted was not extended.

5. On 28.2.2011, the case was directed to be listed on the next day i.e.

1.3.2011. On 1.3.2011, no order was passed and the case was directed to be listed in terms of order dated 21.2.2011. On 24.3.2011, 8.4.2011 and 13.7.2011, no orders were passed when the case was listed before the Court. On 21.10.2011 this Court directed the matter to be listed in the next cause list. However, interim order, which was specifically made clear that it had not been extended in the order dated 21.2.2011, was again extended. On 28.11.2011, it was directed that the mater to be listed after two weeks and, also interim order, if any, to continue till the next date of listing. On 19.12.2011 on the illness slip of learned counsel for the petitioner, the case was ordered to be listed in the second week of January, 2012. However, interim order was not specifically extended. On 13.1.2012, learned counsel for the petitioner again sought adjournment and, the case was directed to be listed after two weeks. On 20.1.2012, no order was passed and, on 25.1.2012, it was directed that the case to be listed in the next week. On 2.2.2012, no order was passed. Similarly, on 13.2.2012, no order was passed. On 27.2.2012, it was directed that the matter to be listed in the week commencing 26th March, 2012. On 14.5.2012, it was directed that the case to be listed in the month of July, 2012. The interim order which was again not extended after 28.11.2011, was extended vide order dated 16.7.2012 and, the case was directed to be listed on 18.7.2012. On 18.7.2012, the case was directed to be listed along with Criminal Misc. Case no.543 of 1993. On 24.8.2012, it was directed that the matter to be listed in the second week of September, 2012. Thereafter, the case was directed to be listed along with Criminal Misc. Case No.543 of 1998 and Writ Petition No.642(MB) of 1995 vide order dated 14.9.2012. Thereafter, the case was not listed. On 5.6.2017, no one appeared on behalf of the petitioner, however, learned counsel or the C.B.I. was present and, the case was directed to be listed in the next cause list. Again on 12.3.2018, the case was directed to be listed in the week commencing 26.3.2018. On 30.8.2018, it was directed the case to be listed in the next cause list. On 14.2.2019 when the case was called out, learned counsel for the petitioner sought adjournment and, this Court directed the case to be listed peremptorily in the next cause list. The case was listed on 27.2.2019, however, learned counsel for the petitioner did not appear even when the case was taken up in the revised call and, therefore, this Court dismissed the petition for want of prosecution and, the interim order, if any, was ordered to be vacated. This Court also directed that the office to communicate the order to the court below within ten days.

6. Thereafter, the petitioner moved an application for recall of the order dated 27.2.2019 and, this Court vide order dated 26.3.2019 recalled the order dated 27.2.2019 and, restored the petition to its original number. On 29.4.2019, this Court directed the case to be listed peremptorily along with the record of Writ Petition No.155 (MB) of 1996 and Criminal Misc. Case No.543 of 1998 in the next cause list. On request of the parties, the case was directed to be listed in the next cause list vide order dated 7.5.2019. On 14.5.2019, counsel for the C.B.I. did not appear and the Special Public Prosecutor appointed under Section 24 Cr.P.C. also did not appear and, some of his junior appeared. This Court took strong objection to his appearance and, directed

that the case to be listed on 28.5.2019. On 28.5.2019, it was directed that the matter to be listed on 10.7.2019. On 10.7.2019, the case was directed to be listed on 24.7.2019. On 24.7.2019, the case was directed to be listed on 16.8.2019. On 16.8.2019, Lawyers were on strike and, the case was directed to be listed in the next cause list. Again on 21.8.2019 Lawyers were on strike and, therefore, the case was directed to be listed in the next cause list. On 28.8.2019, the case was directed to be listed in the week commencing 16.9.2019. On 16.9.2019 learned counsel for the petitioner sought adjournment, however, learned counsel for the C.B.I. was present and, the case was directed to be listed on 30.9.2019. On 30.9.2019, the case was directed to be listed on 19.10.2019. On 19.10.2019, an adjournment was sought on behalf of the learned counsel for the petitioner on the ground that he was unwell. In view thereof, the matter was directed to be listed on 31.10.2019.

7. Two very disturbing factors emerge from the narration of the orders passed in the present petition. Interim order initially granted on 3.6.2004 was limited upto 19.7.2004, which was not extended on 19.7.2004 when the matter was listed or thereafter. However, the trial court did not proceed to frame charge against the petitioner. Despite having dismissed the discharge application, there having no order by this Court after 19.7.2004. It appears that while directing the matter to be listed in the next cause list, vide order dated 19.8.2009 i.e. after five years from the date when the interim order dated 3.6.2004 got expired on 19.7.2004, it was directed that the interim order, if any, should continue till the next date of listing of the petition. The case was listed thereafter, on 31.8.2009, but the interim order was, however, not extended. Vide order dated 21.2.2011, it was specifically made clear that the interim order granted earlier was not extended. However, vide order dated 21.11.2011, it was directed that the interim order, if any, would continue till the next date of listing. On 19.12.2011, the case was adjourned on the ground of illness of learned counsel for the petitioner and, it was directed that the matter to be listed in the second week of January, 2012, but the interim order was not extended. Again the interim order, which was extended vide order dated 21.11.2011 till the next date of listing i.e. 19.12.2011, was extended vide order dated 16.7.2019 i.e. after six and half years. On 16.7.2019, it was directed that the case to be listed on 18.7.2019 and the interim order, if any, should continue till then. Thus, after 18.7.2019 there had been no order on the order-sheet extending the interim order when the case was dismissed on 27.2.2019. Despite there being no interim order, this Court is baffled to find out that why the trial court did not frame charge and proceed with the trial for all these years. The second aspect of the matter, is that as and when the matter was listed and, it was likely to be taken up for hearing, learned counsel for the petitioner has sought adjournment either on the ground of illness or he was on sanctioned leave. It is only when this Court made it categorically clear in no uncertained terms vide order dated 19.10.2019 that the case would not be adjourned on any ground on 31.10.2019, the learned counsel for the petitioner finally addressed the argument. In view of the aforesaid facts, this case remained pending for more than 15 years before this Court.

8. The purpose of mentioning the orders available on the order-sheet in detail is to highlight the manner in which the parties take up a case for hearing before this Court after an interim order is granted. From 3.6.2004 till 31.10.2019 when this Court made it clear in no uncertained terms that the case would not be adjourned on any ground on 31.10.2019, finally, learned counsel for the petitioner has made his submissions. Before this date, the order-sheet is only of adjournment of the case. This is the precise cause of huge pendency in this Court. It is expected from the Bar and the Bench to see that the precious time of the Court is not wasted in this manner, in which the matter gets adjourned on every date for 15 years. Listing of the case before the Court requires human efforts by several persons and, it consumes the time of counsels representing the parties as well as of the Bench and, therefore, it is expected that whenever the matter is listed, the counsels should make an endeavour to have fructified hearing. Once, interim order is granted, the endeavour should not be to continue the interim order in perpetuity without final hearing of the matter. This Court expects from the Bar that its members should come prepared to argue the cases and not to seek adjournment only in order to perpetuate the interim order and keep the matter alive in the Court. This does not augur well for justice delivery system. Justice delayed is justice denied. The responsibility lies on the shoulder of the Bar as well as on the Bench to see that the cases which come before the Court, are decided at the earliest.

9. The facts of the present case, in brief, are that the petitioner and his wife Smt. Savita Devi filed Writ Petition No.155 (MB) of 1996 before this Court alleging that the petitioner, a doctor (BAMS degree holder) and his wife were peace loving citizens of the country. One Phool Kumari executed a Will in favour of them on 2.2.1994 in respect of House No.142 situated at Mohalla Idgah, District Lakhimpur Kheri and, after the death of Phool Kumari, the petitioner and his wife became the absolute owner of the said house. Their application for mutation was also decided in their favour vide order dated 10.10.1995 by the Executive Officer, Nagar Palika Parishad, Lakhimpur Kheri. A copy of the Will and the alleged order dated 10.10.1995 were placed on record as Annexures No.1 and 2 to the petition.

10. It was further alleged that in the year 1992 one Nanga Ram and his sons Ram Saran, Jas Karan and Rajendra Prasad took forcible possession of the house of Phool Kumari. Phool Kumari and the petitioner approached the police authorities including the District Magistrate. The administrative authorities directed that Nanga Ram and others be evicted from the house. It was said that after the house got mutated in the name of the petitioner and his wife, they had been living in the said house. However, Ram Saran, Jas Karam and Rajendra Prasad were threatening the petitioner and his wife to vacate the house and transfer the same in their name, otherwise they would face serious consequences. It was said that the petitioner on 6.1.1996 had approached the District Magistrate, Superintendent of Police and the Station House Officer, P.S. Kotwali, Lakhimpur Kheri fearing untoward incident by Ram Saran and others inasmuch as they were trying to dispossess the petitioner and his wife from the house forcibly. It was said

that no action was taken on the said application and, instead the petitioner was called by the Station House Officer at the police station and was asked to show the papers of the house. The petitioner showed all the papers to the Station House Officer. The petitioner was made to sit at the police station. It was further said that in the meantime, his son Amit came to Kotwali along with few other persons of the locality and informed that Ram Saran, who was an Ex-MLA and his two brothers Jas Karan and Rajendra Prasad along with number of persons, had come to the house of the petitioner and were taking away all belongings and, they were also assaulting the family members of the petitioner. It was said that the petitioner requested the Station House Officer to take appropriate action, but of no avail. The petitioner came to know that it was all done in collusion with the police and on instructions of high ups. No action was taken even when the petitioner approached the District Magistrate as well as the Superintendent of Police, Lakhimpur Kheri, neither FIR was lodged. It was said that the police was not acting because of political pressure and was the hands in glove with the Ex-MLA. A prayer was made in the petition for a mandamus/direction to register an FIR on the basis of the complaint given regarding the incident, which took place on 10.1.1996.

11. This Court vide order dated 19.1.1996 directed the Station House Officer, of Police Station Kotwali, Lakhimpur Kheri to remain present before the Court on the next date of listing of the petition i.e. 22.1.1996 along with relevant record. On 22.1.1996, the Court directed the Station House Officer to file an affidavit in response to the writ petition. It appears that the Station House Officer on 21.1.1996 passed an order for registration of the FIR and, thus, the FIR came to be registered on 21.1.1996 at 3.15 PM at Police Station Kotwali, Lakhimpur Kheri on the compliant of the petitioner dated 10.1.1996. On 21.8.1996, the Court passed an order in the aforesaid writ petition holding that the local police had failed to discharge its primary duty of investigating of the two FIRs and, therefore, the case was directed to be investigated by the C.B.I. It was further directed the C.B.I. would investigate the allegations made by the petitioner in the FIR besides the following points should also be investigated by the C.B.I.:-

"(i) Who was in possession on 6.1.1996 of the premises in dispute when the report Annexure-3 to the writ petition was lodged by one of the petitioners?

(ii) Whether the petitioners were forcibly dispossessed and the house was grabbed by Sri Ram Saran with the aid and connivance of the District Administration and/or police personnel of P.S. Kotwali Lakhimpur Kheri ?

(iii) To get the complete file of the record referred to above traced out and forward it along with the report to this Court. In case the complete record is not traced out, the reasons thereof."

The C.B.I. was directed to submit its report in a sealed cover within two months. The case was directed to be listed on 4.11.1996 for further orders.

12. Thus, in the manner, the FIR registered at Case Crime No.86 of 1996 on 22.1.1996 under Section 395 IPC against Ram Saran, Jas Karan and

Rajednra Prasad was transferred to the C.B.I. in pursuance of the order of the Division Bench of this Court dated 21.8.1996 passed in Writ Petition No.155 (MB) of 1996 and, it was registered as CBI case on 11.9.1996. The C.B.I. undertook the investigation. It appears that the C.B.I. conducted the investigation and Deputy Superintendent, CBI, Lucknow submitted a detailed report pointing out that the petitioner was not in possession of the house on 6.1.1996 and, neither he was dispossessed on 10.1.1996 as alleged or otherwise. The C.B.I. also in its report said that record showed that no proceedings took place after 23.9.1992 and, the contention of the petitioner was not borne out from the record. The C.B.I. in its report further said that the alleged Will was forged Will. In view of the aforesaid report, this Court dismissed the writ petition summarily on the ground that there was no occasion for the Court to interfere in the controversial facts. The C.B.I. and parties were given liberty to take consequential legal proceedings.

13. After dismissal of Writ Petition No.155 (MB) of 1996 by a Division Bench of this Court vide order dated 4.8.1997, the Additional Registrar of this Court filed a complaint under Section 195 Cr.P.C. in the court of Special Judicial Magistrate, CBI, Lucknow alleging that in the investigation of the C.B.I. which was carried out in pursuance of the order of this Court dated 21.8.1996 would establish that the compliant dated 6.1.1996 (Annexure-III to the petition) and complaint dated Nil (Annexure-IV to the writ petition) of Writ Petition No.155 (MB) of 1996 on the basis of which Case Crime No.86 of 1996, under Sections 395 IPC was registered on 22.1.1996 at Police Station Kotwali, Kheri were found to be false and fabricated. It was further said that the investigation conducted by the C.B.I. by collecting oral, documentary and circumstantial evidence would show that Dr. Dev Nath Verma, the petitioner and his family were not in possession of House No.142, situate at Mohalla Idgah, Lakhimpur Kheri during January, 1996 and his belongings/property were neither forcibly removed nor were looted by Sri Ram Saran and his brothers Jas Karan and Rajendra Prasad along with 10-12 persons on 10.1.1996 as alleged or otherwise. It was further said that investigation also disclosed that House No.142 at Mohalla Idgah, Lakhmpur Kheri belonged to late Smt. Phool Kumari and, the Rent Control and Eviction Officer, Lakhimpur Kheri vide order dated 30.7.1986 had allotted the said house to late Sri Nanga Ram, father of Ram Saran and others, who took possession of the said house on 14.8.1986. Against the order passed by the Rent Control and Eviction Officer, Lakhimpur Kheri, Smt. Phool Kumari filed revision before the IIIrd Additional District Judge, Lakhimpur Kheri, who vide oder dated 23.9.1992 remanded the case to the Rent Control and Eviction Officer with direction that the case be heard afresh. It was also said that the evidence collected and investigation carried out by the C.B.I. revealed that the allegations levelled by the petitioner in his complaint regarding the incident of 10.1.1996 were found to be completely false.

14. It was also said that in pursuance of the order dated 23.9.1992 passed by the IIIrd Additional District Judge in the revision filed by Smt. Phool Kumari, no hearing had taken place before the Rent Control and Eviction Officer. It was said that the contention Dr. Dev Nath Verma,

the petitioner that in January, 1994 an application was moved on behalf of Smt. Phool Kumari before the district authorities for restoration of the possession of the house and, the possession of the entire house was again restored to Smt. Phool Kumari in the last week of January, 1994 were wholly false and incorrect. There was no such order reflecting listing of the case in January, 1994 and the assertions made by the petitioner in his affidavit were found to be completely false. It was also said that assertions in the affidavits of the petitioner and his wife Smt. Savita Devi that on the basis of the Will purportedly executed on 2.2.1994 by Smt. Phool Kumari and, the certificate dated 27.2.1994, House No.142 got mutated in their favour on 10.10.1995 in the records of Nagar Palika Parishad, were incorrect, false and fabricated.

15. The investigation had established that the alleged Will deed dated 2.2.1994 was neither registered nor authenticated by notary pubic. It was a forged, false and fabricated Will. The Central Forensic Science Laboratory vide report No.CFSL-97/D-99/937 dated 31.3.1997 had opined that the finger print impression appearing on page-1 of Will dated 2.2.1994 was not that of late Smt. Phool Kumari. Thus, the Will, which was annexed with the writ petition, was forged and fabricated document. It was further said that Dilip Singh and Kunwar Bhanu Pratap Singh, grand sons of Late Smt. Phool Kumari had resolutely denied the death of Smt. Phool Kumari on 27.2.1994 and, they had specifically said that Smt. Phool Kumari died on 9.3.1994 in the Medical College, Lucknow. The Birth and Death Registrar of Nagar Nigam, Lucknow too confirmed that Smt. Phool Kumari died on 8.3.1994 at Lucknow. It was further said that the averments made in affidavit by the petitioner was full of falsehood and, he deliberately attempted to obfuscate the matter of ownership of House No.142, Mohalla Idgah, Lakhimpur Kheri and, the averments made in the writ petition were incorrect, false and fabricated. It was further said that a Division Bench of this Court vide order dated 4.8.1997 while dismissing the writ petition summarily, directed the concerned parties to take consequencial legal proceedings. It was said that the aforesaid facts would disclose the commission of offence punishable under Sections 420, 467, 468, 471 IPC and, also under Section 182/211 IPC. In view of the aforesaid, a request was made to proceed against the petitioner. The complaint was filed in the official capacity of the complaint as envisaged under Section 195 Cr.P.C..

16. Non-bailable warrant was issued against the petitioner. The petitioner was produced before the Special Judicial Magistrate, CBI, Lucknow on 3.3.1998. The petitioner, thereafter, moved an application under Section 239 Cr.P.C. for discharge on 18.6.1998 in Complaint Case No.30 of 1998. The learned Magistrate vide order dated 20.7.1998 rejected the discharge application of the petitioner. The petitioner, thereafter, filed Writ Petition No.2648 (MB) of 1998. However, the same was converted into a petition under Section 482 Cr.P.C. and was numbered as 543 of 1998. This Court vide judgement and order dated 8.3.2002 allowed the said petition on the ground that the Division Bench in its order dated 4.8.1997 while dismissing Writ Petition No.155 (MB) of 1996 had not directed for filing of the compliant inasmuch as the

Court had neither recorded a finding to the effect nor made a complaint thereof in writing and, it was left open to the parties to take consequential legal proceedings. It was further held that the Registrar had no authority to lodge the compliant under Section 340 Cr.P.C. as there was no order of the Court for lodging the compliant as provided under Section 340 Cr.P.C. However, it was observed that it would be open to the CBI either to submit the charge sheet or file a complaint in the court of Special Judicial Magistrate. In view thereof, the proceedings of Complaint Case No.30 of 1998 pending in the court of Special Judicial Magistrate were quashed. It was left open to the C.B.I. to file a complaint or charge sheet as the case may be and, it was said that in such proceedings bar of Section 195 Cr.P.C. would not apply inasmuch the offence of forging the Will was a distinct offence committed outside the Court proceedings.

17. The C.B.I. thereafter, filed the charge sheet dated 12.7.2002 in the case against the petitioner finding that the facts and investigation clearly disclosed the commission of the offences punishable under Sections 420, 467, 468 and 471 and, also under Section 182/211 IPC. The petitioner having been summoned, filed an application for discharge before the learned Magistrate. The learned Magistrate vide order dated 2.4.2003 had held that there was sufficient material and evidence available on record to attract the offences under Sections 420, 467, 468, 471 and Section 182/211 IPC inasmuch as the petitioner had prepared forged documents to deceive, which included the Will dated 2.2.1994, death certificate of Smt. Phool Kumari and, he used these documents in the court proceedings alleging to be true and correct though he knew that these documents were forged and fabricated. Learned Magistrate, therefore, held that there was strong suspicion against the petitioner for producing the forged and fabricated documents in the Court proceedings and, held the application to be without any merit and substance. The application was dismissed and, it was ordered the case to be listed on 21.4.2003 for framing of charge.

18. The petitioner, thereafter, filed revision before the court of Additional District Judge, Court No.7, Lucknow being Criminal Revision No.72 of 2003 against the order dated 2.4.2003 passed by the learned Magistrate. The revisional court said that considering the evidence and material collected by the C.B.I. during investigation, which were available with the charge sheet, including the forensic science laboratory report in respect of the alleged Will dated 2.2.1994, at this stage on the basis of the statement of some witnesses that the Will was executed by Smt. Phool Kumari, the petitioner could not be discharged. It was said that the Will was in possession of the accused and from the statement of the grandsons of Smt. Phool Kumari, it was clear that he forged the death certificate of Smt. Phool Kumari as well. Learned revisional court, however, partly allowed the revision and held that taking cognizance against the accused under Section 182/211 IPC was not correct. The revisional court dismissed the revision in respect of taking cognizance of the offences under Sections 420, 467, 468 and 471 IPC inasmuch as there was sufficient material available on record, on the basis of which there was strong suspicion against the petitioner for commission of these offences.

19. Heard Sri Nandit Srivastava, learned Senior Advocate assisted by Sri Monoj Kumar Dixit, learned counsel for the petitioner and the learned AGA, none for C.B.I.

20. Learned counsel for the petitioner submits that considering the statement of the wittinesses recorded by the C.B.I. under Section 161 Cr.P.C., no offence is made out against the petitioner. He further submits that attesting witnesses have specifically stated that the Will was executed by Smt. Phool Kumari on 2.2.1994 in favour of the petitioner and his wife. He has also tried to place reliance on the statement of some of the witnesses recorded under Section 161 Cr.P.C. He submits that report of the forensic science laboratory is an expert opinion and, it cannot be relied upon against the testimony of an eye witness. He, therefore, submits that there is not enough material and evidence on record to form a prima facie opinion regarding strong suspicion against the petitioner for commission of the offence and, therefore, the orders passed by the learned Magistrate as well as by the revisional court are liable to be set aside. He has also relied upon the judgements of the Supreme Court in the cases of ***Arjan Singh and others Vs. Hazara Singh,*** 1980 SCC (Cri) 309, ***Dilawsar Balu Kurane Vs. State of Maharashtra,*** 2002 SCC (Cri) 310 and ***Sajjan Kumar Vs. Central Bureau of Investigation (2010)*** 9 SCC 368.

21. On the basis of the aforesaid judgements, he submits that the trial court has cursorily passed the order though it is required to weigh the evidence for limited purpose of finding out whether a prima facie case is made out against the petitioner or not. He, therefore, submits that considering the ratio laid down by the Supreme Court in the aforesaid judgements, the application for discharge ought to have been allowed.

22. I have considered the submissions of the learned counsel for the petitioner carefully and perused the record.

23. The C.B.I. in its detail investigation, has clearly opined that the petitioner had forged the Will dated 2.2.1994 allegedly executed by Smt. Phool Kumari. The C.B.I. has brought on record the Central Forensic Science Laboratory report in respect of the Will to come to this conclusion. The death certificate of Smt. Phool Kumari was also forged by the petitioner, which is evident from the certificate issued by the Municipal Corporation, Lucknow and, the statements of the grandsons of Smt. Phool Kumari. The petitioner allegedly used these documents so that he could occupy the property of House No.142, situate at Mohalla Idgah, Lakhimpur Kheri. When the application for discharge is moved, the trial court is not required to examine and consider the evidence and material on record in detail to form an opinion whether, prima facie, case raising strong suspicion against the petitioner for commission of the offence is made out or not. The trial court at this stage, is not required to go in detail and weigh the evidence to find out whether the conviction of the accused would be secured in all likelihood. If the trial court is of the opinion that there is sufficient material and evidence on record, which raises strong suspicion against the accused for commission of the offence, the trial court is required to proceed for framing of the charge.

24. In the present case, as mentioned above, it cannot be said that there is no evidence or material on the basis of which no prima facie case against the accused is made out to raise strong suspicion of his involvement in the commission of the offence.

25. The Supreme Court in the case of ***State of Tamil Nadu by Inspector of Police Vigilance and Anti-corruption Vs. N. Suresh Rajan and others,*** (2014) 11 SCC 709 has held that at the stage of discharge, the court is required only to go into the probative value of the material and, it is not expected to go into deep the matter to hold that the material should not warrant conviction. What is required at the stage of discharge is that if, the court finds that, prima facie, the offence has been committed, it can frame charge.

Paragraphs 29, 32.4, 33 and 34 of the aforesaid judgement are extracted herein below :-

*"**29.** We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. 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 on 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.*

32.4. *While passing the impugned orders [N. Suresh Rajan v. Inspector of Police, Criminal Revision Case (MD) No. 528 of 2009, order dated 10-12-2010 (Mad)] , [State v. K. Ponmudi, (2007) 1 MLJ (Cri) 100] , the court has not sifted the materials for the purpose of finding out whether or not there is sufficient ground for proceeding against the accused but whether that would warrant a conviction. We are of the opinion that this was not the stage where the court should have appraised the evidence and discharged the accused as if it was passing an order of acquittal. Further, defect in investigation itself cannot be a ground for discharge. In our opinion, the order impugned [N. Suresh Rajan v. Inspector of Police, Criminal Revision Case (MD) No. 528 of 2009, order dated 10-12-2010 (Mad)] suffers from grave error and calls for rectification.*

33. *Any observation made by us in this judgment is for the purpose of*

disposal of these appeals and shall have no bearing on the trial. The surviving respondents are directed to appear before the respective courts on 3-2-2014. The Court shall proceed with the trial from the stage of charge in accordance with law and make endeavour to dispose of the same expeditiously.

***34.** In the result, we allow these appeals and set aside the order of discharge with the aforesaid observations."*

26. In the case of ***Amit Kapoor Vs. Ramesh Chander and another,*** (2012) 9 SCC 460, the Supreme Court has held that at the time of considering the application for discharge, the Court is required to consider the "record of the case" and the documents submitted therewith. Where it appears to the Court and, in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. The Court is not concerned with the proof, but only with strong suspicion that the accused has committed the offence. Paragraphs 17 and 19 of the aforesaid judgement are extracted herein under :-

*"**17.** Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.*

***19.** At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh [(1977) 4 SCC 39 : 1977 SCC (Cri) 533] : (SCC pp. 41-42, para 4)*

"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter

comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing', as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-- ... (b) is exclusively triable by the court, he shall frame in writing a charge against the accused', as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

27. The Supreme Court in the case of ***State by the Inspector of Police,***

Chennai Vs. S. Selvi and another, (2018) 13 SCC 455 has summarised the principle while considering the application for discharge of an accused. Paragraphs 6, 7 and 8, which are relevant, are extracted herein below :-

*"**6.** It is well settled by this Court in a catena of judgments including Union of India v. Prafulla Kumar Samal [Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 : 1979 SCC (Cri) 609] , Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , Sajjan Kumar v. CBI [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , State v. A. Arun Kumar [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] , Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) 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 material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; 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 within his rights to discharge the accused. 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 statements 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 materials as if he was conducting a trial.*

7. In Sajjan Kumar v. CBI [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , this Court on consideration of the various decisions about the scope of Sections 227 and 228 of the Code, laid down the following principles: (SCC pp. 376-77, para 21)

"(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully

justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

***8.** This Court in State v. A. Arun Kumar [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] and State of T.N. v. N. Suresh Rajan [State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709 : (2014) 3 SCC (Cri) 529 : (2014) 2 SCC (L&S) 721] has reiterated almost the aforementioned principles. However, in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , relied upon by the counsel for Respondent 1 is not applicable to the facts of the case inasmuch as the said matter arose out of the judgment of the High Court quashing the entire criminal proceedings inclusive of the registration of first information report. The said matter was not concerned with the discharge of the accused."*

28. In the case of ***Asim Sharif Vs. National Investigation Agency,*** (2019) 7 SCC 149, the Supreme Court has again reiterated the principle that while considering the application for discharge, the court has power to sift and weigh the evidence only for limited purpose to find out whether or not prima facie case exists against the accused. If the material placed

before this Court raises strong suspicion against the accused, the Court is wholly justified in framing of the charge. After taking note of the judgement in the case of Sajjan Kumar (supra), in paragraph 18 of the aforesaid judgement, the Supreme Court has held as under :-

*"**18.** Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) 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 material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the court is not supposed to hold a mini trial by marshalling the evidence on record."*

29. In the recent judgement, the Supreme Court in the case of ***Tarun Jit Tejpal Vs. State of Goa and other:*** 2019 SCC OnLine SC 1053 after taking note of the judgements in the cases of Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 (Para 10), State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 (Para 4), Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715, Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460, Ajay Singh v. State of Chhattisgarh, (2017) 3 SCC 330, Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76, State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709 (Para 29 to 31.3), State v. S. Selvi, (2018) 13 SCC 455, Mauvin Godinho v. State of Goa, (2018) 3 SCC 358., in paragraph 32 of the judgement held as under :-

*"**32**. Applying the law laid down by this Court in the aforesaid decisions and considering the scope of enquiry at the stage of framing of the charge under Section 227/228 if the CrPC, we are of the opinion that the submissions made by the learned Counsel appearing on behalf of the appellant on merits, at this stage, are not required to be considered. Whatever submissions are made by the learned Counsel appearing on behalf of the appellant are on merits are required to be dealt with and considered at an appropriate stage during the course of the trial. Some of the submissions may be considered to be the defence of the accused. Some of the submissions made by the learned Counsel appearing on behalf of the appellant on the conduct of the victim/prosecutrix are required to be dealt with and considered at an appropriate stage during the trial. The same are not required to be considered at this stage of framing of the charge. On considering the material on record, we are of the opinion that there is more than a prima facie case against the accused for which he is required to be tried. There is sufficient ample material*

against the accused and therefore the learned Trial Court has rightly framed the charge against the accused and the same is rightly confirmed by the High Court. No interference of this Court is called for.

"Tarun Tej Pal Vs. Goa, 2019 SCC Online 1053 after taking note of the judgement in the case of Union of India Vs. Praful .. n paragraph 20 of the judgement held as 32 it has been held as under :-

30. Thus, the law is very well settled that while considering the application for discharge or at the time of framing of charge, the Court is only required to weigh the material and evidence on record to find out whether, prima facie, case is made out against the accused, which raises strong suspicion against him to have committed the offence and, if it is found that the ingredients of the commission of the offence are available on the basis of record, the Court will proceed to frame the charge. At this stage, the Court is not required to weigh the evidence in detail to find out whether evidence would be sufficient to record conviction or not. The Court is only required to evaluate the material and evidence to find out prima facie case.

31. Considering the facts of the present case and on the anvil of law as has emerged, it cannot be said that there is not enough material for a prima facie case which raises strong suspicion against the petitioner to have committed the offences under Sections 420, 467, 468, 471 IPC and, therefore, the present petition, which has remained pending in the Court since 2004, is hereby ***dismissed.***

32 . The learned Magistrate is directed to proceed immediately to frame charge and, conclude the trial expeditiously, preferably, within a period of one year.

(2019)11ILR A18

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.11.2019

BEFORE

THE HON'BLE PANKAJ BHATIA , J.

U/S 482/378/407 No. 1253 of 2016

Bhupendra Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Gopesh Tripathi

Counsel for the Opposite Parties:
Govt. Advocate, Sri Shreesh Kr. Mishra

A. Criminal Law-Code of Criminal Procedure. 1973- Section 482, Section 156(3), Sections 200/202 - Summoning order-On basis of Second Complaint-The opposite party no. 2 moved an application under section 156(3) Cr.P.C- Rejected by the Learned C.J.M on merits -Second Complaint for the same incident again filed by the Opposite Part No.2- without disclosing dismissal of first complaint.

B. Held- Second complaint is nothing but a mere repetition of the first application - None of the exceptional circumstances as enumerated in the judgement of Poonam Chand Jain vs. Farzu, (2010) 2 SCC 631, (2010) 2 SCC (cri) 1085 (supra) were available while filing the second complaint- Hence Second Complaint held to be not maintainable- Complaint Case quashed- Application u/s 482 Cr.P.C. is disposed off. (Para 15,16,17,18)

Application u/s 482 Cr.P.C. is disposed off. (E-3)

List of cases cited: -

1. Poonam Chand Jain vs. Farzu, (2010) 2 SCC 631, (2010) 2 SCC (cri) 1085

2. Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar, (AIR 1962 SC 876)

3. State of Haryana and others vs. Bhajan Lal and others, 1992 Supp(1) SCC 335

4. M. Nagabhushan vs. State of Karnataka and others, (2011) 3 SCC 408

5. Upkar Singh vs. Ved Prakash and others, AIR 2004 SC 4320

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Gopesh Tripathi, learned counsel for the applicant, learned AGA for the State and perused the material available on record.

2. The present application 482 Cr.P.C. has been filed challenging the summoning order dated 18.10.2018 passed in Complaint Case No. 433 of 2013 as well as the revisional order dated 23.12.2015 passed in Criminal Revision No. 10 of 2014.

3. The allegations in brief leading to the filing of the present application are:

4. That the applicant is the proprietor of M/s Vikram Shastralaya and is dealing in firearm at Raebareli. The father of the opposite party no. 2 was the owner of pistol and had a licence, as he was involved in a criminal case, the same was deposited with the firm of the applicant. The father of the opposite party no. 2 sold the said Pistol No. 1680 for a consideration of Rs. 30,000/- in the year 1996 as his licence had been cancelled, however, the sale was actually effected with the permission from the District Magistrate vide order dated 10.11.2000 on 31.5.2001.

5. The opposite party no. 2 moved an application under section 156(3) Cr.P.C on 21.4.2012 with the allegation that after the death of her father on 24.4.2011, when the opposite party no. 2 went to enquire about the pistol, she was informed that the same had been sold by her father. The said application filed by the opposite party no. 2 under section 156(3) Cr.P.C. was registered as Miscellaneous Case No. 173 of 2012 by the CJM who called for reports from the Police Station concerned and the District Magistrate/Licensing Authority. The City Magistrate submitted a report that the requisite permission was granted by the District Magistrate for the sale of the weapon on 10.11.2000 and the weapon was actually sold by the holder Jaswant Singh on 31.5.2001. After considering the reports, as called for, the learned CJM rejected the application filed by the opposite party no. 2 vide order dated 14.6.2012 (Annexure3 to the application), the said order attained finality and was not challenged.

6. The opposite party no. 2, without disclosing the earlier order passed by the CJM, filed a fresh complaint levelling the same allegations vide complaint dated 4.7.2012 under section 200 Cr.P.C. The CJM taking cognizance of the offence as disclosed in the complaint dated 4.7.2012 registered the case as Case No. 433 of 2012 and proceeded to record the statements under sections 200 and 202 Cr.P.C. and proceeded to summon the applicant under sections 504, 506, 406, 419, 420, 467, 468 and 471 IPC vide

order dated 18.10.2018 (Annexure6 to the application).

7. The applicant challenged the said summoning order by filing a Criminal Revision No. 10 of 2014 disclosing the entire facts including the fact that the complaint on same allegation had already been rejected and was concealed in the present proceedings, the revision was dismissed vide order dated 23.12.2014.

8. Sri Gopesh Tripathi, learned counsel for the applicant, has strenuously argued that the proceedings initiated vide Complaint Case No. 433 of 2012 were nothing but an abuse of process of law and were not maintainable in view of the fact that the earlier complaint had been rejected vide order dated 14.6.2012 on the same allegations. He has further argued that the complaint deserves to be quashed for the reason that it discloses that no offence under the sections under which the applicant was summoned. He placed reliance upon the judgement of the Apex Court in the case of **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp(1) SCC 335.** He has further argued that the second complaint was barred by the principles of res judicata which are in the nature of a public policy. He placed reliance upon the decision in the case of **M. Nagabhushan vs. State of Karnataka and others, (2011) 3 SCC 408.** He further argued that after the dismissal of the application under section 156(3) Cr.P.C., on merits, a fresh complaint for the same action, is not maintainable as it does not fall within the exceptional circumstances, as laid down and explained by the Hon'ble Apex Court in the case of **Poonam Chand Jain and another vs. Farzu, (2010) 2 SCC 631, (2010) 2 SCC (cri) 1085.** He lastly submits that the proceedings of summoning order and the revisional order are liable to be quashed as being an abuse of process of law.

9. The copy of the complaint, statement recorded under sections 200 Cr.P.C. and 202 Cr.P.C. are on record. It is essential to record that the weapon in question is a 32 bore pistol which is prohibited bore and cannot be held without licence.

10. A perusal of the complaint reveals that the opposite party no. 2 had alleged that after the death of her father when she contacted the applicant she was informed that the pistol had been sold to the applicant for Rs. 30,000/- by the father in the year 1996 and the permission for the said sale was granted in the year 10.11.2000, as such, it is clear that the documents of 1996 were prepared by committing forgeries. In para 10 of the complaint, it was specifically stated that a complaint in that regard was made to the Superintendent of Police vide application dated 31.3.2012, however, no action was taken. It is relevant to note that there were no disclosure of the earlier order dismissing the complaint of the opposite party no. 2 on the same allegation. In the statement recorded under section 200 Cr.P.C. also it was specifically stated that the opposite party no. 2 does not have the requisite licence to hold the prohibited bore pistol and she wants to sell the same or give it to the Government, there is no averment with regard to the earlier proceedings.

11. The counsel for the respondent has filed a counter affidavit bringing on record an affidavit of Jaswant Singh dated 13.4.1996, which is alleged to be a forged

document wherein he has deposed that the deponent shall obtain the requisite permission and sell the same by giving possession to the applicant herein. It is also admitted that amount of Rs. 30,000/- was received by the deponent, it was also deposed that in the event of not being able to obtain the requisite permission, an amount of Rs. 50,000/- shall be refunded.

12. It is also contended that the sale and the affidavit was said to be executed on 15.4.1996 whereas the permission regarding the sale of pistol was granted on 10.11.2000 which clearly reveals that the sale receipt and the affidavit were prepared for undue advantage. He further argued that the second complaint with regard to the same incident is not prohibited placing reliance on the judgement of in the case of **Upkar Singh vs. Ved Prakash and others, AIR 2004 SC 4320.**

13. On the basis of the material on record and the arguments advanced, the sole question to be considered is whether the complaint and the statements recorded under sections 200 and 202 Cr.P.C reveal the commission of offence under the sections in which the applicant has been summoned and whether the second complaint for the same incident was maintainable without disclosure of the outcome of the first complaint and whether the same can be termed as abuse of process of law.

14. The Apex Court in the case of **Poonam Chand Jain vs. Farzu, (2010) 2 SCC 631, (2010) 2 SCC (cri) 1085** considered the effect of dismissal of the first complaint on merit and its consequences on the second complaint. The Apex Court relying upon the earlier judgement in the case of **Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar, (AIR 1962 SC 876)** held as under:

"Almost similar questions came up for consideration before this Court in the case of Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar, (AIR 1962 SC 876). The majority judgment in Pramatha Nath (supra) was delivered by Justice Kapur. His Lordship held that an order of dismissal under Section 203 of the Criminal Procedure Code (for short `the Code') is, however, no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. This Court explained the exceptional circumstances as (a) where the previous order was passed on incomplete record

(b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings. This Court made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In paragraph 50 of the judgment the majority judgment of this Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. This Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the

complaint is dismissed adduce some more evidence. According to this Court such a course is not permitted on a correct view of the law. (para 50, page 899)

This question again came up for consideration before this Court in Jatinder Singh and others vs. Ranjit Kaur (AIR 2001 SC 784). There also this Court by relying on the principle in Pramatha Nath (supra) held that there is no provision in the Code or in any other statute which debars complainant from filing a second complaint on the same allegation as in the first complaint. But this Court added when a Magistrate conducts an enquiry under Section 202 of the Code and dismisses a complaint on merits a second complaint on the same facts could not be made unless there are `exceptional circumstances'. This Court held in para 12 if the dismissal of the first complaint is not on merit but the dismissal is for the default of the complainant then there is no bar in the filing a second complaint on the same facts. However if the dismissal of the complaint under Section 203 of the Code was on merit the position will be different. Saying so, the learned Judges held that the controversy has been settled by this Court in Pramatha Nath (supra) and quoted the observation of Justice Kapur in paragraph 48 of Pramatha Nath (supra):-

".....An order of dismissal under S. 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into....."

Again in Mahesh Chand vs. B. Janardhan Reddy and another- (2003) 1 SCC 734, a three Judge Bench of this Court considered this question in paragraph 19 at page 740 of the report. The learned Judges of this court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous complaint was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In Mahesh Chand (supra) this Court relied on the ratio in Pramatha Nath (supra) and held if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances and thereafter the exceptional circumstances pointed out in Pramatha Nath (supra) were reiterated.

Therefore, this Court holds that the ratio in Pramatha Nath (supra) is still holding the field. The same principle has been reiterated once again by this Court in Hiralal and others vs. State of U.P. & others- AIR 2009 SC 2380. In paragraph 14 of the judgment this Court expressly

quoted the ratio in Mahesh Chand (supra) discussed hereabove.

Following the aforesaid principles which are more or less settled and are holding the field since 1962 and have been repeatedly followed by this Court, we are of the view that the second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the application of the first complainant. In fact such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in Pramatha Nath (supra). In that view of the matter the second complaint in the facts of this case, cannot be entertained."

15. In the present case, a perusal of the complaint and the order passed earlier rejecting the complaint makes it clear that the second complaint (under challenge in the present proceeding) is nothing but a mere repetition and nothing has been argued to demonstrate that any of the exceptional circumstances as enumerated in the judgement of **Poonam Chand Jain (supra)** were available while filing the second complaint.

16. On this count alone and placing reliance on the judgement of **Poonam Chand Jain (supra)** I have no hesitation in holding that the summoning order dated 18.10.2013 passed in Complaint Case No. 433 of 2013 as well as the revisional order dated 23.12.2015 are in ignorance the settled position of law and thus cannot be sustained and are quashed.

17. Consequently, the Complaint Case No. 433 of 2013, pending before the court of Additional Civil Judge (Junior Division)/Magistrate, Court No. 22, Raebareli is hereby quashed.

18. The application u/s 482 Cr.P.C. is disposed off.

19. Let a copy of this order be sent to the court concerned for it being placed on record.

(2019)11ILR A23

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.11.2019

BEFORE
THE HON'BLE PANKAJ BHATIA , J.

U/S 482/378/407 No. 2916 of 2016

N.K. Mehrotra ...Applicant
Versus
Chief Judicial Magistrate, Lucknow & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anupam Mehrotra

Counsel for the Opposite Parties:
Govt. Advocate, Dr. Nutan Thakur (In Person)

A. Crimina Law-Code of Criminal Procedure, 1973 – Section 197; Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975- Protection under Section 17 (1) of the Lokayukta Act- has to be

strictly interpreted- Held- Complaint barred under Section 17(1) of the Act.

B. Section 200 Cr.Pc- Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975- Section 21 of the I.P.C- Section 197 of the Cr.P.C. The order passed by the applicant acting as a Lokayukta was in discharge of his official capacity which he was authorised to perform under the provisions of the U. P. Lokayukta Act - No cognizance could be taken by the Magistrate without sanction under Section 197 Cr.P.C. Impugned proceedings of criminal case and order taking cognizance accordingly quashed.

C. Complaint - "taking cognizance"- Section 200 and Section 202 Cr.P.C.- Held - the Magistrate recording the statements under Section 200 Cr.P.C. and fixing date for recording of the statement under Section 202 Cr.P.C. would fall within the expression "taking cognizance", as used in Section 200 Cr.P.C.

D. "Public Servant"- Section 21 (Seventh Explanation) of the I.P.C. read with Section 13 (6) of the Lokayukta Act –Held- Applicant would fall within the definition of ''public servant' and cannot be removed without following the procedure as prescribed under Section 6 of the Lokayukta Act and without the sanction of the Governor.

Application u/s 482 Cr.P.C. disposed of.

(E-3)

List of Cases cited: -

1. M/s Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors., (1998) SCC (Cri) 1400

2. Institution of A.P. Lokayukta Vs T. Rama Subba Reddy; (1997) 9 SCC 42,

3. St. of U.P. Vs Sheo Shanker Lal Srivastava; (2006) 3 SCC 276

4. M.P. Special Police Establishment Vs St. of M.P.; (2004)8 SCC 788

5. Rang Nath Mishra Vs St. of U.P.; (2015) 8 SCC 117

6. St. of Rajasthan Vs Shamsher Singh; (2015) 4 SCC (Cri) 421

7. St. of Orissa Vs MESCO Steels Ltd..; (2013) 4 SCC 340

8. Matajog Dubey Vs H.C. Bhari; AIR (1956) SC 44

9. Ramayya Vs St. of Bombay; AIR (1955) SC 287

10. Amrik Singh Vs St. of Pepsu; AIR (1955) SC 309

11. N.K. Ogle Vs Sanwaldas; (1999) 3 SCC 284

12. Manharibhai Muljibhai Kakadia & anr. Vs Shaileshbhai Mohanbhai Patel & ors.; (2012) 10 SCC 517

13. Suresh Kumar Bhikamchand Jain Vs Pandey Ajay Bhushan; (1998) 1 SCC 205

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Anupam Mehrotra, Advocate on behalf of the applicant. No one appears for the opposite party no. 2. I have also heard learned AGA for the State.

2. The present petition has been filed seeking quashing of Case No. 8737 of 2015 (Dr. Nutan Thakur v. Sri N.K. Mehrotra) pending in the Court of Chief Judicial Magistrate, Lucknow for the offences allegedly committed by the applicant as Lokayukta, U.P. under Sections 166, 167, 195, 195-A, 196, 200, 211, 219, 500 I.P.C.

3. The brief facts, giving rise to the present application under Section 482 Cr.P.C., are as under:-

4. The petitioner, a retired Judge of this Court, was appointed as a Lokayukta, Uttar Pradesh under the U.P. Lokayukta and Up-Lokayuktas Act, 1975 (hereinafter referred to as the 'Lokayukta Act') and acted as a Lokayukta from 16.3.2006 till 31.1.2016.

5. It has been stated in the application that while the applicant was acting as a Lokayukta, a Complaint Case No. 3540 of 2014 dated 26.12.2014 was filed by the OP No. 2 before the applicant. The applicant in exercise of his powers found the complaint of the OP No. 2 as vexatious and frivolous and passed relevant orders under Section 10 (5) read with Section 10 (4) of the Lokayukta Act. A copy of the said decision has been annexed as Annexure-2 to the application.

6. The OP No. 2 herein challenged the said order dated 25.5.2015 passed by the applicant in a writ petition before this Court being Writ Petition No. 11178 (MB) of 2015 (Nutan Thakur v. State of U.P. and others), which is pending.

7. On 21.7.2015, a complaint was filed before the applicant acting as a Lokayukta against the husband of the opposite party no. 2 and on the said complaint the applicant acting as a Lokayukta conducted the investigation and after conducting the said investigation, submitted his report no. 04 of 2015 dated 24.8.2015 to the Chief Secretary, Government of U.P. with his findings and recommendations, along with relevant document, material and evidence. The applicant, acting as a Lokayukta vide his said report dated 24.8.2015 made several recommendations against the husband of OP No. 2. The husband of the OP No. 2 challenged the said report of the Lokayukta dated 24.8.2015 by filing a Writ Petition No. 7964 (MB) of 2015 (Amitabh Thakur v. Sri N.K. Mehrotra and Others), which is pending.

8. In pursuance of the report of the Lokayukta dated 24.8.2015, the State Government acting upon said recommendation, lodged an F.I.R. dated 16.9.2015 through the Vigilance Establishment, Government of U.P. at Police Station Gomti Nagar, Lucknow under Section 13(2) read with Section 13 (1) (e) of Prevention of Corruption Act, 1988.

9. Prior to the submission of the report dated 24.8.2015, a notice was got served on behalf of the parents of the husband of OP No. 2 dated 22.8.2015 purporting to be legal notice under Section 80 C.P.C. threatening the institution of a suit for damages and compensation.

10. On 3.9.2015, a complaint was filed under Section 200 Cr.P.C. before the C.J.M., Lucknow alleging that the complainant is a civil activist and an advocate and is filing the complaint for the illegal acts of the applicant against the husband of the complainant while passing orders in Case No. 2583 of 2015. It was further alleged that while acting as a Lokayukta, the applicant has deliberately relied upon the evidences which he knew to be wrong and false and on half baked facts, which were well within the personal knowledge of the applicant and thus was guilty of wrongly relying upon non-existent evidence and knowing that the evidence was non-existent proceeded to pass an order against the provisions of the

Lokayukta Act and the Lokayukta Complaint Rules, 1977. It was further alleged that the husband of the complainant had informed the applicant about the facts through written communication dated 12.8.2015 and 19.8.2015. In sum and substance, the allegations made in the complaint were that the applicant has passed a wrong order relying upon evidences which he knew were incorrect and half baked and wrong facts with a view to harm the complainant's husband. A copy of the complaint which is on record clearly reveals that the entire allegations were in relation to the order passed by the applicant in exercise of his power under the Lokayukta Act.

11. The C.J.M. vide his order dated 3.9.2015 took cognizance of the offence alleged and directed for registration of the complaint and for recording of the statements under Section 200 Cr.P.C. on 10.09.2015.

12. On 10.09.2015, one Sri Sanjay Sharma intervened in the said Complaint Case No. 8737 of 2015 and requested for rejection of the complaint and informed the C.J.M. that the cognizance of the complaint was barred under Section 17 of Lokayukta Act and Section 201 I.P.C. and the complaint was not maintainable. The C.J.M. vide his order dated 10.9.2015 held that at this stage the intervener had no right to intervene and consequently rejected his application and fixed 11.9.2015 for recording of evidence under Section 200 Cr.P.C. He subsequently proceeded to record the statement under Section 200 Cr.P.C. on 11.9.2015 and subsequently the statement under Section 202 Cr.P.C. was adjourned for recording on various dates.

13. The applicant filed the present application under Section 482 Cr.P.C. on 3rd May, 2016 seeking the quashing of the criminal proceedings.

14. Sri Anupam Mehrotra, Advocate has made the following submissions:-

15. That the Magistrate was not justified in registering the complaint against the petitioner who happens to be the Lokayukta as the allegations in the complaint were based upon the acts which were in discharge of the official duty as a Lokayukta. The submissions are that Section 17 (1) of the U.P. Lokayukta and Up-Lokayuktas Act, 1975, bars any prosecution for the official acts He further argues that the Magistrate received an information to that effect, however, despite being informed he proceeded to record the evidence under Section 200 of Cr.P.C. which is violative of the immunity granted to the petitioner under Section 17(1) of the Act. The next argument of Sri Anupam Mehrotra is that even in terms of the provisions of Section 197 Cr.P.C. without there being any sanction the Magistrate could not entertain the complaint and to take steps as has been done by the Magistrate. He further argues that the acts done by the petitioner in discharge of his duty as Lokayukta fell within the exceptions under Chapter IV of the Indian Penal Code. He specifically relied upon Sections 76 and 79 of Chapter IV of the Indian Penal Code, in that regard he further relied upon the judgments filed in the form of Synopsis which are taken on record. He has relied upon the judgment of the Supreme Court in the cases of ***M/s Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others, 1998 SCC (Cri) 1400, Institution of A.P.***

Lokayukta v. T. Rama Subba Reddy; (1997) 9 SCC 42, State of U.P. v. Sheo Shanker Lal Srivastava; (2006) 3 SCC 276, M.P. Special Police Establishment v. State of M.P.; (2004)8 SCC 788, Rang Nath Mishra v. State of U.P.; (2015) 8 SCC 117, State of Rajasthan v. Shamsher Singh; (2015) 4 SCC (Cri) 421, State of Orissa v. MESCO Steels Ltd.; (2013) 4 SCC 340, Matajog Dubey v. H.C. Bhari; AIR 1956 SC 44, Ramayya v. State of Bombay; AIR 1955 SC 287, Amrik Singh v. State of Pepsu; AIR 1955 SC 309 and N.K. Ogle v. Sanwaldas; (1999) 3 SCC 284.

16. The next argument of Sri Mehrotra is that the antecedents of the applicant are doubtful inasmuch as the complainant is a habitual litigant and on several occasions being reprimanded by the High Court. A copy of the order whereby the P.I.L. being Misc. Bench No. 2967 of 2014 filed by the OP No. 2 was dismissed by imposing a cost of Rs. 25,000/- and by making the following observations:-

"8. In many of the files of public interest litigation filed by the petitioner, examined by the Court, we find that the petitioner has raised issues within a few days when any social or political issue attracts the attention of the media. Almost all the writ petitions are filed without any research or material and based only on the newspaper reports. The petitioner appears to have a permanent presence before the Bench hearing public interest litigation matters. It appears from the records of the writ petitions and the orders that the petitioner has received a tacit encouragement in filing such petitions, which takes away substantial time of the Court leaving other important matters.

9. Most of the writ petitions, filed by the petitioner in person are not in public interest. These writ petitions have been filed covering almost every subject covered by media to be topical mostly concerning social, political economic or commercial interest. She has also allowed her children, still minor in filing writ petitions; the last one concerning the decision of the Central government awarding Bharat Ratna awards. Almost every subject under the sun which attracts her imagination becomes a subject matter of public Interest Litigation.

10. In order to save this Court from the tsunami of writ petitions filed by the petitioner who appear almost every other day in Court touching matters which hits the headline, treating it as public interest, we find it appropriate to direct that hence forth the registry of the Court will not entertain any writ petition in public interest from Dr Nutan Thakur - either in person or though counsel (either as petitioner or co-petitioner) unless the petition, filed by her, accompanies a demand of Rs.25,000/- (Twenty Five Thousand). At the time of admission of the writ petition, if the Court considers that the petitioner has raised a matter which is genuine and bonafide in public interest, the demand draft deposited by her may be returned to her. In case it is found by the Court that the Writ Petition filed by her does not involve any public interest and the writ petition is dismissed, the amount in the demand draft deposited by her will be treated as costs imposed on her, and the amount will be credited in the account of the High Court Legal Services Committee at Lucknow to be spent for activities of the Legal Services Committee of the High Court.

11. The writ petition is dismissed, with cost of Rs.25,000/- to be

paid by the petitioner appear in person to be deposited by her within a month with Senior Registrar, High Court at Lucknow, failingwhich it will realized from her by the District Magistrate, Lucknow with one month thereafter for which the demand will be sent by the Senior Registrar, subject to deposit made by her within within one month."

17. On the basis of submission as recorded above, Sri Anupam Mehrotra, Advocate prays that the proceedings pending before the Chief Judicial Magistrate are liable to be quashed.

18. Thus, what is to be decided by this Court is:-

(i) whether the order dated 3.9.2015 amounts to "taking cognizance',

(ii) whether the complaint as filed is barred under Section 17(1) of the Lokayukta Act,

(iii) whether there being an absence of sanction under Section 197 Cr.P.C. the C.J.M. erred in taking cognizance of complaint and,

(iv) whether the complainant could not have filed the complaint being a habitual litigant.

19. To appreciate the arguments advanced it is essential to deal with the scope and ambit of the "Lokayukta Act' and Section 197 Cr.P.C. The scheme of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975 makes it clear that the said Act was enacted for appointment and function of authorities for investigation of grievances and allegations made against Ministers, Legislatures and public servants in certain cases.

20. Section 3 of the said Act provides for the appointment of Lokayukta and Up-Lokayukta who are empowered to conduct investigations. It provides that the Lokayukta shall be appointed after the consultation with the Chief Justice of High Court of Judicature at Allahabad and the leader of the opposition in the Legislative Assembly.

21. The Act further bars the Lokayukta or the Up-Lokayukta from holding any other Office. The appointment of the Lokayukta is for a tenure as provided under Section 5 of the Act being six years from the date on which he enters his Office. Section 6 of the said Act provides for the manner of removal of Lokayukta and Up-Lokayukta. Section 7 of the said Act provides for the matter in which the investigations may be carried out by the Lokayukta or the Up-Lokayukta and Section 8 specifically bars the matters in which the investigations cannot be carried out by the Lokayukta.

22. Section 10 of the Lokayukta Act provides for the procedure to be adopted in respect of investigations and is as under:-

"10. Procedure in respect of investigations. *- (1) Where the Lokayukta or an Up-Lokayukta proposes (after making such preliminary inquiry, if any, as he deems fit) to conduct any investigation under this Act, he -*

(a) shall forward a copy of the complaint to the public servant concerned and the competent authority concerned;

(b) shall afford to the public servant concerned an opportunity to offer his comments on such complaint; and

(c) may make such orders as to the safe custody of documents relevant to the investigation, as he deems fit.

(2) Every such investigation shall be conducted in private, and in particular, the identity of the complainant and of the public servant affected by the investigation shall not be disclosed to the public or the press whether before, during or after the investigation :

Provided that, the Lokayukta or an Up-Lokayukta may conduct any investigation relating to a matter of definite public importance in public, if he, for reasons to be recorded in writing, thinks fit to do so.

(3) Save as aforesaid, the procedure for conducting any such investigation shall be such as the Lokayukta or, as the case may be, the Up-Lokayukta considers appropriate in the circumstances of the case.

(4) The Lokayukta or an Up-Lokayukta may, in his discretion, refuse to investigate or cease to investigate any complaint involving a grievance or, an allegation, if in his opinion -

(a) the complaint is frivolous or vexatious, or is not made in good faith; or

(b) there are no sufficient grounds for investigating or, as the case may be, for continuing the investigation; or

(c) other remedies are available to the complainant and in the circumstances of the case it would be more proper for the complainant to avail of such remedies.

(5) In any case where the Lokayukta or an Up-Lokayukta decides not to entertain a complaint or to discontinue any investigation in respect of a complaint, he shall record his reasons therefor and communicate the same to the complainant and the public servant concerned.

(6) The conduct of an investigation under this Act in respect of any action shall not affect such action, or any power or duty of any public servant to take further action with respect to any matter subject to the investigation."

23. Section 12 of the Lokayukta Act provides for the evidences that may be called for in discharge of the official functions. Section 13 provides for the manner in which the action can be taken in the case of complaints by persons who willfully or maliciously makes false complaints and Section 13 (6) confers the power to detain in custody for taking cognizance of the offence. Section 13 (6) of the said Act is as under:-

"(6) When any such offence as is described in Section 175, Section 178, Section 179 or Section 180 of the Indian Penal Code is committed in the view or presence of the Lokayukta or Up-Lokayukta, he may cause the offender to be detained in custody and may, at any time on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to simple imprisonment for a term which may extend to one month, or to fine which may extend to five hundred rupees, or to both."

24. Section 17 of the Lokayukta Act, which is the sum and substance the

sheet anchor of the arguments made by the counsel for the applicant provides for protection to the Lokayukta or the Up-Lokayukta in respect of anything which in good faith done or intended to be done under this Act. Section 17 is as under:-

*"**17. Protection.** - (1) No suit, prosecution or other legal proceeding shall lie against the Lokayukta or the Up-Lokayukta or against any officer, employee, agency or person referred to in Section 14 in respect of anything which is in good faith done or intended to be done under this Act.*

(2) No proceedings of the Lokayukta or the Up-Lokayukta shall be held bad for want of form and except on the ground of jurisdiction, no proceedings or decision of the Lokayukta or the Up-Lokayukta shall be liable to be challenged, reviewed, quashed or called in question in any Court."

25. Section 197 Cr.P.C. provides for prior sanction before any cognizance can be taken for allegations against Judges and public servants. Section 197 Cr.P.C. is as under:-

*"**197. Prosecution of Judges and public servants.**-(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]-*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.]

[Explanation.-For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166-A, Section 166-B, Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 370, Section 375, Section 376, Section 376-A, Section 376-C, Section 376-D or Section 509 of the Indian Penal code (45 of 1860).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such

class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression"Central Government" occurring therein, the expression" State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

26. Sri Anupam Mehrotra has relied upon the definition of the public servant as defined under Section 21 I.P.C. to contend that the applicant falls within the definition of a public servant and as such no cognizance could have been taken by the Magistrate without any sanction which the C.J.M. has done in the teeth of Section 197 Cr.P.C. Sri Mehrotra further submits that as the applicant is entitled to detain any person in confinement by virtue of power conferred under Section 13 (6) of the Lokayukta Act and as such he falls within the seventh category as defining public servant under Section 21 I.P.C. Section 21 I.P.C. is quoted as under:-

***"21. "Public servant"**.--The words "public servant" denote a person falling under any of the descriptions hereinafter following; namely:-- [***]*

Second. --Every Commissioned Officer in the Military, [Naval or Air] Forces [***] of India];

er by himself or as a member of any body of persons, any adjudicatory functions;]

Fourth. -- Every officer of a Court of Justice [(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to

take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth. -- Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth. -- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh. --Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth. -- Every officer of [the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth. -- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [the Government], or to make any survey, assessment or contract on behalf of [the Government], or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of [the Government], or to make, authenticate or keep any document relating to the pecuniary interests of [the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of [the Government] [***];

Tenth. -- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

[Eleventh. --Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]

[Twelfth. --Every person--

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).] "

27. The expression "cognizance" and "taking cognizance" came up for interpretation before the ***Hon'ble Supreme Court in the case of Manharibhai Muljibhai Kakadia and Another v. Shaileshbhai Mohanbhai Patel and others; (2012) 10 SCC 517,*** wherein the Hon'ble Supreme Court has held as under:-

"24. The procedural scheme in respect of the complaints made to Magistrates is provided in Chapter XV of the Code. On a complaint being made to a Magistrate taking cognizance of an

offence, he is required to examine the complainant on oath and the witnesses, if any, and then on considering the complaint and the statements on oath, if he is of the opinion that there is no sufficient ground for proceeding, the complaint shall be dismissed after recording brief reasons. The Magistrate may also on receipt of a complaint of which he is authorised to take cognizance proceed with further inquiry into the allegations made in the complaint either himself or direct an investigation into the allegations in the complaint to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. In that event, the Magistrate in fact postpones the issue of process. On conclusion of the inquiry by himself or on receipt of report from the police officer or from such other person who has been directed to investigate into the allegations, if, in the opinion of the Magistrate taking cognizance of an offence there is no sufficient ground for proceeding, the complaint is dismissed under Section 203 or where the Magistrate is of the opinion that there is sufficient ground for proceeding, then a process is issued. In a summons case, summons for the attendance of the accused is issued and in a warrant case the Magistrate may either issue a warrant or a summons for causing the accused to be brought or to appear before him.

25. Pertinently, Chapter XV uses the expression, "taking cognizance of an offence" at various places. Although the expression is not defined in the Code, but it has acquired definite meaning for the purposes of the Code.

34. The word "cognizance" occurring in various sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that an offence has been committed. ***In the context of Sections 200, 202 and 203, the expression "taking cognizance" has been used in the sense of taking notice of the complaint or the first information report or the information that an offence has been committed on application of judicial mind. It does not necessarily mean issuance of process."***

28. A perusal of the order dated 3.9.2015, and the Magistrate recording the statements under Section 200 Cr.P.C. and fixing the same for recording of the statement under Section 202 Cr.P.C. clearly would amount to fall within the expression "taking cognizance", as used in Section 200 Cr.P.C. Furthermore a perusal of Section 200 Cr.P.C. makes it clear that the Magistrate after taking cognizance on an offence shall proceed to examine on oath the complainant and the witnesses present, if any. In view thereof, I have no hesitation in holding that the Magistrate had taken cognizance of the allegations levelled against the applicant by the complainant in the complaint while passing the order dated 3.9.2015.

29. The next question to be answered is whether the complaint was barred under Section 17 (1) of the Lokayukta Act. The Section 17 (1) of the Act has been incorporated in the Act to give protection to the Lokayuktas with a view to ensure the functioning of the Lokayukta in a free and fair manner. It specifically provides the protection of the actions taken/orders passed in the course of the powers entrusted upon the

Lokayukta under the Act from prosecution. The said protection granted under Section 17 (1) has to be strictly interpreted without which the entire object of the Lokayukta Act and the appointment of the Lokayukta would wipe out the spirit with which the Act has been enacted. The scheme of the Act makes it clear that the Lokayukta has to be a neutral person who is required to take decision without any fear or favour and without the kind of protection as provided under Section 17 (1) of the Lokayukta Act being there, it cannot be conceived that the object of the Act would be fulfilled.

30. The complaint as filed before the C.J.M. makes allegations against the applicant with regard to the orders passed by the applicant under Section 10 (5) of the Act. The sum and substance of the allegations is that while passing the said order, the Lokayukta has relied upon non-existence evidences and half baked facts which the applicant had the personal knowledge of being contrary to the actual facts. There is no allegation whatsoever that the order passed was not in good faith. It is relevant to note that the order which led to the filing of the complaint is already a subject matter of writ petition which is pending, in which no orders have been passed. A perusal of the complaint makes it abundantly clear that the allegations levelled in the complaint were with regard to the acts of the applicant while discharging his statutory duties as a Lokayukta of State of Uttar Pradesh and thus no legal proceedings could be instituted against the applicant as prohibited under Section 17(1) of the Act and the Magistrate was clearly barred from taking cognizance of the offences as has been done by the Magistrate.

31. Now coming to the question of prior sanction required under Section 197 Cr.P.C. before taking cognizance of an offence. Section 197 Cr.P.C. specifically bars any Court from taking cognizance against a "Judge' or a "Magistrate' or a "public servant' without sanction of the Government. A bare reading of provisions of Section 197 (1) Cr.P.C. makes it clear that for attracting the provision of Section 197 Cr.P.C. it is essential that (i) the person accused of an offence should be a "Judge' or a "Magistrate' or a "public servant' (ii) and he should not be removable from his Office save by or with the sanction of the Government. Thus, if it is established that the person falls within the category of a "Judge' or a "Magistrate' or a "public servant' and he cannot be removed from his Office except with the sanction of the Government, the provisions of Section 197 Cr.P.C. shall become applicable forthwith.

32. Section 21 (Seventh Explanation) of the I.P.C. read with Section 13 (6) of the Lokayukta Act makes it clear that the applicant would fall within the definition of "public servant' and furthermore provision of Section 6 of the Lokayukta Act make it clear that a Lokayukta cannot be removed without following the procedure as prescribed under Section 6 of the Lokayukta Act and without the sanction of the Governor. Thus, on both the counts i.e. the applicant falling within the definition of a "public servant' and also "not removable except with the sanction of the Governor', the protection of Section 197 (1) Cr.P.C. squarely applies to the applicant and thus on this count also the Magistrate has erred in taking cognizance of an offence.

33. Sri Mehrotra has extensively relied upon the observations made by the Apex Court in the Constitution Bench

judgment of ***Matajog Dubey v. H.C. Bhari; AIR 1956 SC 44,*** wherein the Constitution Bench was considering the proceedings the proceedings against the public servant without sanction. The Constitution Bench decision Matajog Dobey case clearly enunciates where a power is conferred or a duty is imposed by a statute or otherwise and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution because it is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command. The Court was considering in the said case the allegation that the official authorised in pursuance of a warrant issued by the Income Tax Investigation Commission in connection with certain pending proceedings before it, forcibly broke open the entrance door and when some resistance was put, the said officer not only entered forcibly but tied the person offering resistance with a rope and assaulted him mercilessly causing injuries and for such an act, a complaint had been filed against the public officers concerned. This Court, however, came to hold that such a complaint cannot be entertained without a sanction of the competent authority as provided under Section 197 CrPC. This Court had observed that before coming to a conclusion whether the provisions of Section 197 of the Code of Criminal Procedure will apply, the court must come to a conclusion that there is a reasonable connection between the act complained of and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim that he did it in the course of the performance of his duty.

34. Applying the said test, it is clear that the order passed by the applicant acting as a Lokayukta was in discharge of his official capacity which he was authorised to perform under the provisions of the Lokayukta Act.

35. Sri Mehrotra has further strenuously relied upon on the judgment of the Apex Court in the case of ***N.K. Ogle v. Sanwaldas; (1999) 3 SCC 284,*** wherein the Apex Court relied upon the decision in the case of *Matajog Dubey (supra)* followed the same and further relying upon the case of ***Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan; (1998) 1 SCC 205*** held as under:-

"In Suresh Kumar case [(1998) 1 SCC 205 : 1998 SCC (Cri) 1] relying upon Matajog Dobey case [AIR 1956 SC 44 : (1955) 2 SCR 925 : (1955) 28 ITR 941] and bearing in mind the legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with previous sanction of the Government concerned, this Court has held that the said provision is a prohibition imposed by the statute from taking cognizance and, as such, the jurisdiction of the court in the matter of taking cognizance and, therefore, a court will not be justified in taking cognizance of the offence without such sanction on a finding that the acts complained of are in excess of the discharge of the official duty of the government servant concerned."

36. In view of the law as laid down by the Apex Court as extracted above, I

have no hesitation in coming to the conclusion that no cognizance could be taken by the Magistrate without sanction under Section 197 Cr.P.C.

37. Coming to the argument of Sri Mehrotra that the complainant is a habitual litigant and on that score also the complaint deserves to be quashed, I am afraid, I am unable to accept the said submission merely because the complainant has been barred from instituting Public Interest Litigation, there cannot be any blanket bar against the complainant initiating or resorting to legal remedies as may be available to the complainant in the facts of the given cases. Thus, the submission of Sri Mehrotra on that count deserves to be rejected.

38. On the basis of the findings recorded above, I am of the view that the complaint as filed was specifically barred under Section 17 (1) of the Lokayukta Act and the order taking cognizance of the offence was barred under Section 197 Cr.P.C. As such, the Case No. 8737 of 2015 (Dr. Nutan Thakur v. Sri N.K. Mehrotra) pending in the Court of Chief Judicial Magistrate, Lucknow as well as the order taking cognizance dated 3.9.2015 deserves to be quashed and are accordingly quashed.

39. The application under Section 482 Cr.P.C. is disposed off in terms of the said direction.

40. No order as to costs.

41. Let a copy of this order be sent to the concerned court for it being taken on record.

(2019)11ILR A36

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.10.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH , J.

U/S 482/378/407 No. 3015 of 2015

Satish Singh ....Applicant
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri S.K. Singh (In Person)

Counsel for the Opposite Parties:
Govt. Advocate, Sri Kanhaiya Lal, Sri Umesh Singh

A. Criminal Law-Criminal Application Under Section 482 Cr.P.C - Section 190(1)(a) and Section 203 Cr.P. C - Rejection of Complaint –It is not only the prima facie case where the Magistrate chooses to adopt the course provided under Chapter XV of the Cr.P.C. on a complaint but, the Magistrate is also required to satisfy himself of the sufficiency of the material/evidence to proceed against the accused which must be sufficient for the complainant to succeed in bringing charge home. Application of Judicial mind- The criminal justice process may not be initiated in a mechanical manner - It must be disclosed from the order that the Magistrate while taking cognizance of an offence on a complaint filed under Section 190(1)(a) Cr.P.C., applied his judicial mind to the relevant issues. It must be sufficiently incorporated in the order - If the Magistrate finds that the complaint does not disclose any cause of action upon examination of the complainant, the Magistrate should not proceed with the complaint and should dismiss it.

Glaring contradictions in the statement of the complainants, witnesses and averments in the

complaint - No prima facie case made out – Magistrate refused to take cognizance. Revisional Court set aside the order on the ground that at the time of summoning the accused only *prima facie* case is required to be considered- Contradictions in the statement of the complainant and the averments in the complaint were minor and on that basis it could not be said that no *prima facie* case was made out. High Court set-aside the order of the revising authority.

B. The order passed by learned revisional court is unsustainable and the present revision *(sic)* Criminal Application under section 482 of the Cr.P.C.) is *allowed.* (Para 20,21,22,23,25,27,28)

Application u/s 482 Cr.Pc allowed (E-3)

List of cases cited -

1**.** Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749

2. S.R. Sukumar Vs S. Sunaad Raghuram, (2015) 9 SCC 609

3. Mehmood Ul Rehman Vs Khazir Mohammad Tunda, (2015) 12 SCC 420

(Delivered by Hon'ble Dinesh Kumar Singh, J.)

1. The petitioner is a practicing lawyer of this court. He has filed the present petition under section 482 Cr.PC for setting aside order dated 31.03.2015 passed by revisional Court/Additional Sessions Judge, Ambedkar Nagar in Criminal Revision No.231 of 2013 setting aside the order dated 20.09.2013 passed by II-Additional Civil Judge(Junior Division)/ Judicial Magistrate, Ambedkar Nagar in Complaint Case No.250 of 2013 whereby the learned magistrate had rejected the complaint of respondent No.2 under Section 203 Cr.P.C.

2. The petitioner and respondent No.2 are the resident of the same village. Petitioner's bhumidhari land is adjacent to Abadi land of the village. Respondent No.2 had constructed a house near the land of the petitioner. It is alleged that respondent No.2 had been trying to encroach upon the land of the petitioner.

3. Respondent No.2 belongs to a political party and the said political party was in power in the State at the relevant time. Respondent No.2 was making endeavour to encroach the land of the petitioner in the year 2003. Thereafter, he usurped the land of the petitioner and made construction over it. The petitioner, however, complained to the revenue authorities against the encroachment of his land by respondent No.2 and the revenue authorities evicted respondent No.2 from the land of the petitioner.

4. When respondent No.2 did not succeed in his attempt to usurp the land of the petitioner and encroach the land illegally, he filed an application dated 05.02.2013 under Section 156(3) Cr.P.C. for a direction to register an FIR against the petitioner and his family members and investigate thereof.

5. Learned magistrate treated the said application filed by respondent No.2 as a complaint and proceeded to record the statement of the complainant and witness(es) under Sections 200 and 202 Cr.P.C. The case was registered as Complaint Case No.250 of 2013. Learned magistrate, however, after considering the statement of the complainant (respondent No.2) and witnesses who were brother and daughter of respondent No.2 arrived at a conclusion that there were glaring contradictions in the averments/allegation in the complaint and the statements of the complainant and the witnesses which were inconsistent and contradictory.

6. Learned Magistrate vide a reasoned order dated 20.09.2013 dismissed the complaint under Section 203 Cr.P.C.

7. Being aggrieved by the dismissal of the complaint, respondent No.2 filed a revision being Criminal Revision No.231 of 2013 in which the impugned order dated 31.03.2015 has been passed.

8. Heard Sri Satish Kumar Singh, the petitioner in-person and learned A.G.A. for the State. Despite notice no one has put in appearance on behalf of respondent No.2.

9. Learned Magistrate in the order dated 20.09.2013 after considering the statements of the complainant and the witnesses had come to the conclusion that no prima facie case was made out for summoning the proposed accused and, therefore, rejected the Complaint Case No.250 of 2013. Learned Magistrate had recorded a finding that the complainant in his statement under Section 200 Cr.P.C. had stated that at the time of incident his son, Gulab was also present with him at his agricultural field. He further said that the accused assaulted him and his son by kicks and fists. However, neither in the complaint nor in the statement of the witnesses under Section 202 Cr.P.C. there was any mention of his son being present at the time of incident.

10. Learned magistrate had further recorded a finding of fact that the complainant in his statement had said that the accused thereafter, assaulted him and his son inside the house and on raising alarm one Ram Charan and his daughter, Anju came there. However, the witnesses under Section 202 Cr.P.C. said that the accused had assaulted the complainant and his daughter inside the house but in the complaint, Anju, the daughter of the complainant was nowhere mentioned. Thus, there were glaring contradictions in the statement of the complainants, witnesses and averments in the complaint. Specific stand of the complainant was that the accused assaulted the complainant and his son, however, in the complaint it was alleged that the accused assaulted only the complainant and in the statement of the witnesses under Section 202 Cr.P.C. it was alleged that the accused assaulted the complainant and his daughter, Anju. It had further been observed by the learned Magistrate that according to the averments in the complaint, the accused had assaulted the complainant inside his house by lathi whereas in the statement under Section 200 Cr.P.C. the complainant did not mention the assault by Lathi and Danda. It was alleged that the accused assaulted him by kicks and cricket bat.

11. Considering these glaring contradictions in the complaint, statements of the witnesses and statement of the complainant, the learned Magistrate did not find sufficient ground to summon the accused and, therefore, dismissed complaint under Section 203 Cr.P.C.

12. Learned Revisional Court, however, has set aside the said order on the ground that at the time of summoning the accused only *prima facie* case is required to be considered. Contradictions in the statement of the complainant and the averments in the complaint were minor and on that basis it could not be said that no *prima facie* case was made out.

13. I have considered the submissions of the petitioner and learned A.G.A. for the State.

14. When a Magistrate receives a complaint, it is not necessary for the Magistrate to take cognizance for the facts alleged in the complaint which would disclose commission of an offence. The magistrate has discretion in the matter. If a complaint discloses cognizable offence, the magistrate may forward the complaint to the police for investigation under section 156(3) Cr.P.C., such a course is conducive to justice and to save the valuable time of the Magistrate from being wasted in enquiring into a matter by himself. Investigation is a primary duty of the police and, therefore, if the complaint discloses cognizable offence, the Magistrate ordinarily should refer the complaint to the police for investigation. If the Magistrate refers the complaint to the police for investigation, he is not required to examine the complaint on oath inasmuch as he is not taking cognizance of any offence therein. However, if he takes cognizance and adopts the course in chapter XV of the Cr.P.C., thereafter he would not be competent to revert back the precognizance stage.

15. When a magistrate chooses to take cognizance on a complaint, he can adopt any of the following alternatives:-

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding, he can straightway issue process to the accused but before he does so, he must comply with the requirements of Section 200 and record the evidence of the complainant and his witnesses; or

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself; or

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

16. If the Magistrate after considering the statement of the complainant and, the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding, he can dismiss the complaint.

17. The question which arises for consideration in the present case is whether in dismissing the complaint under Section 203 Cr.P.C. after considering the contents of the complaint and the statements of the complainant and witnesses, did the learned Magistrate commit any illegality or exercised his jurisdiction improperly or violate any provision of Cr.P.C. which warranted the learned Revisional Court to interfere with the order passed by learned Magistrate?

18. Learned Magistrate after considering the averments in the complaint, statements of the complainant and the witnesses was of the opinion that there were glaring contradictions and there was no sufficient material for summoning the accused. Can it be said that the discretion vested in the Magistrate was exercised arbitrarily or against the provision of Cr.P.C.?

19. Learned Revisional court has set aside the order dated 31.03.2015 of the learned magistrate on the ground that the learned Magistrate is only required to examine whether a *prima facie* case is made out or not against the accused. Revisional Court has also opined that the contradictions in the statements of the

complainant and witnesses and averments in the complaint are minor.

20. It is well settled that before issuing process and setting criminal proceedings in motion, the learned Magistrate is not only required to see the *prima facie* case but has also to be satisfied that there is sufficient material to proceed against the accused after examining the contents of the complaint and the statements of the complainant and the witnesses and other evidence.

21 . The Magistrate has to form an opinion of a *prima facie* case at the time of taking cognizance but when the Magistrate issuing process to summon the accused, he should see whether there is sufficient material to proceed against the accused after considering the averments of the complaint and the statements of the complainant and the witnesses as well as other evidence.

22. It is no longer res integra that summoning an accused in a criminal case is a serious matter. Criminal Law cannot be set into motion of course. It is not sufficient that a complainant files a complaint and gets his statement recorded and brings one witness for summoning the accused. Learned Magistrate is required to apply his mind to the facts of the case and law applicable thereto. He must examine the nature of allegation made in the complaint and the evidence both oral and documentary in support thereof. The evidence must be sufficient for the complainant to succeed in bringing charge home. The Supreme Court in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749*** in para 28 has held as under:-

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. 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. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

23. Learned Magistrate has to apply his judicial mind to the contents of the complaint and the material filed therewith for taking judicial notice of an offence. The order must disclose that learned Magistrate while taking cognizance of an offence on a complaint filed under Section 190(1)(a) Cr.P.C. has applied his judicial mind to the allegations in the complaint, the statement of the complainant and, if the Magistrate finds that the complaint does not disclose any cause of action upon examination of the complainant, the Magistrate should not proceed with the complaint and should dismiss it.

24. The Supreme Court in the case of ***S.R. Sukumar v. S. Sunaad***

Raghuram, (2015) 9 SCC 609 while explaining the meaning on taking cognizance of the offence on a complaint in paras 11 and 12 has held as under:-

11. *Section 200 CrPC contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present, if any. Then normally three courses are available to the Magistrate. The Magistrate can either issue summons to the accused or order an inquiry under Section 202 CrPC or dismiss the complaint under Section 203 CrPC. Upon consideration of the statement of the complainant and the material adduced at that stage if the Magistrate is satisfied that there are sufficient grounds to proceed, he can proceed to issue process under Section 204 CrPC. Section 202 CrPC contemplates "postponement of issue of process". It provides that the Magistrate on receipt of a complaint of an offence, of which he is authorised to take cognizance may, if he thinks fit, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or have an inquiry made by any Magistrate subordinate to him, or an investigation made by a police officer, or by some other person for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds no sufficient ground for proceeding, he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 CrPC. A Magistrate takes cognizance of an offence when he decides to proceed against the person accused of having committed that offence and not at the time when the Magistrate is just informed either by the complainant by filing the complaint or by the police report about th*

12. *"Cognizance" therefore has a reference to the application of judicial mind by the Magistrate in connection with the commission of an offence and not merely to a Magistrate learning that some offence had been committed. Only upon examination of the complainant, the Magistrate will proceed to apply the judicial mind whether to take cognizance of the offence or not. Under Section 200 CrPC, when the complainant is examined, the Magistrate cannot be said to have ipso facto taken the cognizance, when the Magistrate was merely gathering the material on the basis of which he will decide whether a prima facie case is made out for taking cognizance of the offence or not. "Cognizance of offence" means taking notice of the accusations and applying the judicial mind to the contents of the complaint and the material filed therewith. It is neither practicable nor desirable to define as to what is meant by taking cognizance. Whether the Magistrate has taken cognizance of the offence or not will depend upon the facts and circumstances of the particular case.*

25. It is also well established that it is the duty of the Magistrate while passing an order issuing process to an accused to apply his judicial mind to the relevant issues and that must be sufficiently incorporated in the order. However, it is not required that a detailed speaking and reasoned order should be passed at the stage of Sections 190 and 204 Cr.P.C. If the order does not disclose application of judicial mind, the order passed by the learned Magistrate issuing process is liable to be quashed by the High Court in exercise of its power under

Section 482 Cr.P.C. As mentioned above the criminal powers against an accused must not be issued in a mechanical manner.

26. The Supreme Court in the case of ***Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420*** has explained the satisfaction required on the part of the Magistrate for formation of an opinion to issue process under Section 204 IPC on a complaint under Section 190(1)(a) Cr.P.C.

Paras 22 and 23 of the aforesaid report are extracted herein below:-

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.*

23. *Having gone through the order passed by the Magistrate, we are satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance and issuing process to the appellants. The contention that the application of mind has to be inferred cannot be appreciated. The further contention that without application of mind, the process will not be issued cannot also be appreciated. Though no formal or speaking or reasoned orders are required at the stage of Sections 190/204 CrPC, there must be sufficient indication on the application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded under Section 200 CrPC so as to proceed against the offender. No doubt, the High Court is*

right in holding that the veracity of the allegations is a question of evidence. The question is not about veracity of the allegations, but whether the respondents are answerable at all before the criminal court. There is no indication in that regard in the order passed by the learned Magistrate.

27. To form a prima facie satisfaction as to whether there are grounds for proceedings on a complaint filed under Section 190(1)(a) Cr.P.C. against the accused, the Magistrate is required to consider the averments of the complaint to examine prima facie truth and inherent improbabilities apparent in the allegations made in the complaint. If the Magistrate comes to the conclusion that the allegations are improbable without considering the defence of the accused, learned Magistrate should not proceed with the complaint.

28. In the present case, the learned Magistrate for valid and cogent reasons after considering the averments of the complaint and the statements of the complainant and the witnesses was of the opinion that there was no sufficient material/ ground to proceed against the accused. It is not only the prima facie case where the Magistrate chooses to adopt the course provided under Chapter XV of the Cr.P.C. on a complaint but the Magistrate is also required to satisfy himself of the sufficiency of the material/evidence to proceed against the accused. The learned Magistrate cannot be said to have exercised his discretion improperly or against any express provision of law. The learned Magistrate after applying his judicial mind to the evidence and material before him had dismissed the complaint under Section 203 Cr.P.C. The said order passed by the learned Magistrate should not have been interfered with by the Revisional Court.

29. In view of the aforesaid, I am of the view that the order passed by learned revisional court is unsustainable and the present revision is ***allowed.*** Judgment and order dated 31.03.2015 passed by Revisional Court is set aside.

(2019)11ILR A43

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.10.2019

BEFORE
THE HON'BLE RAJEEV SINGH , J.

U/S 482/378/407 No. 5778 of 2019

Jyotinder Singh Randhawa ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Arun Sinha, Sri Siddhartha Sinha, Sri Umang Agarwal.

Counsel for the Opposite Party:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973 Sections 10(3) and 10(4) of the Passports Act, 1967- Impounding of passport. The Passports Act, 1967 is a complete code read with the Passport Rules, 1980. Held: Merely on the basis of anticipation mentioned in the report of the Prosecuting Officer presumption cannot be drawn at the time of passing the order for retaining the passport -The court below is bound to record its satisfaction for the same- The trial court cannot retain the passport on the request of the Prosecuting Officer. (Para 12,14,16,17 & 18)

Application for release of passport of the applicant rejected-Report of Prosecuting Officer that in case the passport is returned to the applicant he may leave the country. No written request was made by the Forest

Official for retaining the passport before the court below - Forest Officer has not placed any report before the court below to impound the passport of the accused-applicant – No application filed by the Forest Officials before the Passport Authority under the provisions of The Passports Act, 1967 to impound the passport during the trial.

Application u/s 482 Cr.P.C. allowed (E-3)

List of cases cited :-

1. Suresh Nanda Vs CBI (2008) 3 SCC 674

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

1. Heard Mr. Arun Sinha, learned counsel for the applicant, Mr. Aniruddh Kumar Singh, learned A.G.A. for the State and perused the record.

2. The present application has been filed under Section 482 Cr.P.C. for quashing the order dated 06.07.2019 for retaining the passport of the applicant, passed by learned Chief Judicial Magistrate, Bahraich in Case No. 3740 of 2018, under Sections 9/27/29/31/32/39/44/48A/49B/50/51(IC)/ 52/38V of the Wildlife (Protection) Act, 1972 and Section 26 of the Forest Act, 1927, Range- Motipur, Katarniyaghat, District Bahraich and to release the passport.

3. Learned counsel for the applicant submitted that the applicant is a renowned and acclaimed Golfer who has represented India across the Globe and has been awarded Arjuna Award by Hon'ble the President of India and is having no criminal antecedents. He further submitted that the applicant was falsely implicated in the aforesaid case by the Forest Officials and nothing, as claimed by the Forest Officials, has been recovered from the applicant or from his car. The "Jungle Fowl" which is alleged to have been hunted by the applicant and allegedly recovered from the vehicle of applicant does not come in any of the Schedule of Animal and their Species as provided under Wild Life (Protection) Act, 1972.

4. Learned counsel for the applicant further submitted that the penalty in the Wild Life (Protection) Act, 1972 has been provided under Section 51, under which the accused may be punished with the imprisonment which shall not be less than three years or with fine which may extend to Rs. 25,000/- but may extend to seven years with fine which shall not be less than Rs. 10,000/-. He further submitted that the applicant was enlarged on bail by this Court in the aforesaid case vide order dated 21.02.2019 in Bail Application No.1402 of 2019 with the directions that the "accused-applicant" will co-operate in the investigation of the case and will also deposit his passport till submission of report under Section 173 Cr.P.C. , it was further directed that the decision with regard to the retention of the passport will be taken by the trial court after the report so submitted under Section 173 Cr.P.C.

5. Learned counsel for the applicant further submitted that the applicant was detained by the Forest Officials on 26.12.2018 and the Case was registered against him bearing No. 68 of 2018-19, Range- Motipur, District Bahraich and the seizure report was sent by the Forest Officials to the Chief Judicial Magistrate, Bahraich. Thereafter, the complaint dated 22.02.2019 was filed in the court of Chief Judicial Magistrate, Bahraich under Section 55 of the Wild Life (Protection) Act, 1972 and on the same date the

cognizance was taken by the court below on the aforesaid complaint without considering the fact that the complaint was filed under Section 55 of Wild Life (Protection) Act it is observed that the charge sheet was filed and the cognizance was taken on the charge sheet and he further submitted that in the case of complaint he had to follow the procedure.

6. Learned counsel for the applicant further submitted that on 21.02.2019 the applicant was enlarged on bail by this Court in Bail Application No. 1402 of 2019 and on the next date, i.e., on 22.02.2019, the Complaint Case was filed and after letting off from jail, the applicant moved an application before the Chief Judicial Magistrate, Bahraich on 05.03.2019 and prayed for release of his passport, but the application of the applicant was rejected vide impugned order with the observation that the Prosecuting Officer has reported that in case, the passport is returned to the applicant, he may leave the country.

7. Learned counsel for the applicant further submitted that the court below has committed error in considering the report of the Prosecuting Officer and making observations since the case is to be listed for framing of the charge, therefore, the presence of accused-applicant is necessary in court as well as at the time of recording of statement under Section 313 Cr.P.C. etc. and in case, the passport is released in favour of the applicant, he may go abroad and the trial of the case would be hampered. The judgment of the Hon'ble Supreme Court relied by the applicant was also not considered in true sense by the court below.

8. Learned counsel for the applicant further submitted that the complaint was filed on 22.02.2019, under Section 55 of the Wild Life (Protection) Act, 1972 in the court below and though the applicant was in custody but the charge was not framed and there is no explanation recorded by the court below as to why the charge could not be framed.

9. Learned counsel for the applicant relied on the decision of Hon'ble Supreme Court in the case of ***Suresh Nanda vs. Central Bureau of Investigation (2008) 3 SCC 674,*** on paragraphs 18 and 19, and submitted that the trial court cannot impound the passport.

10. Learned A.G.A. opposed the prayer of the applicant and submitted that there is no illegality in the order passed, as the passport of the applicant was deposited under the order of this Court vide order dated 21.02.2019 in Bail Application No.1402 of 2019.

11. After carefully considering the arguments of the counsel for the applicant as well as learned A.G.A. and going through the records, it is found that on the basis of allegation of hunting in the Tiger Reserve Forest, the applicant was detained on 26.12.2018 and the recovery memo/seizure memo was prepared by the Forest Officials and registered the Case No. 68 of 2018-19, under Sections 9/27/29/31/32/39/44/48A/49B/50/51(IC)/ 52/38V of the Wildlife (Protection) Act, 1972 and Section 26 of the Forest Act, 1927, Range- Motipur, Katarniyaghat, District Bahraich. Thereafter, the applicant was enlarged on bail by this Court vide order dated 21.02.2019 with the condition that the accused/applicant will deposit his passport before the trial court, till the submission of report under Section 173 Cr.P.C., after the report so

submitted further decision with regard to the retention of the passport will be taken by the trial court. It is also found from the record that on 22.02.2019, the complaint was filed under Section 55 of the Wild Life (Protection) Act, 1972. The provision of Section 55 (supra) is reproduced as under-

"[55. Cognizance of offences.-- No court shall take cognizance of any offence against this Act except on the complaint of any person other than--

(a) the Director of Wild Life Preservation or any other officer authorised in this behalf by the Central Government; or

[(aa) the Member-Secretary, Central Zoo Authority in matters relating to violation of the provisions of Chapter IVA; or]

[(ab) Member-Secretary, Tiger Conservation Authority; or

(ac) Director of the concerned tiger reserve; or]

(b) the Chief Wild Life Warden, or any other officer authorised in thisbehalf by the State Government 2[subject to such conditions as may be specified by that Government]; or

[(bb) the officer-in-charge of the zoo in respect of violation of provisions of section 38-J; or]

(c) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Central Government or the State Government or the officer authorised as aforesaid.]"

12. As no such presumption has been shown in the complaint filed by the Forest Officials that in case, the accused-applicant is released on bail, then he would flee away from the country and will not cooperate in the trial of the case, but merely on the basis of anticipation mentioned in the report of the Prosecuting Officer, the court below presumed that the applicant would flee away and the proceedings of the trial would be hampered.

13. The Provisions of the Sections 10(3) and 10(4) of the Passports Act, 1967 (hereinafter referred as **"the Act"**) provides that the passport authorities are empowered to impound/revoke the passport in case, the criminal proceeding is pending against the holder. The Provisions of Sections 10(3) and 10(4) of The Act are reproduced as under-

"10. Variation, impounding and revocation of passports and travel documents.--

(3) The passport authority may impound or cause to be impounded or revoke a passport or travel document,--

(a) if the passport authority is satisfied that the holder of the passport or travel document is in wrongful possession thereof;

(b) If the passport or travel document was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passport or travel document or any other person on his behalf:

5[Provided that if the holder of such passport obtains another passport, the passport authority shall also impound or cause to be impounded or revoke such otherpassport.]

(c) if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;

(d) if the holder of the passport or travel document has, at any time after the issue of the passport or travel document, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India;

(f) if any of the conditions of the passport or travel document has been contravened;

(g) if the holder of the passport or travel document has failed to comply with a notice under sub-section (1) requiring him to deliver up the same;

(h) if it is brought to the notice of the passport authority that a warrant or summons for the appearance, or a warrant for the arrest, of the holder of the passport or travel document has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been so issued or an order has been so made.

(4) The passport authority may also revoke a passport or travel document on the application of the holder thereof."

14. It is not the case of the State that the Forest Officer has placed any report before the court below for impounding the passport of the accused-applicant and if no such request is moved by the Forest Officer before the court then presumption cannot be drawn at the time of passing the order for retaining the passport and the court below is bound to record its satisfaction for the same. The Forest Officials ought to have moved an application before the Passport Authority under the Provisions of The Act for impounding the passport during the trial.

15. In the case of ***Suresh Nanda (supra)***, Hon'ble Apex Court has categorically held that court cannot impound a passport. The relevant paragraphs Nos. 17, 18 and 19 of the aforesaid case are being reproduced as under-

*"**17.** In the present case, neither the Passport Authority passed any order of impounding nor was any opportunity of hearing given to the appellant by the Passport Authority for impounding the document. It was only the CBI authority which has retained possession of the passport (which in substance amounts to impounding it) from October 2006. In our opinion, this was clearly illegal. Under*

Section 10-A of the Act retention by the Central Government can only be for four weeks. Thereafter it can only be retained by an order of the Passport Authority under Section 10(3).

18. *In our opinion, even the court cannot impound a passport. Though, no doubt, Section 104 CrPC states that the court may, if it thinks fit, impound any document or thing produced before it, in our opinion, this provision will only enable the court to impound any document or thing other than a passport. This is because impounding of a "passport" is provided for in Section 10(3) of the Passports Act. The Passports Act is a special law while CrPC is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of Statutory Interpretation (9th Edn., p. 133). This principle is expressed in the maxim generalia specialibus non derogant. Hence, impounding of a passport cannot be done by the court under Section 104 CrPC though it can impound any other document or thing.*

19. *For the aforesaid reasons, we set aside the impugned order of the High Court and direct the respondent to hand over the passport to the appellant within a week from today. However, it shall be open to the respondent to approach the Passport Authorities under Section 10 or the authorities under Section 10-A of the Act for impounding the passport of the appellant in accordance with law."*

16. As it is evident from the record and also from the impugned order that no any written request was made by the Forest Official for retaining the passport before the court below and only the Prosecuting Officer has made his anticipation that in case, the passport of applicant is released, he may flee away This submission must be based on the instruction of the Authority. The trial court cannot retain the passport on the request of the Prosecuting Officer.

17. The Act is the complete code read with the Passport Rules, 1980 which contains the procedure for issuance and revocation of passport, Section 10 of the Act clearly provides the procedure for impounding the passport, in case, any criminal proceeding is initiated against the holder, therefore, it is appropriate that the opposite party may approach to the Passport Authority for impounding of the passport of the applicant.

18. In view of the above facts and discussions, the present application is ***allowed.*** The impugned order dated 06.07.2019 is ***quashed.*** The passport of the applicant be handed over to him forthwith. However, it shall be open to the opposite party to approach to the Passport Authority under the Provisions of the Act for impounding the passport of the applicant in accordance with the law.

(2019)11ILR A48

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.04.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Application No.6348 of 2005
(U/S 482 Cr.P.C.)

Muttan & Ors. ...Applicants

Versus

The State. of U.P.& Anr. ...Opposite Parties

Counsel for the Applicants:

Sri A.R.Gupta.

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

A. Criminal Law-Criminal Procedure Code, 1973, Section 482 Cr.P.C. - Scope - Quashing of entire criminal complaint proceedings. Complaint case filed on basis of improbable allegations, malice, oblique motives and vengeance- Matter falls in category no.(7) mentioned in the case of State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) - Continuation of the proceedings on that basis is likely to result in abuse of court's process- Accordingly application is allowed and the entire proceedings of complaint in question against the accused-applicants stand quashed.

Complaint under sections 420/406 I.P.C. filed by the father-in-law of the Applicant No.4 as a counterblast to the Cases filed by the Applicant No. 4 under section 498-A I.P.C. etc. and under Section 125 of the Cr.P.C. - Applicant no.4, is daughter-in-law of opposite party no.2. Allegation that she took away certain jewellery with her. (Para 5).

Application u/s 482 Cr.P.C. stand quashed (E-3)

List of cases cited :-

1. St. of Haryana Vs Bhajan Lal (1992) SCC(Cr.)426.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been filed seeking the quashing of entire proceedings arising out of Case No. 662 of 2003, under sections 420/ 406 I.P.C., Police Station- Rajpur, District- Kanpur Dehat (Noore @ Noor Hasan vs. Multan and others) pending in the Court of Civil Judge (J.D.) Bhaganipur, Kanpur Dehat.

2. Heard learned counsel for the applicants.

3. Submission of the applicants' counsel is that the complaint in question has been lodged with express mala fides only in order to add harassment to the applicants and in order to add coercive pressure upon the applicants not to pursue the matter against the opposite party which it was facing. It was pointed out that applicant no.4, Anwar Jahan was married to one Mohammad Obaid, son of opposite party no.2. Anwar Jahan was very badly treated by her husband and in-laws and because of the same a case under section 498A etc. had to be filed. Apart from this a case of refusal to maintain her under section 125 Cr.P.C. was also brought in the Court on behalf of applicant no.4, Anwar Jahan. Submission is that the proceedings of 125 Cr.P.C. was initiated on 16.4.2002 while the case under section 498A etc. was brought against the opposite party no.2 on 1.10.2002. Reliance in this regard was placed on Annexure No.1 and 2 of the application which are the copies of application under section 125 Cr.P.C. and complaint filed against the husband side. Further submission is that a lot of pressure was exercised upon the applicants that they should not pursue the matter and should enter into compromise but as Anwar Jahan was subjected to enormous cruelty the applicants did not buckle down and decided to pursue the matter against husband side against all odds. Indignated by the same the opposite party has used the present complaint case as an arm twisting device out of ire and vengeance. Submission is that malice behind the complaint is apparent on the face of record and in view of the Apex Court's decision given in Bhajanlal's case, the proceedings against applicants ought to be quashed in the wake of mala fides which are demonstrable in this case. The

improbability of the allegations and the story given out in the complaint was also emphasized by the counsel. It has also been pointed out that the alleged jewellery said to have been taken away by Anwar Jahan was her own streedhan as per the allegations made in the complaint and it would hardly constitute any offence if she took it.

4. Heard learned A.G.A. and perused the record.

5. Notice on the opposite party was served but nobody is present on his behalf. The perusal of the complaint shows that so far as the jewellery part which is said to have been taken away by Anwar Jahan is concerned it is said to have been given to her in Chadhava which is a convention prevalent in Hindus whereby gifts in the form of jewellery are given to the daughter-in-law when she contracts marriage. Just as the parents give gifts to the daughter, the in-laws also confer gifts as Chadhava to the daughter-in-law. Therefore so far as the jewellery part which is said to have been taken away by Anwar Jahan is concerned, there appears substance in the submission made by the counsel in that regard and even if for the sake of argument it is taken to be true that she took away certain jewelleries with her they are according to the allegations of complaint in the nature of Chadhava which will be tantamount to her own streedhan. Therefore so far as that part of allegation is concerned it shall hardly constitute any offence. So far as the other allegations regarding amount of Rs.25,000/- having been taken away by wife is concerned the allegation appears to be not very convincing or palatable. There does not appear to be any good reason as to why the husband would put Rs.25,000/- in the suitcase of the wife and not in his own. If the relationship of husband and wife were cordial and if there was no dispute in between them and if the relationship were normal then it might be easily believed that a husband may put the cash in the suitcase of the wife. But in the wake of the bitterness which existed in between the two and in the wake of the background which is discernible from record that there was hardly any love lost between the couple though they lived together under the same roof, such kind of allegation that a sufficient by big amount of cash was put not in the suitcase of the husband or the parents but was put in the suitcase of the embittered and hostile wife does not appear to be a very probable claim of complainant and this Court would take such kind of allegation only with a pinch of salt. At any rate filing of the present complaint was done when already the criminal litigation against opposite party had started at the initiation of applicant's side, the refusal of the husband to maintain his wife having resulted in filing of the maintenance suit under section 125 Cr.P.C. while the ill-treatment that was meted out to the wife had prompted her to get the process of law started against husband and other in-laws. The factum of the the initiation of these criminal proceedings against the husband side is a proven fact and is not a matter of dispute and therefore the submission made by the counsel in this regard that the present complaint with such kind of improbable allegations was prompted by nothing except malice appears to have substance. It is not difficult to see through the oblique motive which inspired the filing of the complaint and it is not difficult to infer that motives out of ire and vengeance and mala fides are at the back

of initiation of these proceedings under challenge.

6. In this regard it may be useful to keep in perspective the law laid down by **Hon'ble Supreme Court in the case of State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.)** 426, in which certain categories have been recognized on the basis of which the criminal proceeding against a certain party or the accused may be quashed. It was observed by the Hon'ble Apex Court in **Bhajan Lal's** case as follows:-

"The following categories can be stated by way of illustration wherein the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure can be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

7. In the considered view of this Court this matter falls in category no.(7) mentioned hereinabove. This Court finds reason to hold that the complaint in question is inspired by malice and the version contained therein is full of high improbabilities and the continuation of the proceedings on that basis is likely to result in abuse of court's process, and therefore, the entire proceeding of complaint in question is liable to be quashed.

8. In this view of the matter this application is allowed and the entire proceedings of complaint in question against the accused-applicants stand quashed.

9. A copy of this order be certified to the lower court concerned forthwith.

9. A copy of this order be certified to the lower court concerned forthwith.

(2019)11ILR A52

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHREY , J.

Criminal Misc. Application No.7093 of 2006 u/s 482 Cr.P.C.

Aijaz Gaffar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Kumar Srivastava, Sri Ravi Kumar Pandey.

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

A. Criminal Law-Criminal Procedure Code, 1973 - Complaint Case – Section 482, Cr.P.C. - Defence of accused cannot be considered by the Court at this stage being a disputed question of facts. No illegality in issuing summons against the applicant specially when the complaint has been filed by a public servant while discharging his official duty and there are sufficient ground to proceed against the applicant in the case based on material available before the court below. (Para 12 & 13)

B. Special Act and General Act – Both would apply. The Magistrate can take cognizance for the offence under Indian Penal Code on the basis of police report without awaiting the receipt of complaint that can be filed by the officer concerned for taking cognizance regarding contravention of provisions of the Special Act.

FIR alleging offence under the Indian Penal Code, 1860. Arising from one occurrence, complaint lodged alleging commission of offence under the Factories Act, 1948 - Sections 92 read with Sections 31 & 29, read with Rules 56, 55A and 107 (2) of the Rules of 1950-FIR lodged alleging offence under Section 304A IPC. The FIR is lodged under Section 304A IPC for "causing death by negligence" by the wife of deceased employee and the complaint has been filed against the applicant under Factories Act for not observing requisite safety measures at the factory. (Para 15)

Application u/s 482 Cr.P.C rejected (E-3)

Case law relied/discussed: -

1. St. of Guj. Vs Afroz Mohammad (Crl App.No.224/2019) dated 05.02.2019; 2019 SCC Online SC 132

2. Application u/s 482 No.16700 of 2019 (Imran and 3 ors. Vs St. of U.P. & anr.) order dated 10.7.2019

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

1. Applicant, Manager of a factory of M/s Calcom Vision Ltd, which is situated at Surajpur Industrial Area, Greater Noida has approached this Court by way of filing present application under Section 482 Cr.P.C. for quashing the proceedings of Complaint Case No.1942 of 2005 *(State Vs. Aijaz Gaffar)* filed under Section 92 of the Factories Act, 1948, Police Station Surajpur, District Gautam Budh Nagar, pending before learned Chief Judicial Magistrate, Gautam Budh Nagar, UP.

2. One Smt. Geeta Yadav, wife of Late Vijay Yadav lodged a FIR dated 11.03.2005 (Case Crime No.32/2005), under Section 304A IPC that her husband who was working as Engineer with M/s Calcom Vision Ltd. died on 09.03.2005 within the premises of the factory, due to negligence of factory management as roof of the factory which was made of cement fell down when deceased went to repair the roof.

3. On 09.03.2005, inspection of the factory was conducted under Rule 123 of the UP factories Rules 1950, wherein multiple defaults were noted under various provisions of Factories Act, 1948 *(hereinafter referred as to 'the Act of 1948')* and Uttar Pradesh Factories Rules, 1950 *(hereinafter referred as to 'the Rules of 1950')*. Accordingly, Inspection Report was prepared, shortcomings were noted under Rule 123, Section 31 Rule 56, Section 29 Rule 55A, Section 7A, Section 58 Rule 110, Rule 14-D, Rule 107 (2) Rule 303 (3), Rule 52-A etc. of the Act of 1948 and the Rules of 1950.

4. Additional Director, Factories UP, NOIDA Region, NOIDA filed complaint under Section 92 of the Act of 1948 against the petitioner for committing violation of Sections 31, 29 of the Act of 1948 read with Rules 56, 55A and 107 (2) of the Rules of 1950, before learned Chief Judicial Magistrate, Gautam Budh Nagar.

5. The Chief Judicial Magistrate, Gautam Budh Nagar took cognizance of the complaint (Complaint No.1948/2005) on 24.05.2005 and issued summons to the applicant. As the complainant and witnesses were public servant and complaint was made under act in the discharge of their official duties, complainant and witnesses were not examined.

6. Applicant has challenged the entire proceedings arising out of Complaint Case No.1943/2005 before the Court by way of filing present application under Section 482 Cr.PC.

7. This Court has passed the following order on 13.07.2006.

"Heard learned counsel for the applicant and learned A.G.A.

It is contended by the learned counsel for the applicants that on the same allegations which have been made in the complaint an F.I.R. has been lodged against the Managing Director.

Issue notice to opposite party no. 2 returnable within a period of four weeks

In view of the facts and circumstances of the case and submissions made by the learned counsel for the applicants and learned A.G.A. the further proceedings in Criminal Complaint Case No. 1942 of 2005

pending in the court of learned C.J.M., Gautam Buddh Nagar shall remain stayed till the next date of listing.

List after 4 weeks for orders."

8. A counter affidavit has been filed on behalf of respondent No. 2 (Assistant Director factories UP) denying averments made in the application as well as submitted that certain violation of statutory norms were found during inspection of the factory.

9. Shri Ravi Kumar Pandey, learned counsel appearing on behalf of appellant submitted that since an FIR has been lodged against the applicant, therefore, no complaint under the Factories Act would be maintainable and further documents have been filed along with present application to show that factory had "Safety and Health Policy" and inspection was done at the back of the management of the factory.

10. Per contra, Shri M.P. Singh Gaur, learned A.G.A. for the State submitted that complaint was filed after several irregularities were noticed during inspection. He further submitted that learned trial court has rightly taken cognizance and summoned the applicant.

11. Heard learned counsel for the parties and perused the material available on record.

12. Law is well settled regarding the summoning order passed under Section 204 Cr.P.C., which is reiterated in a latest judgment passed by Hon'ble Supreme Court in the matter of ***State of Gujarat vs. Afroz Mohammad (Crl Appeal No.224/2019) dated 05.02.2019 reported at 2019 SCC Online SC 132 that*** -

"24. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 Cr.P.C. is not the same at the time of framing the charge. For issuance of summons under Section 204 Cr.P.C., the expression used is "there is sufficient ground for proceeding....."; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is " there is ground for presuming that the accused has committed an offence...". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 Cr.P.C., detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 Cr.P.C."

(emphasis supplied)

13. In view of above, there is no illegality in issuing summon against the applicant specially when the complaint has been filed by the public servant while discharging of his official duties and there are sufficient ground to proceed against the applicant in the case based on material available before the court below. It is also well settled that defence, if any, cannot be considered by the Court at this stage being falls under disputed questions of facts.

14. A co-ordinate Bench of this Court in a recent judgement in the matter of ***"Imran and 3 others vs. State of U.P. and another*** passed in ***Application u/s 482 No.16700 of 2019,*** dated 10.7.2019" has dealt with the issue of filing complaint in Special Act and also lodging FIR in Indian Penal Code on the same occurrence, has held in para 35 that :-

"35. After evaluating the submission advanced by the learned counsels for the respective parties in the light of discussion made above as well as under the conspectus of judicial pronouncements made in this regard by the various High Courts and the Apex Court, the issues involved in the present case are answered as follows:-

(i) If the act of accused makes out a cognizable offence under IPC as well as an offence under Section 21 of the MMDR Act 1957, the registration of FIR under both the enactments is not illegal , as there is no bar to investigate the matter by the police when the cognizable offence has taken place irrespective of penal provisions whether under the special enactment or general law. Since it is well settled that when there is a conflict between a special and general law, indisputably the special enactment will prevail over the general law , therefore on account of categorical bar under Section 22 of the Act 1957, the police officer cannot submit police report under Section 173 Cr.P.C. with regard to offence under Mines & Minerals(Development & Regulation) Act 1957.

(ii) Despite provisions provided under section 22 of the the Mines and Minerals (Development and Regulation) Act 1957, the police authorities can not be debarred from tacking action against the persons for committing theft of sand and minerals in the manner provided under the Code of Criminal Procedure. The ingredients to constitute offence under the Mines and Minerals (Development and Regulation) Act 1957 as well as offence under 378/379, etc. of Indian Penal Code are different , therefore doctrine of double jeopardy is not attracted. Hence the accused can be prosecuted simultaneously for one set of offence under two or more Acts.

(iii) On account of specific prohibition/bar, as contained in section 22 of the Mines and Minerals (Development and Regulation) Act 1957, accused cannot be prosecuted on the basis of police report under section 173 Cr.P.C. And can be prosecuted only on complaint made by the officer concerned in case of contravention of section 4 of the Mines and Minerals (Development and Regulation) Act 1957, but prosecution of accused on the basis of police report under section 173 Cr.P.C. for the offence under Indian Penal Code is not barred by Section 22 of the Mines and Minerals (Development and Regulation) Act 1957.

(iv) As per the provisions contained in section 22 of the Mines and Minerals (Development and Regulation) Act 1957, The Magistrate can not take cognizance for the offence under the Mines and Minerals (Development and Regulation) Act 1957 on the police report /charge-sheet under Section 173 of The Criminal Procedure Code, but can taken cognizance for the offence under Indian Penal Code , if any on the basis of same police report without awaiting the receipt of complaint that can be filed by the

offcer concerned for taking cognizance regarding contravention of provisions of the Mines and Minerals (Development and Regulation) Act 1957."

(emphasis supplied)

15. In view of above, this application is also liable to be dismissed as 'FIR is also lodged against the incident against the petitioner' is no ground for quashing of summoning order. The FIR is lodged under Section 304A IPC which states that "causing death by negligence" by the wife of deceased employee and the complaint has been filed against the applicant under Factories Act for not observing requisite safety measures at the factory. There is no illegality in summoning order, therefore, the application fails being sans merit.

16. Accordingly, the application u/s 482 Cr.P.C. is ***dismissed.***

17. Interim order stands vacated.

(2019)11ILR A56

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.10.2019

BEFORE
THE HON'BLE VIKAS KUVAR SRIVASTAVA , J.

U/S 482/378/407 No. 7255 of 2019

Smt. Meera Mishra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Satyendra Kumar Maurya

Counsel for the Opposite Parties:
G. A.

A. Criminal Law-Indian Penal Code, 1860 - Section 406 and 506 IPC- Criminal Breach of trust- Entrustment- of the amount - Agreement to sell admitted and acknowledged by the applicant - The moment accused denied to repay the said amount on his failure to execute the sale deed, he had misappropriated the amount in his benefit and the basic ingredients of offence under Section 406 I.P.C. stood constituted- (Para 7,8,11).

B. Criminal Law-Criminal Procedure Code, 1973 – section 482 – Scope- The charge-sheet along with the material collected by the police, prima facie support the allegation contained in the FIR. No abuse of process of court or any illegality made out warranting interference by the Court to quash the proceedings.

Non-execution of sale deed despite admitted agreement to sell. Section 406 - Dispute being criminal and not of civil nature - Intention was not to execute the sale deed but to obtain money by inducing the informant to believe the proposal of execution of sale deed. (Para 12,15,18)

Application u/s 482 Cr.P.C. rejected. (E-3)

List of cases cited :-

1. R. Kalyani Vs Janak C. Mehta & ors.(2009) 1 SCC 516,

2. Mahesh Chaudhary Vs St. of Raj. & anr. (2009) 4 SCC 439

3. Inder Mohan Goswami Vs St. of U.P. (2012) SCC 1

4. St. of Haryana & ors. Vs Bhajan Lal & ors.(1992) Supp (1) SCC 335

(Delivered by Hon'ble Vikas Kuvar Srivastava, J.)

1. The application in hand is moved under section 482 of Criminal procedure

code, 1973 by learned counsel Sri Satyendra Kumar Maurya on behalf of the accused applicant involved in Case Crime No.986/2017 under Sections 406 and 506 IPC, Police Station - Kotwali, District Sitapur. The applicant seeks following reliefs-

"WHEREFORE, it is most respectfully prayed that this Hon'ble court may kindly be pleased to exercise the power U/S 482 Cr.P.C. to quash the charge sheet dt. 1.11.2017 and summoning order dt. 18.1.2018 in crl. Case no.366/2018, crime no.986/17 U/S 406, 506 IPC P.S. Kotwali, District Sitapur in re; State Vs. Meera Mishra and others in the interest of justice, pending in the court of ld. Chief Judicial Magistrate-Sitapur."

2. According to the prosecution story against the accused applicant, he has issued a receipt, on receiving from the informant of the case worth Rs.6,57,315/- as part of sale consideration for the proposed transfer of the house No.A-113, Awas vikas Colony. He assured to execute sale deed in favour of informant within three months but neither the said promise made by the applicant accused was fulfilled nor the money paid on the assurance of sale was repaid.

3. The grounds upon which the relief to quash the charge-sheet as pleaded in the application are:-

(i) false implication on the basis of fabricated facts.

(ii) that the applicant no.1 made request to the opposite party no.2 to get execution of sale deed but the informant made request some more time to pay the rest of the sale consideration.

(iii) that on the request of informant applicant no.1 given her time and agreement was renewed on 21.4.2017 in between the parties.

4. On the aforesaid ground the quashment of charge-sheet is sought emphasizing upon there being a dispute of civil nature therefore, criminal prosecution does not arise.

5. The applicant accused who is slapped with offence under Section 406 and 506 IPC. Section 406 provides punishment for criminal breach of trust which is quoted hereunder:-

"406. Punishment for criminal breach of trust.--Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

6. Criminal breach of trust is defined under Section 405 IPC which is also for easy reference cited hereunder:-

405. Criminal breach of trust.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

[Explanation 2[1].--A person, being an employer 3[of an establishment

whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.] 4[Explanation 2.--A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

7. By virtue of an agreement which the applicant accused has admitted and acknowledged in this application by issuing a receipt made annexure in the application, the payment by the informant as part payment of sale consideration for purchase of house which the applicant accused proposed to sale. As such the applicant accused was entrusted with the aforesaid amount under assurance of executing a sale deed of house No. A-113, Awas vikas Colony.

8. Subsequent to the failure on the part of accused-applicant to execute the sale deed of his house in favour of the informant. On failure to comply with the obligation under his assurance he had to repay the money entrusted with him by the informant. The moment he denied to repay the said amount on his failure he had misappropriated the amount in his benefit and the offence under Section 406 I.P.C. stands constituted because the allegation if taken together are fulfilling the ingredient rendered for consideration of offence therein.

9. Section 506 provides punishment for the offence of criminal intimidation, which thus reads as under:-

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."

10. The criminal intimidation is defined in Section 503 IPC which is quoted hereunder:-

503. Criminal intimidation.--Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation.--A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. Illustration A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

11. In the present case the allegations are when on failure of execution of sale deed by the applicant accused the informant requests to repay the money paid to him on account of payment of sale consideration or to execute, he denied to do anything and threatened for life and limb of the informant. As such from the very allegations made in the FIR they fulfill the ingredients under Section 503 of the criminal intimidation for which Section 506 IPC is slapped upon the accused applicants.

12. So far as the argument as to the dispute being of civil nature is concerned, it is different aspect of the fact wherein execution of sale deed is denied giving cause of action on the breach of promise,but the same would civilly actionable only when the promise is under a legally enforceable agreement. In the present matter the intention seems not to execute the sale deed but to obtain money, as the applicant did not enter into a lawful written agreement for sale but given oral assurance while receiving money by issuing receipt of payment, he induced the informant of the case to believe the proposal of execution of sale deed. This is the aspect in the case which makes the transaction and conduct criminal in nature. Any finding as to the truthness or falsity of allegation in the FIR with this regard depends upon the legally adduced evidence in trial. On having been tried the allegation if proved for the purpose of conviction but so far as the FIR having allegations to the above effect are fulfiling the ingredients of offence for which the accused applicant are slapped. The charge-sheet along with the material collected by the police prima facie supporting the allegation in the FIR cannot be held a result of abuse of process or suffering from any illegality wherein the interference of the court for quashing may be exercised using extraordinary power under Section 482 Cr.P.C. The court has not to embark on evidence at this stage to make any finding as to the truthness or falsity.

13. In ***R. Kalyani Vs. Janak C. Mehta and Ors. reported in (2009) 1 SCC 516,*** Hon'ble Supreme Court has held in its para-9 as under:-

"9. Propositions of law which emerge from the said decisions are :

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

*(4) I**f the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."***

14. Hon'ble Apex court in the case of ***Mahesh Chaudhary Vs. State of Rajasthan & Anr. reported in (2009) 4 SCC 439*** in its para nos.14 held as under:-

"It is also well settled that save and except very exceptional circumstances, the court would not look to any document relied upon by the accused in support of his defence. Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or Complaint Petition fulfill the ingredients of the offences alleged against the accused."

15. As such the prosecution is found to be legitimate. Process issued wherein for appearance are defied by the accused applicants. The accused applicant instead for putting appearance before the court having participation to get adjudicated the case on the basis of evidence adduced by them in their defence have come into the High Court invoking its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet, this is nothing but an effort to stifle the lower court's proceeding.

16. The scope of interference and exercise the extraordinary power of court under Section 482 Cr.P.C. is explained in para 23 and 24 of judgment of Hon'ble Apex Court in the case of ***Inder Mohan Goswami Vs. State of U.P. reported in 2012 SCC 1,*** which reads as under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(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.

24. Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court

would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

17. Hon'ble Apex Court has further in ***State of Haryana & Ors. Vs. Bhajan Lal & Ors.*** reported in ***1992 Supp (1) SCC 335*** illustrated certain circumstances, wherein such power can be used and now repeatedly the said illustrations are relied in various judgment of Hon'ble Apex Court and those are treated as guidelines and reads 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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

18. On the basis of above discussion from the material placed on record of the case no prima facie case is made out for relief of quashing the charge-sheet and summoning order against the accused, hence, application is liable to be rejected.

Accordingly, application is ***dismissed*** as rejected.

(2019)11ILR A61

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE
THE HON'BLE VIKAS KUVAR SRIVASTAVA , J.

U/S 482/378/407 No. 7336 of 2019

Sukhveer Singh & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mohmmad Aslam Beg

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973 –Section 190 Cr.P.C.- Cognizance - Defence of the accused- Involvement of the person and not of his innocence or any version in defence of the accused is not to be seen.

At that stage, the application of judicial mind is confined to the allegations in the complaint or those averred in the FIR and to the material collected by the investigating officer as submitted along with the charge sheet, that the offence alleged has been committed - Defence of the accused-At the stage of cognizance, court is concerned with the involvement of the person and not of his innocence therefore any version in defence of the accused is not to be seen. (Para 10,11,19,22)

B. Criminal Law-Criminal Procedure Code, 1973 –Section 190 Cr.P.C.- Cognizance - Plea of Collusion - is a defence against the accusation made. It can be proved by adducing cogent and material evidence at the Trial, but not at the stage of cognizance. (Para 12,13,14)

C. Criminal Law-Criminal Procedure Code, 1973 –Section 190 r/w Sections 173 and 204 Cr.P.C.- Summoning Order- Accused not to be heard. No violation of the principles of natural justice.

There is no provision to grant any opportunity of hearing to the accused at the pre-cognizance stage, under the Cr.P.C - Section 173 Cr.P.C. does not require to provide a copy of the charge sheet to the accused, prior to the application of mind by the Magistrate to take judicial notice of the materials available in the charge-sheet - Issuance of Summoning order - Virtually amounts to providing an opportunity to the accused to appear before the court so as to enable him to put his defence against the allegations in complaint/FIR and the charge-sheet submitted by the police. No prima facie case is made out with regard to abuse of process on the part of informant or the police. (Para 17,18,21,25,32)

Application u/s 482 Cr,Pc rejected (E-3)

List of Cases cited :-

1. Inder Mohan Goswami Vs St. of U.P., (2012) SCC 1

2. Sanjay Singh Ram Rao Chavan Vs Dattatray Gulab Rao Phalke, (2015) 3 SCC 126

3. Md. Alauddin Khan Vs St. of Bih & ors. AIR (2019) SC 1910

4. Devendra Prasad Singh Vs St. of Bih & ors. ,(2019) 4 SCC 351

5. St. of Har. & ors. Vs Bhajan Lal & ors. AIR (1992) SC 604

6. Umesh Kumar Vs St. of A. P, AIR (2014) SC 1106

(Delivered by Hon'ble Vikas Kuvar Srivastava, J.)

1. The application in hand is moved under section 482 of Criminal procedure code, 1973 by learned counsel Sri Mohammad Aslam Beg on behalf of applicants accused involved in Case crime no.867/2016 under Sections 147, 323 I.P.C. & Section 3(1)(10) SC/ST Act, Police Station - Kakori, District Lucknow. The applicant seeks relief, praying to,

"quash impugned summoning order dated 17.01.2017, and charge sheet dated 06.12.2016 bearing charge sheet No.90 of 2016 in S.T No.22 of 2017 case crime No.867 of 2016 Under Section 147, 323 IPC and Section 3(1)(X) SC/ST Act Police Station Kakori District Lucknow State of U.P. Versus Sukhveer Singh and others passed by Special Judge (SC/ST

Act) District-Lucknow contained in Annexure No.1 and 2 to this petition respectively."

2. Briefly stating, the prosecution story as revealed from the FIR is that the informants, Chandrika, Jitendra, Mahesh, Chandrani and Kiran belonging to the class of people falling under the scheduled castes allege that an old Naala (water channel) was passing nearby their agricultural field becomes blocked while making the Agra Expressway.

3. The fact of obstruction in the water channel was complained by the informants to the higher officials. After the local inspection on the direction of officers, the Nala was dig open and obstruction in flow of water was removed. After two days angered there by Sukhveer Singh (present applicant), Ram Singh and Rajkumar, Shivbaran, Alok, Satish Kumar Singh came along with their companions and began to ran beat the informant in their field and made them badly injured.

4. Heard the learned counsel for the applicant and the Learned AGA appearing on behalf of the state opposite parties. Perused the materials available on record.

5. The scope and circumstances for exercising the extraordinary power by the court under Section 482 Cr.P.C. is explained in para 23 and 24 of judgment of Hon'ble Apex Court in the case of ***Inder Mohan Goswami Vs. State of U.P. reported in 2012 SCC*** 1, which reads as under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(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.

24. Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

6. The grounds set forth in application, upon which the relief to quash the charge-sheet and summoning order issued by Magistrate as pleaded by the applicants are:-

(a) because impugned summoning order dated 17.01.2017 is illegal and arbitrary and against provision of law.

(b) because impugned summoning order dated 17.01.2017

passed by learned court below is not only against provisions of law but also against the principle of natural justice.

(c) Because on 17.01.2017 learned court below passed summoning order in illegal and arbitrary manner without considering facts and circumstances of the case and without considering evidence on record.

(d) because police with collusion of the opposite party no.2 submitted charge sheet against the petitioners without collecting any material and evidence, in case crime No.867 of 2016 under Section 147, 323 IPC and Section 3(1)(10) SC/ST Act, Police Station Kakori, District Lucknow.

7. The offences are registered on the basis of allegations made in the FIR against the applicant under Sections 147 and 323 I.P.C. along with Section 3(1)(X) SC/ST Act (as applicable after amendment with effect from 26.1.2016) on bare reading of the aforesaid section of the Scheduled Casts & Scheduled Tribes (Prevention of Atrocities) Act provides that, "whoever not being the member of SC/ST castes corrupts or fouls the water of any spring reservoir or any other source ordinarily used by members of scheduled caste and schedule tribes SC or ST so as to render it less fit for the purpose of which it is ordinarily used. From the allegations in the FIR, it is very clear that the allegations made therein if on face value they are taken to be true in their intracity, they disclose the commission of offence from which the accused applicant is slapped.

8. This is pertinent to mention here that charge sheet after due investigation has been filed in the court, the court has taken cognizance and consequent thereupon issued summons to the applicant accused vide order dated 17.1.2017.

9. T he first issue with regard to the relief as prayed under Section 482 Cr.P.C. to quash the charge sheet and summoning order, is whether they are illegal, being arbitrary and against provisions of Law. On bare reading of the allegations made in the FIR the allegations of maar-peet having been beaten up by the accused applicant who are members of upper caste with victim (informants) belonging to a caste falling under Scheduled Caste are sufficient to constitute the offence prima facie, as the applicant accused jointly attacked with lathi, danda in their field, annoyed by their success in getting the obstruction in the watter channel's flow removed.

10. From the materials placed before the Court it is sufficiently clear that the charge sheet submitted after investigation by the Investigating Officer in aforesaid provisions before the Court and the court has taken cognizance of the offences labelled therein against the accused persons. Law requires the magistrate while when charge sheet is submitted before the court it has to satisfy itself, from the allegations in FIR and the evidence collected by the Investigating Officer during investigation, the allegations in FIR and evidence supporting the allegation are fulfilling the ingredients of the offences slapped against the accused. On the basis of those he has reason to believe that accused might have commited such offences triable by the court.

11. After its prima facie satisfaction, the court proceeds further and when the court intends to proceed further for trial

of the accused as to the commission of offence, this is called 'cognizance' taken by the court of the offences. Consequent thereupon the court issue summons to the applicant accused for trial.

12. In putting the case that it attracts the exercise of the extra ordinary power under section 482 Cr.P.C. for the reason of abuse of the process by the informant and the police, the investigating officer is alleged to have been in collusion with the informants. It is further alleged that the Investigation officer, without collecting material evidences he submitted the charge sheet, falsely implicating the applicant and other accused persons. Though the vehemence of argument is upon non collection of evidence by the police during investigation but the learned counsel could neither carved out from the materials placed on record by him nor from the contents of charge sheet, which evidence apart from the evidence of injured witnesses in an incident of beating is needed. Materials with regard to injuries sustained by them is available in charge sheet. Facts of obstruction in the flow of water channel complained to the high officials and police officers, redressal of the grievance by the officers by removing the obstruction to restore the water channel to the field and ultimately annoyed thereby incident of beating to the informants by the accused, all are placed in charge sheet with supporting evidence. The police during investigation has to be collect material which it found sufficient to emanate them to believe that if they even on their face value if taken without proof, prima facie sufficient to believe that accused has committed the offence from which he is charged in the First Information Report. In support of the ground assailing the validity and legality of the charge-sheet the applicant has neither pleaded nor argued carving out from the materials on record, the illustration as to the irregularity or illegality if any committed by the investigating officer, due to which the charge sheet would become illegal document.

13. Another ground pleaded to hold the illegality of charge-sheet is the alleged 'collusion'. 'Collusion' literally means and is said to be a "secret argument especially to do something dishonest" in order to deceive or cheat some one else. The plea of Collusion is a defence against the offence, the accused is charged with and it can be proved adducing cogent and material evidence in trial.

14. Apart the bald statement of the fact of Collusion it is also not explained in pleading how it can be inferred from the attending circumstances that the charge sheet is arbitrary and illegally filed due to collision with informant. In absence of pleading to this effect it seemed to have been alleged loosely without any substance.

15. Seeking the relief of quashing of the summoning order dated 17.1.2019, applicant has assailed the 'cognizance' of the offences taken by the court on perusal of charge-sheet blaming that it is against provisions of law and principle of natural justice, therefore is illegal and arbitrary. Though, 'the law', which is said to be violated in taking cognizance is neither pleaded nor referred in the argument.

16. The next challenge to the cognizance of offence dated 17.1.2019 is that the order of summoning to the

accused is violative of 'principal of natural justice'. Impliedly by referring the principal of natural justice the applicant accused opposes the summoning order on the ground that prior to issuance of summons he is not given opportunity to be heard. This seems to be suffering from a misconception of law. The Code of Criminal Procedure prescribes that after due investigation without committing any unnecessary delay, investigating officer is to submit report before the court under Section 173 before the court competent to take cognizance of the offence on a police report stating there in-

(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."

17. The manner and procedure prescribed for submission of charge-sheet before the court under Section 173 Cr.P.C. does not requires to provide copy of the charge sheet to the accused, prior to the application of mind by the magistrate to take judicial notice of the materials available in the charge-sheet whether or not there are reason to believe on the basis their of that any offence is committed by the accused. This is established principle of law and procedure

18. The law is settled by the courts from time and against that no violence can be done with the language of the provisions of procedural law, either by subtracting any word included by the legislative body in the statute nor to add any word which does not exist in the provision. Therefore question of violation of principle of natural justice on the ground that prior to issuance of summon or taking cognizance of offence the accused was not heard, does not stand before the law as prescribed there in the criminal procedure code.

19. It would not be out of context to have a discussion upon the word 'Cognizance'. The word 'cognizance' is not defined anywhere in the code. Virtually taking cognizance does not involve any formal action of any kind. It occurs as soon as the magistrate applies his mind to the suspected commission of an offence. It is prior to the commencement of preceding and is an indispensable requisite for holding a valid trial. Cognizance is taken of an offence and not of an accused. Section 190 of the Cr.P.C. provides about the application of judicial mind to the allegations in the complaints or those averred in the FIR

and materials collected by investigating officer submitted in the charge sheet that offence is constituted. In Taking cognizance the magistrate considers wheather there is sufficient ground for proceeding further for trial. Therefore cognizance is a consideration over the fact running into the mind of magistrate so as to form opinion within a spur of moment to proceed further for trial.

20. Hon'ble Supreme Court has explained the word 'cognizance' in the case of ***Sanjay Singh Ram Rao Chavan Vs Dattatray Gulab Rao Phalke reported in (2015) 3 SCC*** 126, the relevant portion is quoted hereunder:-

"The expression "cognizance' has not been defined in the code. But the word "cognizance' is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of' and when used with reference to a court or a Judge, it connotes "to take notice of judicially."

21. So far as the issuance of summoning order dated is concerned, virtually this amounts, providing an opportunity to the accused to appear before the court so as to enable him to put his defence against the allegations in complaint/FIR and the charge-sheet submitted by the police. If there is sufficient grounds for proceeding on the chargesheet/complaint then the magistrate can issued a process under section 204 Cr.P.C. pusuant to taking such cognizance.

22. The Magistrate has discretion to be exercised judicially in determining whether there is prima facie case to take cognizance. At this stage of cognizance, court is concerned with the involvement of the person and not of his innocence therefore any version in defence of the accused is not to be seen. Question of affording opportunity while taking cognizance for the accused to put his defence does not arise. Thus, the allegation as to the summoning order dated 17.1.2019 being violative of principle of natural justice is of no force and cannot be taken into consideration for quashing the same the reason of it's being illegal.

23. In a recent case decided by Hon'ble Apex Court in the case of ***Md. Alauddin Khan Vs. State of Bihar & Ors. reported in AIR 2019 SC 1910*** where the accused were labelled with the allegation of having committed offence punishable under Sections 323, 379 read with section 34 IPC. On submission of charge-sheet the magistrate by holding that a prima facie case was made out against accused on the basis of allegations made in the complaint. The question was raised there that whether a judicial magistrate was right in holding that a prima facie case is made out against the accused person for commission of offence punishable under Sections 323, 379 read with section 34 IPC, so as to call upon them to face a trial on merit. In the circumstances the High Court held that no prima facie case has been made out against the accused. Hon'ble Supreme Court in its para 15, 17 and 19 has held as under:-

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, then

the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case.

19. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside and the order of the Judicial Magistrate dated 13.02.2013 is restored because it records a finding that a prima facie case for taking cognizance of the complaint is made out."

24. In another case before The Hon'ble Supreme Court, ***Devendra Prasad Singh Vs. State of Bihar and Others*** decided recently on 2.4.2019 reported in ***2019 4 SCC 351,*** the facts were that the High Court allowed the application filed by accused under section 482 of the criminal Procedure Code 1973 and quashed the order dated 21.1.2014 passed by the Judicial Magistrate first class in complaint case by which the Magistrate had taken cognizance of the offence coming out from the allegations made in the complaint against the accused for commission of offence under Sections 323, 341, 379 and 504 IPC. The question was again before the Honorable Supreme Court that whether the High Court was justified in quashing the complaint holding that there was no prima facie case made out against the accused for issuance of process of summon to him for commission of offence punishable under Sections 323, 341, 379 and 504 IPC. In para 11 and 12, Hon'ble Supreme Court has held as under:

"11. In our view, in order to attract the rigor of Section 197 of the Cr.P.C., it is necessary that the offence alleged against a Government Officer must have some nexus or/and relation with the discharge of his official duties as a Government Officer. In this case, we do not find it to be so.

12. So far as the second ground is concerned, we are of the view that the High Court while hearing the application under Section 482 of the Cr.P.C. had no jurisdiction to appreciate the statement of the witnesses and record a finding that there were inconsistencies in their statements and, therefore, there was no prima facie case made out against respondent No.2. In our view, this could be done only in the trial while deciding the issues on the merits or/and by the Appellate Court while deciding the appeal arising out of the final order passed by the Trial Court but not in Section 482 Cr.P.C. proceedings."

25. In view of the aforesaid discussions, considering all the facts and

materials placed on record by the applicant accused no prima facie case is made out with regard to abuse of process on the part of informant or the police. Further, it is also not convincing from the facts that quashing of charge sheet and summons is merely an effort by the applicant to stiffle a legitimate prosecution against him.

26. In para 102 of the ***State of Haryana & Ors. Vs. Bhajan Lal & Ors.*** reported in ***AIR 1992 SC 604,*** Hon'ble Supreme Court has illustrated several circumstances wherein the extraordinary power under section 482 Cr.P.C. maybe exercised for the purpose of preventing an abuse of process or to secure the ends of Justice or to enforce the order of the court. Illustrations given in para 102 quoted hereunder are treated as guidelines for the purpose of exercising of powers under section 482 CRPC:-

"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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

27. The applicants-accused have no case falling under any of the categories of cases given as illustrative guidelines for the exercise of jurisdiction under Section 482 Cr.P.C. by Hon'ble Apex Court in the above cited judgement State of Haryana Vs. Bhajan Lal **(supra).**

28. In para 27 of the ***Inder Mohan Goswami (Supra)***, Hon'ble Supreme Court has held as under:-

"The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to 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 should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage."

29. In ***Umesh Kumar Vs. State of Andhra Pradesh*** reported in ***AIR 2014 SC*** 1106, Hon'ble the Apex Court has held that criminal prosecution if otherwise justifiable and possess upon adequate evidence does not become vitiated on account of malafide aur political mandata of First Information Report or complaint. In para 12 of the aforesaid judgement the Hon'ble Supreme Court has held that once criminal law is put in motion and after investigation the charge sheet is filed, it requires scrutiny in the court of law only.

30. The applicant accused has itself placed the order sheet of the court below from the date of summoning order dated 17.01.2017 to 18.07.2019 in Sessions Trial No.22/2017 running before the Special Judge, SC/ST Act, Lucknow. The order sheet on reading cumulatively reveals that since date of summoning the process is being repeated for compliance and still the accused applicant instead of appearing before the court despite knowledge of the summoning order preferred to come to invoke the extraordinary power of the High Court for quashing of the charge sheet and summoning order.

31. The extraordinary power of the court should be exercised sparingly where the applicant has established prima facie case with regard to abuse of process. The materials placed by him do not impulse necessity to quash the charge sheet and summoning order.

32. Therefore, the application under section 482 Cr.P.C. moved with the relief sought therein for quashment of summoning order dated 17.1.2017 and charges sheet arisen out of case crime No.867 of 2016 Under Section 147, 323 IPC and Section 3(1)(X) SC/ST Act Police Station Kakori District Lucknow, for the reasons having no merit and is liable to be rejected and accordingly ***dismissed.***

(2019)11ILR A70

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE
THE HON'BLE VIKAS KUVAR SRIVASTAVA , J.

U/S 482/378/407 No. 7348 of 2019

Surendra Tiwari @ Surendra Prasad Tiwari & Anr. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Dev Mani Mishra.

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973 - Section 482 – Sections 227/228 Cr.P.C – Accused having no criminal history - may be a relevant fact to be proved as evidence in defence. It is immaterial to consider whether or not the charge sheet is liable to be quashed.

B. Evidence Law-Indian Evidence Act, 1872. Section 3, Interpretation clause – Explanation (e) makes plain - That a man has a certain reputation, is a fact.". It would require proof. Thus the reputation of the applicant accused, as claimed by him is not relevant at the stage of framing of charge.

C. Criminal Law-Criminal Procedure Code, 1973 - Counter/Cross Case - Different versions of the parties as to one/same incident form a Cross Case – once prima facie, the offence punishable under Section 323, 504 and 506 IPC is found established from the allegations made in the F.I.R. and the evidence collected during investigation in that case, the submission of charge-sheet in such a case cannot be questioned as mechanically submitted without application of mind by the Investigating Officer.

D. Criminal Law-Criminal Procedure Code, 1973 – Section 204. Non-mention of SC/ST Act in FIR and charge sheet. Still charge under SC/ST Act may be framed. Though there is an obscurity as to that provision of law in the FIR or charge-sheet, it cannot be prima facie held that no offence is made out under provisions of the SC/ST Act. The court taking cognizance had to be reminded of its duty to evaluate the material allegations also with regard to the offence, if any, under the SC/ST Act at the time of hearing the applicant accused on framing of charges under Section 227/228 of the Cr.P.C. The court has to pass a reasoned and cogent order as to the commission of offence under SC/ST Act.

In view of the above, the application under Section 482 Cr.P.C. for quashing the charge-sheet and the proceeding of case crime no. 80/2019 S.T. No.319/2019 (State of U.P. Vs. Surendra Tiwari and Anr.) pending in the court of Special Judge, SC/ST Act, Pratapgarh is declined and the same is ***disposed of*** with following directions:-

(i) The accused/applicants to appear before the court promptly without any further delay.

(ii) In case the accused/applicants move any prayer for bail the same shall be decided by the court concerned as soon as practicably possible, even on the same day, keeping in mind the purpose of issuance of processes like summon, bailable warrant or non bailable warrant, as the case may be, is to procure and ensure the attendance of the accused in the trial pending against him.

(iii) The court concerned is directed to consider the prayer while hearing the accused at the time of framing of charges under Sections 227/228 of the Cr.P.C. with regard to the offences punishable under SC/ST Act with clarity as to the specific provision of law under which particularly offence therein is made out or not and accordingly to proceed further.

Registry is directed to send a copy of the order to the court concerned.

Application u/s 482 Cr.P.C. disposed of
(E-3)

(Delivered by Hon'ble Vikas Kuvar Srivastava, J.)

1. The application in hand is moved under section 482 of Criminal procedure code, 1973 by learned counsel Sri Dev Mani Mishra on behalf of applicant accused involved in case crime no.

80/2019 under Sections 323, 504, 506 IPC & Section 3(1)(D) of Scheduled Caste and Scheduled Tribes Act (which shall hereinafter be addressed as SC/ST Act), Police Station - Aspur Deosara, District Pratapgarh. The applicant seeks following reliefs, praying to:-

"That under the facts and circumstances of the case, it is very respectfully prayed that this Hon'ble Court may kindly be pleased to allow this petition and quash the impugned Charge sheet dated 18.07.2019, U/S- 323,504,506, I.P.C, and 3(1)(D) S.c & S.t Act. Police Station-Aspur Deosara, District- Pratapgarh, filed in F.I.r No. 0080/2019, U/S- 323,504,506, I.P.C, and 3(1)(D) S.c & S.t Act. Police Station-Aspur Deosara, District- Pratapgarh, contained and annexed as annexure no. 2 to this petition. Further it is prayed that this Hon'ble Court may graciously be pleased to quash the entire proceedings of S.T. No. 319/2019 state of U.P. versus Surendra Tiwari and Another, pending before special judge S.c & S.t Act. Pratapgarh, In the interest of justice."

2. The grounds upon which the relief to quash the charge-sheet is sought, as pleaded in the application are-

(i) applicants have no criminal history.

(ii) the allegations labelled against the applicants in the present case are nothing but an attempt to save himself from own wrong by the informant.

3. Learned A.G.A concentrating over the ground that just because the applicant has no criminal history, the FIR, charge sheet as well as criminal proceeding initiated against him do not become shaky and suspicious in itself. He further argued that each and every case is to be looked into with respect to the particular allegations made therein and so far as the fact of accused having no criminal history is concerned, it may be a relevant fact to be stated as evidence in defence, however it is immaterial for considering whether or not the charge sheet is liable to be quashed. The argument of the learned A.G.A is supported with the interpretation of word 'fact' as interpreted under Section 3 of the Evidence Act, the 'interpretation clause', which is quoted hereunder provide as following:-

"Fact". --"Fact" means and includes--

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious. Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) **That a man has a certain reputation, is a fact."**

4. In view of the above, the reputation of the applicant accused, as

claimed by him of having no criminal antecedent is of no avail at this stage where evidence is not being appreciated for the purpose of evaluating the allegations made against him in the FIR and the charge-sheet.

5. The other ground on the basis of which the relief of quashing the charge-sheet and the entire proceeding is sought raises an issue "whether the allegations labelled against the applicants in present case, are nothing but an attempt by the informant to save himself from his own wrong" is to be examined carefully so as to prevent abuse of process, if any, is being done.

6. In ***R. Kalyani vs. Janak C. Mehta and Ors. (2009) 1 SCC 516***, the Hon'ble Supreme Court has held as under:-

"9(2). For the said purpose, the court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence".

7. Heard the learned counsel for the applicant and the learned A.G.A. appearing on behalf of the state opposite parties. Perused the materials available on record.

8. Before entering into merit of the present application under Section 482 of Criminal Procedure Code, 1973 (shall hereinafter be read as Cr.P.C. only) it would be relevant to keep in mind, the scope and ambit of Section 482 of Cr.P.C. and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Criminal Procedure Code can be exercised. It is explained in a plethora of judgements of the Honorable Apex Court, such as in ***Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1,*** is quoted hereunder:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(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"

9. In the case of ***Parbatbhai Ahir vs. State of Gujarat (2017) 9 SCC 641,*** again the Hon'ble Supreme Court has had an occasion to consider whether the High Court can quash the FIR/complaint/criminal proceedings, in exercise of the inherent jurisdiction under Section 482 Cr.P.C. held as under:-

"15. *Considering a catena of decisions of this Court on the point, this Court summarized the following propositions:*

"(1) Section 482 CrPC 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 recognizes and preserves

powers which is inherent in the High Court.

(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 Cr.P.C. The power to quash under Section 482 is attracted even if the offence is non compoundable.

(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.

(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.*

(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 formulate.

(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.

(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 insofar as the exercise of the inherent power to quash is concerned.

(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.

(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;

(10) There is yet an exception to the principle set out in Propositions (8) and (9) above. Economic offences involving the financial and economic wellbeing 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. The Hon'ble Supreme Court in ***R.P. Kapur v. State of Punjab reported in (1960 CriLJ 1239)*** summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

11. In ***State of Haryana & Ors. Vs. Bhajan Lal & Ors. reported in AIR 1992 SC 604,*** Hon'ble Supreme Court has illustrated several circumstances wherein the extraordinary power under section 482 of Criminal Procedure Code may be exercised for the purpose of preventing an abuse of process or to secure the ends of Justice or to enforce the order of the court. Illustrations quoted hereunder are treated as guidelines for the purpose of exercising of powers under section 482 of Criminal Procedure Code:-

"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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing

efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. In view of the aforesaid judgment of Hon'ble Supreme Court, before going into discussion, it would be necessary here to have a look upon the facts of the case in hand. Briefly stating, the F.I.R, as lodged by opposite party no.2 in the present application, bearing Crime No.80/2019 registered at Police Station - Aspur Deosara, District Pratapgarh under Sections 323, 504, 506 I.P.C. read with Section 3(1)(D) SC/ST Act (as amended on 18.6.2019) the present applicant (the accused in aforesaid case crime) along with his companions ran cows into the field in the night of 18.6.2019 at about 8:00 p.m. The cattles so pushed in the field began to graze the crops grown in the field. When the informant tried to stop this the applicant accused began to abuse in filthy language threatening to kill, attacked on him with lathi and danda. When the informant made hue and cry, for his rescue, the wife of informant rushed up to save him then the applicant accused assaulted her also with lathi and danda. The informant (opposite party no.2) informed the concerned police station but instead of registering his FIR he was scolded and driven away. The informant and his wife were not heard by police.

13. On the other hand with regard to the same incident the F.I.R. bearing No.76/2019 has been filed by the accused applicant on 19.6.2019, in the same Police Station under Sections 427, 452, 506, 504, 323 I.P.C. with the similar allegations, alleging that the incident occurred on 18.6.2019 at about 8:00 p.m in night wherein they were assaulted in a scuffle with the opposite party no.2 of the present case.

14. In the aforesaid reference, it has been submitted on behalf of the informant of Case Crime No.80/2019 that the accused applicant belong to the upper caste of the society and the opposite party no.2, (informant) belongs to scheduled case, due to this fact the Informant and his wife were not heard by the Police and their FIR was not registered. However, both the parties to the incident have their counter version to each other.

15. On hearing the parties, the issues arising in this application are as following:-

(i) As to which version is true out of the two counter versions with regard to the same incident in two FIR's.

(ii) whether the investigating officer without any application of mind, over the materials collected by him mechanically forwarded the charge sheet to the court concerned.

(iii) whether the court of Special Judge, SC/ST Act has applied its mind while taking cognizance of the offences on the basis of material collected and placed by the Investigating Officer in the charge sheet.

16. So far as the happening of incident with regard to which allegations are made in the FIR is concerned, the

same is almost admitted and will be treated as prima facie true for the reason that the applicant accused have also lodged an FIR for the same incident.

17. The role of accused applicant in an admitted incident is to be tested on the basis of evidences which is matter of trial and any defence taken by accused at this stage cannot be entertained.

18. If an incident, of scuffling and beating each other, occurs in between two groups of people and both of them have complained of the incident to the police, putting their own versions, though incriminating each other and exculpating themselves, at least the occurrence of incident is admittedly established. In such a circumstance the counter versions of the parties to the same incident form cross cases. There is no express provision in Criminal Procedure Code for their investigation or trial separately. Therefore, the investigating officer has a duty to carefully collect the evidence with regard to the role of accused in such cases as to which one of them is aggressor in causing the incident or in defence, and also their individual role in the offence. Therefore the allegations in the F.I.R. if fulfill the ingredients of the offence, the FIR is to be treated as deserving for investigation. After collecting the prima facie evidence, the investigating officer has to place them on record along with the name and details of witnesses and documentary evidence. In the light of the above discussion it would be necessary to go through the relevant Section of I.P.C. namely Sections 323, 504 and 506 as well as those under the SC/ST Act.

19. In view of the above, it would be necessary to examine whether the allegations made in the FIR are fulfilling the ingredients of the offences with which the accused are slapped.

20. Section 323 IPC runs as under:-

S.323. *Punishment for Voluntarily causing Hurt- Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.*

Section 319 of the I.P.C. defines "Hurt", *whoever causes bodily pain disease or injury to any person is said to cause hurt*. Section 323 of the I.P.C. is with regard to the punishment to a person who does any act with the intention thereby, causing hurt to any person, with the knowledge that he is likely thereby to cause hurt to any person, shall be punishable with the imprisonment for one year or fine of Rs.1,000/- or both as such the FIR allegations no doubt fulfill the ingredients of offence punishable under Section 323

21. Section 504 IPC runs as under :-

S.504. Intentional insult with intent to provoke breach of the peace.-- Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 504 of the I.P.C. makes the offence of causing insult intentionally with intent to provoke breach of the

peace. In the present case the accused applicant by pushing the cattle into the field of the informant with intent to destroy the crops grown therein, and when the informant forbid him to do so, the applicant accused along with other companions abusing in filthy language began to beat the informant. The FIR lodged by the applicant accused himself admits that the informant scuffled with him and also incident of beating occurred thereby. Prima facie, the aforesaid allegations coming out from both the FIR's lodged with regard to the same incident, no doubt prima facie fulfills the allegations of intentional insult with intent to provoke breach of peace.

22. Sections 503 and 506 IPC runs as under:-

S.503. *Criminal intimidation.--Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation.--A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. Illustration A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.*

S.506. P*unishment 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.*

Section 506 IPC which makes punishable the offence of criminal intimidation as defined under Section 503 of I.P.C. is also prima facie being constituted from the allegations made in the FIR by the informant against the applicant/accused. As per the allegations made in the FIR it comes out, that when forbidden by the informant the accused applicant criminally intimidated him with threat to his life and limbs.

23. In the light of the above discussion, it is clear that prima facie the offence punishable under Section 323, 504 and 506 IPC are found established from the allegations made in the F.I.R. and as such from the evidence collected during the investigation, the submission of charge-sheet cannot be said to be forwarded mechanically without applying the mind by the Investigating Officer to the court for cognizance of offence.

24. The charge sheet has not only been submitted before the court with regard to the offences under Section 323, 504, 506 IPC but also with regard to the offence under SC/ST Act. The court has

taken cognizance as pleaded in the application itself, along with other provisions of Indian Penal Code and the offence under Section 3(1)(D) of the SC/ST Act. From the material placed before this court, particularly the certified copy of the charge sheet dated 18.7.2019 filed in the court of Additional District and Sessions Court-3, SC/ST Act, Pratapgarh whereupon Sessions Trial no.319/2019 is founded the offence mentioned to be under Section 3(1)(x) SC/ST Act. Section 3 (1)(x) of the SC/ST Act (as amended) runs as under:-

"intentionally insults or intimidates with the intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view"

25. On further perusal of the material placed before the Court, it appears that the offence being entertained by Special Court on the charge sheet submitted by the police under Section 3(1)(D) of the SC/ST Act.

26. On perusal of the F.I.R., which is found registered along with Sections 323, 504, 506 I.P.C. and under Section 3(1)(D) of the SC/ST Act. There is no section 3(1)(D) in the Act. If the same be read as Section 3(1)(d), the same runs as under:-

"*(d) garlands with footwear or parades naked or semi-naked a member of a Scheduled Caste or a Scheduled Tribe;"*

27. The allegations made in the FIR are prima facie though fulfilling the ingredients of offence under Section 3(1)(x) SC/ST Act but not 3(1)(d) SC/ST Act, so far as the Section 3(1)(D) is concerned does not exist in the Act. There is no allegation of insult or intimidation with intent to humiliate the informant as a member of Scheduled Caste and Scheduled Tribes community in any place within public view. Even then the charge sheet is forwarded and the special court SC/ST Act took cognizance of the offence mechanically, with an obscurity as to which provision of law in SC/ST Act applies.

28. In para 27 of the ***Inder Mohan Goswami (Supra),*** Hon'ble Supreme Court has held as under:-

"27. The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to 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 should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage."

29. In ***Inder Mohan Goswami (Supra)***, Hon'ble Apex Court in para 28 observed as under:-

"28. This Court in State of Karnataka v. L. Muniswamy and Ors. reported in 1977CriLJ1125 observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

30. Hon'ble Apex Court in the case of ***Madhavrao Jiwajirao Scindia & Others v. Sambhajirao Chandrojirao Angre & Others (1988) 1 SCC 692*** observed as under:

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

31. In the present case, when there is no prima facie case as to the abuse of process on the basis whereof the charge sheet and the order of the Magistrate taking cognizance be quashed, the other ground taken by the applicant accused that the summon was not issued to him after cognizance is baseless from the perusal of the order of Magistrate of taking cognizance. Moreover, if the accused have knowledge of the pendency of criminal proceeding against him and approaches to the High Court for the quashing of charge sheet and summoning order then he cannot be said to be unaware of the issuance of summon and its pendency. If the allegations as to the non service of summons is taken as true, then also merely because of that the FIR and the charge sheet which are found legal and without any error quashing of further proceeding would not be justified on the said ground of alleged non service of summon.

32. So far as the infringement of personal liberty is concerned, the applicant accused when knows about the process issued by the court against him for his appearance it is not good and bonafide on his part to disobey the process by not appearing there, but to approach the High Court for quashing the charge sheet and cognizance order on frivolous grounds. The purpose of issuing process like summons, despite service of summon and on defiance on the part of

the accused in not appearing, issuance of bailable warrant and when that too is avoided issuance of non bailable warrant, all are aimed only to procure and ensure the attendance of applicant accused in court for trial. When he appears before the court for trial, he would have sufficient opportunity at every stage therein of being heard by putting defence against prosecution.

33. In the present case, so far as the proceeding under Sections 323, 504, 506 I.P.C. is concerned, the submission of charge sheet as well the taking of cognizance of the offence by the court therein is free of any impunity. Simultaneously the cognizance of offence under the Scheduled Caste and Scheduled Tribes is concerned, prima facie, from the allegations made in the FIR and the material in the charge-sheet seems to be discrepant with regard to the provision of SC/ST Act wherein the cognizance of the offence is taken. There is an obscurity as to the provision. However, only for the reason that the provision of law as quoted in the FIR or charge-sheet is obscure it cannot be prima facie held that from the allegations in the FIR no offence is being made out in any provisions of the SC/ST Act. There as allegations in the FIR as to the humiliation and criminal intimidation of the informant. As such in the present case the prosecution cannot be said illegitimate.

34. The court concerned which has took cognizance under the SC/ST Act is to be reminded of its duty to evaluate the material allegations with regard to the offence whether or not being constituted under any relevant provision thereto, existing in Scheduled Caste and Scheduled Tribes Act at the time of hearing the applicant accused on framing of charges under Section 227/228 of the Cr.P.C. The court has to pass a reasoned and cogent order as to the commission of offence under SC/ST Act.

35. The accused applicant though not pleaded in their application, but argued that in the alternative, if the case is not made out with regard to the abuse of process or on any other ground under Section 482 Cr.P.C. then benefit of interim stay of the arrest be given in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgment passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

36. Hon'ble Apex Court in the case of **Inder Mohan Goswami (Supra)** under the head ***"Personal liberty and the interest of the State***" held as under:-

Personal liberty and the interest of the State Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.

48. The issuance of non-bailable warrants involves interference

with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

49. Just as *liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.*

When non-bailable warrants should be issued

Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

** it is reasonable to believe that the person will not voluntarily appear in court; or*

** the police authorities are unable to find the person to serve him with a summon;*

** it is considered that the person could harm someone if not placed into custody immediately.*

50. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

51. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court#s proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

52. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

53. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.

37. The grant of interim order as to surrender and applies for bail before the court concerned is not justifiable as prima facie the allegations in the FIR and materials in charge-sheet tend to fulfill the ingredients of offence under relevant provision of SC/ST Act which stand parallel to the offence under Sections 323, 504, 506 of the IPC. As such the prosecution is found legitimate. Any such grant of interim stay on arrest, impliedly would have effect of diluting the rigour of the legislative intention behind the enactment of Section 18 in the said Act.

38. In view of the above, the application under Section 482 Cr.P.C. for quashing the charge-sheet and the proceeding of case crime no. 80/2019 S.T. No.319/2019 (State of U.P. Vs. Surendra Tiwari and Anr.) pending in the court of Special Judge, SC/ST Act, Pratapgarh is declined and the same is ***disposed of*** with following directions:-

(i) The accused/applicants to appear before the court promptly without any further delay.

(ii) In case the accused/applicants move any prayer for bail the same shall be decided by the court concerned as soon as practicably possible, even on the same day, keeping in mind the purpose of issuance of processes like summon, bailable warrant or non bailable warrant, as the case may be, is to procure and ensure the attendance of the accused in the trial pending against him.

(iii) The court concerned is directed to consider the prayer while hearing the accused at the time of framing of charges under Sections 227/228 of the stay of arrest till the accused applicant Cr.P.C. with regard to the offences punishable under SC/ST Act with clarity as to the specific provision of law under which particularly offence therein is made out or not and accordingly to proceed further.

Registry is directed to send a copy of the order to the court concerned.

(2019)11ILR A83

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.10.2019

BEFORE
THE HON'BLE VIKAS KUVAR SRIVASTAVA , J.

U/S 482/378/407 No. 7406 of 2019

Mithun Kumar Nishad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dhananjai Kumar Tripathi.

Counsel for the Opposite Parties:
G.A.

A. Criminal Procedure Code, 1973, section 482 and 438 - Scope- Allegations made in the FIR taken on face value, in their entirety, disclose commission of the offence by the accused-applicant. Grant of interim protection to accused from arrest - Shall not be permissible as the same would be dilution of the express prohibition made under Section 18 of the SC/ST Act.

Offences under Sections 354(Ka)(Ga) I.P.C. and Section 3(1)(xi) of SC/ST Act - Section 18 of the SC/ST Act - Allegations made in the FIR taken on face value, in their entirety, disclose commission of the offence by the accused-applicant. The ingredients of Section 354(Ka)(Ga) of the I.P.C and Section 3(1)(xi)

of SC/ST Act – made out. (Paras 6,12,13,16,18)

Application u/s 482 Cr.P.C rejected (E-3)

List of cases cited:-

1. Inder Mohan Goswami Vs St. of Uttaranchal (2007)12 SCC

2. St. of Har. & ors. Vs Bhajan Lal & ors. AIR (1992) SC 604

3. Amrawati & anr. Vs St. of U.P. (20040 (57) ALR 290

4. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) (3) ADJ 322 (SC)

5. Vilas Pawar Vs St. of M.H., (2012) 8 SCC 795 : 3 SCC (Cri) 1062

(Delivered by Hon'ble Vikas Kuvar Srivastava, J.)

1. The application in hand is moved under section 482 of Criminal procedure code, 1973 by learned counsel Sri Dhananjai Kumar Tripathi on behalf of applicant accused involved in case crime no 1312 of 2017 registered under Section 354(Ka)(Ga) I.P.C. and Section 3(1)(xi) of SC/ST Act (which shall hereinafter be addressed as SC/ST Act), Police Station Risia District- Bahraich. The applicant seeks following reliefs, praying to:-

"WHEREFORE, it is most humbly prayed that this Hon'ble Court may kindly be pleased to quash the impugned charge sheet (Police Report) bearing No.63 of 2017, dated 02.11.2017, vide case crime No.1312 of 2017, under Section - 354(Ka)(Ga) IPC and Section 3(1)(xi) at Police Station Risia, District Bahraich and the order of cognizance and summoning order dated 24.11.2017 as well as non bailable warrant dated 05.07.2018, passed by learned Special Judge SC/ST Act, Bahraich, in Special Criminal Case No.261 of 2017. In Re:- "State Versus Mithun Kumar" and further proceedings of the case in pursuance thereof, in the ends of justice."

2. The grounds upon which the relief to quash the charge-sheet as pleaded in the application are-

(i) That petitioner is quite innocent, he has committed no offence as alleged in the impugned first information report and he has been falsely implicated in the alleged offence by the complainant/opposite party no.2 due to enmity.

(ii) That no offence under Section - 354(Ka)(Ga) I.P.C. and Section 3(1)(xi) SC/ST is made out against the applicant.

(iii) applicant is a law abiding and peace loving person.

(iv) no summon whatsoever has ever been served upon the petitioner till date.

3. Heard the learned counsel for the applicant and the Learned A.G.A. appearing on behalf of the state opposite parties. Perused the materials available on record.

4. Before entering into merit of the case it would be relevant to keep into mind the scope and ambit of section 482 of Criminal Procedure Code and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said Section of the Criminal Procedure Code can be exercised. It is explained in a plethora of

judgement of the Honorable Apex Court. One of those judgement is ***Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1***, para 23 is quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(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"

5. On bare reading of F.I.R., it reveals that applicant belonging to upper caste at about 4:00 p.m. when informant was taking bath in her house peeping her through a hole in the bathing place from the wall of his house. When a girl belonging to scheduled caste, the informant protested the applicant came at the bathing place and caught hold her and told her daringly, earlier I was peeping you but now will see directly standing in front of you. Simultaneously he vegan to tease her by touch on her private parts doing indecent activities. He insisted to marry with him, threatening to make viral some pornographic photos of the informant prepared by him. When the informant made noise, the applicant-accused fled away threatening to forcibly marry her. Thereafter the informant immediately approached to the police station. FIR was not lodged. The incident is of 26 of May, 2017. They sent the information to S.P., Bahraich through Registered Post on 29.5.2017 but FIR could be lodged only on order of Magistrate passed under Section 156 (3) of the Criminal Procedure Code. The correlative Section under Scheduled Caste and Schedule Tribes (Prevention of Atrocities) Act as amended up to date dealing with punishment for shown offences committed under Indian Penal Code against a member of Scheduled Caste runs as under:-

"3(1)(xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;"

6. From the allegations in the FIR, it is very clear that allegations made therein even if on their face value be taken to be true in their entirety, they disclose the commission of offence from which the accused applicant is slapped as they fulfill the ingredients of Section 354(Ka)(Ga) of the I.P.C., which runs as under:-

354A. *Sexual harassment and punishment for sexual harassment-*

(1) A man committing any of the following acts?

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***354C.** Voyeurism-*

Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine. Explanations-

(1) For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

(2) Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section."

7. This is pertinent to mention here that charge sheet after due investigation has been filed in the court, the court has taken cognizance and consequent thereupon issued summons to the applicant accused.

8. In para 102 of the ***State of Haryana & Ors. Vs. Bhajan Lal & Ors***. r***eported in AIR 1992 SC 604,*** Hon'ble Supreme Court has illustrated several circumstances wherein the extraordinary power under Section 482 of Criminal Procedure Code maybe exercised for the purpose of preventing an abuse of process or to secure the ends of Justice or to enforce the order of the court. Illustrations given in para 102 quoted hereunder are treated as guidelines for the purpose of exercising of powers under section 482 of Criminal Procedure Code:-

"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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code

except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. On perusal of the FIR allegations in the light of the provisions under Section 354A and 354C that the activities of the applicant accused as alleged fulfill the ingredients of the aforesaid Sections of IPC which prima facie shows the act of outraging the modesty of a women or to cause her dishonored trying to sexual exploit her. SC/ST Act also provides that if a person other than scheduled caste and schedule tribe use force to any women belonging to scheduled caste and scheduled tribe with intention to dishonor or outrage her modesty is said to have committed an offence under the SC/ST Act. As such prima facie there are sufficient material on record in the shape of charge sheet whereupon the Magistrate took cognizance of the offence and issued summons to the applicant-accused.

10. The offence as prima facie appears to have been committed on perusal of FIR and from materials collected by police, does not fall within the ambit of any of the illustration given in the decision of Apex Court.

11. In para 27 of the ***Inder Mohan Goswami (Supra),*** Hon'ble Supreme Court has held as under:-

"The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to 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 should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and

produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage."

12. When there is no prima facie case as to the abuse of process on the basis whereof the charge sheet and the order of the Magistrate taking cognizance be quash, the another ground taken by the applicant accused that the summons was not issued to him after cognizance is baseless from the perusal of the order of Magistrate of taking cognizance. Moreover, if the accused have knowledge of the pendency of criminal proceeding against him and approaches to the High Court for the quashing of charge sheet and summoning order then he cannot be said unaware of the pendency for reason of service of summons. If the allegations as non service of summons is taken as true then also merely because of that the FIR and the charge sheet which are found legal and without any error cannot be quashed. So far as the ground as to the infringing a personal liberty is concerned, the applicant accused when knows about the process issued by the court against him for his appearance it is not good on his part of disobey the process of not appearing their and approaching the High Court for quashing the charge sheet and cognizance order. The purpose of issuing process like summons, despite service on defying by the accused on appear, issuing bailable warrant and when that is different defying by not appearing before the Court when issuing non bailable warrant. All are aimed only to procure and ensure the attendance of applicant accused in court.

13. In the present case a legitimate prosecution is pending against the accused, therefore, quashing of charge sheet or the order of Magistrate taking cognizance there on would not be liable to be quashed exercising power under Section 482 of Criminal Procedure Code.

14. The accused applicant though not pleaded in their application but argued that in the alternative, if the case is not made out with regard to the abuse of process or in any other ground of Section 482 Cr.P.C. then benefit of interim stay of the arrest be given in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

15. With regard to the law laid down in the above decisions of our own High Court and affirmed by Hon'ble Supreme Court, it would be pertinent that the direction contained therein as to grant of interim bail or interim stay of arrest, was issued when Section 438 of the Criminal Procedure Code was not applicable in State of U.P. Now the said provision of Cr.P.C. for granting anticipatory bail is made applicable to the State of U.P. also.

16. Since, the matter is of an offence under SC/ST Act and same is found prima facie established, the question is whether the accused may be given order of grant of interim protection to him form arrest. Section 18 of the SC/ST Act provides as under:-

"18. Section 438 of the Code not to apply to persons committing an

offence under the Act.?Nothing in section any case involving the arrest of any person on an accusation of having committed an offence under this Act."

17. In ***Vilas Pawar v. State of Maharashtra, (2012) 8 SCC 795 : 3 SCC (Cri) 1062***, the nature and scope of Section 18 of the SC/ST Act is held as under:-

"Nature and scope- Section 18 of the SC/ST Act creates a bar for invoking Section 438 Cr.P.C. However, a duty is cast on the court to verify the avernments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST act has been prima facie made out. In other words, if there is a specific avernment in the complaint, namely insult or intimidation with intent to humiliate by calling with caste, name the accused persons are not entitled to anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out, Vilas Pawar v. State of Maharashtra, (2012) 8 SCC 795 : 3 SCC (Cri) 1062."

18. In the present case from the FIR allegations the offence under Section 3(1)(xi) SC/ST 18. Act as amended on 18.6.2019 is found prima facie constituting the offence where the court has taken cognizance and issued process for trial to the accused applicant, if he failed to appear or intentionally defied the process, whatsoever may be arresting the stay in the meantime prior to the date the accused appears/surrenders and applies for the bail shall not be permissible as the same would be dilution of the express prohibition made under Section 18 of the SC/ST Act.

438 of the Code shall apply in relation to

19. The petition being not tenable and baseless and accordingly ***dismissed***

(2019)11ILR A89

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.10.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN , J.

U/S 482/378/407 No. 7524 of 2019

Achutya Nand Mishra ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mahmood Alam, Sri Abdul Ahad, Sri Gayasudden.

Counsel for the Opposite Party:
G.A.

A. Criminal Law-Criminal Procedure Code, 1973 – Section 167 (2) Cr.P.C.- Charge sheet not filed although mandatory period of 90 days expired. Even more than fourteen months' period has lapsed since the accused-petitioner is in judicial custody-Offences under Sections 3/4/5/9 of the Official Secret Act-Complaint under those sections has not been filed and sanction for prosecution has not been obtained-Detention of the petitioner is prima facie illegal-Matter remanded back. (Para 3,5,6,7,8)

Application u/s 482 Cr.Pc disposed of (E-3)

Case Law relied upon/discussed: -

1. Sayed Mohd. Ahmad Kazmi Vs St. (Govt. of NCT of Delhi) and ors., (2012) 12 SCC 1

2. Suresh Kumar Bhikamchand Jain Vs St. of MH & anr., (2013) 3 SCC 77

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Mahmood Alam, learned counsel for the petitioner/ applicant and Sri Santosh Mishra, learned AGA.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioner has assailed the order dated 4.10.2019 passed by the Special Chief Judicial Magistrate (Economic Offences), Lucknow rejecting the bail application of the petitioner whereby benefit of Section 167 (2) Cr.P.C. has been prayed submitting that charge sheet has not been filed within the statutory period so prescribed, therefore, the petitioner may not be detained under judicial custody. Learned counsel for the petitioner has further submitted that this is settled proposition of law of the Hon'ble Apex Court that if statutory period prescribed under Section 167 (2) Cr.P.C. expires, the accused-applicant is entitled for bail and in that circumstances/ eventuality his/ her right for bail accrues and discretion of the court does not play any role.

3. In the present case, the petitioner-accused has been sent under judicial custody on 19.9.2018 in Crime No.5/2018, under Sections 419, 420, 121, 121A IPC read with Section 66D I.T. Act relating to Police Station - ATS Lucknow. Perusal of the impugned order dated 4.10.2019 clearly reveals that the charge sheet has not been filed since 19.9.2018 when the present petitioner-accused has been sent for judicial custody, therefore, the mandatory period of 90 days has already expired, even more than fourteen months' period has lapsed since the accused-petitioner is in judicial custody. Therefore, he has contended that in these circumstances, the present applicant may not be denied bail and therefore, the order dated 4.10.2019 is patently illegal, unwarranted and has been passed in utter violation of the settled proposition of law.

4. Learned counsel for the petitioner has drawn attention of the dictum of Hon'ble Apex Court in re; **Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and others, (2012) 12 SCC 1** and **Suresh Kumar Bhikamchand Jain v. State of Maharashtra and another, (2013) 3 SCC 77**, contending that if the charge sheet is not filed within the statutory period so prescribed under Section 167 (2) Cr.P.C., the accused-petitioner is legally entitled to be released from jail/ judicial custody. The impugned order dated 4.10.2019 further provides that besides crime case wherein the petitioner has been sent for judicial custody, the culpability of the present petitioner-accused has been seen under Sections 3/4/5/9 of the Official Secret Act; however even the complaint under those sections have not been filed and sanction for prosecution is required in that case and admittedly till the passing of impugned order dated 4.10.2019 sanction for prosecution has not been obtained. The impugned order dated 4.10.2019 further reveals that the learned court below has passed the order in compliance of the order dated 13.5.2019 passed by this Court in Bail No.1191 of 2019 whereby this Court while rejecting the bail of the petitioner granted six months' time to conclude the trial. Since those sections in Crime No.5/2018 have already been expunged, therefore, no trial can be conducted and concluded in such crime case i.e. Crime No.5/2018.

5. I have also noted one fact that wrong fact regarding submission of the charge sheet has been placed before this Court when Bail No.1191 of 2019 was being opposed inasmuch as the charge sheet was not filed on 13.5.2019, even the charge sheet has not been filed till date and now since those sections have been expunged, there is no question of filing charge sheet.

6. It appears that in the given circumstances, detention of the present petitioner is prima facie illegal and while rejecting the application of the present petitioner, learned court below should have considered these facts and circumstances vis-a-vis the legal provision including the dictums of the Hon'ble Supreme Court carefully. Prima facie, it appears that no such things have been considered and perused by the learned court below while rejecting the application of the petitioner on 4.10.2019, therefore, I find that the order dated 4.10.2019 is not sustainable in the eyes of law and liable to be set aside.

7. Accordingly, I hereby set aside the order dated 4.10.2019 passed by the learned court below in Case Crime No.5/2018, Police Station - ATS, Lucknow.

8. I hereby remand this matter to the learned court below to pass a fresh order considering the aforesaid facts and circumstances as well as the legal proposition of law including the dictum of the Hon' ble Apex Court on the subject and reasoned and speaking order be passed, with expedition, preferably within a period of fifteen days from the date of production of certified copy of the order of this Court.

9. The petition is accordingly **disposed of.**

(2019)11ILR A91

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.10.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN , J.

U/S 482/378/407 No. 7614 of 2019

Ramesh Chandra Dutta ...Applicant
Versus
The State ...Opposite Party

Counsel for the Applicant:
Sri Pranshu Agarwal, Sri Raghvendra Pandey.

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

A. Criminal Law-Criminal Procedure Code, 1973 - Section 223 Cr.P.C.; Section 13(1)(d) of the Prevention of Corruption Act, 1988 - Summoning for framing of charge against a non-public servant, with the aid of Section 120-B of IPC - who has not committed any offence under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act,1988 along with co-accused Public Servant who is said to have committed such offence - No charge framed earlier under the P.C. Act - Matter remanded back to the trial court which shall consider the settled proposition of law as per the Cr.P.C. and judgement of Hon'ble Supreme Court in State through CBI New Delhi vs. Jitender Kumar Singh, (2014) 11 SCC724. (Para 9)

Application u/s 482 Cr.Pc accordingly disposed of. (E-3)

List of cases cited: -

1. St. through CBI New Delhi Vs Jitender Kumar Singh, Criminal Appeal No.943 of

(2008) with Criminal Appeal No.161 of (2011), (2014)11SCC724

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Pranshu Agrawal, learned counsel for the petitioner and Sri S.B. Pandey, learned Senior Advocate assisted by Sri Kazim Ibrahim, Advocate for the C.B.I.

2. By means of this petition, the petitioner has assailed the order dated 11.10.2019 by means of which the application (B-37) filed by the petitioner in the court below for transmitting the record of case to the court of Chief Judicial Magistrate, Lucknow on the ground that the learned court below may not try the offences committed on various sections of Prevention of Corruption Act.

3. Sri S.B. Pandey, learned Senior Advocate has opposed the aforesaid prayer of the petitioner referring the provisions of Section 223 of Cr.P.C., which categorically explains about the persons who may be charged jointly. Section 223 (d) Cr.P.C. provides that the persons may be charged and tried together if those are accused on different offences committed in the course of some transactions. Therefore, the petitioner may be charged along with Branch Manager, namely, Vijay Kumar Nagar, who is said to have committed an offence under Sections 13 (2) of Prevention of Corruption Act and as the present petitioner is co-accused so invoking the provisions of Section 120-B I.P.C. the joint trial of the present petitioner with Sri Vijay Kumar Nagar is permissible as per Section 223 Cr.P.C.

4. Learned counsel for the petitioner has submitted that undisputedly the present petitioner is a private person and is not serving in any government/non-government organisation/ instrumentality of the State. Therefore, he may not be treated as a "Public Servant" in any manner whatsoever. The trial under the Prevention of Corruption Act is meant for "Public Servant" who has committed any offence under the said Act.

5. Sri Pranshu Agrawal, learned counsel for the petitioner has further submitted that even by invoking Section 120-B I.P.C. no one can be charged and tried under various sections of Prevention of Corruption Act if the person is not a "Public Servant". He has further submitted that by means of impugned order, the petitioner has been summoned for framing of the charges and view of the learned court below is that the charges against the petitioner may be framed under Section 13 (2) of Prevention of Corruption Act read with Section 120-B I.P.C.

6. Sri Pranshu Agrawal has placed reliance upon the dictum of Hon'ble Supreme Court in re: ***State through CBI New Delhi vs. Jitender Kumar Singh rendered in Criminal Appeal No.943 of 2008 with Criminal Appeal No.161 of 2011***, which has been decided by Hon'ble Supreme Court on 05.02.2014. The relevant para-45 is being reproduced here-in-below:-

"45. We may now examine Criminal Appeal No. 161 of 2011, where the FIR was registered on 2.7.1996 and the charge-sheet was filed before the Special Judge on 14.9.2001 for the offences under Sections 120B, 420 IPC read with Sections 13(2) and 13 (1) of the PC Act. Accused 9 and 10 died even

before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could also not be framed since he died on 18.2.2005. The Special Judge also could not frame any charge against non-public servants. As already indicated, under sub-section (3) of Section 4, the special Judge could try non-PC offences only when "trying any case" relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under Section 3 (1) of the PC Act. Consequently, there was no occasion for the special Judge to try any case relating to offences under the PC Act against the Appellant. The trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua-non for exercising powers under sub-section (3) of Section 4 of PC Act. In the instant case, since no PC offence has been committed by any of the non- public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. The jurisdictional fact, as already discussed above, does not exist so far as this appeal is concerned, so as to exercise jurisdiction by the Special Judge to deal with non-PC offences."

7. Heard learned counsel for the parties and perused the material available on record.

8. Since the learned counsel for the parties are agreeable that the matter may be decided finally at the admission stage, therefore, I hereby decide the matter finally.

9. As per the material available on record, the present petitioner is non-public servant and has not prima facie committed any offence which could attract the provisions of Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, however, he is a co-accused with Mr. Vijay Kumar Nagar, the Branch Manager, who is said to have committed such offences. The consideration would have been different had the charges under various sections of Prevention of Corruption Act been framed against the petitioner earlier but admittedly no charges under those sections of Prevention of Corruption Act have been framed and the petitioner has been summoned by the learned trial court for framing the charges. Therefore, before framing the charges against the petitioner under Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act, the learned court below shall consider the settled proposition of law on the point as per the Cr.P.C. and also in view of the dictum of Hon'ble Supreme Court in re: ***Jitender Kumar Singh*** (supra) as to whether the petitioner may be charged under Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act invoking the provisions of Section 120-B I.P.C. when undisputedly the petitioner is not a "Public Servant". Learned counsel for the Prosecution may also cite some case laws and legal provisions before the learned court below to satisfy the court as per their point of view. Such satisfaction of the learned court below should be speaking and reasoned one.

10. In view of the aforesaid terms, the petition is ***disposed of***.

(2019)11ILR A94

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.04.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Application No.8318 of 2003
u/s 482 Cr.P.C.

Virendra Kumar Jha ...Applicant
Versus
Civil Judge Junior Division, Shahjahanpur & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Praveen Kumar Srivastava, Sri Sushil Kumar Srivastava, Sri Mohit Singh.

Counsel for the Opposite Parties:
A.G.A., Sri C.B. Prasad, Sri J. Habib, Sri Javed Habib, Sri R.L. Verma, Sri V.K. Dwivedi.

A. Criminal Law-Code of Criminal Procedure, 1973 - Cognizance under Section 190(1)(c) Cr.P.C.- Section 200 and 202 Cr.P.C – Procedure to entertain a complaint case is mandatory. Magistrate rejected police report and took cognizance under Section 190(1)(c) Cr.P.C. relying on affidavits filed before him by the complainant along with Protest Petition - Not legal and permissible for the Magistrate to adopt that procedure.

If Magistrate finds lack of material with investigation of Police, option available to him is to take into account original complaint and follow procedure prescribed in Section 200 and 202 for taking cognizance-Magistrate cannot mix-up the material placed by complainant along with Protest Petition to take cognizance after rejecting Police Report but without following the procedure prescribed under Chapter 15. (Para 14,16,22, 29)

B. Criminal Law -Code of Criminal Procedure, 1973 - Cognizance under Section 190(1)(c) Cr.P.C - Magistrate has not given any reason for rejecting Police report - Approach contrary to law and cannot be sustained.

Application u/s 482 Cr.P.C allowed (E-3)

List of cases cited: -

1. Tula Ram Vs Kishore Singh AIR (1977) SC 2401

2. M/s India Carat Pvt. Ltd. Vs St. of Kar. (1989) (26) ACC 280 (SC)

3. Gangadhar Janardan Mhatre Vs St. of Mah. & ors. (2004) (7) SCC 768

4. Rakesh & anr. Vs St. of U.P. & anr. (2014) (13) SCC 133

5. Minu Kumari & anr. Vs St. of Bih. & ors. (2006) (4) SCC 359

6. Sunil Bharti Mittal Vs C.B.I., (2015) (4) SCC 609

7. Pakhando & ors. Vs St. of U.P. (2001) (43) ACC 1096

8. Mohammad Yusuf Vs St. of U.P. (2007) (9) ADJ 294

9. Kallu & ors. Vs St. of U.P. (2010) (69) ACC 780

10. Mitrasen Yadav Vs St. of U.P. (2010) (69) ACC 540

11. Criminal Rev. No. 1601 of (2015), Mukeem 7 2 ors. Vs St. of U.P. & anr., decided on 07.08.2015

12. Writ Petition- Misc. Single No. 3776 of (2012), Md. Shafiq Khan & ors. Vs St. of U.P. & ors., decided on 24.03.2014

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Praveen Kumar Srivastava, Advocate, holding brief of Sri Sushil Kumar Srivastava, learned counsel for applicant and learned AGA for State.

2. This application under Section 482 Cr.P.C. has been filed for quashing orders dated 09.05.2003, 16.08.2003 and 12.09.2003 and also to quash proceeding against applicant in Case Crime No. 163 of 2000, under Sections 427, 166, 392 IPC, Police Station Tilhar, District Shahjahanpur, pending in the Court of Civil Judge, Junior Division, Tilhar, Shahjahanpur.

3. The facts disclosed in the application are that applicant, at the relevant point of time, was posted on the post of Executive Officer, Nagar Palika Parishad, Tilhar, Shahjahanpur in 2002. Opposite party-3 was permitted to install a khokha (Thatchment) on a land belong to Nagar Palika, measuring 6 X 3 meters on 13.09.1994, with a licence fee of Rs. 50/- per month. Said licence was for a period of six months. There was a clear condition that licensee shall not make any permanent construction over the allotted land. Licence was renewed upto 12.09.1997.

4. After expiry of period of licence, opposite party-3 instead of evicting the premises, filed an Injunction Suit No. 94/97 in the Court of Civil Judge (Junior Division), Tilhar, Shahjahanpur impleading Nagar Palika Parishad, Tilhar and Executive Officer Nagar Palika Parishad, Tilhar as defendants. Suit was decreed with the direction that defendants would not evict plaintiff from the said premises except following the procedure prescribed in law. Taking undue advantage of the injunction order, opposite party-3 attempted to raise permanent construction on the land of Nagar Palika whereupon Sub-Divisional Magistrate, Tilhar passed an order dated 21.03.2000 directing applicant to take necessary steps for preventing unauthorized construction and removal thereof, since it is a public premises and responsibility to restrain anyone from unauthorized possession and unauthorized construction lie upon Nagar Palika.

5. Pursuant to order of Sub-Divisional Magistrate dated 21.03.2000, applicant took steps and prevented opposite party-3 from raising illegal construction. Again, opposite party-3 filed Original Suit (hereinafter referred to as "OS") No. 21 of 2000 in the Court of Civil Judge (Junior Division), Tilhar, Shahjahanpur stating that he is entitled to raise construction on disputed property and carry on his business and defendants have no right to interfere, therefore, a permanent injunction be issued restraining them from interfering in possession. The relief sought in aforesaid suit read as under:-

''अ. यह कि स्थाई निषेधाज्ञा विरूद्ध प्रतिवादीगण इस आशय की पारित की जावे कि प्रतिवादीगण स्वयं, उनके कर्मचारी, ठेकेदार, सहयोगी आदि वादी की विवादित सम्पत्ति जिसका ब्यौरा वाद पत्र के अन्त में दिया है, में वादी के शांतिपूर्वक निर्माण कार्य करने एवं उसके कब्जा व दशल इस्तेमाल में किसी भी प्रकार का हस्तक्षेप करने से बाज रहे।

ब. यह कि वादी को हर्जा व खर्चा मुकदमा प्रतिवादी से दिलाया जावे।

स. यह कि अनुतोष न्यायालय के अनुसार बहक वादी मुफीद हो वह भी वादी के प्रतिवादीगण से दिलाया जावे।''

"A. That an order in the nature of permanent injunction may be passed against defendants restraining them, their employees, contractors, companions, etc from any sort of interfering with peaceful

construction, possession and use by the plaintiff on his property in question whose details are mentioned on the end of the plaint.

B. That the compensation and expenses may be paid to the plaintiff by the defendants.

C. That any other relief which the Court deems proper in favour of the plaintiff may be paid to him by the defendants."

(English Translation by Court)

6. Opposite party-3 had constructed three side walls of about five feet height. Applicant, in the light of orders issued by Sub-Divisional Magistrate, sought police help to remove such an unauthorized construction on the land of Nagar Palika. Thereupon, opposite party-3 filed an application under Section 156(3) Cr.P.C. before Chief Judicial Magistrate concerned, whereupon a police report was called which was submitted by Inspector, Police Station Tilhar on 26.07.2000. Chief Judicial Magistrate, however, passed an order directing police to register report, whereupon FIR being Case Crime No. 163 of 2000, under Sections 427, 166, 392 IPC was registered. After investigation, police submitted final report dated 15.10.2000 whereagainst a protest petition was filed by opposite party-3 on 22.04.2003. Magistrate vide order dated 09.05.2003 rejected final report dated 15.10.2000 and taking cognizance under Section 190(1)(c) Cr.P.C., for the offences under Sections 427, 166, 392 IPC, summoned accused-applicant and others.

7. It is contended that Magistrate has proceeded in the case as State case and not a complaint case without following the procedure prescribed for complaint case. In order to reject final report, it has relied on the evidence placed before it by opposite party-3 along with its protest petition. Where Magistrate rely on evidence placed by complainant in a protest petition in order to reject police case, law is that Magistrate in such a case, would treat protest petition as complaint and proceed in the matter as complaint case and not as a State case.

8. In my view, submission of counsel for applicant has substance.

9. Chapter XIV, Cr.P.C. deals with conditions requisite for initiation of proceedings and also the powers of cognizance of a Magistrate. Section 190, relevant for our purpose, is reproduced as under:

"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 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."

10. Chapter XV, thereafter has four Sections, i.e., Sections 200 to 203, which deal with complaint to Magistrate. Chapter XVI deals with commencement of proceedings before Magistrate and Section 204 empowers a Magistrate to issue summons or a warrant, as the case may be, to secure attendance of an accused, if in the opinion of Magistrate, there is sufficient ground to proceed and take cognizance of offence.

11. If magistrate finds that Police has not made proper investigation and submitted final report, it can direct police to make further investigation in the matter, or, if there is sufficient material, he can pass order taking cognizance and summoning accused.

12. As long back as in 1977, Supreme Court in **Tula Ram Vs. Kishore Singh AIR 1977 SC 2401** said that Magistrate can ignore a final report submitted by Police including the conclusion and take cognizance of case under Section 190(1)(b) on the basis of material collected during investigation and issue process, or in the alternative, he may take cognizance of original complaint, examine the complainant and his witnesses and thereafter issue process to accused, if he is of opinion that case should be proceeded with.

13. In **M/s India Carat Pvt. Ltd. Vs. State of Karnataka 1989 (26) ACC 280 (SC),** Court has observed in para 16 of judgment that Magistrate can take into account statements of witnesses examined by Police during investigation, take cognizance of offence complained of, order to issue a process to accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion of making out a case against accused. Magistrate can ignore conclusion arrived at by Investigating Officer, independently applying his mind to the facts emergent from investigation and can take cognizance of case or in alternative he can take cognizance of original complaint and examine complainant and his witness and thereafter issue process to accused, if he is of opinion that the case should proceed. Following observations of Court fortify what is observed above:

*"**16.** The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently **apply his mind to the facts emerging from the investigation and take cognizance of the case,** if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is*

not bound in such a situation to follow the procedure laid down in Section 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(b) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

17. *The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in* ***Tula Ram and others Vs. Kisohre Singh 1978 (1) SCR 615 that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."***

(emphasis added)

14. The observations made in para 16 and 17 in **M/s India Carat Pvt. Ltd. Vs. State of Karnataka (supra)** make it very clear that Magistrate if proceed to take cognizance on Police report, material which can be examined by him would be such which has been collected during investigation. If Magistrate finds that Police has not properly made investigation and appropriate material has not been collected, it is always open to him to direct Police for further investigation but if Magistrate finds fault with investigation made by Police and still finds justification to proceed with the matter taking into account complaint made by complainant, in such case he has to examine complainant and his witness and thereafter issue process.

15. In **Gangadhar Janardan Mhatre vs. State of Maharashtra and others 2004 (7) SCC 768,** the Court reiterating above view said as under:

"The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts ***emerging from the investigation*** *and take cognizance of the case, if he thinks fit, exercise of his powers under Section 119(1)(b) and direct the issue of process to the accused."*

(emphasis added)

16. Having said so, Court has also made it clear that while proceeding to issue process considering facts emergent from investigation and taking a different view than what has been reported by Police, Magistrate need not apply procedure laid down in Section 200 and 202. However, if Magistrate finds lack of material with investigation of Police, option available to him is to take into account original complaint and if that is adopted by Magistrate, he is bound to

follow procedure prescribed in Section 200 and 202 for taking cognizance, but he can not mix-up the material placed by complainant along with Protest Petition to take cognizance after rejecting Police Report but without following the procedure prescribed under Chapter 15.

17. A similar view has also been expressed in **Rakesh and another Vs. State of U.P. And another 2014 (13) SCC 133** where Court referred to and relied on the decision in **H.S. Bains Vs. State (UT of Chandigarh) 1980 (4) SCC 631.**

18. In **Minu Kumari and another Vs. State of Bihar and others 2006 (4) SCC 359,** Court said as under:

"11. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take congnizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. ***The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused.*** *Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused.* ***The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused."***

(Emphasis added)

19. In **Sunil Bharti Mittal Vs. Central Bureau of Investigation 2015 (4) SCC 609,** Court said:

"... even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (See ***Union of India v. Prakash P. Hinduja and Anr.***

2003 (6) SCC 195. *Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the* ***Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."***

(Emphasis added)

20. This Court has also followed a similar line and some authorities, relevant in this regard, may be noticed for reference.

21. In **Pakhando and others Vs. State of U.P. 2001 (43) ACC 1096**, a Division Bench of this Court after considering Section 190 Cr.P.C. has held, if upon investigation Police comes to conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify forwarding of accused for trial and submits final report for dropping proceedings, Magistrate shall have following four courses and may adopt any one of them:

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(I)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) **He may,** without issuing process or dropping the proceedings decide to take cognizance under Section 190(I)(b) **upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.** (Emphasis added)

22. Thus the "material" which can be examined by Magistrate when Police submitted final report and upon notice issued to complainant, Protest Petition is filed along with some material by complainant is confined to investigation only. When matter has been investigated by Police after registering a report, Magistrate obviously is not proceeding according to procedure prescribed in Chapter XV. I find that it would not be appropriate for Magistrate not to follow procedure under Section 200 and 202 Cr.P.C. but straightway relying on affidavits filed before him by complainant along with Protest Petition, take cognizance and summon accused after rejecting Police Report. This is not legal and permissible.

23. In **Mohammad Yusuf Vs. State of U.P. 2007 (9) ADJ 294,** Police

submitted final report which was not accepted by Magistrate, not on the basis of material collected by Police, but, relying on Protest Petition and accompanying affidavit Magistrate issued process. Court disapproved the aforesaid procedure adopted by Magistrate and said:

"Where the ***magistrate decides to take cognizance under section 190 (1) (b) ignoring the conclusions reached at by the investigating officer*** *and applying his mind independently,* ***he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer.*** *In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Section 200 and 202 Cr.P.C.* ***The Magistrate could not take cognizance under section 190 (1) (b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof.*** *The Magistrate having taking into account extraneous material i.e. protest petition and affidavits while taking cognizance under section 190 (1) (b) Cr.P.C. the impugned order is vitiated."* (Emphasis added)

24. In **Kallu and others Vs. State of U.P. 2010 (69) ACC 780,** Court said:

"Therefore, in present case also, if the ***material in the case diary was not sufficient for summoning the accused persons to face the trial, then the protest petition filed by the complainant against the final report ought to have been registered as complaint and after following the procedure laid down in section 200 and 202 Cr.P.C."***

(Emphasis added)

25. Court further held:

"If after taking evidence under section 200 and 202 Cr.P.C., the magistrate decides to take cognizance against the accused persons, final report has to be rejected, but in any case, cognizance cannot be taken merely on the basis of affidavits or other material filed by the complainant in support of the protest petition against final report without following the procedure laid down under Chapter XV Cr.P.C., *if the material in the case diary is not sufficient to take cognizance."* (Emphasis added)

26. In **Mitrasen Yadav Vs. State of U.P. 2010 (69) ACC 540,** Court said that on the basis of Protest Petition and documents filed therewith, no cognizance under Section 190(1)(b) Cr.P.C. can be taken.

27. In **Criminal Revision No. 1601 of 2015, Mukeem and 2 others Vs. State of U.P. and another,** decided on 07.08.2015, Court while deprecating procedure followed by Magistrate by relying on Protest Petition and its documents, without following procedure of complaint, said:

"The impugned order shows that the Magistrate summoned accused

persons presuming that oral evidence on behalf of first informant was adduced on protest petition, which is possible only when the protest petition was ordered to be treated as a complaint. ***The record shows that neither protest petition was ordered to be registered as complaint nor any oral evidence of the witnesses was recorded.*** *Summoning of the accused persons on the basis of the oral evidence indicates that the Magistrate was satisfied with the fact that in evidence collected by the I.O, there was no sufficient material for taking cognizance. The learned Magistrate has also observed that the I.O. has committed a mistake in not recording the evidence of other witnesses.* ***Summoning is also based on facts mentioned in the*** *protest petition and documentary evidence, as mentioned in the order impugned which is* ***erroneous in view of the law cited above."*** (Emphasis added)

28. In **Writ Petition- Misc. Single No. 3776 of 2012, Mohammad Shafiq Khan and others Vs. State of U.P**. and others, decided on 24.03.2014, Court, in para 9, held as under:

"9. Therefore, it is clear from the above that ***the Magistrate on the basis of protest petition can reject the final report, he may treat the protest petition as complaint, he may also direct for further investigation. But in the facts of this case the Magistrate while rejecting the final report has also taken into consideration the affidavits filed along with protest petition and this approach of the Magistrate was not in accordance with law."*** (Emphasis added)

29. Looking to exposition of law, discussed above, I find that in the present case Magistrate has not referred to any material placed before him as collected by Investigating Officer. Instead it has rejected final report on the basis of facts stated in Protest Petition and thereafter summoned accused-applicant. Magistrate has not given any reason for rejecting Police report and nothing has been said in this regard. This approach on the part of Magistrate, I find is contrary to what has been laid down in the above authorities and the same cannot be sustained.

30. In the result, application is allowed. Impugned orders dated 09.05.2003, 16.08.2003 and 12.09.2003 and further proceedings in Case Crime No. 163 of 2000, under Sections 427, 166, 392 IPC, Police Station Tilhar, District Shahjahanpur, pending in the Court of Civil Judge, Junior Division, Tilhar, Shahjahanpur are hereby set aside.

(2019)11ILR A102

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA , J.

Criminal Misc. Application No.8408 of 2017 u/s 482 Cr.P.C.

Munna Lal & Ors ...Applicants
Versus
State of U.P. & Anr ...Opposite Parties

Counsel for the Applicants:
Sri Shiv Nath Singh, Sri Satyam Singh, Sri D.P.S. Chauhan.

Counsel for the Opposite Parties:
A.G.A., Sri Keshari Nandan Singh

A. Criminal Law -Indian Penal Code, 1860 - Section 464 of IPC – Ingredients- `false documents' - Not sufficient that a document has been

made or executed dishonestly or fraudulently – Further, requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed.

B. Criminal Law -Indian Penal Code, 1860 - Section 464 of IPC – Ingredients- `false documents' – Registered Sale Deed - Allegation of executing a false document against the bona fide purchaser for consideration. Non-applicant, executed registered sale deed in favour of applicant no. 3 in his capacity as the owner of the property, a part of which he is not the owner - Execution of such document is not execution of a false document as defined under section 464 of IPC and section 467 & 471 IPC not attracted.

No offence of cheating or forgery on the part of the accused who is a bona fide purchaser for consideration- Ingredients of cheating as stated in section 415 IPC not found from the allegations of the Complainant. (Clarifying) - If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating, but a third party who is not the purchaser under the deed may not be able to make such complaint against the purchaser. (Para 8,14,15,18,19,20 & 21)

Application u/s 482 Cr.P.C. allowed. (E-3)

List of cases cited: -

1. G. Sagar Suri Vs St. of U.P. (2000) SCC 636

2. Indian Oil Corp. Vs NEPC India Ltd. (2006) 6 SCC 736

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Supplementary affidavit filed by learned counsel for the applicants is taken on record.

2. The present application under Section 482 Cr.P.C. has been filed with the prayer to quash the entire proceedings of Complaint Case No.3610 of 2016 (Chaman Kumar Satyarthi v. Shiv Kumar and others), pending in the court of Additional Chief Metropolitan Magistrate, Court No.3, Kanpur Nagar as well as summoning order dated 12.8.2016.

3. Heard Sri Shiv Nath Singh, learned Senior Advocate assisted by Sri D.P.S. Chauhan, learned counsel for the applicants, Sri Keshari Nandan Singh, learned counsel for opposite party no.2 as well as learned A.G.A. for the State and perused the record.

4. In brief, the background of the case is that the opposite party no.2 moved an application under Section 156(3) Cr.P.C. before the C.M.M., Kanpur Nagar for lodging of F.I.R. against the applicants and two others, however, the same was treated as a complaint case by the Magistrate. It is alleged in the application that the cousin brother of opposite party no.2 and his wife Smt. Kamla Devi executed a sale deed of a joint property, a part of which belongs to his father by a registered sale deed on 18.12.2013 and besides their own share also sold 48 square yards of the land belonging to his father and, thus, committed forgery. It is further stated that the applicants who are the vendees of the aforesaid sale deed after hatching conspiracy committed forgery by executing unregistered sale deed of a part of House No.35 belonging to his father on which eight shops existed and thereafter extended threats to the tenants of the aforesaid shops and also attempted to get the tenants evicted from the same. In the

aforesaid manner, the applicants and other co-accused have committed cheating and forgery and they are intended to take illegal possession over the rented shops belonging to his father. After recording statements under Sections 200 and 202 Cr.P.C. of the witnesses, the Magistrate summoned the applicants and other co-accused under Sections 419, 420, 468, 471 I.P.C. The applicants have challenged the impugned complaint and the summoning order on the ground that even if the entire allegations contained in the complaint and in the statements recorded under Sections 200 and 202 Cr.P.C. are accepted to be true on its face value, neither any offence of cheating nor of forgery is made out.

5. Before submitting legal submissions, learned Senior Advocate has submitted brief facts of the case in order to understand the entire controversy between the applicants and opposite party no.2. In para 9 of the affidavit, it is stated that the disputed House No.35 belonged to one Smt. Mohaniya and after her death the same devolved on her sons namely Heera Lal an Sunder Lal. The opposite party no.2, Chaman Kumar Satyarthi is the son of Sunder Lal, whereas, non-applicant, Shiv Kumar is the son of Heera Lal and both the brothers had half shares in the aforesaid house. The non-applicant, Shiv Kumar executed a sale deed of his share in favour of applicant no.3, Smt. Manorama. The applicant no.1, Munna Lal and his son, Sunny were contesting the cases on behalf of Smt. Manorama. It is categorically stated that the applicant nos. 1 and 2 had nothing to do with the property, except, they were pleading the cases of Smt. Manorama in the Rent Control Act and other matters.

6. Learned counsel for opposite party no.2 has argued that in fact, prima facie, offences of cheating and forgery are made out against the applicants and other co-accused, inasmuch as, the non-applicant, Shiv Kumar knowing fully well that he is the owner of only half of the share of House No.35, yet with a wrongful intention in order to make wrongful gain to himself and wrongful loss to opposite party no.2 executed a sale deed more than that of his share on which eight shops existed and the rent was being collected by his father. He further submits that the applicants in collusion with other co-accused had also instituted proceedings before the Rent Control Court claiming themselves to be owner of the shop and by misrepresentation and playing fraud upon the court got certain orders from the Rent Control Court. Learned counsel has also given details of the manner in which the applicants on the basis of forged unregistered sale deed of eight shops belonging to his father attempted to obtain eviction of the tenants. He further argues that it is well settled that even if the dispute between the parties is partly civil in nature and also contains the ingredients of criminal nature and if it is so, they can also be tried by criminal courts. In the present case as the offence of cheating and forgery is, prima facie, established, therefore, the submission of learned counsel for the applicants cannot be accepted that the present proceedings instituted on complaint are not maintainable. Thus, the application is bereft of any merits and the same is liable to be dismissed.

7. Learned Senior Advocate has argued that there is no dispute that non-applicant, Shiv Kumar has inherited the share of his father Heera Lal and also had a joint ownership in House No.35 along with opposite party no.2. Even if, for the

sake of argument, the averments made in the complaint are assumed to be true that non-applicant, Shiv Kumar executed registered sale deed in favour of Smt. Manorama more than that of his share measuring 48 square yards on which certain shops existed, then neither offence of cheating nor forgery on the part of the accused is attracted. There is no evidence of hatching any conspiracy against the applicant no.3 who is in fact a bona fide purchaser for consideration.

8. Therefore, the question arises for consideration is whether the material on record, prima facie, constitute any offence against the accused. The contention of learned counsel for the applicants is that if the allegations made in the complaint and in the statements in support thereof, even if accepted to be true in entirety does not disclose the ingredients of any offence of forgery under Sections 467, 468, 471 or cheating under Section 420 I.P.C. At the very outset, I may record that the Hon'ble Apex Court has time and again drawn attention to the growing tendency of complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to settle civil disputes. But at the same, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. Reference may be made to the judgment rendered by the Hon'ble Apex Court in ***G. Sagar Suri v. State of U.P. (2000) SCC 636 and Indian Oil Corporation v. NEPC India Ltd. (2006) 6 SCC 736.***

9. According to applicants, the sale deed executed by non-applicant, Shiv Kumar obviously does not fall in any of the category of making of false documents, even for the sake of arguments it is accepted that he has executed a sale deed of the joint property more than of his share i.e. 48 square yards and then the applicants/vendees attempted to get the tenants evicted on the basis of the aforesaid sale deed. In the present case, it is not disputed by opposite party no.2 that non-applicant, Shiv Kumar has not acted as an impostor of opposite party no.2 or his father but he executed the sale deed in his capacity as the owner of the property.

10. Section 464 defining "making a false document" is extracted below :

"464. Making a false document.- A person is said to make a false document or false electronic record;

First.- Who dishonestly or fraudulently-

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature, with the intention of causing it to be believed that such document or a part of document,

electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly.- Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alternation; or

Thirdly.- Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Explanation 1 - A man's signature of his own name may amount to forgery.

Explanation 2 - The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

[Note: The words `digital signature' wherever it occurs were substituted by the words `electronic signature' by Amendment Act 10 of 2009]." (emphasis supplied)

11. The condition precedent for an offence under sections 467 and 471 is forgery. The condition precedent for forgery is making a false document (or false electronic record or part thereof). This case does not relate to any false electronic record. Therefore, the question is whether the non-applicant, Shiv Kumar, in executing and registering the sale deed purporting to sell a part of the property (even if it is assumed that it did not belong to him), can be said to have made and executed false documents, in collusion with the other accused.

12. An analysis of section 464 of Penal Code shows that it divides false documents into three categories:

In short, a person is said to have made a `false document', if *(i)* he made or executed a document claiming to be someone else or authorized by someone else; or *(ii)* he altered or tampered a document; or *(iii)* he obtained a document by practising deception, or from a person not in control of his senses.

13. The sale deeds executed by first appellant, clearly and obviously do not fall under the second and third categories of `false documents'. It therefore remains to be seen whether the claim of the complainant-opposite party no.2 that the execution of sale deed by Shiv Kumar who was in no way connected with a part of joint property, amounted to committing forgery of the documents with the intention of wrongful gain to himself in collusion with the applicants would bring the case under the first category.

14. There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorized or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he bonafide believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of `false documents', it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed.

15. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document purporting to convey some property a part of which he is not the owner as alleged is not execution of a false document as defined under section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither section 467 nor section 471 of the Code are attracted.

16. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

17. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

18. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him

to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused i.e. applicants.

19. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the non-applicant by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

20. As the ingredients of cheating as stated in section 415 are not found, it cannot be said that there was an offence punishable under sections 417, 418, 419 or 420 of the Code.

A clarification

21. When it is stated that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, it should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint.

22. In the light of aforesaid, the averments made in the complaint if assumed to be true do not make any offence under Section 419, 420, 468, 471 I.P.C. and, therefore, the continuance of the proceedings arising out of the impugned complaint is nothing but an abuse of process of court and, thus, in the exercise of inherent power, I deem it fit to quash the impugned complaint and the summoning order.

23. Considering the overall facts and circumstances of the case and taking the entire allegations made in the complaint and in the statements recorded under Sections 200 and 202 Cr.P.C., this Court is satisfied that, prima facie, commission of cognizable offence is not made out against the applicants and non-applicant, Shiv Kumar and his wife Smt. Kamla Devi.

24 . Accordingly, the complaint and the proceedings arising therefrom including the summoning order are hereby quashed.

The present application under Section 482 Cr.P.C. is, accordingly, allowed.

(2019)11ILR A108

ORIGINAL JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 13.05.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL , J.

Criminal Misc. Application No.14361 of 2004
u/s 482 Cr.P.C.

Naththu Singh. ...Applicant
Versus
State of U.P. & Anr ...Opposite Parties

Counsel for the Applicant:
Sri S.P. Singh, Sri Vikrant Rana.

Counsel for the Opposite Parties:
A.G.A., Sri Anoop Trivedi, Sri Vibhu Rai.

A. Criminal Law -The Negotiable Instruments Act, 1881 - Section 138 – Debt - Cheque issued by one partner of a partnership firm, by and on behalf of the Firm, towards the share/profit of the partnership firm to another partner - is not a debt on any of the partner against another partner.

Liability of partners is co-extensive along with that Firm and is a legal liability- Partners of a Firm qua share of profit in the Firm business do not stand in the capacity of creditor and debtor but being Owners of the Firm are jointly and severally liable. Term 'Liability' not attracted in respect to money or amount, which is claimed to be the share in profit of a partner- For dispute arising out of distribution of share, remedy lies to the partner to file suit for accounting in common law, but Section 138 of N. I. Act would not be attracted. (Para 5,7,8 & 9)

Application u/s 482 Cr.P.C allowed (E-3)

List of Cases cited: -

1. Aneeta Hada Vs Godfather Travels & Tours Pvt. Ltd, (2012) 5 Supreme Court Cases 661

2. Himanshu Vs B. Shivamurthy & anr., (2019)

3 Supreme Court Cases 797.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Vikrant Rana, learned counsel for applicant, learned A.G.A. for State and Sri Vibhu Rai, Advocate holding brief of Sri Anoop Trivedi, learned counsel for respondent-2.

2. This application under Section 482 Cr.P.C. has been filed praying for quashing of proceedings of complaint under Section 138 of The Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I.Act") in Case No.246 of 2004 pending in the Court of Judicial Magistrate, Mawana, Meerut (Rajveer Singh vs. Naththu Singh).

3. It is submitted that cheque in question was issued by Firm, signed by authorized signatories i.e. three partners but complaint has been made without impleading the Firm and, therefore, it was not maintainable. In this regard reliance has been placed on Supreme Court's decision in **Aneeta Hada Vs. Godfather Travels and Tours Private Limited, (2012) 5 Supreme Court Cases 661** and in **Himanshu Vs B. Shivamurthy and Another, (2019) 3 Supreme Court Cases 797.**

4. When questioned learned A.G.A. as well as learned counsel appearing for respondent 2 could not dispute aforesaid expositions of law.

5. From record it is evident that though cheque has been sent by partners of Firm, but it is by the Firm and on behalf of Firm i.e. M/S Nathu Singh and Others. This is evident from page 19 of paper book. So far as liability is concerned, in the matter of Firm, liability of partners is co-extensive. It is also of

that Firm registered with Registrar of Firms and Societies and is a legal liability. Copy of partnership is on record and it shows that there were seven partners namely Sri Nathu Singh s/o Sri Shiv Charan Singh, Sri Lov Kush s/o Sri Rajbir Singh, Sri Jugberr s/o Sri yadram, Sri Arun Kumar s/o Sri Anand Pal Singh, Sri Arvind Kumar s/o Sri Rohtash Singh, Sri Rajbeer Singh s/o Sri Yadram Singh and Sri Rajbeer Singh s/o Sri Bhopal Singh.

6. As per averments in para 5 of complaint, the Firm was practically being run by Nathu Singh. In February 2004 all the partners decided to separate whereupon accused-applicant assured that share of partners in total profit shall be given to them and in respect thereto Cheque No.965804 for Rs.3,10,000/- dated 20.02.2004 was issued.

7. On above averment, it is evident that it is the share/profit of one of partner in the Firm for which cheque was issued by another partner. Section 138 of N.I. Act will apply only when cheque is issued for payment of any amount of money to another person for discharging of any debt or other liability. Profit or share in a Partnership Firm is not a debt on any of the partner against another partner. In common parlance, a debt is something owed to another and liability is an obligation, a chosen action which is capable of being assigned by creditor to some other person.

8. Here two partners of a Firm qua share of profit in the Firm business, do not stand in the capacity of creditor and debtor. Both are in capacity of Owners of the Firm and being Owners of the Firm, partners are also jointly and severally liable. If for distribution of share, there is some dispute, under the provisions of The Partnership Act, 1932 (hereinafter referred to as "Act, 1932"), remedy lies to the partner to file suit for accounting in common law, but to bring it within the term of any debt or liability attracting Section 138 of N. I. Act, in my view is clearly erroneous. Here one partner do not owe anything to another partner. All the partners have their specified shares in the Firm and if there is any dispute with regard to receipt of such share between partners, the same can be settled by initiating proceeding of accounting, but not by taking recourse to Section 138 of N.I. Act.

9. Similarly, to attract the term 'liability', it is difficult to hold that one partner owes liability to another partner in respect to money or amount, which is claimed to be the share in profit, since, profit is earned by Firm and all the partners having similar and equal status in the Firm, it can be distributed amongst themselves as per their consent or taking remedy in common law, but Section 138 of N. I. Act would not be attracted, hence, proceedings under Section 138 N. I. Act, are wholly without jurisdiction.

10. In view thereof, application is allowed. The proceedings of Case No.246 of 2004, under Section 138 of N.I. Act, pending in the Court of Judicial Magistrate, Mawana, Meerut (Rajveer Singh vs. Naththu Singh) is hereby quashed.

(2019)11ILR A110

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH , J.

Criminal Misc. Application No.17207 of 2016u/s 482 Cr.P.C.

Wasim & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rahul Srivastava, Sri Bhuvnesh Kumar Singh.

Counsel for the Opposite Parties:
A.G.A., Sri Mukhtar Alam, Sri Sudhir Dixit.

A. Criminal Law- Criminal Procedure Code, 1973 – Summoning - Proviso to sub-section (2) of Section 202 Cr.P.C -It is not for the accused person to voice any grievance that no further witnesses named by the complainant had been examined and, therefore, the applicants had been prematurely summoned.

Not the case of the applicants that no *prima facie* case is made out against them on the basis of the complaint read with the statements already recorded.

B. Criminal Law -Criminal Procedure Code, 1973 – Section 482 – Scope - Malicious prosecution-Cross cases- Nothing to doubt the occurrence of the injuries claimed by the complainant-Correctness of the two versions cannot be determined at this stage to reach a conclusion that the present complaint is *mala fide.*

Impugned summoning order already upheld by lower revisional court in case of co-accused facing the same fact allegations. (Para 12,13,14,15,16 & 17)

Application u/s 482 Cr.Pc rejected (E-3)

List of cases cited: -

1. Shivjee Singh Vs Nagendra Tiwary & ors., (2010) 7 SCC 578 (followed)

2. St. of Haryana & ors. Vs Bhajan Lal & ors., (1992) Supp 1 SCC 335

3. M/s. Eicher Tractor Ltd. & ors. Vs Harihar Singh & anr., (2009) 64 ACC 296

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. Rejoinder affidavit has been filed today. Taken on record.

2. Heard Sri Bhuvnesh Kumar Singh, learned counsel for the applicants; Sri Mukhtar Alam and Sri Sudhir Dixit, learned counsel for the opposite party no.2 and; learned AGA for the State.

3. The present application u/s 482 Cr.P.C. has been filed to quash the summoning order dated 15.12.2015 as well as entire proceeding of Complaint Case No. 2658 of 2015 (Shahnawaz Vs. Daud & Ors.), under Sections 302, 307, 459 I.P.C., Police Station Kiratpur, District- Bijnor.

4. Learned counsel for the applicants submits, in the first place, there is non-compliance of the mandatory provision of law being the proviso to sub-section (2) of Section 202 Cr.P.C. Relying on the application filed by the opposite party no.2/complainant dated 03.11.2015 (to examine Dr. Upendra Singh and Dr. Prem Prakash) and another application to examine Dr. Ram Kumar and Sri Kuldeep Singh, it has been submitted, in the context of a complaint case, the offence alleged being triable exclusively by a Court of Sessions, it was mandatory for the learned Magistrate to first record the statements of all the aforesaid four witnesses before proceeding to issue process against the applicants. Also, in response to the decision cited by the learned counsel for the opposite party no.2 in **Shivjee Singh Vs. Nagendra Tiwary & Ors., (2010) 7**

SCC 578, it has been submitted, in that case, the facts were entirely and fundamentally different, inasmuch as the complainant in that case had given up the remaining two witnesses. Therefore, the ratio of that decision is distinguishable.

5. Second, it has been submitted, the prosecution lodged against the present applicants is wholly *mala fide.* In this regard, it has been submitted, on 18.07.2015, the incident had taken place wherein close relatives of complainant had assaulted the applicant no.1, his father and others. In that incident, the father of the applicant no.1 died of a gun-shot injury while applicant no.1 also received a gun-shot injury. Injuries to both persons had been caused from close range. Also, in the indiscriminate firing by the assailants, one of them i.e. Chhuttan also suffered a gun-shot injury. The panchnama and site-plan were prepared by the police authorities. The place of incident was found to be an open place from where blood stains and empty cartridges were recovered by the police. During investigation, four country-made pistols were recovered from Faizan, Imran, Rizwan and Azad.

6. Consequently, charge-sheet was submitted on 27.08.2015. Cognizance was taken and thereafter the case was committed for trial to the Court of Sessions on 06.11.2015 being S.T. No. 552/2015. Therein evidence was led and arguments heard. However, upon administrative order passed by the learned District Judge that trial case was transferred two days before the date fixed for delivery of judgement. The matter is thus pending. As to the present prosecution, it has been submitted, the same had been lodged with *mala fide* intention only to set up a completely false defence to the prosecution story in S.T. No. 552/2015. A wholly unbelievable case has been set up by the complainant that too 15 days after the incident, that he and others had been assaulted by the applicants inside their residence when certain injuries were suffered by Chhuttan as also the applicant and his father suffered gun shot injuries. Thus, it has been submitted, the complaint is nothing but an eye-wash and a pretence set up only to pressure the applicants to withdraw from the criminal case lodged by them. It is wholly *mala fide.* He has also relied on a decision of the Supreme Court in the case of **M/s. Eicher Tractor Ltd. & Ors. Vs. Harihar Singh & Anr., (2009) 64 ACC 296**. In that context, he has further placed reliance on para 102 (7) of the earlier decision of the Supreme Court in the case of **State of Haryana & Ors. Vs. Bhajan Lal & Ors., (1992) Supp 1 SCC 335.**

7. Opposing the present application, learned counsel for the opposite party no.2 and learned AGA would submit that in view of the decision of the Supreme Court in the case of **Shivjee Singh Vs. Nagendra Tiwary & Ors. (supra)**, it is no longer *res integra* whether the proviso to the sub-section (2) of Section 202 Cr.P.C. is mandatory i.e. whether it is necessary for the learned Magistrate to first record statements of all witnesses named by the complainant before proceeding to issue process against the accused person. The choice being of the complainant to examine such witness as he may choose, merely because an application may have been filed earlier to examine some other witness as well, it would not bind the learned Magistrate to first record their statements also, even

though *prima facie* he feels satisfied that a case was made out to take cognizance and issue process.

8. Merely because some other witnesses had not been examined did not prevent the learned Magistrate from taking cognizance and issuing process, at an earlier point in time, upon examination of other witnesses. In this regard, it is submitted, six witnesses had been examined in support of the complaint and the impugned order itself reflects that P.W.-1 Zaheer Ahmad; P.W.-2 Chhuttan; P.W.-3 Gulbahar Alam; P.W.-4 Rizwan and; P.W.-5 Ram Kumar had been examined under Section 202 Cr.P.C. while the complainant had also been examined under Section 200 Cr.P.C. It is after considering those statements and the complaint allegations that, at present, the learned Magistrate felt *prima facie* satisfied to proceed further. Therefore, relying on the decision of the Supreme Court in **Shivjee Singh Vs. Nagendra Tiwary & Ors. (supra)**, it has been submitted, there is no illegality committed by the learned Magistrate.

9. As to the allegations of *mala fide* prosecution, it has been submitted, the present is a case where there are two narrations of one incident, one being made by the mother of the applicant no.1 and the other made by opposite party no.2 Shahnawaz. Inasmuch there is death caused on one side and grievous hurt injury caused on the other, it cannot be disputed that there is *prima facie* basis for the accusations made by both sides. The cause of the injury or death or the manner in which they were caused is what requires a trial to be held. According to the applicants, all injuries had been caused by the close relatives and associates of opposite party no. 2 and that fact allegation may be tried in S.T. No. 552/2015. However, the facts are otherwise. That fact allegation may be examined only in the trial that may arise on the complaint lodged by the opposite party no. 2. Both sides having led evidence to establish existence of *prima facie* case, it would be premature to reach a conclusion that the allegations made by opposite party no.2 are *mala fide.* It would remain a matter to be examined upon detailed evidence to be led by both sides. Only then the truth may be established.

10. In any case, it has been submitted that the present summoning order was challenged by one of the co-accused Shadab in Criminal Revision No. 6 of 2016 filed before the learned Additional Sessions Judge, Court No.2, Bijnor. It was dismissed by order dated 04.03.2017, a copy of which has been annexed along with the counter affidavit. Therefore, it has been submitted that, in any case, the ground of *mala fide* allegations may not be entertained in the present proceedings in view of the fact that the summoning order has already been affirmed by the revisional court (though at the behest of a co-accused) and which order has attained finality.

11. Having heard learned counsel for the parties and having perused the record, it is true that in **Shivjee Singh Vs. Nagendra Tiwary & Ors. (supra),** as a fact, the complainant had, after recording evidence of two out of four witnesses, given up the remaining two witnesses for reason of his apprehension that they had been won over by the accused. However, that distinction of the fact apart, the Supreme Court has, after making detailed

consideration of the various provisions falling under Chapters XV and XVI of the Cr.P.C. and existing precedent, culled out the legal situation emanating therefrom. In paragraph no. 22 of that decision, the Supreme Court considered the usage of the word "all" appearing in the proviso to Section 202 (2) Cr.P.C. and found it to be qualified by the word "his", i.e. the complainant. It was then reasoned that such qualification implied that the complainant was not bound to examine all the witnesses named in the complaint or whose names may have been disclosed in response to the order passed by the learned Magistrate.

12. It was further clarified only those witnesses were required to be examined whom the complainant may consider material to make out a *prima facie* case for issue of process. It is then left to the choice of the complainant to examine or to not examine other witnesses once *prima facie* case had been made out according to him, i.e. the complainant. As to the consequence of non-examination of other witnesses, it was further held, the same is to be considered at the stage of trial and not earlier. The Magistrate has also not been required to make any detailed discussion on the merits or demerits of the case, at this stage. In view of that reasoning contained in the decision of the Supreme Court, it is not possible to draw a distinction being claimed by the learned counsel for the applicants. The distinction of fact, pointed out by learned counsel for the applicant, is, on the reasoning of the Supreme Court found to be inconsequential for the purposes of issuance of process.

13. It may have been a different case if, in the absence of any specific expression or application made by the complainant not to examine any further witness, the learned Magistrate has chosen to dismiss the complaint. In that case, the complainant may have felt aggrieved and sought remedies against such action. However, that reasoning is not available to the accused persons, since they have been summoned upon *prima facie* satisfaction having been recorded as to their complicity in the offence alleged being reached on the basis of statements already recorded. It is not the case of the applicants that on the basis of the statements recorded by the learned Magistrate, no offence was made out.

14. Thus, in view of the ratio of law laid down by the Supreme Court, it is not for the accused person to voice any grievance that no further witnesses named by the complainant had been examined and, therefore, the applicants had been prematurely summoned. Since it is not the case of the applicants that no *prima facie* case is made out against them on the basis of the complaint read with the statements already recorded, the argument advanced by learned counsel for the applicants, does not call for any further discussion. It is rejected.

15. As to the second objection raised that the complaint is *mala fide*, suffice it to observe, at present, there is nothing to doubt the occurrence of the injuries claimed by the complainant, inasmuch as even, according to the case of the present applicants, Chhuttan had received a gun shot injury in the incident that had taken place. As to which of the two versions of the incident is correct, it is not for this Court to hazard a guess at this stage to reach a conclusion that the present complaint is *mala fide*.

16. Though, there can be no doubt that the *mala fide* complaint or prosecution

can never be allowed to proceed in the view of the decision of the Supreme Court in the case of **State of Haryana & Ors. Vs. Bhajan Lal & Ors. (supra)** as followed in **M/s. Eicher Tractor Ltd. & Ors. Vs. Harihar Singh & Anr. (supra),** however, to reach that conclusion, the facts must be unequivocally clear to the court. At present, there is sufficient doubt as to which version of the same event is correct. Therefore, the plea of *mala fide* prosecution is also rejected, at this stage.

17. Further, in this regard, it also cannot be lost sight that in case of the co-accused Shadab, the summoning order that is under challenge in the present proceedings, has been upheld by the lower revisional court and that order has not been assailed by that co-accused Shadab. Though the applicants may not be bound by that order, however, in exercise of inherent jurisdiction under Section 482 Cr.P.C., the court cannot be unmindful of that order having been attained finality. In such fact circumstances and background of legal remedy availed by the said Shadab, he is likely to stand trial on the same fact allegations. For that reason also, I am disinclined to exercise the inherent jurisdiction of this Court, on behalf of other co-accused persons, facing the same fact allegations. The interest of justice and concern to prevent abuse of process of court appears to lie not in quashing the complaint at this stage but rather in allowing the complaint to proceed further.

18. Accordingly, the present application lacks merit. The prayer made to quash the complaint is declined.

19. However, in case the applicants appear before the learned court below within a period of 45 days and apply for bail, the learned court below shall deal with their bail application as expeditiously as possible, strictly in accordance with law, without being influenced by any observations made in this order.

20. With the aforesaid observations, the present application is disposed of.

(2019)11ILR A115

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Application No.17753 of 2005 u/s 482 Cr.P.C.

Surendra Kumar Singh & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ranjeet Singh

Counsel for the Opposite Parties:
A.G.A., Sri M.K. Tiwari.

A. Criminal Law -Criminal Procedure Code, 1973 - Section 482 of the Cr.P.C. – Gound - Malicious Prosecution-Applicants summoned to face trial u/s 435 IPC by the Magistrate treating Protest petition as Complaint- Strong circumstances to indicate that the incident remained unwitnessed by anybody and implication of the accused is just a result of prior enmity- Delay in lodging F.I.R. wholly unexplained phenomenon which shall go to the root of the matter- Matter falls in category no.(7) mentioned in case of State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 42.

Proceedings are inspired by malice on the part of complainant and the version contained

therein is full of high improbabilities and the continuation of the proceedings on that basis is likely to result in abuse of court's process. (Para 6,7 & 8)

Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1.St. of Haryana Vs Bhajan Lal (1992) SCC(Cr.) 42

(Delivered by Hon'ble Karuna Nand Bajpayee J.)

1. This application u/s 482 Cr.P.C. has been moved on behalf of applicants seeking the quashing of complaint dated 27.10.2004 and impugned order dated 16.9.2005 as well as entire proceedings arising out of Case No.1847 of 2005 (Surendra Pal vs. Ram Singh and others), u/s 435 I.P.C. pending in the court of Chief Judicial Magistrate, Bijnore.

2. List has been revised. Despite repeated calls none has appeared on behalf of opposite party no.2 to oppose this application. Learned A.G.A. is present. This application is of year 2005. In the wake of heavy pendency of cases in this Court where dockets are already bursting on their seams there is no justifiable reason to further procrastinate the matter. This Court, therefore, deems it fit to proceed in the matter with the assistance of the learned AGA representing the State.

3. Heard learned counsel for the applicants and learned A.G.A.

4. It appears from the perusal of the record that an F.I.R. under section 435 Cr.P.C. was lodged by the complainant but after investigating into the case a final report was submitted. The complainant was summoned who protested against the submission of final report and as it was within the powers of Magistrate to do so, he took the cognizance in the matter treating the protest as complaint and proceeded in the matter following the right procedure. During the course of inquiry the complainant was examined under section 200 Cr.P.C. and then under section 202 Cr.P.C. P.W.1, Omprakash, P.W.2, Rohtash Kumar and P.W.3, Gyanchand were examined. On the basis of the material that was adduced during the course of enquiry the Court below thought it fit to proceed to summon the accused in order to face the trial. The version that appears to have been brought forward by the complainant is to the effect that there were some prior enmity going on between the complainant and the accused persons. On the day of occurrence i.e. to say on 12.3.2004 at about 4:00 a.m. when the complainant and his brother Rajendra Kumar had gone to attend the call of nature he found that co-accused Ram Singh, Dhyan Singh, Surendra Kumar, Mahavir and Veerpal were putting fire to the sugarcane crop that were there in his fields. The complainant and his brother raised hue and cry which attracted a number of witnesses which included witnesses Rohtash Singh, Rampal Singh, Omprakash, Gyan Chandra and Satyendra etc. who arrived on the spot and helped quenching the fire. This version has been by and large reiterated by witnesses Omprakash, Gyanchandra and Rohtash who have been examined under section 202 Cr.P.C. on behalf of complainant. Being satisfied by the material adduced, the Court proceeded to summon the accused persons to face the trial under section 435 Cr.P.C.. Submission of the counsel in defense of the applicant is that

story as has been alleged on behalf of complainant is highly improbable and the witnesses who claimed to have seen the occurrence are shear chance witnesses and their presence on the spot appears to be suffering with the element of high improbability. It has been contended that the incident is said to have taken place at about 4:00 a.m. in the morning. It is too much of coincidence to believe that just the moment when the complainant and his brother had gone near their own fields, it was just at that point of time that the accused came over there and set the crop ablaze. According to the counsel if the complainant was already present on the spot, there was no reason for the accused to have indulged in this act in their presence. They could have done it much earlier throughout the night which preceded the time of occurrence and they could also have committed this offence after the complainant had left the spot. Submission is that such kind of allegation is militating against the normal ways of conduct which is to screen oneself from being seen by others committing the crime. The very fact that the said occurrence is said to have taken place in the wee hours shows that whosoever has done it had taken care of to conceal himself from being witnessed by others. In such circumstances, the claim of the complainant that the occurrence took place in the presence of multiple witnesses is by itself a highly unnatural claim and is not worth placing reliance upon. Further submission is that witnesses Gyanchandra and Rohtash who claimed to have seen the accused persons setting the crop ablaze again suffers the same criticism of high improbability. It has also been submitted that putting fire into the crop does not take much time and if what has been alleged was true then task of setting ablaze would have ended within minutes and therefore it further appears to be a very incredible, unnatural and improbable story that at that brink of time when the accused were setting ablaze the crop the other witnesses would also have landed on the spot and could find the occasion to have seen accused committing the offence in question in their presence. Submission is that the presence of the witnesses in the wee hours at 4:00 a.m. in the morning is a claim which does not inspire confidence and it appears that if at all there was some crop which suffered some loss by fire then the implication of the accused has been made only as a result of wild guess and as a result of conjectures alone. In the same context the counsel has further added the argument about the delay in lodging F.I.R.. The incident is said to have taken place on 12.3.2004 while the F.I.R. was lodged on 16.3.2004. Submission is that this yawning gap and the huge delay in lodging F.I.R. remains wholly unexplained on behalf of complainant. If the incident had taken place on 12.3.2004 there was no justification to wait for so long and lodge the F.I.R. after so much of delay. Submission is that this yawning gap in lodging the F.I.R. is well consistent with the probability that this time was consumed in finding out the possible offenders and ultimately when after confabulation and consultations the suspicion matured against the present applicants, the F.I.R. was lodged. In addition to it contention of the counsel is that initially after investigation the allegations were not found substantiated by investigating officer and as a result of the same the final report was also submitted. The Court below while rejecting the final report did not at all

consider the circumstances and the material collected by investigating officer which persuaded him to file his final report in favour of accused. The exercise of summoning the accused has been done in a rather mechanical manner and lacks actual application of judicial mind. Argument is that the continuation of the proceedings against the applicants will result in nothing except abuse of court's process.

5. Perused the record in the light of submissions made at the bar.

6. Perusal of the record shows that the time of incident as is said to have taken place was at 4:00 a.m. in the morning. This Court finds substance in the submissions raised by the counsel that the presence of the complainant and his brother at that hour cannot be said to be a very natural presence. The presence of other witnesses also appears to be merely coincidental and not natural. The claim of the complainant that all of them had the occasion to witness the accused setting ablaze the crop also appears to be a highly improbable claim and it is too much to believe such a coincidence. Delay in lodging F.I.R. is also wholly unexplained phenomenon which shall go to the root of the matter. Submission of the counsel about the confabulations made during this period appears to have substance and it is not difficult to see that the implication of the accused appears to be more as a result of wild conjectures based on previous enmity rather than on any basis of truth. There are strong circumstances to indicate that the incident remained unwitnessed by anybody and implication of the accused is just a result of prior enmity and in such circumstances this Court is of the view that the application deserves to be allowed.

7. So far as the law on the point of quashing criminal proceedings against the accused is concerned this aspect has been expatiated upon by Hon'ble Supreme Court in a number of cases. It would be necessary to site the relevant observations made by Apex Court in perspective the law laid down by Hon'ble Supreme Court in the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426,** in which certain categories have been recognized on the basis of which the criminal proceeding against a certain party or the accused may be quashed. It was observed by the Hon'ble Apex Court in Bhajan Lal's case as follows:-

"The following categories can be stated by way of illustration wherein the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure can be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code

except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. In the considered view of this Court this matter falls in category no.(7) mentioned hereinabove. This Court finds reason to hold that the proceedings in question are inspired by malice or the part of complainant and the version contained therein is full of high improbabilities and the continuation of the proceedings on that basis is likely to result in abuse of court's process, and therefore, the entire proceeding of complaint in question is liable to be quashed.

9. In this view of the matter this application is allowed and the entire proceeding of complaint in question against the accused-applicants stand quashed.

10. A copy of this order be certified to the lower court concerned forthwith.

(2019)11ILR A119

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

U/S 482 No. 27412 of 2019

Shyam Lal Rajput & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Samit Gopal, Sri Shakti Shanker Tiwari, Sri Subhash Chandra Tiwari

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

A. Criminal Law -Criminal Procedure Code, 1973 – Section 482 – Scope - Suicide Note- The genuineness of the suicide note can only be finally

adjudicated upon and decided at the trial. High Court cannot examine such issue under section 482 Cr.P.C.

The suicide note is admissible and relevant under Section 32 of Indian Evidence Act as the same relates to the cause of death and also to the circumstances of the transaction which resulted in his death- Like any other fact the instigation or the abetment is also provable by circumstantial evidence and it cannot be said either as a matter of rule of law or even of prudence that unless there is direct evidence of instigation available the charge will remain unproved-Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.

B. Delay in lodging of the F.I.R. - May also be reckoned as a strong circumstance to suggest that the first informant never had any motive to falsely implicate the accused and he reported the facts as they emerged and came to his knowledge in the process of time gradually-The perusal of the F.I.R. and the material collected by the Investigating Officer and specially the suicide note of the deceased on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. (Para 5, 9, 10 11)

Application u/s 482 Cr.P.C rejected (E-3)

List of cases cited:-

1. Chandra Deo Singh Vs Prokash Chandra Bose AIR (1963) SC 1430

2. Vadilal Panchal Vs Dattatraya Dulaji Ghadigaonker AIR (1960) SC 1113

3. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736

4. R.P. Kapur Vs St. of Punjab AIR (1960) SC 866

5. St. of Haryana Vs Bhajan Lal (1992) SCC(Cr.) 426

6. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been filed seeking the quashing of charge sheet dated 25.07.2018 as well as the entire proceedings of Case No.45169 of 2018 (State vs. Shyam Lal and others) arising out of Case Crime No.411 of 2018, u/s 306, 406 I.P.C., pending in the Court of A.C.M.M.-II, Kanpur Nagar.

2. Heard applicants' counsel and learned A.G.A.

3. Entire record has been perused.

4. Submission of learned counsel for the applicants is that the date of incident of the present case when it took place was 29.3.2018 whereas the F.I.R. has been lodged on 10.4.2018 i.e. after 12 days of the incident which is suggestive of manipulation and fabrication on the part of the prosecution. Further submission is that the alleged suicide notes appear to have been manipulated by the first informant so as to falsely implicate the applicants. It was also submitted that there is no direct evidence on record to prove instigation or abetment made by the applicants on the basis of which it may be said that the death of the deceased directly owes its genesis to or has nexus with any such conscious culpable act committed by accused which may be tantamount to abetment. Therefore, the offence punishable under Section 306 I.P.C. is not made out against the applicants. Certain other contentions have also beeen raised by the applicants' counsel but all of them relate to disputed

questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded. Contention is that the charge-sheet and consequent proceedings should therefore be quashed.

5. The law regarding sufficiency of material which may justify the summoning of accused and also the court's decision to proceed against him in a given case is well settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.

6. Through a catena of decisions given by Hon'ble Apex Court this legal aspect has been expatiated upon at length and the law that has evolved over a period of several decades is too well settled. The cases of (1) ***Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430*** , (2) ***Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker AIR 1960 SC 1113*** and (3) ***Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736*** may be usefully referred to in this regard.

7. The Apex Court decisions given in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and in the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426** have also recognized certain categories by way of illustration which may justify the quashing of a complaint or charge sheet. Some of them are akin to the illustrative examples given in the above referred case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736**. The cases where the allegations made against the accused or the evidence collected by the Investigating Officer do not constitute any offence or where the allegations are absurd or extremely improbable impossible to believe or where prosecution is legally barred or where criminal proceeding is malicious and malafide instituted with ulterior motive of grudge and vengeance alone may be the fit cases for the High Court in which the criminal proceedings may be quashed. Hon'ble Apex Court in Bhajan Lal's case has recognized certain categories in which Section-482 of Cr.P.C. or Article-226 of the Constitution may be successfully invoked.

8. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

9. A perusal of the record shows that on 30.3.2018 the first informant had given a written information at P.S. Kalyanpur, Kanpur Nagar that his son namely Ram Kishore had committed suicide. This information was duly entered into the concerned police station as G.D. No. 30 dated 30.3.2018 at 10:12 hours. Later on, the opposite party no. 2 had moved an application at the concerned police station on 10.4.2018 with the allegation that while cleaning the room of the deceased Ram Kishore he had got a suicide note of the deceased in which the deceased himself had narrated the reasons for

committing suicide. In the said suicide notes the deceased had narrated the details of atrocious trauma inflicted upon him by the present applicants which compelled him to commit suicide. On the aforesaid application of the opposite party no. 2 an F.I.R. being Case Crime No. 411 of 2018 was lodged against the applicants for the offences punishable under Sections 306, 406 I.P.C. The investigating officer investigated the present case and after recording the statement of several witnesses as well as after going through the suicide notes written by the deceased, submitted charge sheet against the applicants for the offences punishable under Sections 306, 406 I.P.C. A supplementary affidavit has been filed by the applicants annexing therewith the copies of suicide notes which the prosecution alleges to have been written by the deceased himself. A perusal of the these suicide notes which runs in several parts and several pages show that the applicants were continuously blackmailing the deceased, due to which he was compelled to commit suicide. One of the suicide notes which appears to be dated 29.3.2018 finds endorsement by the deceased which has been mailed to PMO. Another application which is addressed to the Chief Minister of U.P. wherein it has been written by the deceased that he is going to commit suicide and it was the applicants who were responsible for the same. The detailed allegations as well as complete narration of facts which compellingly drove the deceased to commit suicide has been mentioned in the suicide notes which runs from page no. 28 to 35 of the supplementary affidavit. It has been mentioned in the suicide notes that when the deceased was a student of B.Tech. Ist year the applicant no.1 asked him to give tuition to her child. Thereafter the applicant no.1 purposely introduced her own sister and had given proposal for marriage with the deceased. Later on the applicants facilitated the deceased to enter into relationship with the sister of the applicant no. 1 namely Pooja. It further transpires from the overall reading of the suicide note that the relationship of the deceased with the aforesaid Pooja was made by the accused a clever contrivance to exploit the deceased emotionally and economically both. By illusing the relationship as a blackmailing tool the process of squeezing out money from the deceased was engineered by the accused. The accused claimed to be in possession of some objectionable photographs of the deceased with aforesaid Pooja and he having been put under the sting of such blackmail, was asked to cough up more and more money. Even half of the share of some land was also demanded and it also appears from the suicide note that roughly about Rs. 1,84,000/- were also extracted out from the deceased over a period of time. It also appears that the deceased having been put under the mortifying fear of infamy, humiliating social exposure and the loss of honour was compelled to give Rs. 3,000/- per month to the accused on insistent demand of the accused. But the rapacity of the accused still did not get satiated and they started demanding further more. An amount of Rs.5000/- per month was further pressed for. The suicide note also reveals that the applicant no. 1 was in fact, cousin of the deceased whereas the applicant no.2 is the wife of the applicant no.1 and the applicant no.3 is the father-in-law of the applicant no.1. The perusal of the suicide note would further reveal that the deceased had been so much mentally tortured by the applicants which compelled the beleaguered deceased to

think that he was not having any other choice but to commit suicide and eventually after facing incessant emotional trauma and blackmailing which continued for 2 to 3 years by the applicants, the deceased committed suicide. The suicide note contains some very pathetic description about the mental agonising ordeal through which the deceased underwent and which was caused and inflicted upon him by the calculated overt acts of blackmail by the accused. So far as the delay in lodging of the F.I.R. is concerned, it is clear that as soon as the first informant got the suicide note of the deceased, he at once approached the police station and got registered the present F.I.R. In fact the said delay in lodging the F.I.R. may also be reckoned as a strong circumstance to suggest that the first informant never had any motive to falsely implicate the accused and he reported the facts as they emerged and came to his knowledge in the process of time gradually. The genuineness of the suicide note upon which the prosecution is claiming reliance can only be finally adjudicated upon and decided in the trial. Apparently the suicide note is admissible and relevant under Section 32 of Indian Evidence Act as the same relates to the cause of death and also to the circumstances of the transaction which resulted in his death.

10. So far as the submission of counsel with regard to non-availability of any direct evidence to prove instigation or abetment done by the applicants is concerned, it may be observed that it depends upon the facts of each case and the court has to proceed to see whether the ingredients of charge are actually made out or not. There may be cases where we may find direct evidence of instigation resulting in the commission of suicide. But there may be cases where we may find enough circumstances to show that the mental harassment to which the deceased was subjected was a calculated one and was so sustained and intense that the same was so very likely to drive a man of normal sensitivities to commit suicide. Like any other fact the instigation or the abetment is also provable by circumstantial evidence and it cannot be said either as a matter of rule of law or even of prudence that unless there is direct evidence of instigation available the charge will remain unproved. We find in the present matter that there is a sustained history of mental harassment to which the deceased was subjected and for the perpetration of which the accused were responsible. Whether ultimately the charge shall stand proved or not is quite a different matter and the eventual verdict has to be arrived at through the evaluation of evidence by a full fledged trial. Whether the conviction will be upheld or not is also to be seen at the time of final adjudication on the point of guilt or innocence of the accused. But for the purposes of evaluating the sufficiency of material which may justify the summoning of applicants and call him upon to face the trial this Court finds enough material from the suicide note itself which reveals that the deceased was pushed to the wall by the accused and was constantly being kept at tenterhooks and was incessantly being blackmailed and harassed to the extent that he found no other way than to put an end to the journey of his life. It also does not appear to be a case in which it may be said that the act of suicide committed by the deceased was an act of disproportionately abnormal or ultra sensitive person. Normally, we do not come across a

suicide note with such profusely elaborate details. The entire emotional catharsis has been vented out in the last words which were penned out by the deceased and which are in the nature of a tell-tale story. How he got trapped in the situation and how the accused were constantly subjecting him to a blackmailing emotional torture, the narration of the suicide notes furnishes all such material and this Court finds that the accused must face trial and be called upon to answer the charge. Submission of charge sheet in a matter like this cannot be said to be unjustified therefore. This certainly does not appear to be a case in which the venue of judicial probe should be shutdown and foreclosed or where this Court should feel inclined to scuttle the prosecution of the accused at the very threshold even before it sets on. Whether such kind of highly immoral and culpably incriminating conduct of the accused was in ordinary circumstances sufficient to drive a man of normal sensitivities and self respect to commit suicide and thereby amount to instigation and abetment or not, may be adequately adjudicated upon only through a proper trial and finding in that regard must be returned by the trial court which possesses primary jurisdiction to pronounce judicially on these aspects of the case.

11. The submissions made by the applicants' learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A more elaborate discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer and specially the suicide note of the deceased on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

12. The prayer for quashing the same is refused as I do not see any abuse of the court's process either.

13. The application therefore stands dismissed.

(2019)11ILR A124

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE
THE HON'BLEKARUNA NAND BAJPAYEE, J.

Criminal Misc. Application No. 29058 of 2019
u/s 482 Cr.P.C.

Rajesh Malik & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Pankaj Kumar Gupta, Sri Anoop Trivedi

Counsel for the Opposite Parties:
A.G.A., Sri Ajatshatru Pandey, Sri G.S. Chaturvedi.

A. Criminal Law- Criminal Procedure Code, 1973 – Sections 173(2), 173 (8), 190(1)(b) - Final Report submitted by the prosecution, after conducting investigation u/s 173 (8) of the Code of Criminal Procedure, 1973, can only be considered by the court along with the Police Report / Chargesheet filed u/s 173 (2) of the Cr.Pc, at the stage of framing of Charge.

The investigating agency is empowered to conduct further investigation in any criminal case, according to the need thereof and the only rider applicable upon such authority of investigating agency is that the concerned court should be apprised with the requirement of further investigation.

There is sufficient hiatus between the submission of charge sheet u/s 173(2) Cr.P.C. and the subsequent filing of the report regarding further investigation u/s 173(8) Cr.P.C. The court while deciding upon the point of framing of the charge shall naturally look into the material furnished by prosecution and made available before it which includes the report regarding further investigation u/s 173(8) Cr.P.C. also.

The adjudication on the disputed factual aspects and issues involved in the matter falls within the domain of concerned court below, which may properly evaluate the materials available in case diary as well as the outcome of both the reports submitted u/s 173(2) and 173(8) of Cr.P.C. at the stage of framing of the charge.

Even in the cases where a final report is submitted in favour of accused at the very outset or the cases where the police may submit a charge sheet and again submit a final report on the basis of further investigation made by it, in all such cases if the Magistrate at the stage of taking cognizance itself forms the opinion on the collective consideration of both the reports that the material available constitutes an offence, he can very well take cognizance of the offence u/s 190(1)(b) Cr.P.C., notwithstanding the contrary opinion of the police expressed in the final report. (Para 11,13,15)

Criminal Application rejected. (E-3)

List of Cases cited: -

1. Vinay Tyagi Vs. Irshad Ali @ Deepak & Ors, 2013 (5) SCC 762

2. Dharmatma Singh Vs. Harminder Singh & Ors., 2011 (6) SCC 102

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Supplementary affidavit filed on behalf of applicants as well as power filed today by Shri Ajatshatru Pandey, Advocate on behalf of opposite party no.2 are taken on record.

2. The applicants Rajesh Malik and Randeep Waraich have invoked inherent jurisdiction of this Court u/s 482 of Cr.P.C. for quashing of impugned charge sheet dated 03.9.2018, cognizance order dated 08.10.2018 passed by the Chief Judicial Magistrate, Gautam Budh Nagar as well as entire proceedings in Criminal Case No.2009 of 2019 (State vs. Rajesh Malik and others) arising out of Case Crime No.1201 of 2018, u/s 406, 420, 467, 468, 471 and 34 I.P.C., Police Station-Sector 20 Noida, District-Gautam Budh Nagar.

3. In nutshell the controversy involved in the present matter is that opposite party no.2 Amit Gupta along with Sanjay Rastogi, Paramjit Gandhi and PTC Mouldings Pvt. Ltd. lodged an F.I.R.

dated 22.7.2018 against Rajesh Malik, Randeep Waraich and M/s Cornoustie Management (India) Pvt. Ltd. with the allegations of cheating forgery and fraud and conspiracy by stating that the accused persons have cheated them for an amount of almost Rs.5,36,89,000/- (Five crore thirty six lakh eighty nine thousand only) by dishonestly enticing and selling them (complainants) non-existent plots in Noida. It has been alleged in the F.I.R. that in the year 2011-12, Rajesh Malik and Randeep Waraich represented themselves to be the Director of M/s Cornoustie Management (India) Pvt. Ltd. It was made to appear by these persons that Cornoustie was the sole legal heir of several plots/land in Sectors-96, 97 and 98 in Noida which were being developed by a company known as Unitech Group as a part of its large project known as Unitech Grande. These persons further made to appear that they received these plots from Unitech for valid consideration and were therefore in position to further sell those plots to third parties. It was further made to appear to the complainants that Unitech Hi Tech Developers Ltd. had allotted several plots to Carnoustie including plot Nos.D3, D4, D5, D6 and D7 in Sectors 96, 97 and 98 in Noida, in respect of which the site plans were shown to the complainants by pointing out the location of the plots, on the basis of which the complainants found these plots to be contiguous and well situated. It has also been alleged in the F.I.R. that in order to deceive the complainants, the accused Rajesh Malik and Randeep Waraich made continuous representations to make the complainants believe that they were the sole owners of these plots and would enter into formal documentation to transfer ownership to the successful purchasers. Upon such fraudulent and dishonest representation of facts, the complainants made payments of huge amounts on different dates by way of cheque/RTGS, total of which comes to the tune of Rs.9,14,78,000/-. The F.I.R. further discloses the amount, date and mode of total 13 different payments made in the year 2012 and 2013 through bank transactions. It is further alleged in the F.I.R. that Sanjay Rastogi purchased two plots being D6 and D7 and the seller signed one agreement for plot No.D7 but dillydallied signing of another agreement for plot No.D6. It has been further alleged in the F.I.R. that M/s Cornoustie Management (India) Pvt. Ltd. with a dishonest intention to perpetuate fraud and cause loss to the complainant, executed as many as seven documents in the form of agreement to sale, irrevocable letter of authority, indemnity/undertaking, allotment letter etc. in favour of Amit Gupta and Sanjay Rastogi. It has been further submitted that the complainants have now learnt that the representations and claims of these persons were not only false but were false to the knowledge of Rajesh Malik and Randeep Waraich at the time of making these representations and claims and hence, the object of cheating is clear. It is further alleged in the F.I.R. that these persons began to delay the identification of plots and completing the documentation in favour of complainants on one pretext or other and ultimately refused to complete the allocation process and to give possession of these plots to the representative complainants. It is further alleged that accused persons began stating that they were having talks with Unitech for early release of plots, despite representing themselves as sole owner at the initial stage of negotiations in the year 2011-12. It is further alleged that the complainants apprehended that

there was some collusion with the accused persons and the Unitech Company and as such, when the complainants started asking for refund of their hard earned money along with interest together with compensation, from the accused persons, they started avoiding their calls, and in the year 2017 Rajesh Malik refused to return money and threatened the complainants that he would in turn embroil them and their families into false cases and legal prosecutions. The present F.I.R. dated 22.7.2018 containing the aforesaid allegations was registered as Case Crime no.1201 of 2018 u/s 406, 409, 417, 419, 420, 467, 468, 471, 474, 34 and 120-B I.P.C. at Police Station-Noida, Sector-20, District-Gautam Budh Nagar.

4. The record reveals that the local police conducted investigation of crime in question and after recording statements u/s 161 Cr.P.C. of various persons, supposed to be acquainted with the facts of the case, and after collecting documents/material etc, submitted the charge sheet dated 3.9.2018 against both the applicants Rajesh Malik, Randeep Waraich as well as against M/s Cornoustie Management (India) Pvt. Ltd., upon which the concerned court below took cognizance of the offence vide order dated 08.10.2018 and the criminal case was registered in the court below as Criminal Case No.2009 of 2019 (State vs. Rajesh Malik). There is nothing on record to show as to when summons were issued against the applicants and another co-accused but record reveals that the report dated 25.3.2019 was submitted by the Additional Superintendent of Police, Crime, Bulandshahr before S.S.P., Bulandshahr stating various reasons to conduct further investigation in the matter u/s 173 (8) of Code of Criminal Procedure. The record further reveals that on 25.6.2019, the complainant approached the concerned court below i.e. A.C.J.M.-III, Gautam Budh Nagar seeking issuance of non bailable warrants against the accused persons, upon which the concerned court below observed in the order-sheet dated 25.6.2019 that the accused Rajesh Malik had moved application before the court below to provide charge sheet and case diary for the purposes of further investigation, whereupon appropriate order dated 04.5.2019 was passed. The Court below also observed in the order dated 25.6.2019 that the bailable warrants of Rs.20,000/- were continuing against accused Rajesh Malik and Randeep Waraich and though service report thereof has not been returned but because of the fact that application of the accused Rajesh Malik has already been heard, it is presumed that accused Rajesh Malik had complete knowledge of the proceedings of criminal case, despite which he has not appeared before the court. With such observations, the court of A.C.J.M.-III, Gautam Budh Nagar issued non bailable warrants against accused Rajesh Malik and issued bailable warrants of Rs.20,000/- against accused Randeep Waraich and fixed next date 18.7.2019. The record further reveals that on 5.7.2019 a supplementary report u/s 173(8) of Cr.P.C. was submitted by the Station House officer under instructions of higher authorities which was taken on record and the next date was fixed as 18.7.2019. It is also born out from perusal of record that the opposite party no.2 preferred Criminal Misc. writ Petition No.13732 of 2019 before the Division Bench of this Court against the order of further investigation in the crime in

question, which was dismissed vide order dated 17.7.2019. With such factual backdrop this criminal application has come up before this Court for adjudication upon the reliefs pressed by the applicants.

5. Heard Shri Anoop Trivedi, learned Senior Advocate appearing for applicants, Shri G.S. Chaturvedi, learned Senior Advocate appearing for opposite party no.2 and learned Additional Government Advocate for the State.

6. Main submission raised by applicants' counsel is that though in the initial investigation the charge-sheet was submitted against the applicants but on further investigation the inference drawn by the Investigating Officer was in favour of applicants that no offence against the applicants is made out. This report regarding further investigation has not been considered or taken into account so far by the Magistrate. According to counsel for the applicants, the material collected through further investigation and its resultant report are relevant documents to decide whether cognizance in the matter should have been taken or not, and therefore, the court should have once again reconsidered its decision whereby it had taken cognizance of the matter and should have dropped the proceedings in view of favourable report submitted by the Investigating Officer who conducted further investigation into the case. According to applicants' counsel, if the subsequent further investigation contains material favourable to the accused or if the subsequent Investigating Officer has drawn favourable inference, there is no good reason to continue the criminal proceedings going on against the accused. Further submission is that one company Unitech was given a licence to develop a plotted colony. The layout was sanctioned by the Development Authority in favour of Unitech. Unitech allotted these plots to Carnoustie Management Private Limited company in 2007. According to the agreement executed in favour of the aforesaid company the plots were further transferred to certain persons including the informant/opposite party no.2. This took place in the year 2012 but the possession was not given to the buyers by the Unitech. Multiple persons therefore felt aggrieved by the same and the matter was taken up to the Supreme Court. Certain aggrieved persons who had formed an association had also preferred an application in the Supreme Court. The Hon'ble Supreme Court passed an order on 6.4.2017 which would show that in the Supreme Court, Unitech had given the undertaking that it shall not disturb any of the rights of the members of association. Thus the interim application got disposed of by the Apex Court in view of the undertaking given regarding the protection of the rights of the aggrieved. But later on F.I.R. in this regard was also brought against the applicants' company and applicants, who are the directors of the company. Submission is that therefore the F.I.R. is an overreach and is not tenable and is premature.

7. Learned Senior Counsel appearing for first informant-opposite party no.2 has in rebuttal submitted that so far as the result of the further investigation is concerned, the law in that regard is that after being submitted in the Court the same would form part of the record and as in the present case the charge has not yet been framed the material so collected may be considered

at the stage of framing of the charge. The mere fact that some favourable inference was drawn by the investigating officer in the subsequent further investigation will not efface the material collected earlier on the basis of which the charge-sheet was submitted nor the subsequent report by itself shall preside upon the liquidation of the earlier charge-sheet. The eventual impact and consequence of the material collected subsequently and also the inference drawn by the subsequent Investigating Officer may be duly considered by the Court at appropriate stage during the proceedings and may also be used by the applicants as the law might permit. But it shall not vitiate either the process of taking cognizance in the matter or the proceedings of summoning which has been done on the basis of material which existed on that particular point of time when the cognizance was taken and summons were issued. Senior counsel appearing for the opposite party no.2 has further submitted that the respondents had paid the money to Carnoustie company and not to Unitech company and surprisingly enough subsequent to the said payment of money to the Carnoustie company for the purpose of allotment of plots, Unitech company purchased the shares of Carnoustie on the valuation of Rs.51 crores, despite the fact that initially those shares were valued for a meager amount of Rs.1 lakh only. Submission is that this internal factual aspect speaks loud about an unholy nexus in between Carnoustie company and Unitech Company. Submission is that if opportunity of trial is given, aforesaid facts may be confirmed and substantiated by documents. It was vehemently contended that the opposite party was given the assurance that Carnoustie was in actual possession of the plots and was in a position to hand it over to the opposite party. It was only after having been duped by this misleading assurance that a lot of money was handed over to the Carnoustie. But subsequently, it was found that those plots did not exist as promised and were not identifiable and the assurance in this regard was nothing except a ruse and a rank bluff and therefore not only the offence of cheating is made out but the dishonest intention is apparent on the face of record from the very outset of the transaction. So far as the Supreme Court litigation is concerned, according to Senior Counsel, the opposite party no.2 was never the party in that litigation and was not a member of that association which was party in the Apex Court litigation. It has also been submitted that even the submission raised on behalf of applicants regarding the undertaking given by the Unitech in the said proceeding that took place in Apex Court, would in fact go to lend to a very great extent a kind of recognition to the genuineness to the claim of the opposite party and the same is not at all incompatible with the allegation made by the first informant and shall hardly go to help or exonerate the accused-applicants from their liability or for being hands in gloves with Unitech. Even otherwise aforesaid proceedings referred to by the defence side would relate to the civil rights of the parties involved and would not at all absolve the accused from the criminal liability with regard to the offences which they have committed and with regard to which the charge sheet against them has been submitted in the Court. Deception, fraud, dishonest inducement, dishonest concealment of true facts and thereby causing wrongful loss and making wrongful gains, all these

aspects are writ large from the very outset and the bare perusal of the F.I.R. would reveal the sinister design which actuated the entire criminal transaction, as a result of which the first informant and the other aggrieved persons have suffered huge economic losses and the accused must be tried and punished for the criminal liability which accrues to them. The civil rights and liabilities are decided on the preponderance of probabilities while the criminal charge has to be proved beyond reasonable doubt and the proceedings with regard to both of them can simultaneously go together and are not mutually exclusive to each other. According to counsel this is certainly not a case which may be said to be essentially civil in nature or where the alleged offences are not made out from the F.I.R. or where it may be said that deliberately a criminal complexion has been lent to an otherwise dispute of pure civil nature.

8. Learned A.G.A. while supporting the stand taken by the opposite party No.2, has submitted that such a dispute of factual nature raised by the applicants for the purpose of quashing of charge sheet as well as entire proceeding is not liable to be considered by this Court considering the stage of criminal proceeding at which they are pending and such factual controversy should be left for adjudication by the concerned court below at an appropriate stage of proceeding and as such, no interference is required by this Court.

9. In the light of rival submissions of the parties this Court has the occasion to peruse the record which discloses that there are two different reports of investigation conducted in the crime in question which are part of record of the concerned court below, out of which one report submitted u/s 173(2) Cr.P.C. is against the applicants disclosing commission of offences by them and another report dated 15.6.2019 is of further investigation submitted u/s 173(8) Cr.P.C., which according to the claim of applicants, is in their favour. An extract or a part of the case diary relating to the said report dated 15.6.2019 has been placed before this court by means of supplementary affidavit. Before proceeding further in the matter, it would be appropriate to consider as to what is the position of law with regard to status and scope of reports submitted by the investigating Officer u/s 173(2) and Section 173 (8) of Cr.P.C. In this regard, we may find the procedure provided under the Code of Criminal Procedure, 1973, according to which after completion of regular investigation, if the Investigating Officer comes to the conclusion that certain cognizable offences are made out against some accused persons, he is obliged to prepare a report u/s 173(2) Cr.P.C. and to forward it along with case diary containing the material in support thereof to the concerned Magisterial court having jurisdiction in the matter, upon which the concerned Magisterial court applies its mind and finds out as to whether any offence is made out or not. If the police report so submitted and the material collected by investigation discloses that the offence is made out, the cognizance of such offence is taken u/s 190(1)(b) Cr.P.C. and the proceeding is registered for further course of action. In due course issuance of process follows against the accused persons, who are prima facie found to have committed the offences and who are to be called upon to face the trial. There are other optional modes also

available to the concerned Magesterial court while considering report u/s 173(2) Cr.P.C. but those other modes are not relevant in the present controversy and need not be discussed.

10. On the other hand, Section 173(8) Cr.P.C. provides authority to the Investigating Agency to conduct further investigation in any criminal case, as and when such situation arises and to submit report of such further investigation before the concerned court. For ready reference Section-173(8) of Cr.P.C. is quoted herein below :

*"**173(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)."*

11. There is no dispute with the position of law that on the strength of Section 173(8) of Cr.P.C., the investigating agency is empowered to conduct further investigation in any criminal case, according to the need thereof and the only rider applicable upon such authority of investigating agency is that the concerned court should be apprised with the requirement of further investigation in criminal case and the Investigating Officer should desirably take permission from the concerned court to conduct further investigation. It is needless to give reference to the case laws in this regard, as this position of law is being consistently followed by the Hon'ble Supreme Court as well as this Court. What is material in this regard is the status of both the reports u/s 173(2) and 173(8) of Cr.P.C. as well as the scope and stage of consideration by the concerned court upon such reports. For this purpose, it would be useful to refer the observations made by the Hon'ble Supreme Court in the case of **Vinay Tyagi Versus Irshad Ali @ Deepak & Ors reported in 2013 (5) SCC 762**, wherein the Hon'ble Supreme Court extensively dealt with the term 'further investigation/reinvestigation/fresh investigation/de-novo investigation' and discussed catena of earlier judgements of Hon'ble Supreme Court. Regarding consideration of further report u/s 173(8) of Cr.P.C., the Hon'ble Supreme Court observed as follows :

"41. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three

options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct "further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

42. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. ***If the answer is in the negative, on the basis of these reports, the Court shall discharge an accused in compliance with the provisions of Section 227 of the Code.***

12. In another judgement of Hon'ble Supreme Court in the case of **Dharmatma Singh Versus Harminder Singh & Ors. Reported in 2011 (6) SCC 102** observations similar to Vinay Tyagi's case (supra) were reiterated, which are being usefully quoted herein below:

"15. A reading of provisions of sub-section (2) of Section 173, Cr.P.C. would show that as soon as the investigation is completed, the officer in charge of the police station is required to forward the police report to the Magistrate empowered to take cognizance of the offence stating inter alia whether an offence appears to have been committed and if so, by whom. Sub-section (8) of Section 173 further provides that where upon further investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall also forward to the Magistrate a further report regarding such evidence and the provisions of sub-section (2) of Section 173, Cr.P.C., 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). Thus, the report under sub-section (2) of Section 173 after the initial investigation as well as the further report under sub-section (8) of Section 173 after further investigation constitute "police report" and have to be forwarded to the Magistrate empowered to take cognizance of the offence.

16. It will also be clear from Section 190 (b) of the Cr.P.C. that it is the Magistrate, who has the power to take cognizance of any offence upon a "police report" of such facts which constitute an offence. Thus, when a police report is forwarded to the Magistrate either under sub-section (2) or under sub-section (8) of Section 173, Cr.P.C., it is for the Magistrate to apply his mind to the police report and take a view whether to take cognizance of an offence or not to take cognizance of offence against an accused person.

17. It follows that where the police report forwarded to the Magistrate

under Section 173 (2) of the Cr.P.C. states that a person has committed an offence, but after investigation the further report under Section 173 (8) of the Cr.P.C. states that the person has not committed the offence, it is for the Magistrate to form an opinion whether the facts, set out in the two reports, make out an offence committed by the person. This interpretation has given by this Court in Abhinandan Jha & Ors. v. Dinesh Mishra [AIR 1968 SC 117] to the provisions of Section 173 and Section 190 of the Criminal Procedure Code, 1898, which were the same as in the Criminal Procedure Code, 1973.

18. In Abhinandan Jha (supra), para 15 at page 122 of the AIR this Court observed:

"... The police, after such investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, under Section 190(1)(b), notwithstanding the contrary opinion of the police, expressed in the final report."

.....

.....

20. In the facts of the present case, the police in its report submitted to the Judicial Magistrate, First Class, Ludhiana, on 02.02.2006 had filed two challans, one against the appellant, his father Mohan Singh and Bhupinder Singh stating that they had committed offences under Sections 452, 323, 326, 506 read with Section 34 of the IPC and the other challan against the respondent Nos. 1 and 2 and some others stating that they had committed offences under Sections 342, 323, 324, 148 IPC.

21. Pursuant to permission granted by the learned Magistrate on 27.07.2006 for further investigation, a further report has been made by the Superintendent of Police, City-II, Ludhiana, stating that respondent no.1 for his self-defence had caused injuries to the appellant and others and hence the cross-case against the respondent no.1 is required to be cancelled. This further report has to be forwarded to the learned Magistrate and as has been held by this Court in Abhinandan Jha (supra) and Mrs. Rupan Deol Bajaj (supra) it was for the learned Magistrate to apply judicial mind to the facts stated in the reports submitted under sub-sections (2) and (8) respectively of Section 173, Cr.P.C., and to form an opinion whether to take cognizance or not to take cognizance against the respondent no.1 after considering the objections, if any, of the complainant, namely, the appellant."

13. Now coming to the factual situation of the present case it appears that it is not a case in which the material collected through further investigation or the report based thereupon u/s 173(8) Cr.P.C. was available before the court below at the time when it took cognizance of the offences on the basis of the charge sheet submitted u/s 173(2) Cr.P.C. earlier. The report u/s 173(8) Cr.P.C. has been admittedly submitted in the court subsequently much later. The Court could have adverted its mind only on the material which was made available before it. If the charge sheet and the case diary contained enough material to justify taking of the cognizance and thereupon summoning the accused, there is

absolutely no reason to find fault in the same. The allegations, as have been made against the accused-applicants, have already been set forth earlier in this order and it is not difficult to see that prima-facie offences are well made out against the accused-applicants on the basis of the F.I.R. itself. The act of taking cognizance and summoning the accused upon the material which was furnished before the court does not suffer from any flaw. The submission of the counsel that even if the report of further investigation was submitted at some later point of time subsequently, the court was still obliged to once again sit upon judgement regarding the act of taking cognizance and should have given a relook to its decision regarding the summoning of the accused, does not appear to be a very tenable argument. The statutory course provided in the Criminal Procedure Code has to be followed as has been prescribed. In the circumstances of the case there is hardly any occasion to put the clock back. In fact the Courts dealing with criminal matters have no authority to review or recall the orders of import or substance. It is only Section-362 of Criminal Procedure Code which contemplates such a possibility but the same is confined to a very limited class of circumstances. The act of taking cognizance and summoning the accused and the order in that regard as has been done in the present case does not contain any clerical or arithmetic error on the basis of which the same could have been altered or reviewed. There is sufficient hiatus between the submission of charge sheet u/s 173(2) Cr.P.C. and the subsequent filing of the report regarding further investigation u/s 173(8) Cr.P.C. The stage to frame the charge is yet to be arrived at and the accused shall have all the opportunity of being heard at that stage. The court while deciding upon the point of framing of the charge shall naturally look into the material furnished by prosecution and made available before it which includes the report regarding further investigation u/s 173(8) Cr.P.C. also. Both such reports are now available before the concerned court below and it is needless to observe that the concerned court is obliged to consider both the reports at an appropriate stage of the proceedings of criminal case in question, in accordance with the scheme of Code of Criminal Procedure and there is no reason to apprehend otherwise. It has been observed by Hon'ble Apex Court in paragraph no.42 of its decision given in the case of **Vinay Tyagi (supra) t**hat both these reports shall be read conjointly and shall be adverted to by the court and it shall apply its mind to them in order to determine whether there exists grounds to presume that the accused has committed the offence or not. If the Court would find the answer in negative on the basis of the material, it may proceed to discharge the accused in compliance with the provisions of Section-227 of the Code. It shall be for the court below to look into those aspects and to come to its own independent conclusion. As such, the submissions raised by the applicants' counsel seeking the quashing of proceedings as well as the charge sheet in exercise of inherent jurisdiction merely on the ground of filing of a purportedly favourable further report by investigating agency does not appear to be a sound plea so as to be entertained by this Court. The adjudication on the disputed factual aspects and issues involved in the matter falls within the domain of concerned court below, which may properly evaluate the materials available in case diary as well as the outcome of both the reports

submitted u/s 173(2) and 173(8) of Cr.P.C. at the stage of framing of the charge. This Court while exercising its inherent jurisdiction does not deem it appropriate to step into the shoes of the trial court and usurp that jurisdiction. It shall be a judicial overreach which this Court does not see any reason to indulge into. This Court also does not want to enter into any detailed discussion about the merits of the case and make observations in that regard, lest the same may go to prejudice either side or may go to adversely prejudice the mind of the lower court this way or that way. Suffice it to observe that so far as the criminal proceedings presently going on against the applicants based upon the charge sheet submitted earlier are concerned, they are just the logical legal sequel which followed the act of taking cognizance of the offence and are consequential in nature following the act of thereafter summoning the accused on the basis of material contained in the case diary which was available at that point of time and are perfectly within the four corners of law and there is no good reason to quash the same at this stage.

14. So far as the submission on behalf of applicants regarding the order dated 06.04.2017 passed by the Hon'ble Supreme Court in Civil Appeal Nos.8814-8816 of 2016 is concerned, the factum of membership of opposite party no.2 in the Association which was party in the Apex Court litigation, has been seriously disputed and it is not born out from the available record of the present case as to whether the opposite party no.2 was actually the party in the application filed by the Association of UG Noida Villa Owners through its President Sumer Sarin in the said civil appeal (Annexure No.7 to the paper-book). Likewise the aspect of sanctioning of lay out by the development authority in favour of Unitech company and further allotment of plots to the Cornoustie Management Pvt. Ltd. company are such factual disputes, which cannot be appreciated by this Court for want of complete record of initial investigation as well as that of further investigation and is an issue which is well within the realm of the trial court to go into.

15. Be that as it may, the rival submissions regarding disputed questions of facts are outside the scope of inherent jurisdiction to be exercised by this Court u/s 482 of Cr.P.C., which is to be used so sparingly only in very appropriate cases. The only legal and procedural question in the present matter was regarding the scope of both the reports u/s 173(2) and 173(8) of Cr.P.C. as well as the stage of its consideration and the power of concerned court below in this regard. The said issue does not need further elaboration in view of law laid down by the Hon'ble Supreme Court, as quoted above, according to which it is for the concerned court below to appreciate the same at an appropriate stage of proceedings of criminal case in question. It may not be out of place to mention here at this stage that even in the cases where a final report is submitted in favour of accused at the very outset or the cases where the police may submit a charge sheet and again submit a final report on the basis of further investigation made by it, in all such cases if the Magistrate at the stage of taking cognizance itself forms the opinion on the collective consideration of both the reports that the material available constitutes an offence, he can very well take cognizance of the offence u/s

190(1)(b) Cr.P.C., notwithstanding the contrary opinion of the police expressed in the final report. The law on this point is trite and is no more res integra. The observations made by the Hon'ble Apex Court in the case of **Abhinandan Jha (supra)** have already been quoted in the earlier part of the order and this aspect of law does not need further elaboration and the power of the court below in this regard stands well recognized. The mere filing of a final report or filing of a favourable report to the accused will not obliterate or eradicate the allegations of the F.I.R. or the incriminating material collected in support of it by the Investigating Officer on the basis of which the charge sheet was submitted. It is for the court below to exercise its judicial discretion judiciously in this regard whenever it is called upon to evaluate and appreciate the facts of the case and adjudicate upon the sufficiency or insufficiency of material on the basis of which the cognizance may be taken in a given case or the summoning of the accused may be done or the charges against the accused may be framed in a particular case. The law regarding the required standards of sufficiency of material which may justify the summoning of an accused or the framing of charges in a particular case is also too well settled to be referred to in any great detail and the relevant law as has been laid down by the Hon'ble Apex Court and by this Court in this regard has to be kept in perspective at the appropriate stages or at different stages as they may arrive in a given case.

16. In view of aforesaid discussion, the impugned criminal proceedings do not call for any interference by this Court.

17. The applicants must submit to the jurisdiction of the trial court. If they have not sought their bail so far, they may appear before the court below and do the needful in that regard. If an application of seeking bail is duly moved within a period of five weeks from now, the same shall be decided expeditiously in accordance with law by the court concerned. In the aforesaid period or till the date of appearance of the accused in the court below, whichever is earlier, no coercive measures shall be taken or given effect to.

18. For reasons as discussed above, the prayer contained in this application cannot be allowed. The application in that regard therefore stands dismissed.

19. It is made clear that any observations made in the order must not be construed to have any reflection upon the ultimate merits of the case.

(2019)11ILR A136

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM , J.

Criminal Misc. Application No.32676 of 2019
u/s 482 Cr.P.C.

Aniruddha Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ram Chandra .

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

A. Criminal Law -Criminal Procedure Code, 1973 - Section 482 -The High Court is not to appreciate and analyse factual aspect of case because the same is a question of evidence before trial Court.

Once trial Court has summoned the accused after treating the Protest Petition as a Complaint in which the contention of protest petition has been reiterated by complainant in his statement recorded under Section 200 Cr.P.C., which has further been corroborated by testimony of PW-2 and PW-3 examined under Section 202 Cr.P.C. (Para 5,6,7 ,9)

Criminal Application rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs Gaurishetty Mahesh, JT (2010) (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs St., Rep. by Insptr. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the summoning order dated 24.04.2018, passed by the Civil Judge (J.D.) / Judicial Magistrate, Chandausi, District Sambhal in Complaint Case No. 66 of 2017 (arising out of Case Crime No. 655 of 2016), under Sections 352, 504, 506, 406 I.P.C., Police Station Chandausi, District Sambhal as well as entire proceedings of above mentioned case, pending in the Court of Civil Judge (J.D.) / Judicial Magistrate, Chandausi, District Sambhal.

2. Heard learned counsel for applicant, learned A.G.A. for State and perused the record.

3. Learned counsel for applicant argued that it is a malicious prosecution with false concoction. A case was got registered, in which final report was submitted. Thereafter, protest petition was filed, which was treated as complaint, wherein complainant was examined under Section 200 Cr.P.C. and his witnesses were examined under Section 202 Cr.P.C. Thereafter, summoning order was passed, whereas the facts were not constituting offences, for which applicant was summoned.

4. Learned A.G.A. has vehemently opposed the aforesaid prayer.

5. From the perusal of first information report, lodged as Case Crime No. 655 of 2016, it is apparent that complainant Sanjeev Kumar Varshneya got this case lodged against Aniruddha Sharma for offence punishable under Sections 352, 504, 506, 406 I.P.C. This was investigated and resulted in submission of final report. Notice was issued to complainant, who appeared and filed protest petition. Trial court treated it as complaint case. Thereafter, complainant was examined under Section 200 Cr.P.C. and his witnesses were examined under Section 202 Cr.P.C. Thereafter, summoning order was passed, against which this proceeding has been filed. The very contention of protest petition has been reiterated by complainant in his statement recorded under Section 200 Cr.P.C. This has further been corroborated by testimony of PW-2 and PW-3 examined under Section 202 Cr.P.C. Trial court on the basis of

above evidence passed impugned summoning order.

6. This Court in exercise of inherent jurisdiction under Section 482 Cr.P.C. is not expected to appreciate and analise factual aspect of case because the same is a question of evidence before trial Court. Whatever is there on record is the basis of summoning of Aniruddha Sharma for offence punishable under Sections 352, 504, 506, 406 I.P.C.

7. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

8. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "*To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous*

vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. In view of the aforesaid facts and circumstances, there seems to be no ground for interfering in the aforesaid case.

11. The application is accordingly rejected.

(2019)11ILR A139

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM , J.

Criminal Misc. Application No. 32683 of 2019 (u/s 482 Cr.P.C.)

Smt. Shipra Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the .Applicant :
Sri Rakesh Kumar Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Sandeep Mishra.

A. Criminal Law -Criminal Procedure Code, 1973, Section 482 - Malicious prosecution – Applicants claim - complaint filed by way of a counterblast - Previous institution of another case may be evidence of motive or cause the act complained either by way of commission of offence or in self-defence, by either side. It would be a question of fact to be decided on the strength of evidence to be led at the trial court.

Here the summoning order was passed on the basis of statements recorded under Sections 200 and 202 Cr.P.C. The High Court, in exercise of inherent jurisdiction under Section 482 Cr.P.C., is not to analyse the factual aspect because the same is to be seen by the Trial Court. (Para 6,7,10)

Application u/s 482 dismissed (E-3)

List of cases cited: -

1. St. of A.P Vs Gaurishetty Mahesh, JT (2010) (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid, (2008) 1 SCC 474,

3. Monica Kumar Vs St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR (1989) SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for applicant and learned A.G.A. for State.

2. This application U/S 482 Cr.P.C. has been filed seeking quashing of the entire proceeding including summoning order dated 17.06.2019 in Complaint Case No. 333 of 2019, under Sections 323, 504, 506 I.P.C., Police Station

Expressway Noida, District Gautam Budh Nagar, Diwakar Pratap Singh Versus Shipra Singh, pending before Civil Judge (Senior Division) F.T.C. / A.C.J.M., Gautam Budh Nagar.

3. Learned counsel for applicant argued that applicant Shipra Singh is wife of Diwakar Pratap Singh and there occurred an occurrence, for which first information report was got lodged against Diwakar Pratap Singh and his mother, in which charge sheet was filed. As a counter blast, this complaint was filed with malicious prosecution, wherein complainant Diwakar Pratap Singh has given a false statement under Section 200 Cr.P.C. and his two witnesses were of false contention under Section 202 Cr.P.C. The summoning for offence punishable under Sections 323, 504, 506 I.P.C. was malicious having no evidence for it. Hence, this application with above prayer.

4. Learned counsel for opposite party no. 2 argued that this complaint was filed prior to registration of first information report lodged against Diwakar Pratap Singh and his mother upon report of Shipra Singh on 08.12.2018. The contention was said in complaint and it was reiterated in statement recorded under Section 200 Cr.P.C., which was having full corroboration in the testimony of two witnesses examined under Section 202 Cr.P.C. The trial Magistrate has passed the impugned summoning order well within jurisdiction on the basis of evidence placed on record. Hence, this application be rejected accordingly.

5. Learned A.G.A. vehemently opposed the aforesaid prayer.

6. Having heard learned counsel for both sides and gone through material placed on record, it is apparent that an application under Section 156(3) Cr.P.C. was moved by Diwakar Pratap Singh with contention that he was married with Shipra Singh and a daughter Amishi Singh, aged about eight years, was blessed by this marriage. Marriage was of 15.02.2008. The behaviour of Shipra Singh was torturous towards Diwakar Pratap Singh. She used to abuse very often. He was under wait that things will become normal, but of no avail. Rather she developed illicit relation with a co-worker. Complainant left his home, but she under nefarious design on 24.10.2018 took Rs.45,000/- along with golden and silver ornaments from a Bank locker, being operated jointly. Again on 26.10.2018 cash and jewellery was taken, which was reported to be opened by Shipra Singh on 26.10.2018. Again a threat with abuse was extended through telephonic call on 28.10.2018. Complainant was offensive of future of his daughter, aged about eight years, but Shipra Singh used to beat her very often, which was recorded in C.C.T.V. footage. Shipra Singh hatched conspiracy for killing complainant under assistance of others. A report was made at police station as well as to Senior Superintendent of Police, Gautam Buddh Nagar, but of no avail. Hence, this application under Section 156(3) Cr.P.C. was moved. It was registered as complaint case, wherein complainant was examined under Section 200 Cr.P.C. and his two witnesses were examined under Section 202 Cr.P.C. The very contention of complaint was reiterated and corroborated in those testimony and after perusal of same learned Magistrate passed impugned summoning order for offence

punishable under Sections 323, 504, 506 I.P.C.

7. Previous institution of case by Shipra Singh against Diwakar Pratap Singh and his mother is an evidence of motive or cause either in execution of offence or in defence by either side. The same is a question of evidence and of fact to be seen in trial court. In present case the summoning order is passed on the basis of evidence obtained under Sections 200 and 202 Cr.P.C.

8. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

9. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did

not disclose any offence or was frivolous vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

10. In exercise of inherent jurisdiction under Section 482 Cr.P.C., this Court is not to analise the factual aspect because the same being question of trial and of fact to be seen before trial Court. Hence, in overall appreciation of facts and law, mentioned as above, this application merits its dismissal.

11.The application is accordingly **dismissed.**

11. The application is accordingly dismissed.

(2019)11ILR A142

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM , J.

Criminal Misc. Application No.37366 of 2019 u/s 482 Cr.P.C.

Ram Sahay & Ors ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Munna Prasad Yadav

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

A. Criminal Law -Criminal Procedure Code, 1973 - Section 482 Cr.P.C. - Minute details, involving appreciation of facts and evidence, cannot be looked into in application u/s 482 Cr.P.C., being outside the limits propounded by the Hon'ble Supreme Court. (Para 5,6,8)

Criminal Application rejected (E-3)

List of cases cited: -

1. St. of A.P Vs Gaurishetty Mahesh, JT (2010) (6) SC 588

2. Hamida Vs Rashid, (2008) 1 SCC 474,

3. Monica Kumar Vs St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs St., Rep. Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, AIR (1990) SC 494

6. St. of Bihar Vs Murad Ali Khan, AIR (1989) SC 1

7. Amrawati & anr. Vs St. of U.P., (2005) Cri.L.J 755

8. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) 4 SCC 437

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed by Ram Sahay, Shriram, Nisha Devi, Vandana and Ajay against State of U.P. and Hari Lal Yadav with prayer for quashing entire proceedings of Complaint Case No. 4314 of 2019, Harilal Yadav Vs. Ram Sahay and others, under Sections 323, 504, 452, 379 I.P.C., P.S. Saraimeer, district Azamgarh, pending in court of A.C.J.M, Court No. 12, Azamgarh.

2. Heard learned counsel for the applicants and learned A.G.A. for the State. Perused the records.

3. Learned counsel for applicants argued that it is a false case got registered after lapse of two years for an occurrence for which Case Crime No. 101 of 2015 was got registered on 7.6.2015 for the offences punishable u/s 147, 148, 452, 352, 323, 325, 504 I.P.C. against Harilal, Kalpu Yadav, Shailendra, and three others, wherein investigation resulted in submission of charge sheet and the same is pending. The same occurrence has been complained in the present complaint and general allegations against six accused persons were levelled, but one Ravindra was not summoned and others five applicants have been summoned for the offences punishable u/s 323, 504, 452, 379 I.P.C., whereas this was apparently a counter blast with a view to harass informant and prosecution witnesses of above previously instituted case and those medical documents were of 7.6.2015, whereas medico legal reports of the applicants were of 6.6.2015 i.e. instant medical report. Hence this application be allowed and thereby proceeding of complaint case be quashed.

4. Learned A.G.A. has opposed the application

5. Having heard learned counsel for applicants and learned AGA, it is apparent that the occurrence of 6.6.2015 is undisputed fact. The same occurrence has been complained in the present complaint. Name of accused persons is there in above previously registered F.I.R. Accused persons are complainant in the present case. They too have suffered injuries, which were examined on 7.6.2015. They have moved application before police authority for getting their case registered, but this was not registered. Hence this complaint was filed. The trial Judge has recorded statements of complaint u/s 200 Cr.P.C. as well as of witnesses u/s 202 Cr.P.C. They are in full corroboration with each other having full reiteration of statement of complainant and on the basis of same learned trial Magistrate passed the summoning order. Minute details, being argued, being appreciation of facts and evidence, are not be made in the proceeding u/s 482 Cr.P.C. in exercise of inherent power.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals

rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

7. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. Hence, under above facts and circumstances, there is no ground for this application.

10. Accordingly, the application is rejected.

11. However, in case the applicants surrender before before the court concerned within 30 days from today and apply for bail, it will decide their bail application in wake of the law laid down by this Court in the Full Bench decision of ***Amrawati and another Vs. State of U.P., 2005 Cri.L.J 755*** affirmed by ***Hon'ble Supreme Court in the case of Lal Kamlendra Pratap Singh Vs. State of U.P. (2009) 4 SCC 437.***

12. For a period of 30 days from today, which shall not be extended further in any case, no coercive action shall be taken against the applicants, in the above mentioned case.

(2019)11ILR A145

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM , J.

Criminal Misc. Application No.37372 of 2019
u/s 482 Cr.P.C.

Brajesh Kumar Yadav & Ors.....Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Harish Chandra Mishra.

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

A. Criminal Law -Criminal Procedure Code, 1973, Section 482 – Scope - Where the summoning order is passed on the basis of evidence obtained under Sections 200 and 202 Cr.P.C. there was prima-facie sufficient evidence to pass summoning order. No scope for the High Court to analyse meticulously the evidence placed on record. It is the jurisdiction and domain of trial court.

The statement of complainant recorded u/s 200 Cr.P.C. is in full reiteration of the contents of the complaint. The same is corroborated by the statements recorded u/s 202 Cr.P.C. From very perusal of those statements, prima-facie sufficient evidence exists to pass summoning order, as above.

B. Criminal Procedure Code, 1973, Section 482 – Ground for interference - Previous complaint - against fair price shop dealer may be a motive for either side. This court in exercise of inherent jurisdiction u/s 482 Cr.P.C. is not to analyse meticulously the evidence placed on record. Rather that is jurisdiction and domain of trial court.

C. Criminal Procedure Code, 1973, Section 482 – Ground for interference – malicious complain/counterblast-Previous institution of case may be a motive for either side which is a question of evidence and of fact to be seen in trial court. No ground to interfere.

Application u/s 482 Cr.P.C. rejected. (E-3)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed by applicants Brajesh Kumar Yadav, son of Sarnam Singh Yadav, Sarnam Singh, son of Sarman Yadav and Deepchandra, son of Asha Ram, against State of U.P. and Shambhu Dayal with prayer for quashing entire proceedings of Complaint Case No. 59 of 2017, under Sections 392, 452, 504, 506 I.P.C., P.S. Punchh, district Jhansi, pending in court of Special Judge (D.A.A. Act)/ Additional Sessions Judge, Jhansi, as well as summoning order dated 2.8.2019 passed in above mentioned complaint case.

2. Heard learned counsel for the applicants and learned A.G.A. for the State. Perused the records.

3. Learned counsel for applicants argued that a complaint was made against fair price shop run by complainant- O.P. No. 2, wherein Sub Divisional Magistrate suspended fair price shop of O.P. No. 2. Though, subsequently it was revived and owing to above enmity this false accusation was got lodged against applicants, which was with no truth and learned Trial Judge had summoned applicants for offences, as above. It was mere counter blast by complainant. Hence misuse of process of court. Application be allowed and prayed relief be granted.

4. Learned A.G.A. vehemently opposed the application.

5. Having heard learned counsel for both sides and gone through impugned order as well as material placed on record, it is apparent that a complaint was filed

by Shambhu Dayal before court of Special Judge (D.A.A. Act)/ Additional Sessions Judge, Jhansi, as Complaint Case No. 59 of 2017 against Brijesh Kumar Yadav, Sarnam Singh and Deepchandra, for offences punishable u/s 392, 393, 387, 432, 504, 506 I.P.C., P.S. Punchh, District Jhansi, with this contention that complainant Shambhu Dayal is a fair price shop dealer at village Khilli. Brijesh Kumar Yadav, Sarnam Singh and Deepchandra are bullies of society. They have created terror there at, but no one dare to complain against them. They very often lodge complaint against fair price shop dealer, which were found to be false. On 8.8.2017 at 1.30 P.M. when complainant was busy with his business at his fair price shop, those accused Brijesh Kumar Yadav, Sarnam Singh and Deepchandra came there. They did criminal trespass in the shop and asked for two bags of rice and 50 liters of Kerosene oil. This demand could not be fulfilled without ration card and entry of it in the register. They did assault with complainant and abused with derogative language. They abused him by the name of his caste and extended threat of dire consequences and robbed Rs.10,000/- with other Rs.1000/- lying at counter. Persons of Mohalla Rajesh, Santram, Lakshmi, Sushil etc. came there and intervened then the accused persons ran from the spot while extending threat of dire consequences. Matter was tried to be lodged at police station, but they compelled the complainant to compromise and ultimately it was reported to the S.S.P., Jhansi, but was of no avail. Then this complaint was filed, wherein statement of complainant u/s 200 Cr.P.C. and of his witnesses Santram and Lakshmi Prasad were recorded u/s 202 Cr.P.C. The trial court after hearing learned counsel for complainant passed impugned summoning order, wherein applicants Brijesh Kumar Yadav, Sarnam Singh and Deep Chandra were summoned to face trial for offences punishable u/s 392, 452, 504, 506 I.P.C. vide order dated 2.8.2019. The statement of complainant recorded u/s 200 Cr.P.C. is in full reiteration with contention of complaint. The same is with corroboration by statements recorded u/s 202 Cr.P.C. and from very perusal of those statements, there was prima-facie sufficient evidence to pass summoning order, as above. Accordingly, impugned summoning order has been passed. Previous complaint against fair price shop dealer may be a motive for either side, but this court in exercise of inherent jurisdiction u/s 482 Cr.P.C. is not to analyse meticulously the evidence placed on record. Rather that is jurisdiction and domain of trial court.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an

enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

7. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. Hence, under above facts and circumstances, there is no ground for this application.

10. Accordingly, the application is rejected.

11. However, in case the applicants surrender before before the court concerned within 30 days from today and apply for bail, it will decide their bail application in wake of the law laid down by this Court in the Full Bench decision of ***Amrawati and another Vs. State of U.P., 2005 Cri.L.J 755*** affirmed by Hon'ble Supreme Court in the case of ***Lal Kamlendra Pratap Singh Vs. State of U.P. (2009) 4 SCC 437.***

12. For a period of 30 days from today, which shall not be extended further in any case, no coercive action shall be taken against the applicants, in the above mentioned case.

(2019)11ILR A148

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM , J.

Criminal Misc. Application\ No. 37400 of 2019 u/s 482 Cr.P.C.

Dr. Jaipal Gupta ...Applicant
Versus
State of U.P. & Anr ...Opposite Parties

Counsel for the Applicant:
Sri Sanjeev Kumar Pandey, Sri Vikrant Pandey

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

A. Criminal Law -Code of Criminal Procedure, 1973 – Section 156(3) – Second/subsequent application – maintainability. Dismissal of previous application u/s 156(3) Cr.P.C. for want of prosecution - Not a bar for Second application u/s 156(3) Cr.P.C. moved with same contention.

B. Criminal Law -Code of Criminal Procedure, 1973 – Section 156(3) – Ground - variance in allegations in two applications filed by the same complainant for the same occurrence – It is a question of fact to be seen at the trial. It was not within jurisdiction of revisional court or this court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. to meticulously examine the facts. From the contention made in complaint, there is sufficient accusation for offences on basis of which the applicant has been summoned. (Para 5,8)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs Gaurishetty Mahesh, JT (2010) (6) SC 588

2. Hamida Vs Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P (2008) 8 SCC 781

4. Popular Muthiah Vs St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, AIR (1990) SC 494

6. St. of Bih. Vs Murad Ali Khan, AIR (1989) SC 1

7. Amrawati & anr. Vs St. of U.P., (2005) Cri.L.J 755

8. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) 4 SCC 437

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed by applicant Dr. Jaipal Gupta @ Jai Prakash Gupta against State of U.P. and Dr. Pankaj Sharma with prayer to quash order dated 7.9.2019 passed by Additional District & Sessions Judge, Court No. 15, Meerut, in revision and the summoning order dated 30.4.2016 passed by A.C.J.M.-V, Meerut, as well as entire proceedings of Complaint Case No. 414 of 2016, Dr. Pankaj Sharma Vs. Dr. J. P. Gupta, under Sections 420, 504, 506 I.P.C., pending in court of A.C.J.M.-V, Meerut.

2. Heard learned counsel for the applicant and learned A.G.A. representing the State. Perused the records.

3. Learned counsel for applicant argued that for the same occurrence an application u/s 156(3) Cr.P.C. was filed by complainant and the same was

dismissed for want of prosecution. Again, accusation got filed u/s 156(3) Cr.P.C., wherein above fact of previous application was not disclosed and this application was treated as a complaint, wherein statements of complainant recorded u/s 200 Cr.P.C. and of his witnesses u/s 202 Cr.P.C. were at variance with previous statement made in previously instituted application u/s 156(3) Cr.P.C. and Trial Judge passed summoning order, as above. This was challenged before Court of revision and learned Additional Sessions Judge in the body of order mentioned the objection raised by applicant and the argument advanced by counsel for applicant, but did not give any finding about same and dismissed revision, which was abuse of process of court. Hence this proceeding with above prayer.

4. Learned A.G.A. has opposed the application.

5. Admittedly, previous application u/s 156(3) Cr.P.C. was dismissed for want of prosecution i.e. it was not decided on merit. The application moved u/s 156(3) Cr.P.C. was with prayer for directing Station Officer concerned to register and investigate the case, which remained pending for more than a year and owing to absence of applicant, it was dismissed for want of prosecution. Hence dismisssal of this application was neither on merit nor was at bar for subsequent proceeding. Second application u/s 156(3) Cr.P.C., moved with same contention, was treated as a complaint, wherein complainant was examined u/s 200 Cr.P.C., who reiterated his version and this was supported by two witnesses in their statements recorded u/s 202 Cr.P.C. Though there is variance regarding amount and place of its delivery this is the second application with same but delivery under deceit is there in both applications. Hence it is a question of fact to be seen by trial court at the stage of trial, but it was not within jurisdiction of revisional court or before this court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. as meticulous examination of facts, which are question of facts, are to be made by trial court during trial. But from the contention made in complaint, there is sufficient accusation for offences for which summoning order is there. Same is with full reiteration by statements of complainant and his witnesses recorded u/s 200 and 202 Cr.P.C.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid,**

(2008) 1 SCC 474, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

7. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. Hence, under above facts and circumstances, there is no ground for this application.

10. Accordingly, the application is rejected.

11. However, in case the applicant surrenders before before the court concerned within 30 days from today and applies for bail, it will decide his bail application in wake of the law laid down by this Court in the Full Bench decision of ***Amrawati and another Vs. State of U.P., 2005 Cri.L.J 755*** affirmed by ***Hon'ble Supreme Court in the case of Lal Kamlendra Pratap Singh Vs. State of U.P. (2009) 4 SCC 437.***

12. For a period of 30 days from today, which shall not be extended further in any case, no coercive action shall be taken against the applicant, in the above mentioned case.

(2019)11ILR A150
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.11.2019

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE IRSHAD ALI, J.

Special Appeal No. 93 of 2018

State of U.P. & Ors. ...Appellants
Versus
Mohd. Rizwan & Ors. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Sri Amit Kr. Singh Bhadauriya, Sri Anuj Dayal, sri Onkar Singh Kushwaha, Pt. S. Chandra, Sri Raj Kumar Mishra,Sri Rajeiu Kumar Tripathi, Upendra Nath Mishra

A. Service Law - Education Service - Appointment/Recruitment - Re-evaluation - The qualifying examination is being conducted for the TET i.e. for seeing whether the person is qualified to become a teacher and thereafter to face examination for recruitment as Teacher. The instant examination pertains to the syllabus of Class 1st to 5th and children have an active and inquisitive mind and, thus, the NCTE as well as the Examination Authority have correctly framed the question having difficulty standard and linkages up to the secondary stage in as much as a child cannot be restricted from asking questions, which may be beyond the syllabus prescribed. (Paras 30, 37)

The questions were asked as per the guidelines issued for conducting the TET examination, therefore, Single Judge committed error of law in holding the questions to be out of syllabus. (Para 32) **Single** Judge issued mandamus commanding the Secretary, Examination Regulatory Authority to make fresh evaluation of all the answer sheets of the candidates by deleting 14 questions from total questions of the question papers of UPTET Examination 2017. It was pleased that the questions were outside the syllabus, ambiguous, were not clear, were capable of having two or more answers or for that matter, the question was incapable of being answered. It was also pleaded that regulatory authority while setting the question paper was not empowered to reassign the marks when NCTE guidelines had indicated marks to be assigned to respective segments of the question paper. (Paras 11, 22).

C. Service Law - Education Service - Appointment/Recruitment - The Court should not at all re-evaluate or scrutinize the answer sheets of the candidates. It has no exercise in the matter and academic matter are best left open to academics. The Court should presume the correctness of the key answers and proceed on that assumption. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate. (Paras 33 to 35)

It is clear that the authority conducting the examination may permit re-evaluation of an answer sheet or scrutiny of answer sheet as a matter of right only if a statute, rule or regulation governing the examination permits it. The Court may permit re-evaluation or scrutiny only in rare and exceptional cases

D. Service Law - Education Service - Appointment/Recruitment – Challenge to entire examination - Only because some candidates are disappointed the entire examination process does not deserve to be derailed.

Only 3 questions out 150 questions were found doubtful. The method adopted by the examination regulatory authority by granting 3 marks to all the candidates would be fair and should not cause prejudice to any candidate, as the framing of doubtful questions cannot be attributed to the candidates. (Para 36, 41)

Special Appeal allowed. (E-4)

Precedent followed: -

1. Ran Vijay Singh & ors. Vs St. of U.P. and ors., (2018) 2 SCC 357 (Para 20, 33)

Precedent cited: -

1. Bhanu Pratap Singh Vs St. of Uttarakhand & ors.: Special Appeal No. 886 of (2019) decided on 27.09.2019 (Para 23, 38)

2. Richal & ors. Vs Rajasthan Service Commission & ors., (2018) 8 SCC 81 (Para 23, 38)

Present appeal challenges the judgment and order dated 06.03.2018, passed by Single Judge in WP No. 28222 (S/S) of 2017.

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

1) Heard Sri Raghvendra Singh, learned Advocate General assisted by Sri Abhinav Narayan Trivedi, learned counsel for the appellants-State and Sri Sandeep Dixit, learned Senior Advocate assisted by Sri Amit Kumar Singh Bhadauriya, learned counsel for the respondents.

2) This intra-Court appeal has been filed challenging the judgment and order dated 06.03.2018 passed by learned Single Judge in Writ Petition No.28222 (S/S) of 2017; Mohd. Rizwan and 103 others Vs. State of U.P. and others, whereby the learned Single Judge issued mandamus commanding the Secretary, Examination Regulatory Authority to make fresh evaluation of all the answer sheets of the candidates by deleting 14 questions as stated in paragraph Nos.85 and 86 of the order from total questions of the question papers and the Secretary, Examination Regulatory Authority was directed to declare the result on the basis of above direction, as expeditiously as possible, preferably, within a period of one month and thereafter, the examination of the post of Assistant Teachers Recruitment Examination, 2018 shall be conducted and it was observed that it is needless to direct that till the completion of aforesaid exercise, the examination of the Assistant Teacher Recruitment Examination, 2018 be postponed for further date.

3) Factual matrix of the case is that a writ petition was filed before the learned Single Judge by the Shikshamitras, who were reverted as Assistant Teachers of primary schools run and managed by the Board of Basic Education, U.P. during the period 19.02.2006. The Shikshamitras were appointed and were imparting education to the children of the State in the primary schools run and managed by the Board of Basic Education.

4) After enforcement of Right of Children to Free and Compulsory Education Act, 2009 the National Council for Teacher's Education (NCTE) was declared the academic authority by the Central Government. The NCTE laid down the minimum qualification for a candidate to be appointed as Teacher in Class 1st to Class 8th vide notification issued on 23.08.2010, wherein passing of Teachers Eligibility Test (herein after referred as "TET") to be conducted by the appropriate Government in accordance with the guidelines framed by NCTE was made one of the minimum qualification.

5) Thereafter, NCTE issued detailed guidelines on 11.02.2011 for conducting the TET and structure and contents of examination papers and nature and standard of questions etc. were also provided in the said guideline.

6) The State Government issued a Government Order on 24.12.2014, wherein the detailed guidelines relating to syllabus, structure and contents of

examination papers and standard of question etc. were issued.

7) The petitioners, who were Shikshamitras had been given appointment on the post of Assistant Teacher in the primary schools run by Board of Basic Education, therefore, the absorption was nullified by the Full Bench of this Court vide order dated 12.09.2015 in Writ-A No.34833 of 2014; Anand Kumar Yadav and others Vs. Union of India and others. The judgment passed by the Full Bench of this Court was upheld by Hon'ble Supreme Court vide order dated 25.08.2017, however, the Supreme Court directed to the State Government to provide opportunity of participation of two consecutive recruitments in case the Shikshamitras acquire the requisite qualification of TET.

8) In compliance of the judgment and order passed by the Full Bench of this Court as well as affirmed by Hon'ble Supreme Court, the State Government issued direction to the Examination Regulatory Authority to conduct the U.P. TET, 2017 providing certain conditions of relaxation in age and weightage of experience of the post of Shikshamitras upto 25 marks in the recruitment process. In pursuance thereof, the U.P. TET Examination, was held on 15.10.2017, wherein the respondents-writ petitioners appeared.

9) The answer key was issued, to which objections were invited and a final answer key was, thereafter, issued. The candidates appearing in the said examination raised plea of there being incorrect or confusing questions with incorrect or multiple answers by filing Writ Petition No.28222 (S/S) of 2017 on the following relief:

"Issue a writ, order or direction in the nature of certiorari quashing the answer key of UP-TET Examination 2017 (Paper-1) dated 06.11.2017 issued by Examination Controlling Authority, Uttar Pradesh, Allahabad for the appointment of teachers for Class I to V.

Issue a wri, order or direction in the nature of mandamus to revise the result and to grant grace marks to the petitioners for the questions which were wrong and which were out of syllabus in the Uttar Pradesh Teacher Eligibility Test 2017 conducted by the respondent no. 3

Issue a writ, order or direction in the nature of mandamus to direct the respondent authorities for redressing the grievance of the petitioners by appointing the High Level Expert Committee and giving the opportunity of hearing to the petitioners by fixing date and time before declaration of the examination result i.e 30.11.2017.

Issue a writ, order or direction in the nature of mandamus thereby directing the respondent authorities to delete the questions from the question paper, the questions which were wrong and which were out of syllabus and thereafter declare the result of UP-TET 2017.

Issue a writ, order or direction in the nature of mandamus to stay the declaration of the examination result UP-TET 2017 which shall be declared on 30.11.2017 by the respondent no. 3 till the redressal of the grievance of the petitioners

Issue a writ , order or direction that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

And allow this writ petition with cost."

10) The learned Single Judge decided the issue involved in the writ

petition vide impugned judgment and order dated 06.03.2018, against which, Special Appeal No.93 of 2018 was preferred by the respondent-appellants.

11) Before the learned Single Judge, various grounds were taken by the respondent-appellants contending that the questions were ambiguous in as much as the questions were not clear or the questions were capable of having two or more answers or for that matter, the question was incapable of being answered. A plea was also taken that the questions were out side the syllabus and that once the NCTE guidelines had indicated marks to be assigned to respective segments of the question paper, then the regulatory authority while setting the question paper was not empowered to reassign the said marks to other segments of the question paper.

12) Several other special appeal Nos.86 of 2018, 101 of 2018, 107 of 2018 and 119 of 2018 were filed before this Court, wherein, the Division Bench of this Court vide judgment and order dated 17.04.2018 passed the following judgment and order :

"36. Keeping in view the aforesaid discussion and the report received from the subject experts dated 11.04.2018, Special Appeal No. 93 of 2018 is partly allowed to the following extent:

(i) The 10 questions found by the learned Single Judge to be incorrect and were directed to be deleted, will stand modified to the extent that out of those 10 questions only three questions are found to be incorrect based upon the report of the panel of experts and we direct that the Examination Regulatory Authority shall award grace marks for those three questions containing incorrect answer in the answer key.

(ii) The 4 questions which were found out of syllabus by the learned Single Judge are held to be within syllabus and to that extent the direction issued for deleting those 4 questions will stand modified.

37. In Special Appeal No.101 of 2018, 6 questions which were alleged to be containing wrong answers or wrongly framed, were sent to the experts and their answers have been found to be matching with the answers contained in the final answer key of the Examination Regulatory Authority, as such the said appeal is dismissed.

38. In Special Appeal No.86 of 2018, the relief relating to 4 additional questions being wrongly framed or containing incorrect answers stands rejected in view of the fact that no objections were taken with regard to those 4 questions before the Examination Regulatory Authority at the time when opportunity was given after the declaration of first answer key and further the 5 questions being alleged to be out of syllabus also does not find merit and as such the said appeal is dismissed. Further relief in the said appeal claimed with regard to improper layout of the question paper being not in conformity to the Government Order dated 24.12.2014 and with regard to comprehension also does not find any merit and is rejected.

39. Special Appeal No.107 of 2018 stands disposed of in view of the fact that we have awarded grace marks instead of deleting the questions in view of the relief claimed in the said special appeal.

40. No one has pressed Special Appeal No.119 of 2018 although hearing

continued for a good number of days, as such we dismiss this appeal for want of prosecution. However, we have dealt with all the objections raised regarding questions containing wrong answers, questions themselves are wrong, question being out of syllabus and awarding of grace mark. As such said appeal does not require any further consideration and the same is dismissed. "

13) The judgment and order passed by the Division Bench in the aforesaid special appeals was subject matter of challenge before the Hon'ble Supreme Court by the petitioners of Writ Petition No.28222 (S/S) of 2017 in Civil Appeal No.10876 of 2018, wherein a judgment and order was passed by Hon'ble Supreme Court on 26.10.2018, which is being quoted below:

"Leave granted.

We have heard learned counsel for the parties.

The appellants before us filed a writ petition which was allowed bythe learend Single Judge vide judgment and order dated 06.03.2018.

Feeling aggrieved by the judgment and order passed by the learned Single Judge, the State of U.P. preferred an appeal only in one of the writ petitioners out of a batch of writ petitions.

In the appeal, the State of U.P. did not make the present appellants as respondents although they were vitally affected having succeeded before the learned Single Judge. Despite this, the matter was heard by the Division Bench of the High Court in the absence of the appellants. Vide judgment and order dated 17.04.2018, the order passed by the learned Single Judge was partly set aside.

Since the appellants were vitally affected in the matter, they should have been made parties in the appeal before the Division Bench. In any event, the appellants were entitled to be heard by the Division Bench having succeeded before the learned Single Judge.

Under these circumstances, we set aside the impugned judgment and order passed by the High Court and remand the matter to the Division Bench of the High Court for reconsideration on merits. The appellants will be made party - respondents in the High Court.

Any appointment (s) made will be subject to the outcome of the decision rendered by the Division Bench of the High Court.

The civil appeal stand disposed of."

14) It is, however, made clear that the civil appeal was filed before the Hon'ble Supreme Court in one of the writ petition out of batch of writ petitions.

15) Hon'ble Supreme Court set aside the judgment and order passed by the Division Bench of this Court in Civil Appeal No.10876 of 2018 and remanded the matter to the Division Bench of the High Court for reconsideration on merits by impleading the respondents-appellants before the Hon'ble Supreme Court as respondents with the further rider that any appointment shall be subject to outcome of the decision rendered by the Division Bench of the High Court and disposed of the appeal.

16) In compliance of the order passed by the Hon'ble Supreme Court, the respondents-appellants were impleaded as respondent Nos.106 to 132 in the appeal and the appeal was heard on merits.

17) Learned Advocate General placed before this Court certain material

in the shape of guidelines for conducting TET, 2017 and invited attention of this Court on the relevant portion of the guidelines, which is being quoted below:

Paper I (for classes I to V); No. of MCQs - 150;

Duration of examination: one-and-a-half hours

Structure and Content (All Compulsory)

(i) Child Development and Pedagogy 30 MCQs 30 Marks

(ii) Language I

30 " 30 "

(iii) Language II

30 " 30 "

(iv) Mathematics

30 " 30 "

(v) Environmental Studies

30 " 30 "

Nature and standard of questions

While designing and preparing the questions for Paper I, the examining body shall take the following factors into consideration:

- The test items on Child Development and Pedagogy will focus on educational psychology of teaching and learning relevant to the age group of 6-11 years. They will focus on understanding the characteristics and needs of diverse learners, interaction with learners and the attributes and qualities of a good facilitator of learning.

- The Test items for Language I will focus on the proficiencies related to the medium of instruction, (as chosen from list of prescribed language options in the application form).

- The Language II will be from among the prescribed options other than Language I. A candidate may choose any one language from the available language options and will be required to specify the same in the application form. The test items in Language II will also focus on the elements of language, communication and comprehension abilities.

- The test items in Mathematics and Environmental Studies will focus on the concepts, problem solving abilities and pedagogical understanding of the subjects. In all these subject areas, the test items shall be evenly distributed over different divisions of the syllabus of that subject prescribed for classes I-V by the appropriate Government.

- The questions in the tests for Paper I will be based on the topics of the prescribed syllabus of the State for classes I-V, but their difficulty standard, as well as linkages, could be upto the secondary stage.

Paper II (for classes VI to VIII); No. of MCQs - 150;

Duration of examination : one-and-a-half hours

Structure and Content

(i)Child Development & Padagogy (compulsory) 30 MCQs 30 Marks

(ii) Language I (compulsory) 30 " 30 "

(iii) Language II (compulsory) 30 " 30 "

(iv) (a) For Mathematics and Science teacher : Mathematics and Science - 60 MCQs of 1 mark each

(b) For Social studies teacher : Social Studies - 60 MCQs of 1 mark each

(c) for any other teacher - either 4(a) or 4(b)

While designing and preparing the questions for Paper II, the examining body shall take the following factors into consideration:

- The test items on Child Development and Pedagogy will focus on educational psychology of teaching and learning, relevant to the age group 11-14 years. They will focus on understanding the characteristics, needs and psychology of diverse learners, interaction with learners and the attributes and qualities of a good facilitator of learning.

- The test items for Language I will focus on the proficiency related to the medium of instruction, as chosen from list of prescribed options in the application form.

- The Language II will be a language other than Language I. The person may choose any one language from among the available options and as in the specified list in the application from and attempt questions in the one indicated by the candidate in the application form by him. The Test items in Language II will also focus on the elements of language, communication and comprehension abilities.

- The test items in Mathematics and Science, and Social Studies will focus on the concepts, problem solving abilities and pedagogical understanding of these subjects. The test items of Mathematics and Science will be of 30 marks each. The test shall be evenly distributed over different divisions of the syllabus of that subject as prescribed for classes VI-VIII by the appropriate government.

- The questions in the tests for Paper II will be based on the topics of the prescribed syllabus of the State for classes VI-VIII but their difficulty standard as well as linkages could be upto the senior secondary stage.

8. The question paper shall be billingual - (i) in language(s) as decided by the appropriate Government; and (ii) English language.

18) In the light of the provisions referred herein above, learned Advocate General produced the syllabus introduced from Class 1st to Class 12th and submitted that the questions of the TET are not out of syllabus. The questions were within the syllabus as prescribed under the guidelines. Reference may be made regarding question Nos.121, 133, 140 and 150, from the syllabus introduced by the NCERT from class 1st to secondary level, which is as under:

क्र सं	सीरीज ब्त्त्त्ब् प्रश्न सं॰	प्रश्न	अभ्यर्थियों द्वारा माने जाने वाले उत्तर विकल्प सं॰	विभाग द्वारा दिनांक 22 ण्11 ण्2017 को प्रकाशित उत्तर	विषय विशेषज्ञों द्वारा दिए गए अभिमत के अनुसार सही उत्तर विकल्प सं॰ व आख्या	विषय विशेषज्ञों द्वारा उपलब्ध कराये गए संदर्भित साक्ष्य व लेखक के नाम
01	121	The Constituent Assembly adopted our National Anthem on: (1) 20th January, 1950 (2) 24th January, 1950 (3) 21st May, 1949 (4) 13th	out of syllabus	2	2ण् प्रश्न पर्यावरण के उप विषय विज्ञानं एवं सामाजिक विज्ञानं की व्याप्ति	उ॰ प्र॰ शिक्षक पात्रता परीक्षा हेतु निर्गत मार्गदर्शी सिद्धांत में प्राथमिक स्तर ;कक्षा 1 से 5 द्ध हेतु उल्लिखित पाठ्यक्रम के अंतर्गत .

		November, 1949			और सम्बन्ध के अंतर्गत है	1 उ प्र बेसिक शिक्षा परिषद् द्वारा संचालित कक्षा . 5 की पुस्तक ह्मारा परिवेशह् के पाठ ह्मारा संविधानह् के अनुसार पृष्ठ सं १९२.११३ व 2 कक्षा . 6 की ह्मारा इतिहास और नागरिक जीवनह् के पाठ ह्सभी जान एक हैंह् पृष्ठ सं 94.95
02	133	The number of permanent members of the UN Security Council is: (1) 3 (2) 4 (3) 5 (4) 6	out of syllabus	3	3 प्रश्न पर्यावरण के उप विषय विज्ञानं एवं सामाजिक विज्ञानं की व्याप्ति और सम्बन्ध के अंत	उ प्र शिक्षक पात्रता परीक्षा हेतु निर्गत मार्गदर्शी सिद्धांत में प्राथमिक स्तर ;कक्षा 1 से 5 द्ध हेतु उल्लिखित पाठ्यक्रम के अंतर्गत . उ प्र बेसिक शिक्षा परिषद् द्वारा
						र्गत हैं संचालित कक्षा . 5 की पुस्तक ह्मारा परिवेशह् के पाठ ह्विश्व शांति एवं संयुक्त राष्ट्र संघह् के पृष्ठ सं 119. 120 कक्षा . 8 की पुस्तक ह्मारा इतिहास और नागरिक जीवनह् के पाठ ह्संयुक्त राष्ट्र संघह् के पृष्ठ सं 104. 105
03	140	Fundamental Duties are adopted from the Constitution of which country ? (1) Germany (2) United Kingdom (3) USA (4) USSR	1, out of syllabus	4	4, प्रश्न पर्यावरण के उप विषय विज्ञानं एवं सामाजिक विज्ञान की व्याप्ति और सम्बन्ध के अंतर्गत	उ प्र शिक्षक पात्रता परीक्षा हेतु निर्गत मार्गदर्शी सिद्धांत में प्राथमिक स्तर ;कक्षा 1 से 5 द्ध हेतु उल्लिखित पाठ्यक्रम के अंतर्गत . उ प्र बेसिक शिक्षा परिषद् द्वारा संचालित

					हैं	कक्षा 7 की पुस्तक ‘हमारा इतिहास और नागरिक जीवन’ के पाठ ‘हमारा संविधान’ के पृष्ठ सं॰ 108 के अनुसार माध्यमिक शिक्षा परिषद् के पाठ्यक्र मानुसार कक्षा 11 की माध्यमिक नागरिक शास्त्र पुस्तक के पृष्ठ 172 व 185 के अनुसार
04	150	The Head Office of the International Court of Justice is situated in : (1) Geneva (2) The Hague (3) New York (4) Paris	out of syllabus	2	2 प्रश्न पर्यावरण के उपविषय विज्ञानं एवं सामाजिक विज्ञान की व्याप्ति और सम्बन्ध के अंत	उ॰ प्र॰ शिक्षक पात्रता परीक्षा हेतु निर्गत मार्गदर्शी सिद्धांत में प्राथमिक स्तर ,कक्षा 1 से 5 ‘ब’ हेतु उल्लिखित पाठ्यक्रम के अंतर्गत . उ॰ प्र॰ बेसिक शिक्षा परिषद् द्वारा संचालित कक्षा 5 की पुस्तक ‘हमारा परिवेश’ के पाठ ‘विश्व शांति एवं संयुक्त राष्ट्र संघ’ के पृष्ठ सं॰ 119. 120 एवं कक्षा 8 की पुस्तक ‘हमारा इतिहास और नागरिक जीवन’ के पाठ ‘संयुक्त राष्ट्र संघ’ के पेज 105 के अनुसार

19) In view of the aforesaid, his submission is that the learned Single Judge holding the question Nos.121, 133, 140 and 150 to be out of syllabus is erroneous in nature and without taking into consideration the material brought before learned Single Judge at the time of submission made in the writ petition.

20) His next submission is that the learned Single Judge has also erred in law in passing the judgment and order holding himself to be expert on the subject matter ignoring the judgment passed by Hon'ble Supreme Court in the case of **Ran Vijay Singh and others Vs. State of U.P. and others; 2018 (2) SCC 357.**

21) Per contra, Sri Sandeep Dixit, learned Senior Advocate for the respondents submitted that the learned Single Judge has committed no error in law in passing the judgment and order dated 06.03.2018. He further submitted that question Nos.121, 133, 140 and 150 cannot be questioned from the syllabus of Environmental Studies and on the basis of information received from the National Council for Education Research and Training (NCERT), he submitted that question Nos.121, 1331, 140 and 150 may be part of the Political Science, therefore, his submission is that the argument advanced by learned Advocate General is not acceptable on the point addressed by him.

22) Sri Sandeep Dixit, learned Senior Advocate for the respondents further submitted that in accordance with the provisions of sub Section (1) of Section 23 of Right of Children to Free and Compulsory Education Act, 2009, the NCTE has laid down minimum qualification for a person to be eligible for appointment as teacher in Class 1st to Class 8th.

23) He further submitted that procedure for selection of Assistant Teachers in primary schools is regulated by the U.P. Basic Education (Teachers) Service Rules, 1981 and vide 20th amendment dated 09.11.2017 in Rule 8 along with TET, Assistant Teachers Recruitment Examination has been added. In support of his submission, he placed reliance upon certain judgments, which are as under:

a) Bhanu Pratap Singh Vs. State of Uttarakhand and others; Special Appeal No.886 of 2019 decided on 27.09.2019.

b) Richal and others Vs. Rajasthan Service Commission and others; (2018) 8 SCC 81.

24) We have considered the submissions advanced by learned counsel for the parties and the record placed along with the appeal, counter affidavit and supplementary counter affidavit in as much as the judgments relied upon by learned counsel for the parties and the material placed by learned Advocate General and Sri Sandeep Dixit, learned Senior Advocate and the guidelines issued by NCERT showing the questions to be of political science.

25) In regard to the submission of learned counsel for the respondents that environmental studies was limited syallabus confined to family and friends, food, shelter, water, travel, things. Questions pertaining to adoption of National Anthem by the Constitution Assembly, the number of permanent members of UN Security Council, Fundamental duties etc. would not fall in the syllabus of Environmental Studies, we have considered the material and guidelines placed before this Court.

26) On its perusal, it is established that the questions fall in part V pertaining to paper of environmental studies. From perusal of the same, it is also reflected that the test for first paper will be based on topics of the prescribed syllabus for Class 1st to Class 5th, but their difficulty standard and linkages up to secondary stage. On examination of the syllabus produced we found that these questions are of Environmental Studies, thus, the submission advanced by learned counsel for the respondents and the finding returned by learned Single Judge that

these questions are out of syllabus are erroneous in nature and are not acceptable in law.

27) On perusal, we find and what clearly comes out is that the prescribed book for the syllabus of "पर्यावरण अध्ययनष includes "विज्ञान और समाजिक विज्ञान की वियाप्ती और संबंध" for which the book prescribed is "हमारा परिवेश". In case the difficulty level up to the secondary level is seen, then it clearly comes out that answers pertaining to National Anthem, Security Council, International Court of Justice and Fundamental Duties i.e those four questions which were held to be outside the syllabus are all questions for which the difficulty standard and linkages can easily be ascertained and seen up to the secondary stage from the books themselves.

28) Keeping this view point into consideration and in order to have a broader perspective, this Court has gone through the definition of "हमारा परिवेश" the prescribed book for Class-Vth. As per dictionary meaning the word "परिवेश translates to "Environment" or "Surroundings" as per Google. The meaning of the word " परिवेशण" as per Oxford Hindi-English Dictionary, is " Surrounding; Enclosing". The New Lexicon Webseter's Dictionary defines Environment as " Surroundings". Likewise the Illustrated Oxford Dictionary defines the word Environment as " The totality of the physical conditions on the Earth or a part of it". As per the source-:
http://mhrd.gov.in/sites/upload_files/mhrd /files/Learning_outcomesPdf Pages-88,86,97,98,99, uploaded by NCERT the learning outcomes in Environmental Studies at the primary stage has been introduced for the purpose exposing children to the real situations in their surrounding to help them connect, be aware of, appreciate and be sensitised towards the prevailing environmental issues (natural, physical, social and cultural). It also indicates that the Environmental Studies not only helps children to get acquainted with their own environment but it also strengthens their bond with it.

29) Further, as the issue of certain questions being out of syllabus has been raised that once the paper was of Environmental Studies, anything not related to the Environment Studies in its strict sense could not have been asked by the paper setter.

30) Here, we have to see that the qualifying examination is being conducted for the Teacher Eligibility Test (TET) i.e for seeing whether the person is qualified to become a teacher and thereafter to face examination for recruitment as Teacher. The instant examination pertains to the syllabus of Class Ist to Vth and children have an active and inquisitive mind and, thus, in our opinion the NCTE as well as the Examination Authority have correctly framed the question having difficulty standard and linkages up to the secondary stage in as much as a child cannot be restricted from asking questions, which may be beyond the syllabus prescribed.

31) The material produced by Sri Sandeep Dixit, learned Senior Advocate in the shape of NCERT guidelines reflects that these questions belong to Political Science is not disputed. It is indicated in the syllabus of Class 1st to Class 5th, and permitted to be considered upon secondary level by adding it in the syllabus with the specific stipulation in

the guidelines that the question can be asked from the environmental studies.

32) Upon careful examination of the prescribed books from class 1st to secondary level, it is evident that the questions were asked as per guidelines issued for conducting the TET examination, therefore, we are of the view that learned Single Judge has committed manifest error of law in holding the questions to be out of syllabus.

33) Learned Advocate General assailing the judgment of the learned Single Judge placed heavy reliance upon the judgment of Hon'ble Supreme Court in the case of **Ran Vijay Singh (Supra)** and submitted that learned Single Judge has committed patent error of law acting himself to be subject expert. It has been also submitted that learned Single Judge did not himself record any independent finding about any fault or block in the questions based on material placed and had proceeded to hold the questions to be incorrect or out of syllabus on the basis of submission advanced by learned Counsel for the petitioners. Relevant portion of the judgment relied upon by learned Advocate General in the case of **Ran Vijay Singh (Supra)** is being quoted herein below:

"29. In appeal, this Court set aside the decision of the High Court and reiterating the view already expressed by this Court from time to time and allowing the appeal of the CBSE it was held: (SCC p. 526, paras 9-11)

"9. We find that a three-Judge Bench of this Court in Pramod Kumar Srivastava v. Bihar Public Service Commission has clearly held relying on Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth that in the absence of any provision for the re-evaluation of answer books in the relevant rules, no candidate in an examination has any right to claim or ask for re-evaluation of his marks. The decision in Pramod Kumar Srivastava v. Bihar Public Service Commission was followed by another three-Judge Bench of this Court in Board of Secondary Education v. Pravas Ranjan Panda in which the direction of the High Court for re- evaluation of answer books of all the examinees securing 90% or above marks was held to be unsustainable in law because the regulations of the Board of Secondary Education, Orissa, which conducted the examination, did not make any provision for re- evaluation of answer books in the rules.

10. In the present case, the bye-laws of the All India Pre-Medical/Pre-Dental Entrance Examination, 2007 conducted by the CBSE did not provide for re-examination or re-evaluation of answer sheets. Hence, the appellants could not have allowed such re-examination or re-evaluation on the representation of Respondent 1 and accordingly rejected the representation of Respondent 1 for re-examination/re-evaluation of her answer sheets.....

11. In our considered opinion, neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to Respondent 1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters. ....."

30. The law on the subject is therefore, quite clear and we only propose

to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate - it has no expertise in the matter and academic matters are best left to academics;

30.4. The Court should presume the correctness of the key answers and proceed on that assumption; and

*30.5. In the event of a d*oubt, the benefit should go to the examination authority rather than to the candidate. "

34) On perusal of the paragraphs referred herein above, it is clear that if a statute, rule or regulation governing the examination permits the re-evaluation of an answer sheet or scrutiny of answer sheet as a matter of right, then the authority conducting the examination may permit it, if statute, rule or regulation governing the examination does not permit re-evaluation or scrutiny of an answer sheet, then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly without any inferential process of reasoning or by a process of rationalization and only in rare and exceptional cases that material error has been committed.

35) The Court should not at all re-evaluate or scrutinize the answer sheets of the candidates it has no exercise in the matter and academic matter are best left open to academics. The Court should presume the correctness of key answers and proceed on that assumption. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

36) It has further been reflected that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. Only because some candidates are disappointed or dis-satisfied or perceived, some injustice having been caused to them, the entire examination process does not deserve to be derailed. It has also been recorded that inference by the Courts in the result of examination, the examination exercise concludes with an air of uncertainty.

37) Once a Teacher is recruited for the purpose of teaching, it is expected that he would be having a wider perspective so far as the subject being taught is concerned and obviously the teacher cannot be allowed to put down or restrict the questioning of a child, which is beyond syllabus.

38) Sri Sandeep Dixit, learned Senior Advocate for the respondents submitted that primafacie learned Single Judge found that there are discrepancies in evaluation of answer sheets and there are two or three answers of the correct answers. In support of submission

advanced and to justify the order passed by learned Single Judge, he placed reliance upon following judgments:

a) Bhanu Pratap Singh Vs. State of Uttarakhand and others (Supra):

"9. In an intra-court appeal, the Division Bench exercises the very same jurisdiction which the learned Single Judge exercises under Article 226 of the Constitution of India. As the learned Single Judge is not a court subordinate, interference by a Division Bench, in an intra-court appeal, would be justified only if the order under appeal suffers from a patent illegality. Even if two views are possible, and the view taken by the learned Single Judge is a possible view, the Division Bench would still not intervene, even if it is satisfied that the other view, canvassed before it by the appellant, is more attractive. It is only if the view taken by the learned Single Judge is not even a possible view, or it suffers from a patent illegality, would interference be justified. It is evident from a bare reading of the Writ affidavit that the order of regularization dated 31.05.2012 has been subjected to challenge after more than seven years in the year 2019. It cannot, therefore, be said that the learned Single Judge has committed a patent illegality in non-suiting the appellant-writ petitioner on the ground of delay and laches."

b) Richal and others Vs. Rajasthan Service Commission and others (Supra):

"20.Learned counsel for the appellants have also pointed out several other questions in paper No.1 which according to the learned counsel for the appellants have not been correctly answered by the Expert Committee. We have considered few more questions as pointed out and perused the answers given by the Expert Committee and we are of the view that no error can be found with the answers of the Expert Committee with regard to three more questions which have been pointed out before us. The Expert Committee, constituted to validation of answer key, has gone through every objection raised by the appellants and has satisfactorily answered the same. The Commission has also accepted the Report of the Expert Committee and has proceeded to revised the result of 311 appellants before us. We, thus, are of the view that Report of the Expert Committee which has been accepted by the Commission need to be implemented.

21. One of the submissions raised by the appellants is that marks of deleted questions ought not to have been redistributed in other questions. It is submitted that either all the candidates should have been given equal marks for all the deleted questions or marks ought to have been given only to those candidates who attempted those questions.

22. The questions having been deleted from the answers, the question paper has to be treated as containing the question less the deleted questions. Redistribution of marks with regard to deleted questions cannot be said to be arbitrary or irrational. The Commission has adopted a uniform method to deal with all the candidates looking to the number of the candidates. We are of the view that all the candidates have been benefited by the redistributed of marks in accordance with the number of correct answers which have been given by them. We, thus, do not find any fault with redistribution of marks of the deleted

marks. The High Court has rightly approved the said methodology. "

39) Earlier Division Bench of this Court vide order dated 03.04.2018 sent 16 disputed questions for opinion of respective subject experts on the basis of consensus arrived at amongst all learned counsel for the contesting parties. The questions sent to the subject experts are being reproduced below:

"PART - (I)
CHILD DEVELOPMENT AND PEDAGOGY

(1.) Q. No. 16 (Paper Series-C)
Who described different types of personality based on glands?

(I) Cretsthmer
(II) Jung
(III) Cannon
(IV) Spranger

(2.) Q.No.18 (Paper Series-C)
The tendency of feeling of revolt is concerned with which of the following ages?

(I) Childhood
(II) Infancy
(III) Early Adolscence
(IV) Middle Adolscence

(3.) Q.No.26 (Paper Series-C)
Brain storming model of teaching is used to improve which of the following?

(I) Understanding
(II) Application
(III) Creativity
(IV) Problem solving

(4.) Q.No.1 (Paper Series-C).
Which of the following is not the cause of plateau of learning?

(I) Limit of Motivation
(II) Non-Cooperation of School
(III) Physiological Limit
(IV) Limit of knowledge

(5.) Q.No.5 (Paper Series-C)
Factors affecting the social development of children are?

(I) Economic elements
(II) Social Environment elements
(III) Physical elements
(IV) Hereditary elements

PART- (II)
LANGUAGE - I HINDI

(1.) Q.No. 32 (Paper Series-C)
हिन्दी भाषा में कितनी बोलियाँ हैं?

(I) 15
(II) 25
(III) 18
(IV) 22

(2.) Q.No.39 (Paper Series-C)
निम्नलिखित में से कौन सी व्याकरण और वर्तनीय से शुद्व भाषा कहलाती है?

(I) साहित्यिक भाषा
(II) प्रान्जल भाषा
(III) व्याकरणिक भाषा
(IV) मानक भाषा

PART - (III)
LANGUAGE - II, SANSKRIT

(1.) Q.No. 61 (Paper Series-C)

"पितृ" शब्द का सम्बोधन एक वचन रूप होगा?

(I) हे पितृ
(II) हे पिता
(III) हे पितः
(IV) हे पित्रः

(2.) Q.No. 80 (Paper Series-C)
"दा" धातु किस गण की छे?
(I) भ्वादिगण
(II) अदादिगण
(III) तनादिगण
(IV) जुहोव्यादिगण

(3.) Q.No.75 (Paper Series-C)
'शिशुः मोदकाव्य रोदित' उदाहरण है?

(I) स्प्रहेरीप्सितः का
(II) तादर्थ्ये चतुर्थी वाच्य का
(III) रूच्यर्थानां प्रीयमाणः का
(IV) हितयोगे च का

(4.) Q.No.79 (Paper Series-C)
क्ष मिलकर बना है।

(I) क् और ष् से
(II) क् और छ् से
(III) च् और छ् से
(IV) च् और श् से

(5.) Q.No.86 (Paper Series-C)
नयनम् में प्रयुक्त प्रकृति एवं प्रत्यय है।

(I) नम् + ल्यूट्
(II) नी + ल्यूट्
(III) ने + ल्यूट्
(IV) नयन + ल्यूट्

PART - (V)
ENVIRONMENTAL STUDIES

(1.) Q.No. 123 (Paper Series-C)

Which of the following ultra violet rays is more dangerous?

(I) UV-A
(II) UV-B
(III) UV-C
(IV) None of the above

(2.) Q.No.126 (Paper Series-C)
WWF stands for?
(I) World Wide Fund
(II) World War Fund
(III) World Wildlife Fund
(IV) World Watch Fund

(3.) Q.No.131 (Paper Series-C)
In a Food chain of Grassland Ecosystem, the top consumers are?

(I) Herbivorous
(II) Carnivorous
(III) Bacteria
(IV) Either Carnivore or Herbivorous

(4.) Q.No.146 (Paper Series-C)

During the light phase of Photosynthesis, ..., is oxidized and .... is reduced?

(I) Water, NADP
(II) NADPH2, CO2
(III) CO2, Water
(IV) CO2, NADPH2"

40) A report of the subject experts was placed before the earlier Division Bench, wherein vide order dated 11.04.2018, this Court has examined the report in regard to 16 questions referred to the subject experts. Out of 16 questions, 3 questions were having wrong answers, as per key answers indicated by the regulatory authority and on the assurance of learned Advocate General,

grace marks of question Nos.16, 18 and 131 were given on the agreement with the learned counsel for the parties.

41) In regard to the questions, which were directed to be examined by subject experts under the order of this Court after the report submitted is on record. We have perused the same, which reflects that only three questions out of total 150 questions were found doubtful. Consequently, the method adopted by the examination regulatory authority by granting three marks to all the candidates would be fair and should not cause prejudice to any candidate, as the framing of doubtful questions cannot be attributed to the candidates. Moreover, the TET examination being a qualifying examination, in case more number of candidates qualify, the same would certainly result in increasing the level of competitiveness rom amongst the candidates appearing for the examination which would ultimately result in the best amongst the best being selected in order to teach the young and impressionable minds of children.

42) We also perused the report submitted by the subject experts on 11.04.2018, which reveals that three questions were found to be doubtful having different answers, therefore, we are with the agreement of the report submitted by the subject experts being based on concensus of the learned advocates appearing for the parties.

43) In view of the above, the special appeal is liable to be allowed.

44) Accordingly, the judgment and order passed by learned Single Judge dated 06.03.2018 is hereby set aside. The special appeal succeeds and is allowed.

45) However, the Examination Regulatory Authority is directed to treat four questions to be within the syllabus and award marks accordingly.

46) It is further directed to award marks against 13 questions treating to have correct answers and grace marks for three questions containing incorrect answers in the answer key.

47) Accordingly, the Secretary, Examination Regulatory Authority is directed to declare the result within a period of two months from the date of production of a certified copy of this order and to conduct the Assistant Teachers Recruitment Examination within a period of two months, thereafter.

(2019)11ILR A167

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE SUNEET KUMAR , J.

Writ A No.10116 of 2018

Suresh Chandra Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vineet Kumar Singh.

Counsel for the Respondents:
C.S.C.

A. Service Law- Regularization - Fundamental Rules: Rule 56; Uttar Pradesh Collection Amins Service Rules, 1974 - Temporary Seasonal Collection Amin is entitled to post retiral benefits.

A temporary employee appointed on the regular establishment of the Government is entitled to pension under Fundamental Rule 56. (Para 14)

B. Words & Phrases – Interpretation - "regular service" - the word "regular service" refers to nature of service rendered.

It has not been used in the Government order anonymous to substantive service. The word "regular service" has not been used as specifying the capacity or status of its holder but to specify the nature of service rendered. To fall into the domain of "regular service" the service of a temporary employee should be in regular manner, methodically, in due order. (Para 9)

C. Service - Substantive appointment is not a condition precedent for the entitlement of pensionary benefit - The appointment has to be a regular appointment on the pensionable establishment of the Government to earn pension. (Para 17)

Petition allowed (E-4)

Precedent followed: -

1. Hari Shankar Asopa Vs St. of U.P. & anr. (1981) 1 UPLBEC 501 (Para 6)

2. Shakuntala @ Brahmo Devi (Smt.) Vs Director of Pension, (2002) 2 UPLBEC 2521 (Para 8)

3. Yashwant Hari Katakkar Vs U.O.I. & ors. (1996) 7 SCC 113 (Para 11)

4. A.P. Srivastava Vs U.O.I. & ors. (1995) 3 UPLBEC 1842 (Supplement) (Para 12)

5. Ram Pratap Vs St. of U.P., (2006) 4 ADJ 709 (Para 12)

6. Babu Singh Vs St. of U.P., (2006) 8 ADJ 371 (Para 12)

7. Kedar Ram -I Vs St. of U.P., (2008) ILR (All) 659 (Para 12)

8. Ram Sajiwan Maurya Vs St. of U.P. & ors. WP No. 3031 (S/S) of 2004 (decided on 12 August 2009) (Para 12)

9. Kanta Devi Vs St. of U.P., (2009) 10 ADJ 18 (Para 12)

10. Kishan Singh Vs St. of U.P. (2009) 9 ADJ 516 (Para 12)

11. Awadh Bihari Shukla Vs St. of U.P., (2015) 6 ADJ 186 (Para 12)

12. St. of U.P. & ors. Vs Mahendra Chaubey, (2018) 9 ADJ 829 (Para 12)

13. Prem Singh Vs St. of U.P., (2019) LawSuit (SC) 1557 (Para 15, 18)

Precedent referred:-

1. B.O.R. & ors. Vs Prasidh Narain Upadhyay, [(2006) 1 ESC 611 (All)(DB) (Para 10)]

Present petition challenges orders dated 07.03.2018 and 25.05.2012, passed by District Magistrate, Ballia and Up-Ziladhikari, Ballia respectively.

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

1. Heard Sri Vineet Kumar Singh, learned counsel for the petitioner and learned Standing Counsel for the State.

2. Petitioner came to be appointed temporary Seasonal Collection Amin on 7 February 1978, in pay scale 200-320 and thereafter, was granted regular pay scale of Collection Amin from 1982, until his retirement on attaining the age of superannuation on 31 July 2010. Petitioner was granted increments, bonus, leave encashment and income tax was regularly deducted from his salary. The pay scale was revised from time to time. During service, petitioner filed several petitions seeking regularization under 35% quota provided under the Uttar Pradesh Collection Amins Service Rules,

1974 (for short "the Rules 1974"). The petition being Writ- A No.20531 of 2010 came to be disposed of on 24 November 2014, directing the Collector, Ballia, to consider the claim of the petitioner for regularization on the post of Collection Amin under the Rules, 1974. The District Magistrate, Ballia, vide order dated 4 April 2015, rejected the claim of the petitioner on the ground that he was not found suitable. The petitioner immediately after retirement filed a petition being Writ-A No.75928 of 2011, claiming pension alongwith interest. The petition came to be disposed of on 27 November 2017, directing the District Magistrate, Ballia, to consider the claim of the petitioner for post retiral dues including pension.

3. The petition assailing the order dated 4 April 2015, passed by the District Magistrate, Ballia, rejecting the claim of the petitioner for regularization and the petition being Writ-A No.31488 of 2015, came to be disposed of in terms of the aforesaid order dated 27 November 2017. Pursuant to the directions of this Court, petitioner submitted a comprehensive representation for arrears of pension, retiral dues and assailed the order rejecting the claim of the petitioner for regularization.

4. By the impugned order dated 7 march 2018, the District Magistrate, Ballia, declined to grant post retiral benefits, as well as, pension on the ground that petitioner is not entitled under the Rules, 1974, for the pensionery benefits after retirement from service.

5. It is urged that by the learned counsel for the petitioner that the petitioner came to be appointed in 1978 and retired on 31 July 2010, having rendered service for three decades as temporary employee appointed against a post, therefore, is entitled to pension.

6. The Division Bench of this Court in **Hari Shankar Asopa Versus State of U.P. and another1,** was considering as to whether a temporary government servant appointed against substantive post and continued as lecturer, reader and professor of surgery is entitled to retiring pension upon seeking to retire voluntarily. The Court upon considering the Articles 465 and 465A of the Civil Service Regulations read with Financial Hand Book Volume-II Part 2 to 4 made the following observation:

"16. The requirement of employment being substantive and permanent, which is one of the three basis constituents of "qualifying service', envisaged in Articles 465 and 465-A has ceased to be sine qua non for earning a retiring pension by service under the Government of Uttar Pradesh after 7th June, 1975 with effect from which date the Uttar Pradesh Fundamental Rule 56 (amendment and Validation) Act, 1975 U.P. Act No. 24 of 1975), amending Rule 56 of the Rules and rescinding Articles 465 and 465-A of the Regulations, has been enforced. Now the source for attaining the right to retiring pension in R. 56.....

Clause (e) of Rule 56 unequivocally recognises, 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 Cl. (a) or Cl. (b). or who is required to retire, or who is allowed to. Retire under Cl. (c) of R. 56, becomes entitled for a retiring pension, provided, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

7. The Court accordingly held that person appointed temporarily against a substantive vacancy is entitled to retiring pension in view of Rule 56 of the Fundamental Rules.

8. In **Shakuntala @ Brahmo Devi (Smt.) Versus Director of Pension2,** the learned Single Judge of this Court was called upon to consider whether a temporary government servant rendering 34 years of service upon being compulsory retired is entitled to pensionary benefit. While deciding the issue the Government Order dated 1 July 1989, provided that government servants not rendering ten years of regular service are not entitled for pensionary benefits. The Court taking note of the provisions of Articles 361, 424, 465 of the Civil Service Regulations and Fundamental Rule 56 observed as follows:

"10.....By Government order dated 1.7.1989, it was provided that temporary Government servants who have rendered ten years regular service are also entitled for the retirement benefits. The aforesaid Government order was issued with intent to extend the pensionary benefits to temporary Government servants, which is clear from the first paragraph of the Government order. Paragraph 2 of the Government order further provides that those temporary Government servants who have completed minimum ten years regular service on the date of retirement/superannuation or who have been declared invalid by the appointing authority will be entitled to the superannuation/invalid pension, gratuity, family pension as admissible to a permanent employee. Paragraph 3 further provides that this provision will also be applicable in those cases where permission has been granted for voluntary retirement in accordance with the fundamental Rule 56. The Government order does not specifically provide that the persons who are compulsorily retired will not be given the benefit.....

11..... Thus, the intendment of Rule 56 (e) is to provide retirement pension to every Government servant who retires or is required to retire under Rule 56. Thus the intendment of statutory Rule 56 (e) is to extend benefit of retiring pension to both category of persons, i.e., persons compulsory retired or persons voluntarily retired. From the above intendment of rule, it is clear that no distinction or discrimination has been maintained with regard to payment of retiring pension to persons voluntarily retired or compulsorily retired. Thus, by Government order dated 1.7.1989 the temporary Government servant compulsorily retired cannot be excluded from benefits of retiring pension. When the statutory Rule, i.e., 56 (e) does not maintain any distinction with regard to payment of retiring pension to persons compulsorily retired and voluntarily retired, no such classification can be created by a Government order, which is an executive order. The object of the Government order as noted above was to extend pensionary benefits to temporary

Government servants who have rendered ten years regular service. Thus, the persons compulsorily retired cannot be excluded from the pensionary benefits and if it is accepted that the Government order dated 1.7.1989 creates such classification, then the said classification will be arbitrary and unreasonable. It is thus held that the benefit of Government order dated 1.7.1989, is also available to the temporary Government servants who are compulsorily retired. There is no rational basis for any such classification nor there can be any valid object for such classification."

9. The Court upon perusal of the Government order dated 1 July 1989 was of the opinion that the Government order refers to "regular service" and not "substantive service". The Court explained what was meant of regular service. Relevant portion of the order reads thus:

*"12.....The words **nl o"kZ dh fu;fer lsok iw.kZ dj yh gks*A** used in the Government order dated 1.7.1989, means completion of ten years regular service. Words "regular service" has not been defined in the Government order. From a reading of the Government order, it is clear that the word "ten years regular service" has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent is automatically entitled for pension. The Government order dated 1.7.1989 does not contemplate ten years substantive service. The word "regular service" used in the Government order is not anonymous to substantive service. Admittedly, the benefit by Government order is to be extended to temporary Government servants. The temporary Government servant cannot be said to have substantive or regular service. Thus, the word "regular service" used in the Government order dated 1.7.1989 has not been used as specifying the capacity or status of its holder rather. The word "regular service" has been used to denote and specify the nature of service rendered. The emphasis is that service should be "regular". While defining the word 'regular', the Apex Court in Mrs. Raj Kanta v. Financial Commissioner, Punjab and another, AIR 198O SC 1464, has held in paragraph 10 as under :*

"To begin with, the word "regular" is derived from the word "regula" which means 'rule' and its first and legitimate signification, according to Webster, is conformable to a rule, or agreeable to an established rule, law, or principle, to a prescribed mode. In Words and Phrases (Vol. 36A P. 241) the word "regular" has been defined as 'steady or uniform in course, practice or occurrence, etc., and implies conformity to a rule, standard, or pattern'. It is further stated in the said Book that 'regular' means steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variation. The word 'regular' means in a regular manner, methodically, in due order. Similarly, Webster's New World "Dictionary defines 'regular' as 'consistent or habitual in action', not changing, uniform, conforming to a standard or to a generally accepted rule or mode of conduct'."

13. From the above passage of the Apex Court's judgment, it is clear that service of a temporary employee should be in regular manner, methodically, in due order.

14. Government order dated 1.7.1989 meant ten years of temporary Government servant should be regular in nature meaning thereby that if the temporary Government servant has performed his duties irregularly, i.e, with gaps of years, his service may not be treated to be regular. ....."

10. The decision was considered by the subsequent Division Bench in **Board of Revenue and others Versus Prasidh Narain Upadhyay3**. The issue before the Court was whether a seasonal collection peon subsequently confirmed is entitled to pension on rendering 36 years of the continuous service. The plea of the State-respondent that since the petitioner therein had not completed 10 years of substantive service after confirmation is not entitled to pension was rejected.

11. In **Yashwant Hari Katakkar v. Union of India and ors.4,** it was held that an employee who has served more than 20 years is entitled to pension and denial of retiring pension to the petitioner on the ground of not being permanent on any post clearly is violative of Clause (e) of Fundamental Rules, 56. The department cannot keep a person temporary or on daily wages indefinitely.

12. In **A.P. Srivastava v. Union of India and Ors.5**, the Supreme Court has clearly taken a view that in case of a temporary employee who has rendered 20 years of service is entitled to pension. In the expression 'substantive capacity' the emphasis imparted by the adjective 'substantive' is that a thing is substantive if it is essential part of the constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officilase, the capacity in which the person holds the post has to be ascertained by the State. The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. Thus, a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. ((Refer **Ram Pratap V. State of U.P.6, Babu Singh V. State of U.P.7, Kedar Ram-I v. State of U.P.8, Ram Sajiwan Maurya v. State of U.P. and others9, Kanti Devi v. State of U.P.10, Kishan Singh v. State of U.P.11, Awadh Bihari Shukla v. State of U.P.12)**

13. The Division Bench of this Court in **State of U.P. and others v. Mahendra Chaubey13**, allowed the claim of pension of a seasonal collection amin whose temporary service was followed by substantive appointment despite the petitioner therein having not rendered 10 years substantive service after regularization.

14. The principle that emerges from the spectrum of decisions is that a temporary employee appointed on the regular establishment of the Government is entitled to pension under Fundamental Rule 56.

15. A three Judge Bench of the Supreme Court in **Prem Singh vs. State of Uttar Pradesh14** was considering the question, as to whether, Rule 3(8) of the U.P. Retirement Benefits Rules, 196115 and Regulation 370 of the Civil Services Regulation of Uttar Pradesh should be struck down having regard to the fact that

the Supreme Court had upheld the pari materia provision enacted in the State of Punjab which excluded computation of the period of work-charged services from qualifying service for pension.

16. The appellant before the Supreme Court was a work-charged employee having put in more than three decades of service, pension was declined as the appellant had not put in 10 years of regular service after regularisation. The question posed was whether after regularization employees are entitled to count their past service. The Court made the following observations:

"29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? ***No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature.*** *Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month.* ***They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders****. However, the services of some of the appellants in few petitions/appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.*

30. ***In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis.*** *They ought to have resorted to an appointment on regular basis.* ***The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.***

31. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service

can be counted as qualifying service for pension in the aforesaid exigencies.

32. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. ***We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation.*** *In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification.* ***The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.***

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. ***In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.***

35. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka and others vs. Uma Devi, 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be

*regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. I**t would not be proper to relegate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one.** However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. T**hey shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.***

36. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

17. The short question that arises in the instant writ petition is as to whether the temporary Seasonal Collection Amin is entitled to post retiral benefits. It is evident from the material placed on record that the petitioner was appointed Seasonal Collection Amin in 1978, thereafter, was given regular pay scale of Collection Amin from 1982, income tax was regularly deducted from his salary. The regular pay scale of the petitioner came to be revised from time to time. In the service book, petitioner has been referred to as a temporary employee. In the circumstances, it is not open to the respondents to deny pension discarding past services rendered by the petitioner as a temporary employee in the regular establishment of the State Government. Substantive appointment is not a condition precedent for entitlement of pensionery benefit. The appointment has to be a regular appointment on the pensionable establishment of the Government to earn pension.

18. In the facts and circumstances of the instant case, the petitioner admittedly came to be appointed Seasonal Collection Amin in regular pay scale admissible to the post. The revised pay was paid from time to time. Income tax was deducted from the salary of the petitioner. In the circumstances, the law declared in **Prem Singh** (supra) entitles the petitioner to pension and retiral dues.

19. In view thereof, the writ petition is allowed. The impugned orders dated 7 March 2018 and 25 May 2012, passed by the third respondent-District Magistrate, Ballia and fourth respondent-Up-Ziladhikari, Ballia, respectively, are set aside and quashed. Petitioner is entitled to pension. The arrears of pension shall be confined to three years before the date of order. The respondents to pay the admissible retiral benefits within three months from the date of communication of the order.

20. No cost.

(2019)11ILR A176

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE SUNEET KUMAR , J.

Writ A No.13188 of 2019

Vijay Kumar Agrawal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.R. Mishra, Sri Krishna Mohan Misra.

Counsel for the Respondents:
C.S.C.

A. Service Law- Suspension - Disciplinary inquiry - Uttar Pradesh Cooperative Societies Act, 1965 - Section 66, 77-A - U.P. Cooperative Societies Rules, 1968 - Rule 367 - Uttar Pradesh State Cooperative Societies Election Rules, 2014 - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 4 – Lack of efficiency or competence cannot be elevated to be an act and omission to constitute misconduct.

The allegation does not disclose the imputation of the allegation constituting misconduct. The charges do not list/disclose the acts and omission to constitute misconduct under the Conduct Rules. Mandate of proviso to Rule 4 is not made out. (Para 14, 15, 16)

Petition allowed (E-4)

Precedent followed:-

1.Jeetendra Nath Singh Vs St. of U.P. & ors. (Civil Misc. W. P. No. 33269 of 2007), decided on 02.11.2017 (Para 11)

2.Shabih Haider Vs St. of U.P. & ors. [2018 (1) ADJ 327 (DB)(LB)] (Para 12)

3. St. of U.P. Vs. Jai Singh Dixit (Alld.), (1974) ALJ 92 (Para 12)

4. U.O.I. & ors. Vs J. Ahmed, AIR (1979) SC 1022 (Para 14)

Present petition challenges suspension order dated 04.08.2019, passed by Secretary, Cooperative, Government of U.P., Lucknow.

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

1. Heard Sri H.R. Mishra, learned Senior Counsel appearing for the petitioner and Sri Ajit Singh, learned Additional Advocate General for the State-respondents.

2. Petitioner, a Assistant Commissioner & Assistant Registrar, (Agriculture), Cooperative Societies, Varanasi Mandal, Varanasi, is assailing the impugned suspension order dated 4 August 2019 passed by the first respondent, Secretary, Cooperative, Government of U.P., Lucknow.

3. The allegation against the petitioner, inter-alia, is based on a preliminary enquiry report dated 3 August 2019, pertaining to Adarsh Krishi Sahkari Samiti, Umbha, District Sonbhadra (for short " the Adarsh Society"). The report in so far it relates to the petitioner primarily records that petitioner had not followed the mandatory provisions in the discharge of his duty under the Uttar Pradesh Cooperative Societies Act, 1965 (for short "Act, 1965). Consequently, petitioner was placed under suspension pending contemplation of enquiry. The respondents have filed counter affidavit and supplementary counter affidavit bringing on record the charge sheet dated 16 September 2019, leveling three

charges. First charge alleges that a society under the Act, 1965 can be constituted by the farmers by pooling their land, but in the instant case, the Adarsh Society was constituted against the provisions of Section 77-A. The matter pertaining to cancellation of registration of the Adarsh Society is pending before the Deputy Registrar, Cooperative Society, Vindhyachal Division, Mirzapur, and the Assistant Registrar Cooperative Society, Sonbhadra. The fact finding enquiry posed a question to the petitioner as to whether he had ever conducted any inspection/enquiry against the society, but the petitioner did not reply nor any inspection and/or enquiry in terms of Section 66 of the Act, 1965 was constituted/conducted against the Adarsh society. The second charge against the petitioner is that no audit was conducted against the society in terms of Rule 367 of the U.P. Cooperative Societies Rules, 1968, nor any attempt to that effect was made by the delinquent officer. The third charge against the petitioner is that the election to the society is to be held every five years under the Uttar Pradesh State Cooperative Societies Election Rules, 2014, in the presence of an observer appointed by the office of the District Magistrate/District Cooperative Election Commissioner, however, no such election was conducted.

4. The allegation primarily against the petitioner is that the petitioner failed in his duties by not contacting the concerned officers of the Cooperative at District Sonbhadra/Mirzapur for taking appropriate action against the Adarsh society.

5. In the aforesaid backdrop, it is urged by learned Senior Counsel for the petitioner that the allegation in the impugned suspension order and in the charge sheet, taken on face value do no constitute misconduct within the meaning of Uttar Pradesh Government Servant (Discipline & Appeal) Rules,1999 (for short "Rules, 1999'). It is further contended that admittedly the alleged society came to be registered at District Sonbhadra on 10 October 1952, under the old Act and was re-registered in 1970 under the provisions of Act, 1965. The proceedings with regard to cancellation of registration of the society is pending before the competent authority. Petitioner came to be appointed by promotion as Assistant Commissioner and Assistant Registrar, Cooperative, on recommendation of the Uttar Pradesh Public Service Commission (UPPSC) Allahabad, on 29 May 2015 . The first posting of the petitioner was at District Sultanpur where he joined on 14 July 2015, thereafter, he was transferred and posted in the same capacity at Varanasi vide order dated 31 July 2018. Petitioner joined the post on 2 August 2018. The administrative jurisdiction of the office of Assistant Commissioner and Assistant Registrar, Cooperative Societies, Varanasi, comprises of five divisions viz. Varanasi Division, Mirzapur Division, Azamgarh Division, Gorakhpur Division and Basti Division comprising 22 districts.

6. It is urged that an unfortunate incident occurred on 17 July 2019 in village Umbha, Police Station and Tehsil Ghorawal, District Sonbhadra, ten persons died and 28 persons were injured in a dispute pertaining to land. Pursuant thereof, the State Government vide Office Memorandum dated 17 July 2019 appointed three member enquiry

committee, headed by Additional Chief Secretary, Revenue and two other members i.e. Commissioner, Vindhyachal Division, Mirzapur and Additional Chief Secretary Revenue and Basic Education, Government of U.P. The fact finding enquiry committee submitted report dated 3 August 2019 recommending the suspension of the petitioner and other officials of the Revenue and also directed that First Information Report be lodged against the officials including the petitioner. The allegation against the petitioner is confined to the charges leveled against the petitioner in the charge sheet. There is no imputation of misconduct spelled out in the charges with regard to the role or involvement of the petitioner leading to the incident at village Umbha. The responsibility, if any, of the officials of the Co-operative would have to be identified at district Sonbhadra/Mirzapur under which the alleged society was functioning. The petitioner, being the head and incharge of five divisions could not have been placed under suspension on vague and general allegations. The charge is merely an opinion/inference expressed by the enquiry committee not based on any material.

7. Learned counsel for the petitioner further submits that the respondents are bound to follow the provisions mandated under Rules, 1999 governing disciplinary proceedings. Rule 4 provides for suspension, whereunder, Government Servant against whose conduct an inquiry is contemplated or is proceeding may be placed under suspension pending conclusion of the inquiry in the discretion of the Appointing Authority provided that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of being established may ordinarily warrant major penalty. Rule 4 for the purpose of the instant case is extracted :

"4. Suspension

(1) A Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority:

Provided that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established may ordinarily warrant major penalty:

Provided xx xx xx

Provided xx xx xx

(2) A Government Servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government Servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may at the discretion of the appointing Authority or the Authority to whom the power of suspension has been delegated under these rules, be placed under suspension until termination of all proceedings relating to that charge.

(3) (a) A Government Servant shall be deemed to have been placed or as the case may be, continued to be place under suspension by an order of the

Authority Competent to suspend, with effect from the date of his detention , if he is detained in custody, whether the detention is on criminal charge or otherwise , for a period exceeding forty eight hours."

8. Further, it is contended that the appointing authority of the petitioner is the Principal Secretary/Secretary Cooperative, Government of U.P. The impugned order has been passed based on the fact finding enquiry report mechanically without application of mind as to whether the allegation prima facie constitutes misconduct in sofar it relates to the petitioner. It is further contended that even assuming that there was negligence in not complying the provision of the Act and Rules it cannot be said that the office of Assistant Commissioner and Assistant Registrar at Varanasi was remotely responsible for the death of innocent villagers arising out of land dispute at district Sonbhadra.

9. In rebuttal, the learned Additional Advocate General submits that the mandatory duties assigned upon the Assistant Registrar for inspection of the societies and mandating audit was not done, therefore, petitioner is also responsible for the incident that occurred in village Umbha. It is further urged that had the petitioner been vigilant the incident could have been avoided. It is, therefore, urged that the allegations are serious and in the event of charges being proved, it would warrant imposition of major penalty. Criminal prosecution is also pending against the petitioner.

10. On specific query, learned counsel appearing for the respondent admits that the alleged society came to be registered in 1952 and since then it is functioning, the proceedings pertaining to cancellation of registration of the Adarsh society is pending before the competent authority of the Cooperative at district Mirzapur and Sonbhadra. It is not being disputed that the petitioner came to be appointed Assistant Registrar in 2015 and his second posting at Varanasi was made, one year before the occurrence of the incident at Sonbhadra. It is also not being disputed that petitioner has five divisions comprising 22 districts under his jurisdiction and Adarsh Society falls under the jurisdiction of Deputy Registrar/Assistant Registrar, Cooperative at Mirzapur and Sonbhadra. Petitioner has not been suspended pending criminal proceedings, nor has the petitioner been arrested. The only material relied upon while passing the impugned suspension order or framing of the charge sheet is the fact finding enquiry report.

11. The Division Bench of this Court in **Jeetendra Nath Singh Versus State of U.P. and others (Civil Misc. Writ Petition No. 33269 of 2007) decided on 2 November 2017,** while considering the suspension order passed on the recommendation of an official who had no concern either with department or the appointing authority, the Court held that the order of suspension passed by the Inspector General, Registration, U.P., Lucknow, on the recommendation of Deputy Inspector General of Police, Railway, Allahabad Region, Allahabad, is without application of mind, exercise of independent discretion, and passed in a mechanical manner against the mandate of Rule 4 of Rules, 1999. It was further held that pursuant to the First Information Report petitioner therein was not detained. In the circumstances, the

impugned order of suspension came to be quashed.

12. The Division Bench in **Shabih Haider Versus State of U.P. and others, [2018(1) ADJ 327 (DB)(LB)],** held that the order of suspension is not to be passed in a routine manner but the competent authority is required to consider the gravity of the misconduct sought to be enquired into or investigated and the nature of the evidence placed before the appointing authority. The power of the State Government to place government servant under suspension is creature of the statute and/or contract and the decision be taken keeping in view the letter and spirit of the statute. The power of suspension arises when on an objective consideration the appointing authority is of the view that a formal disciplinary inquiry is expected or is proceeding. It was also held placing reliance on the decision of a Five Judge Bench of this Court in **State of U.P. v. Jai Singh Dixit (Alld.), 1974 ALJ 92,** that mere lack of efficiency or skill does not ipso facto constitute misconduct and call for suspension of a government servant.

13. This Court normally would decline to interfere in disciplinary proceedings and the impugned suspension order unless it is shown that it is in violation of statutory rules and does not constitute allegations of misconduct to warrant imposition of major penalty taking the allegations on face value.

14. The three charges at a glance would convey the impression that the petitioner was not a very efficient officer. Some negligence is being attributed to him and lack of qualities expected of an officer of the rank of Assistant Commissioner and Assistant Registrar. The question, therefore, is whether lack of efficiency or competence can be elevated to acts and omission to constitute misconduct. The answer can be found in the observation of the Supreme Court in **Union of India and others Versus J. Ahmed1**, which is extracted:

"The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. to wit, charge No. 2 refers to the quality of lack of leadership and charge No. 5 enumerates inaptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules....."

15. The allegation does not disclose the imputation of the allegation constituting misconduct. The charges do

not list/disclose the acts and omission to constitute misconduct under the Conduct Rules.

16. Having due regard to the facts and circumstances and to the allegations made against the petitioner, this Court, prima facie, is of the opinion that the mandate of proviso to Rule 4 is not made out. Accordingly, the writ petition is allowed. The impugned suspension order dated 4 August 2019 passed by the first respondent, Secretary, Cooperative, Government of U.P., Lucknow, is set aside and quashed. Petitioner shall be reinstated, however, the pending disciplinary proceedings against the petitioner shall continue and be concluded expeditiously preferably within four months from the date of receipt of certified copy of this order, provided the petitioner cooperates and there is no other impediment.

17. No cost.

(2019)11ILR A181

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.11.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No.13256 of 2019

Dr. Rakesh Raman ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hari Prasad Gupta

Counsel for the Respondents:
C.S.C.

A. Service Law - Departmental Inquiry - Initiation of the departmental inquiry – Commences from the date of service of the charge-sheet on the delinquent.

If the charge- sheet is not served upon the employee, it may not be said that the departmental inquiry against the incumbent is pending. (Para 8).

B. Service Law – Promotion pending Departmental Enquiry - Sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet is filed before the criminal court and not before. (Para 8)

Petition allowed (E-4)

Precedent followed: -

1. U.O.I. etc. Vs K.V. Jankiraman & etc. (1991) 4 SCC 109 (Para 8, 9)

2. Harish Kumar Sharma, IFS Vs St. of Pun. & anr. (2017) 4 SCC 366 (Para 8)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri H.P. Gupta, learned counsel for the petitioner and Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has prayed for the following reliefs:-

"(I) Issue a writ, order or direction in the nature of mandamus directing the opposite parties to open the sealed cover procedure, wherein recommendation of the D.P.C. held in the year 2016 has been kept in sealed cover procedure, while the juniors to the petitioner has been promoted vide order dated 30.09.2016.

(II) Issue a writ, order or direction in the nature of mandamus

commanding the opposite parties to promote the petitioner with all the incidental and consequential service benefits including arrears of salary for the post of Additional Director (Level-V) in the pay scale of Rs.37400-67000 grade pay Rs.8900 with effect from 30.09.2016.

(III) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to extend the benefits of the 4th A.C.P. on completion of 24 years continuous satisfactory service with effect from 01.12.2008."

3. The contention of Sri H.P. Gupta, learned counsel for the petitioner is that one departmental inquiry, which was initiated against the petitioner in the year 2011, has been finally concluded on 27.10.2017 as office memo to that effect has been issued by the Secretary of the Department, which is contained as Annexure No.6 to the writ petition. On account of the aforesaid inquiry, the candidature of the petitioner was kept under sealed cover and since the said inquiry has been concluded wherein the petitioner has been exonerated, the sealed cover should be opened.

4. In the meantime, the petitioner has been informed that vide office memo dated 20.11.2015 one more departmental inquiry was initiated, therefore, the petitioner preferred a representation dated 05.02.2016, which is contained as Annexure No.8 to the writ petition, demanding the copy of the charge-sheet, if any, from the Enquiry Officer i.e. the Additional Director, Medical Health & Family Welfare, Agra Division, Agra. Even the Enquiry Officer has also preferred a letter dated 12.11.2018 to the Director General, Medical & Health Services, U.P., Lucknow for providing the charge-sheet to the petitioner. However, on 01.11.2019, the statement was given by the State Counsel before the Court that the charge-sheet has been served upon the petitioner. Therefore, this Court vide order dated 01.11.2019 directed the learned Standing Counsel to produce the copy of the charge-sheet with the proof of service fixing the date on 04.11.2019.

5. On 05.11.2019, Dr. Uday Veer Singh, learned Additional Chief Standing counsel has produced the copy of the charge-sheet. On 05.11.2019, this Court has passed the order as under:-

"Heard Sri H.P. Gupta, learned counsel for the petitioner and Dr. Udai Veer Singh, learned Additional Chief Standing Counsel for the State-respondents.

This Court has passed the order dated 01.11.2019 as under:-

"Learned Standing Counsel states that chargesheet is served upon the petitioner and enquiry would completed within one month. However, he does not have copy of the chargesheeet. He prays for a day's time to produce before this court the service report of the chargesheet upon the petitioner.

Put up this case on 04-11-2019."

In compliance of the aforesaid order, learned Add.C.S.C. has produced the copy of letter dated 04.11.2019 preferred on behalf of the Director General, Medical & Health Services,

U.P., Lucknow addressing to the Chief Standing Counsel, High Court, Lucknow Bench, Lucknow enclosing therewith the copy of one letter dated 22.10.2019 preferred by one Sri J. L.Yadav, Under Secretary, Government of U.P., Lucknow to the Additional Director, Medical, Health and Family Welfare, Agra Division, Agra and the charge-sheet dated 22.10.2019 relating to the petitioner and another charge-sheet dated 22.10.2019 relating to one Dr. V.K. Gupta have been enclosed. The photocopy of the aforesaid instructions letter and the documents are being taken on record.

The perusal of the aforesaid letters clearly reveals that the issue in question is of the year 2015 and it appears that no charge-sheet has been issued against the petitioner since 2015 till date. Even the charge-sheet dated 22.10.2019, which is said to have been issued against the petitioner, has not been served upon the petitioner, as no service report has been indicated in these letters. Further, even the single charge, which has been levelled against the petitioner vide charge-sheet dated 22.10.2019, does not indicate any culpability of the petitioner in the issue.

Prima-facie, it appears that this is half hearted exercise being carried out, resultant thereof, the petitioner is approaching the competent authorities time to time but to no avail. As a matter of fact, these letters do not satisfy the query of the Court dated 01.11.2019.

Dr. Udai Veer Singh, learned Additional Chief Standing Counsel prays for and is granted 24 hours time to seek complete instructions in the matter, particularly on the point as to whether any charge-sheet has been prepared, which is directly relating with the allegations against the petitioner, and if so, as to whether the same has been served upon the petitioner or not.

List / put up this case on 07.11.2019 in the additional cause list."

6. Today, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel has apprised the Court that the said charge-sheet has been provided to the Enquiry Officer but there is no service report with him to show the Court as to whether the said charge-sheet has been served upon the petitioner or not.

7. Sri H.P. Gupta, learned counsel for the petitioner has submitted with vehemence that till date no charge-sheet has been served upon the petitioner.

8. In support of his submission, Sri Gupta has placed reliance upon the judgment of Hon'ble Supreme Court rendered in ***Union of India etc. vs. K.V. Jankiraman etc.*** reported in ***1991 (4) SCC 109*** wherein the Hon'ble Supreme Court has categorically held that the initiation of the departmental inquiry would be considered to be commenced with effect from the date of service of the charge-sheet and if the charge-sheet is not served upon the employee, it may not be said that the departmental inquiry against the incumbent is pending. The aforesaid dictum of Hon'ble Supreme Court has been considered in various cases by the Hon'ble Supreme Court as well as by this Court. The Hon'ble Supreme Court in re: ***Harish Kumar Sharma, IFS vs. State of Punjab and another*** reported in ***(2017) 4 SCC 366*** has followed the dictum of K.V. Jankiraman (supra) and held in paras-16 and 17 as under:-

"16. The employee in respect of whom chargesheet has been issued and the disciplinary proceedings are pending or in respect of whom prosecution for criminal charge is pending, his assessment is to be kept in a sealed cover and is not to be given effect to. The question is as to when prosecution for criminal charge is treated to have been 'pending'. This aspect came up for consideration in K.V. Jankiraman's case and the Court held that sealed cover procedure is to be resorted to only after the charge memo/chargesheet is issued, as is clear from the following passage in para 16 of the judgment:

"16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy..."

17. In view of the aforesaid law laid down by this Court, the crucial aspect is as to whether the prosecution for criminal charge was pending against the appellant when the DPC meeting was held. In K.V. Jankiraman's case, this Court gave imprimatur to the order of the CAT holding that if the chargesheet is filed in a criminal court, sealed cover procedure can be resorted to. This was conclusion No.4 of the CAT judgment, which was upheld by this Court, and this conclusion reads as under:

"(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before..." (emphasis supplied)

9. Considering the rival submissions of learned counsel for the parties and perusing material available on record and

also considering the dictum of Hon'ble Supreme Court in re: ***K. V. Jankiraman*** (supra), I am of the considered opinion that in the given circumstances the sealed cover envelope in the case of the petitioner should be opened atonce as the charge-sheet has yet not been served upon him.

10. Accordingly, the writ in the nature of mandamus is issued commanding the opposite parties to open the sealed cover procedure, within three weeks from the date of production of a certified copy of this order, wherein the recommendation of the D.P.C. held in the year 2016 has been kept in the sealed cover procedure and act upon the recommendation of D.P.C. The petitioner shall also be entitled for all consequential service benefits strictly in accordance to law.

11. The writ petition is, therefore, ***allowed***.

12. No order as to cost.

(2019)11ILR A185

ORIGINAL JURISDICTION
CIVILL SIDE
DATED: ALLAHABAD 17.10.2019

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 13260 of 2016
Connected with
WRIT -A No.13262 of 2019
and
WRIT -A No.13263 of 2019
and
WRIT -A No.13265 of 2019

Km. Anamika Singh ..Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam, Sri Atipriya Gautam, Sri Vinod Kumar Mishra.

Counsel for the Respondents:
C.S.C.

A. Service Law - Termination - U.P. Police Constable and Head Constable Service Rules, 2015: Rule 20(4), Rule 14(1) - Once a trainee police constable is proposed to be terminated on a specific charge of misconduct, the procedure under Rule 14 should be mandatorily followed before proceeding to impose major punishment. (Para 16, 21, 23)

Rule confers jurisdiction upon the appointing authority to assess the working of a probationer with an intent to either confirm his services or to extend the period of probation or to discontinue his employment on account of unsatisfactory work and failure to improve despite opportunity. The petitioners have hardly worked for a month, their termination on grounds of misconduct and assessment of their working during the period of probation. (Para 18, 19, 21)

B. Service Law - U.P. Police Regulations: Regulation 541(2) – Applicability - Police regulations have been held to have binding force but in areas where field is occupied by statutory regulations, the authorities cannot act in violation of statutory rules by resorting to provisions of Police Regulations. (Para 21)

D. Service Law – Termination- Principles to term a termination order as 'simplicitor' or 'punitive' reiterated.

If form and language of the termination of probationer clearly indicate that it is punitive in nature then there would be no requirement to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. (Para 24, 25)

E. Service Law – Constitution of India - Disproportionate action is in derogation

of Art. 311(2) and Art. 14 of Constitution of India – The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the competent authority would be interfered with if it is outrageous defiance of logic. (Para 26 to 32)

Petition allowed (E-4)

Precedent followed: -

1. Parshotam Lal Dhingra Vs U.O.I., AIR (1958) SC 36 (Para 23)

2. S.B.I. Vs Palak Modi (2013) 3 SCC 607 (Para 23)

3. Paras Nath Pandey Vs Director North Central Zone, Cultural Center, Allahabad, (2008) (10) ADJ 283 (Para 12, 24) pet.

4. Mathew P. Thomas Vs Kerala St. Civil Supply Corp. Ltd. & ors., (2003) 3 SCC 263 (Para 25)

5. Ranjit Thakur Vs U.O.I., (1987) 4 SCC 611 (Para 30)
6. Bhagat Ram Vs St. of H. P., AIR (1983) SC 454 (Para 31)

7. S. R. Tiwari Vs U.O.I., (2013) 6 SCC 602 (Para 32)

Precedent distinguished: -
1. Chandra Prakash Sahi Vs St. of U.P., (2000) 5 SCC 152 (Para 21)

Present petition challenges impugned orders dated 26.06.2019, passed by the Senior Superintendent of Police, Prayagraj.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of writ petitions are directed against orders dated 26th June, 2019, passed by the Senior Superintendent of Police, Prayagraj, whereby all the petitioners have been terminated from service. The identical worded orders passed in respect of all the petitioners record that the petitioners while undergoing on the job training, sat on a protest (dharna) on 5.6.2019, and also blocked the road in front of training centre for raising their grievances that were extremely ordinary/trivial in nature, and were otherwise based mostly on rumours. Such act of indiscipline, while on training in a disciplined organization has been viewed seriously as an act of misconduct. Show cause notice was accordingly issued to them, to which a reply has also been submitted. The explanation submitted by present petitioners to the show cause notice has not been found satisfactory and it is observed that chances of petitioners becoming good police personnels do not exist. Jurisdiction under Rule 20(4) of the U.P. Police Constable and Head Constable Service Rules, 2015 read with Regulation 541(2) of the U.P. Police Regulations has been invoked to terminate the services of the present petitioners. Aggrieved by such orders of termination the petitioners are before this Court.

2. Before coming to the issues on merits, it would be worth noticing some of the background facts. State of Uttar Pradesh initiated process to recruit 41520 Constables in Civil Police and Pradeshiya Armed Constabulary (PAC), vide advertisement dated 14.1.2018. Petitioners also applied against the advertisement and having cleared the recruitment process were ultimately selected on 18.2.2019. All the petitioners were allotted Allahabad (Prayagraj) for undergoing on the job training. The first part of the JTC Training Course was

successfully completed by the petitioners w.e.f. 16.5.2019 to 31.5.2019. The next round of training was to be undertaken at Regional Training Centre at Varanasi (hereinafter referred to as the RTC) w.e.f. 3rd June, 2019. It is on record that 300 female constables joined the RTC at Varanasi on 1st June, 2019, while 47 other female constables joined on 2nd June, 2019. Their training commenced on 3rd June, 2019. It is at this stage that the incident is said to have happened giving rise to passing of the orders of termination.

3. Alongwith the writ petition various newspaper reports have been annexed. The first of such newspaper report published in Hindi Daily 'Amar Ujala' from Varanasi is of 6th June, 2019. The headline of the news item quotes the lady trainee constables that their videos were prepared while they were having bath. The incident in question reportedly occurred in the night of 4/5th June, 2019, as per the newspaper report. A protest was reportedly organized by the female trainee constables demanding adequate security arrangement for them and for proper boundary etc. to be raised for their safety and security. Similar reports got published in other prominent newspapers including Dainik Jagaran etc., which are also annexed. Newspaper reports, ipso facto, may not be acceptable, but in view of what has been brought on record of the writ petitions, as would be elaborated later, it is apparent that serious issues relating to safety, security and breach of privacy for female constables on training had arisen resulting in a protest by them.

4. It transpires that on the very next morning a protest was made to highlight the problems faced by the lady police constables. Their protest ended with an assurance received from the Senior Superintendent of Police that their security and safety would be duly looked after. The incident, however, did generate concerns and was apparently taken as an act of serious breach of discipline on part of trainee constables by the higher police officers. The SSP Varanasi on 5th May, 2019 itself constituted a Committee to inquire into the protest by lady constables. This Inquiry Committee comprising of three officers submitted its fact finding report on 8th June, 2019. Copy of this report has been placed on record alongwith the counter affidavit. Its copy has also been served upon the writ petitioners alongwith the show cause notice. This inquiry report is the only material relied upon for taking the action against the writ petitioners.

5. Reference to this report would be necessary at this stage. The fact finding report, dated 8.6.2019, runs into 42 pages and records statement of 50 persons. It includes statement of 33 lady constables who were undergoing training, apart from other police personnels some of whom were present at the training centre. In order to protect the identity of lady constables the names of lady constables in the report is not being mentioned. The statement of first trainee police constable discloses that during the night of 4/5th June, 2019, she heard loud voices at the door of her barrack and when this constable came out she found that many of the female trainees present were weeping and informing the officer of the training centre about entering of some boy in the training centre. The next statement is also of a lady trainee constable narrating similar facts and also that the broken door of her barrack was

repaired only on 4.6.2019 in the evening. Their statements are extracted hereinafter:-

"बैरिक से बाहर निकलने पर काफी लडकियां रो रही थी तथा सभी सर को बता रही थी कि मैने किसी लडके को बैरिक के तरफ आते हुए देखा है तो सभी सर सीसीटीएनएस कार्यालय के आस – पास जाकर देखा, वहां कोई नही मिला। सभी लडकियां रो रही थी, जिन्हें सर समझा रहे थे। मै अपने बैरिक में वापस चली गयी।

2. बयान म0 रि0 आ0 ..... मै एल बैरक में रहती हूं। मेरे कमरे में दरवाजा टूटा हुआ था उसके बारे मे हमने मेजर सर का दिनांक 04.06.2019 को बताया था। दिनांक 04.06.2019 की शाम को ही दरवाजा ठीक करवा दिया गया तथा हमें उन्होने पूर्ण रुप से सुरक्षा का भरोसा दिलाया। दिनांक 04/05.06.2019 करीब रात्रि में 12 बजे काफी शोर–गुल हो रहा था। हम लोग अपने बैरक से बाहर निकले तो जानकारी हुई कि दिनांक 04/05.06.2019 को करीब 11.45 बजे टोली नं0 13 की बैरक डियूटी की महिला ..... ने 02 लडको को परिसर में आते देखा है तथा उसके कुछ समय बाद टोली नं0 11 की .... द्वारा किसी लडके को बैरक मे हाथ डालते हुए देखने की बात बताई जा रही थी। कुछ देर बाद मेजर सर और कुछ आईटीआई, पीटीआई वहां पहुंचे। कुछ देर बाद छोटेलाल सर पहुंचे और लडकियों को रोते और घबडाते हुए देखकर उन्हें सुरक्षा का भरोसा दिलाते हुए घटना के बारे में जांच की बात भी कही और सुरक्षा डियूटी पर 04 आरक्षी की डियूटी तथा 02 महिला आरक्षी की डियूटी लगायी।

3....."मैं सो रही थी। रात्रि करीब 12 बजे बैरक में शोर हुआ तो मै जग गयी तो देखा कि ..... हाथ में वाइपर ली थी और चिल्ला रही थी कि कौन बद्तमीज है और कही कि कोई व्यक्ति खिडकी से हाथ डाल रहा था। फिर सारी लडकियां इकठ्ठा होकर गेट पर चली गयी और शोर मचाने लगी। कुछ देर बाद करीब 12.30 बजे लडकियों ने बताया कि बाहर सर आये है तो हम लोग बाहर आ गये तो देखा की काफी भीड इकठ्ठा हो गयी थी। सभी लडकियां सर से बात–चीत कर रही थी, उनके द्वारा सभी लडकियों को समझाया जा रहा था कि हम लोग तुम्हारे माता – पिता की तरह है। जो भी समस्याएं है उनका निस्तारण सुबह कर दिया जायेगा। मेजर सर करीब 04 बजे तक हम लोगो के साथ थे। इसके बाद मै अपने बैरक में सोने चली गयी।

"प्रश्न – क्या आप द्वारा दिनांक 01.06.2019 से 04/05.06.2019 की रात्रि तक किसी लडके को बैरक अथवा वाशरुम में देखा गया है ?

उत्तर – श्रीमान जी नही, केवल दिनांक 04/05.06.2019 की रात्रि को सीसीटीएनएस कार्यालय के छत पर एवं कुछ देर बाद किसी व्यक्ति को खिडकी के बगल से भागते हुए देखी थी।"

6. The statements of all 33 lady police constables are unanimous, inasmuch as, they came to know of an incident occurring in the intervening night of 4/5th June, 2019, on account of which all the lady constables were frightened and were immensely concerned about their safety and security. It has also been stated by most of these female constables that they could not even dare to go alone to the toilets for the fear of their security. Statements of these constables suggests that two boys came on a bike and entered the training campus and that one of them tried to harm one of the lady trainee constables. The statements also suggest that basic facilities were not satisfactory and that water supply in the toilets was resumed only on 4.6.2019. Trainees had to go about 200 meters just to get drinking water. It is to be remembered that first week of June is the peak summer period when temperature in Varanasi can go upto 48 degree centigrades. Lack of regular water supply for drinking and fir use in toilets can well be visualized. The

report further acknowledges that it was very hot and some of the coolers were got repaired while process was initiated to buy more coolers. Moreover due to low voltage even faces were not running properly.

7. It is not necessary to refer to all the statements but suffice it to note that the statements given by all trainee constables were consistent about an incident having occurred on the fateful night as also about lack of basic facilities at the centre. The questions that have been posed to these lady constables appear to suggest that anxiety on part of the concerned authorities was more to emphasize that there was no fault on their part; that basic facilities existed for them; that none of the candidates had specifically admitted outraging of her modesty; and that on an unfounded hearsay misreporting by one of the candidates the other trainee recruits overreacted and had blown the incident out of proportion.

8. There is an apparent noticeable flaw in the fact finding report. The tenor of report shows insensitivity to the concern of trainee constables who had stayed only for a couple of days and were new to the place. It is but natural that none of the recruits would have wished to be identified for an attempted outraging of her modesty, nor would have dared to speak-up against administration for lack of basic amenities provided to them. The authorities also failed to appreciate the consistent statement of almost all the lady trainee constables that they were in a state of fear and shock and were apprehensive about their safety. In almost all the statements it has surfaced that two boys on a bike entered the training camp with one of them going on roof while the other went near the office. The alleged undesirable acts were attributed to these two intruders. The three member committee, however, disbelieved the concern of lady constables by a curious process of reasoning. It observed as under:-

"जहां तक दिनांक 04.06.2019 को समय करीब 12.00 बजे रात्रि बैरक नम्बर 11 में खिडकी से किसी अज्ञात युवक द्वारा अन्दर हाथ डालने सम्बन्धी आरोप है। खिडकी के ठीक सामने म0 रि0 आ0 ..... का बेड है एवं उसके बगल मे म0 रि0 आ0 ..... का एवं उसके सामानान्तर द्वितीय पंक्ति में .....व ..... का बेड लगा हुआ है। उक्त के संदर्भ मे म0 रि0 आरक्षियों से बयान लिया गया जिसमें से म0 रि0 आ0 ..... व ..... द्वारा रात्रि के समय **करीब 12 बजें के बीच किसी अज्ञात व्यक्ति के हाथ का अन्दर** देखना बताया गया। इस संदर्भ में उल्लेखनीय है कि म0 रि0 आरक्षियों के सुरक्षात्मक दृष्टिकोण से इनकी आवासीय व्यवस्था भी पुलिस लाइन के अन्तिम कोने में स्थापित किया गया है। जो लगभग दोनो तरफ 08 फीट व उससे उंची दीवार से घिरा है, जो सुरक्षित स्थान है। हम अधिकारीगणों द्वारा `बमदम.तम. बवदेजतनबजपवद (दृश्य पुनर्संरचना) करके देखा गया तो खिडकी से बेड की दूरी 03 फीट से अधिक की थी। अतः स्पष्ट है कि खिडकी से बेड तक किसी व्यक्ति के हाथ का पहुंचना सम्भव नही है अतः छेडछाड की नियत से उक्त घटना का कारित किया जाना तार्किक प्रतीत नही होता।

उक्त खिडकी के बाहर उभरी हुई मिट्टी एवं कुछ निष्प्रयोज्य वस्तुएं जैसे दीवाल घडी पडी हुई थी। यदि कोई व्यक्ति वहां किसी भी नियत से खडा होता तो उसके पैरों के निशान उभरी हुई मिट्टी पर जरुर होते।

चूंकि किसी भी म0 रि0 आ0 द्वारा स्पष्ट रुप से यह नही बताया गया कि हाथ किसी लडकी का था अथवा लडके का अतः निश्चित रुप से यह नही कहा जा सकता कि उस स्थान पर कोई पुरुष ही आया था अथवा इस तथ्य से

भी इनकार नही किया जा सकता कि किसी शरारती लडकी द्वारा शरारतवश वहां किसी गलत नियत से उस स्थान पर गयी हो जैसा कि म0 रि0 आ0 ..... द्वारा अपने बयान मे बताया गया कि उक्त युवक/ व्यक्ति सफेद रंग का टी–षर्ट पहने हुआ था और बैरक के समस्त म0 रि0 आ0 सफेद रंग का टी–षर्ट धारण करती है। चूंकि दीवार के पीछे आम सडक है। **अतः यह भी सम्भाव्य है कि कोई व्यक्ति चोरी की नियत से प्रवेश किया हो। किन्तु सीसीटीवी के न होने से एवं म0 रि0 आरक्षियों द्वारा स्पष्ट रुप से हाथ को नही देखे जाने के कारण उक्त आरोप की वास्तविकता पर कुछ भी स्पष्ट रुप से कहा जाना सम्भव नही है।**

दिनांक 01.6.2019 को रिजर्व पुलिस लाइन वाराणसी में 300 म0 रि0 आरक्षियों एवं दिनांक 02.06.2019 को कुल 47 म0 रि0 आरक्षियों द्वारा अपना आगमन कराया गया। घटना दिनांक 05.06.2019 को प्रातः 06 बजे की है। घटना के दिन म0 रि0 आरक्षियों **द्वारा जो समस्यांए बतायी गयी उनमें से मुख्य रुप के कम वोल्टेज होना, पंखे, प्रकाश, शौचालय, स्नानागार, खिडकियों का टूटा होना व सुरक्षा सम्बन्धित समस्याएं बतायी गयी।**

हम अधिकारीगणों द्वारा दिनांक 05.6. 2019 म0 रि0 आरक्षियों के प्रत्येक बैरकों का भौतिक सत्यापन को किया गया तो पाया गया कि लगभग सभी बैरकों में पर्याप्त संख्या मे पंखे लगे हुए है। **जिन बैरकों मे यदि कोई पंखे खराब थे तो उनकी तत्काल मरम्मत हेतु प्रतिसार निरीक्षक वाराणसी को निर्देशित किया गया। म0 रि0 आरक्षियों द्वारा पूर्व मे गर्मी ज्यादा होने की समस्या बताने पर प्रतिसार निरीक्षक रिजर्व पुलिस लाइन वाराणसी द्वारा लाइन में उपलब्ध कूलरों को म0 रि0 आरक्षियों के कक्ष मे लगवाया गया एवं अन्य कूलरों के क्रय सम्बन्धी प्रकिया पूर्व में ही प्रारम्भ की जा चुकी है। जहां तक विद्युत व्यवस्था में वोल्टेज के कम होने की समस्या है जिसका प्रत्यक्ष रुप से पुलिस विभाग से कोई सम्बन्ध नही है। बीच में मात्र 01 दिवस वोल्टेज सम्बन्धी समस्या आयी जिससे बैरको के पंखे धीरे – धीरे चल रहे थे जो कालान्तर में स्वतः ठीक हो गया।**

म0 रि0 आरक्षियों द्वारा बतायी गयी समस्या में एक बाथरुम का होना व एक टोटी का होना बताया गया है। जबकि मौके पर भौतिक सत्यापन करने पर पाया गया कि 42 बाथरुम प्रयोगात्मक अवस्था में सही स्थिति में पाये गये। अतः म0 रि0 आरक्षियों की संख्या के अनुपात से पर्याप्त बाथरुम उपलब्ध पाये गये तथा म0 रि0 आ0 द्वारा बाथरुम से सम्बन्धित छोटी – मोटी समस्याओं के बारे में बताया गया उनका वर्तमान में तत्काल प्रभाव से मरम्मत करा दिया गया है। जहां तक म0 रि0 आ0 द्वारा बाथरुम अथवा शौचालय का दूरी पर स्थित होना बताया गया के सम्बन्ध मे भौतिक सत्यापन करने पर पाया गया कि बैरक से बाथरुम अथवा शौचालय की अधिकतम दूरी लगभग 20 मीटर व न्यूनतम दूरी 04 मीटर पर है, जो बहुत अधिक नही है। अतएव उक्त आरोप असत्य एवं निराधार है। जहां तक शौचालय सम्बन्धी समस्या है तो उसके सम्बन्ध में भौतिक सत्यापन करने पर पाया गया कि 50 शौचालय साफ – सुथरे एवं सुव्यवस्थित दशा में पाये गये जो म0 रि0 आरक्षियों की संख्या के सापेक्ष पर्याप्त है।

म0 रि0 आरक्षियों द्वारा बतायी गयी समस्याओ में से एक बडी समस्या पानी की बतायी गयी कि उन्हे पानी लेने हेतु बैरक से आर0 ओ0 प्लाण्ट जिसकी दूरी लगभग 200 मीटर होगी जाना पडता है। साथ ही पानी रखने हेतु किसी पात्र की व्यवस्था भी नही है। उक्त समस्या के सन्दर्भ में जांच करने पर पाया गया कि दिनांक 04.06.2019 को प्रातः उक्त समस्या के संदर्भ मे म0 रि0 आरक्षियों द्वारा प्रतिसार निरीक्षक के संज्ञान में लाया गया जिसपर प्रतिसार निरीक्षक द्वारा तत्काल संज्ञान लेते हुए 20 ली0 वाले 70 गैलनों व घडो का क्रय कर वितरित कराया गया व बैरकों तक शीतल पेयजल पहुंचाने की व्यवस्था की गयी। अतः उक्त समस्या का समयबद्ध तरीके से निदान कराया गया। जहां तक म0 रि0 आ0 द्वारा पानी हेतु पैसा लिए जाने सम्बन्धी आरोप का प्रश्न है, के सम्बन्ध मे स्पष्ट करना समीचीन होगा कि म0 रि0 आ0 से पानी हेतु कोई पैसा नही लिया गया है, जैसा कि प्रतिसार निरीक्षक के बयान से स्पष्ट है।''

9. The Committee ultimately went on to hold that in respect of extremely

common and simple problems the lady constables overreacted. Findings have ultimately been returned by the Inquiry Committee in following terms:-

"सम्पूर्ण जांच एवं साक्ष्य विश्लेषण से यह पाया गया कि 04 म0 रि0 आ0 जिनमें 01.....02.....03.....व .....04.....सम्मिलित है को पुलिस जैसे अनुशासित बल मे रहते हुए इन 04 म0 रि0 आ0 ने अन्य महिला रि0 आरक्षियों में असंतोष फैलाया और उन्हे सडक जाम करने हेतु उत्प्रेरित कर रिजर्व पुलिस लाईन गेट पर ले जाया गया। अधिकारियों के साथ अभद्र व्यवहार व तर्क – वितर्क करते हुए अनुशासनहीनता का परिचय दिया गया। इन महिला रि0 आरक्षियों द्वारा स्वयं व अन्य म0 रि0 आ0 को पुलिस लाईन गेट पर धरना देने के लिए उत्प्रेरित करने से पुलिस विभाग की छवि धूमिल हुई। यह स्थिति तैयार करने के लिए इन 04 म0 रि0 आ0 को प्रमुख रुप से दोषी पाया जाता है।

इसके अतिरिक्त 13 महिला रिकूट आरक्षियों जिनमे क्रमशः 01.....02.....03.....04.....05.....06.....07.....08.....09.....10.....11.....12.....13.....को अधिकारियों के साथ वाद – विवाद करना, सडक पर बैठना, बार – बार कहने के बाद भी सडक से न हटना एवं माहौल सामान्य करने में सहयोग न करने की दोषी पायी जाती है। भविष्य में इस बात से इंकार नही किया जा सकता कि इनके द्वारा ऐसी सुनी – सुनायी बातों के प्रभाव में आकर अनुशासन पर प्रतिकूल प्रभाव डाला जा सकता है। अतः भविष्य में इनके प्रशिक्षण पर सतर्क दृष्टि रखा जाना अपेक्षित है। अतएव उक्त 13 म0 रि0 आ0 को अन्यत्र आर0 टी0 सी0 में स्थानान्तरित किया जाना विचार करने योग्य है।

इसके अतिरिक्त यह भी देखने मे आया कि कुछ महिला रिकूट आरक्षियों द्वारा क्षुद्र अनुशासनहीनता दर्शायी गयी। उनके दोष के अनुरुप उन्हें अलग से टोली कमाण्डर/टोली उस्ताद/गणना मेजर से चिन्हित कराकर कार्यवाही किया जाना समीचीन होगा।

जांच आख्या अवलोकनार्थ सादर सेवा में प्रेषित है।"

10. The three member committee has fastened responsibility of organising protest and instigating others upon the petitioners. They are also accused of misbehaving with senior officers. The committee has also recommended transfer of thirteen lady constables to other training centres and further observed that in respect of some of the lady trainee recruits, who have shown acts of minor indiscipline, separate proceedings be undertaken to identify them and to take action, accordingly. It is admitted on record that apart from this fact finding inquiry no other inquiry has been held.

11. Alongwith the counter affidavit an order of the Deputy Inspector General of Police (Personnel), dated 11th June, 2019 has been annexed, which directs the SSP Prayagraj to take recourse to Rule 20(4) of the Rules of 2015 read with Regulation 541(2) of the Police Regulations and after affording an opportunity of hearing to the lady constables, take appropriate action. It is in furtherance of this direction that a show cause notice has been issued to all the petitioners. The petitioners have denied the allegations levelled against them in the show cause notice. In the leading writ petition, the petitioner has referred to the statement of the lady constable who had noticed entry of two unauthorised persons in the training centre on a bike and that on account of their attempting to outrage the modesty of one of the constables the trainee constables got frightened and raised their voice. They also informed the authorities about it. She has denied having taken any part in the protest or having instigated anyone else. Similar

stand is taken by other petitioners. The petitioners have also denied having violated any provision of law or having indulged in any act of indiscipline. The explanation submitted by the petitioners have been rejected holding it to be not satisfactory. Consequently, orders of termination have been passed. No disciplinary proceedings have, nevertheless, been initiated against the petitioners.

12. The orders impugned are challenged primarily on the ground that as petitioners have been terminated on specific charges of indiscipline and misconduct, without conducting any disciplinary inquiry against them, as such, the orders are contrary to law. It is also stated that adequate opportunity has been denied to the petitioners to prove their innocence and that the procedure contemplated in law has otherwise been violated. The petitioners further urge that in view of the nature of allegations levelled against them an inquiry under Rule 14(1) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 was imperative which has not be done and consequently the order impugned is unsustainable. Submission is also advanced that Rule 20(4) of the Rules of 2015 have no applicability in the facts of the present case since the termination is founded on misconduct, without holding any enquiry, and not upon assessment of their work upon conclusion of the probation period. Petitioners have placed reliance upon a Division Bench Judgement of this Court in Paras Nath Pandey Vs. Director North Central Zone, Cultural Center, Allahabad passed in Special Appeal No. 798 of 2000. It has also been argued that petitioners' reply has not been considered and the impugned action is otherwise grossly disproportionate so as to shock the conscience of a prudent person.

13. A counter affidavit has been filed stating that due procedure has been followed before passing the order and that the grievance regarding violation of principles of natural justice is not made out. Petitioners have filed a rejoinder affidavit denying averments made in the counter affidavit and have reiterated averments made in the writ petition.

14. I have heard Sri Vijay Gautam, learned Senior Counsel assisted by Sri Atipriya Gautam, learned counsel for the petitioner, learned Standing Counsel for the respondents and perused the materials brought on record.

15. Facts giving rise to the present controversy have already been noticed and, therefore, requires no reiteration. It is admitted that petitioners have been terminated from service on a specific charge of misconduct. According to respondents for extremely ordinary grievances the petitioners went on a protest and blocked the road, outside the training centre, instigated others and misbehaved with higher authorities which is clearly an act unbecoming of a police personnel for which termination is justified.

16. It is not in issue that petitioners services in the matter of alleged misconduct on their part are governed by the provisions of the Rules of 1991. Once a trainee police constable is proposed to be terminated on a specific charge of misconduct, it is imperative that the procedure contemplated under Rule 14 is followed before proceeding to impose

major punishment. It is not in issue that no procedure contemplated under Rule 14 of the Rules of 1991 has been followed. No regular disciplinary proceeding has been instituted; none of the witnesses have been produced in presence of the petitioners and they have also been denied an opportunity to cross examine them. The only inquiry conducted in the matter is at best a fact finding inquiry which cannot be a substitute for a regular disciplinary inquiry contemplated under the Rules of 1991. The petitioners grievance about denial of opportunity to defend themselves is also substantiated on record. Violation of the provisions of Rule 14 is also disclosed. The order impugned in the present writ petition, therefore, is liable to be set aside on this short ground alone.

17. The respondents apparently have invoked Rule 20(4) of the 2015 Rules as also para 541(2) of the U.P. Police Regulations to pass the order impugned. Rule 20(4) of the Rules of 2015 is reproduced:-

''यदि परिवीक्षा अवधि या बढ़ायी गयी परिवीक्षा अवधि के दौरान किसी भी समय या उसके अन्त में नियुक्ति प्राधिकारी को यह प्रतीत हो कि परिवीक्षाधीन व्यक्ति ने बढ़ायी गयी परिवीक्षा अवधि के दौरान नियुक्तिप्राधिकारी के संतोषानुसार पर्याप्त सुधार नहीं किया है तो उसे उसके मौलिक पद पर, यदि कोई हो, प्रत्यावर्तित किया जा सकता है और यदि उसका किसी पद पर धारणाधिकार न हो, तो उसकी सेवायें समाप्त की जा सकती है।''

18. Rule 20(4) confers jurisdiction upon the appointing authority to assess the working of a probationer with an intent to either confirm his services or to extend the period of probation or discontinue his employment on account of unsatisfactory work and failure to improve despite opportunity.

19. On facts, exigency to invoke Rule 20(4) of the 2015 Rules has not arisen. The respondents were not assessing the performance of probationer with the object of extending probation or confirming the services. The petitioners have hardly worked for a month. Their termination is on grounds of misconduct and not assessment of their working during the period of probation. The order impugned, therefore, is also liable to be set aside as it suffers from colourable exercise of power.

20. Para 541(2) of the U.P. Police Regulations provides as under:-

"In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with his service. Before, however this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge."

21. Though Police Regulations have been held to have binding force in Chandra Prakash Sahi vs. State of U.P. reported in (2000) 5 SCC 152 but the regulations ultimately remains a compendium of executive instructions. The Police Regulations would therefore remains subservient to the statutory

service regulations in vogue. In areas where field is occupied by statutory regulations the authorities cannot be permitted to act in violation of statutory rules by having resort to the provisions of Police Regulations.

22. In the matter of holding of disciplinary inquiry rule 14 of the Rules of 1991 occupies the field and specifies the manner of conduct of disciplinary inquiry. The requirement of adherence to rule 14 cannot be obviated by relying upon para 541(2) of the U.P. Police Regulations. Rule 20(4) of the Rules of 2015 and para 541(2) of Police Regulations operate in different field altogether i.e. assessment of work by a probationer and would not be attracted in a case of misconduct.

23. In case of termination on the proved charges of misconduct the authorities would be required to act as per Rule 14(1) of the Rules of 1991 even if the police personnel is on probation. Law in that regard stands settled in Parshotam Lal Dhingra Vs. Union of India; AIR 1958 SC 36. The proposition of law in that regard has remained consistent and has been reiterated in a recent judgment of the Apex Court in State Bank of India vs. Palak Modi reported in (2013) 3 SCC 607. In Palak Modi (supra) services of private respondents were not terminated on account of any deficiency in their performance during probation period but foundation of termination was the alleged use of unfair means in confirmation examination which constituted misconduct. Inquiry in the manner contemplated was not done on the premise that the private respondents were probationer. The Apex Court held the termination to be unsustainable.

24. A Division Bench of this Court in Paras Nath Pandey Vs. Director North Central Zone, Cultural Center, Allahabad reported in 2008 (10) ADJ 283 held as under in para 57 to 59:-

"57. From the above discussions, the principles discernible to find out whether a simple order of termination/discharge of a temporary employee or probationer is punitive or not, broadly, may be stated as under :

(a)The termination of services of a temporary servant or probationer under the rules of his employment or in exercise of contractual right is neither per se dismissal nor removal and does not attract the provisions of Article 311 of the Constitution.

(b)An order of termination simplicitor prima facie is not a punishment and carries no evil consequences.

(c)Where termination simplicitor is challenged on the ground of casting stigma or penal in nature, the Court initially would glance the order itself to find out whether it cast any stigma and can be said to be penal or not. If it does not, no further enquiry shall be held unless there is some material to show certain circumstances, preceding or attending, shadowing the simplicitorness of the said order.

(d)The Court is not precluded from going beyond the order to find out as to whether circumstances, preceding or attending, makes it punitive or not. If the circumstances, preceding or attending, show only the motive of the employer to terminate, it being immaterial would not

vitiate the order unless it is found that order is founded on such act or omission constituting misconduct.

(e)If the order visits the public servant with evil consequences or casts aspersions against his character or integrity, it would be an order by way of punishment irrespective of whether the employee was a mere probationer or temporary.

(f)"Motive" and "foundation" are distinct, though the distinction is either very thin or overlapping. "Motive" is the moving power, which impels action for a definite result, or to put it differently. "Motive" is that which incites or stimulates a person to do an act. "Foundation", however, is the basis, i.e., the conduct of the employee, When his acts and omissions treated to be misconduct, proved or founded, it becomes a case of foundation.

(g)If an order has a punitive flavour in cause or consequence, it is dismissal, but if it falls short of it, it would not.

(h)Where the employer is satisfied of the misconduct and the consequent desirability of termination, it is dismissal even though the order is worded innocuously. However, where there is mere suspicion of misconduct and the employer does not wish to bother about it, and, instead of going into the correctness of guilt, feel like not to keep the employee and thus terminate him, it is simpliciter termination and not punitive.

(i)Where the termination simplicitor is preceded by an enquiry, preliminary or regular , the Court would see the purpose, object of such enquiry as also the stage at which, the order of termination has been passed.

(j)Every enquiry preceding the order of termination/discharge, would not make it punitive. Where an enquiry contemplated in the rules before terminating an probationer or temporary employee is held, it would not make the order punitive.

(k)If the enquiry is to find out whether the employee is fit to be confirmed or retained in service or to continue, such an enquiry would not render termination punitive.

(l)Where the employer hold a formal enquiry to find out the correctness of the alleged misconduct of the employee and proceed on the finding thereof, such an order would be punitive, and, cannot be passed without giving an opportunity to the concerned employee.

(m)If some formal departmental enquiry commenced but not pursued to the end. Instead a simple order of termination is passed, the motive operating in the mind of the authority would be immaterial and such an order would be non punitive

(n)When an order of termination is assailed on the ground of mala fide or arbitrariness, while defending the plea of mala fide, if the authority has referred certain facts justifying the order of discharge relating to misconduct, negligence or inefficiency of the employee in the appeal or in the affidavit filed before the Court, that would not make the order founded on any misconduct.

(o)Sometimes when some reason is mentioned in the order, that by itself would not make the order punitive or stigmatic. The following words mentioned in the order have not been held to be punitive.

i."want of application",

ii."lack of potential",

iii."found not dependable",

iv."under suspension",

v."work is unsatisfactory",

vi."unlikely to prove an efficient officer".

(p)Description of background facts also have not been held to be stigmatic

(q)However, the words "undesirable to be retained in Government service", have been held stigmatic.

(r)If there is (i) a full scale formal enquiry, (ii) in the allegations involving moral turpitude or misconduct, (iii) which culminated in a finding of guilt; where all these three factors are present, the order of termination would be punitive irrespective of the form. However, if any one of three factors is missing, then it would not be punitive.

58. The aforesaid are not exhaustive, but lay down some of the principles to find out whether termination of an employee is simplicitor or punitive. Each and every case has to be considered in the light of the facts and circumstances of the case, but broadly the aforesaid are the factors to find out whether termination of an employee is punitive or not.

59. Considering the facts of this case in the light of the legal principles, as discussed above, we are clearly of the view that the impugned order of termination is nothing but punitive one and, therefore, cannot sustain."

25. In Mathew P. Thomas vs. Kerala State Civil Supply Corporation Ltd. and others, (2003) 3 SCC 263, the Apex Court observed that if form and language of the termination of probationer clearly indicate that is punitive in nature then there would be no requirement to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. This judgment would clearly be attracted in the facts of the present case inasmuch as the very perusal of termination order makes it explicit that termination of petitioners probationer are founded upon misconduct.

26. The petitioners are young unmarried females who have just joined the police force and have worked for less than a month as trainee constables. Their action in reacting to perceived threat to their security and violation of privacy has to be viewed with greater care and concern and in keeping with prevalent societal values. Their response to the situation even if had breached the settled norms of discipline in a police force but it cannot be viewed as an grave act of misconduct so as to warrant extreme punishment of termination from service.

27. The respondents have proceeded against the petitioners on the premise that

on insignificant and non existent causes an act of indiscipline is performed by them. This premise, on facts, is found not to be correct. Statement of large number of lady trainee constables clearly shows occurrence of some incident during the night of 4/5th June, 2019 which generated serious concerns relating to safety and security of young ladies. These young ladies were extremely frightened. The facilities at the training centre for them was otherwise not adequate. It was in this background that they raised an alarm by going on protest for a duration of about half an hour and thereafter continued with their training.

28. Raising of concerns regarding security for young lady constables, on account of the incident happened on the previous night, cannot be treated as protest raised for no valid reasons. It, also, could not be treated as an insignificant issue. Even if protest was impermissible yet it could not be treated as an act so serious so as to justify ouster of lady constables in the peculiar facts of the present case.

29. At the threshold of their career and being new to the organization these constables could have been counselled or warned at best. It was not necessary for the authorities to reciprocate an alleged disproportionate response to the situation by the female constables with a shockingly disproportionate response on their part. Even the inquiry committee had only recommended shifting of some of these constables to other training centres and not their termination. The inquiry report recommended a further inquiry to identify other culprits in an appropriate proceedings which was never conducted.

30. Apart from action being in derogation of the applicable statutory provision as also Article 311(2) of the Constitution of India, the impugned action is grossly disproportionate and is shocking to the very conscience of a prudent person. In Ranjit Thakur vs. Union of India, (1987) 4 SCC 611, their Lordships of the Apex Court observed that sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the competent authority would be interfered with if is in outrageous defiance of logic.

31. In Bhagat Ram vs. State of Himachal Pradesh, AIR 1983 SC 454 the Apex Court observed that the penalty imposed must be commensurate with the gravity of the misconduct and if it is disproportionate then would be violative of Article 14 of the Constitution of India.

32. In S. R. Tiwari vs. Union of India, (2013) 6 SCC 602, the law on proportionality has been elucidated with reference to Article 14 of the Constitution of India in following words in para 6 and 25:-

"6. Thus, the questions that arise for consideration of this Court are whether the punishment of compulsory retirement awarded by the disciplinary authority is proportionate to the delinquency proved and whether the respondents in the contempt petitions

wilfully violated the order dated 5-10-2012 [S.R. Tewari v. Union of India, SLPs (C) Nos. 22263-64 of 2012, order dated 5-10-2012 (SC), wherein it was directed:"Heard the learned counsel for the parties. We are of the view that it is desirable that the petitioner may move a representation before the competent authority and if he does so within a period of one week raising all grievances, the same will be decided by a speaking and reasoned order within a period of two weeks thereafter and the order shall not be given effect to immediately and shall be placed before this Court on the next date of hearing. List this matter after four weeks."] passed by this Court holding that the punishment should not be given effect to until it is produced before the Court at the time of the next hearing.

25. In B.C. Chaturvedi v. Union of India [(1995) 6 SCC 749 : 1996 SCC (L&S) 80 : (1996) 32 ATC 44 : AIR 1996 SC 484] , this Court after examining its various earlier decisions observed that in exercise of the power of judicial review, the court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an authority "shocks the conscience" of the court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, the court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner though he had not intended to do so. The court may further examine the effect, if the order is set aside or substituted by some other penalty. However, it is only in very rare cases that the court might, to shorten the litigation, think of substituting its own view as to the quantum of punishment in place of punishment awarded by the competent authority."

33. It was in this context that when writ petition was entertained this Court noticed the submissions advanced on behalf of the petitioners in following words:-

"The order impugned is assailed on the ground that though it has been passed on specific charges but no opportunity of hearing has been given and no proceedings as per law have otherwise been undertaken. It is also submitted that petitioner had only pointed out various shortcomings and had not indulged in any act of misconduct. Learned counsel for the petitioner further submits that petitioner undertakes not to commit any such act in future. Learned counsel for the petitioner states that petitioner otherwise would submit an undertaking not to repeat any such act in future.

Sri S.K. Dubey, learned Chief Standing Counsel may obtain instructions in the matter, by the next date fixed.

Post as fresh on 2nd September 2019."

34. The respondents, however, have chosen to contest the matter and that is how the writ petition has been heard on merits.

35. The reply submitted by the petitioners to the show cause notice

denying the allegations levelled against them has also not been considered. Explanation of petitioners, on merits, denying the allegations have been discarded by observing that they are not satisfactory. However, no reasons are given as to why petitioners' explanations is found unsatisfactory. No inquiry has otherwise been conducted to prove the charges. The reasons to reject petitioners reply, in the facts and circumstances of the case, is found to be absolutely cryptic and arbitrary.

36. In light of the discussions made above, this Court finds that the impugned action is wholly arbitrary, unreasonable and unsustainable in law. Consequently, order impugned dated 26th June, 2019, passed by the Senior Superintendent of Police, Prayagraj, cannot be sustained and is quashed. The writ petitions are, accordingly, allowed.

37. The petitioners shall submit an unconditional apology and would also submit an undertaking not to indulge in any form of protest of this kind in future. If such an undertaking is submitted alongwith certified copy of this order, the appointing authority shall pass appropriate orders by taking a sympathetic view in the matter, in light of the observations made above, for petitioners to complete their ongoing training. It would be open for the respondents to shift the petitioners to any other training centre as also recommended by the fact finding committee. Needful orders in that regard would be passed within six weeks from the date of presentation of certified copy of this order.

38. In the facts of the present case the parties shall bear their own costs.

(2019)11ILR A199

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.11.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 22782 of 2019

Surendra Kumar Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailendra Singh Rajawat

Counsel for the Respondents:
C.S.C.

A. Service Law - Voluntary Retirement - Financial Handbook, Vol. II, Part II to IV: Regulation 56 - The authority cannot use the application of voluntary retirement to Compulsorily retire an employee.

Application withdrawing application of voluntary retirement was rejected, levelling allegations of misconduct and serious indiscipline against the petitioner. (Para 15)

B. Service Law – Voluntary Retirement and Resignation. Application for voluntary retirement and resignation should be unconditional. It may be withdrawn, before its acceptance. However, in the case of voluntary retirement, the said withdrawal would be permissible subject to the prescription of law as applicable but it is not the case regarding resignation. (Para 10)

Petition allowed (E-4)

Precedent followed: -

1. Dr. Prabha Atri Vs St. of U.P. & ors. (2003) 1 SCC 701 (Para 11)

2. Balram Gupta Vs U.O.I. & anr. (1987) (Supp.) SCC 228 (Para 12)

Precedent distinguished: -

1. Poonam Garg Vs IFCI Venture Capital Funds Ltd. Thru. its M.D. & ors. W.P. (C) 9304/2019 & C.M. No. 38360/2019 (stay) (Para 13)

Present petition challenges order dated 10.07.2019, passed by Settlement Officer of Consolidation, District – Unnao.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri S.S. Rajawat, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel for opposite parties no.1 to 4.

2. In view of the proposed order, notice to opposite party no.5 is hereby dispensed with.

3. By means of this petition, the petitioner has assailed the order dated 10.7.2019 passed by the Settlement Officer of Consolidation, District - Unnao whereby the application of the petitioner dated 18.6.2019 withdrawing the application for voluntary retirement dated 23.5.2019 has been rejected and application for voluntary retirement dated 23.5.2019 has been accepted.

4. The petitioner has submitted his application for voluntary retirement on 23.5.2019, which is contained in Annexure No.7 to the writ petition. Said application is an unconditional application. Thereafter, the competent authority has issued a letter dated 24.5.2019 to the petitioner, which is contained in Annexure No.9 to the writ petition, directing the petitioner to indicate the period as to when he is willing to be retired voluntarily. In the said application, it has categorically been indicated that if the petitioner does not indicate the period, he shall be deemed to be retired w.e.f. 22.8.2019 i.e. after expiry of three months' period w.e.f. 23.5.2019. Thereafter, the petitioner submitted an application on 18.6.2019 prior to 22.8.2019, withdrawing his voluntary retirement application dated 23.5.2019. In said application, the petitioner has narrated so many facts and circumstances but at the end he requested that since his voluntary retirement application has not been accepted by the department, therefore, the said application may not be accepted. After receiving the aforesaid application dated 18.6.2019, the authority competent has passed the order dated 10.7.2019, which is contained in Annexure No.1 to the writ petition, rejecting the application of the petitioner dated 18.6.2019 whereby he had withdrawn his voluntary retirement application dated 23.5.2019.

5. Submission of learned counsel for the petitioner is that while rejecting the application of the petitioner dated 18.6.2019, the authority competent has dealt such application of the petitioner, by means of the impugned order, as if the application for compulsory retirement is being dealt with inasmuch as so many allegations have been levelled against the petitioner regarding his work, conduct and performance of duties. The impugned order goes to the extent that considering the entire service record of the petitioner and his work and conduct, he should not be retained in Government service, however no separate proceedings to that

effect have ever been drawn against the petitioner. In the aforesaid backdrop, the impugned rejection order dated 10.7.2019 which has been passed by the competent authority appears to have exercised his jurisdiction in a whimsical and arbitrary manner, therefore, the order dated 10.7.2019 may be quashed.

6. Per contra, Sri Ran Vijay Singh has referred the relevant provision, which deals compulsory retirement i.e. Rule 56 of the Financial Hand Book, Volume II, Part II to IV. Sri Singh has referred Clauses (c) and (d) of the aforesaid Regulation 56, which are as under:-

"(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 50 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 had completed qualifying service of 20 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 50 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 rates at which he was drawing them 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 in 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."

7. Sri Singh has submitted that the second proviso of Regulation 56 (d) categorically provides that notice once given by the Government servant under Clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority and since in the case in hand, the appointing authority has not found any plausible reason to accept the withdrawal application of the petitioner, therefore, rejected the same vide order dated 10.7.2019. As per Sri Singh, there is no infirmity or illegality in the order dated 10.7.2019.

8. Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel has also

submitted that Annexure No.3 to the writ petition is a letter preferred by the petitioner directly to the Chief Minister, which is misconduct on the part of the petitioner. Sri Singh has further submitted with vehemence that the petitioner has not withdrawn his application for voluntary retirement vide letter dated 18.6.2019 unconditionally but has indicated so many conditions casting aspersions on the superior authorities, therefore, the authority concerned has passed the order dated 10.7.2019 considering those circumstances and facts.

9. Having heard learned counsel for the parties and having perused the relevant material available on record, I am of the considered opinion that the authority competent has not passed the order dated 10.7.2019 strictly in accordance with law and he has dealt the issue of resignation/ voluntary retirement as if it is an issue of compulsory retirement.

10. The case in hand is a case of voluntary retirement. Sometimes voluntary retirement and resignation are taken in a similar way. Both the resignation and the voluntary retirement expressed the voluntary desire of an employee to cease his/ her occupation and all duties that go along with it. They may result from number of reasons, including personal grievances or a disability that prevents the satisfactory completion of work. Neither, however, inherently conveys any sense of wrong doing. Both exist strategies require one to provide advance written notice to the employer, with a final day of service that is clearly delineated and unconditional. Therefore, one thing is for sure that the application for voluntary retirement and resignation should be unconditional and before the said application is accepted, it can be withdrawn. However, in the case of voluntary retirement, the said withdrawal would be permissible subject to the prescription of law as applicable but it is not the case regarding resignation. Further, the touchstone and thumb rules in both the cases may largely be similar while considering a particular issue.

11. In the case of resignation, the law is settled that resignation must be unconditional and having intention to operate as such in view of the dictum of the Hon'ble Apex Court in re; **Dr. Prabha Atri v. State of U.P. and others, (2003) 1 SCC 701**. In the present case, the withdrawal application of the petitioner is unconditional, therefore, it qualifies this test. This analogy may be accepted in case of voluntary retirement.

12. Secondly, resignation can be withdrawn before the same has been accepted by the competent authority. In the instant case, the application of the petitioner regarding voluntary retirement had not been accepted and it was deemed to be accepted w.e.f. 22.8.2019 i.e. the period of three months from tendering such application but the petitioner has withdrawn his said application on 18.6.2019. The Hon'ble Apex Court in re; Balram Gupta v. Union of India and another, 1987 (Supp) SCC 228, has considered more or less identical circumstance and held in para-13 as under:-

*"**13.** We hold, therefore, that there was no valid reason for withholding the permission by the respondent. We hold further that there has been compliance with the guidelines because*

the appellant has indicated that there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in Government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees."

13. The competent authority could have passed any order indicating other reasons except those which have been considered in the impugned order relating to appreciation of his service records, work and conduct etc. of the petitioner. Had the petitioner been retired compulsorily under Regulation 56, the findings of competent authority vide order dated 10.7.2019 would have been justified but this is a case of voluntary retirement, which was withdrawn by the employee before it has been accepted, therefore, the findings of impugned order dated 10.7.2019 are absolutely unwarranted and uncalled for. The High Court of Delhi has considered more or less identical issue in re; **Poonam Garg Vs. IFCI Venture Capital Funds Ltd. through its Managing Director & others**, W.P. (C) 9304/2019 & C.M. No.38360/2019 (stay) following various dictums of the Hon'ble Apex Court on the subject, which has been decided on 27.9.2019 and paragraphs 16, 17, 18, 19, 20 & 21 are relevant for the present issue, which are being quoted herein below:-

"16. The question as to when an employee can be allowed to withdraw his request for resignation or voluntary retirement and the employer"s right to reject such request for withdrawal has been considered by the Supreme Court from time to time and the common thread running through all these decisions is that in normal circumstances, an employee can withdraw its resignation before it comes into effect or operation. In this regard, reference may be made to paragraph 41 of ***Union of India Vs. Gopal Chandra Misra*** *(1978) 2 SCC 301.*

"41. The general principle that emerges from the foregoing conspectus, is that in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post, an intimation in writing sent to the competent authority by the incumbent, of his intention or proposal to resign his office/post from a future specified date can be withdrawn by him at any time before it becomes effective, i.e. before it effects termination of the tenure of the office/post or the employment."

17.The Apex Court in ***Air India Express Limited and Ors. Vs. Gurdarshan Kaur Sandhu*** *2019 (11) SCALE 310 has in paragraph 17 of its decision, after considering its earlier*

decisions in ***Gopal Chandra Misra*** *(supra),* ***Balram Gupta*** *(supra),* ***Punjab National Bank Vs. P.K. Mittal*** *1989 Supp (2) SCC 175 and* ***J.N. Srivastava*** *(supra), summarised the circumstances in which withdrawal of a request for voluntary retirement can be permitted by observing as under:*

"17. It is thus well settled that normally, until the resignation becomes effective, it is open to an employee to withdraw his resignation. When would the resignation become effective may depend upon the governing service regulations and/or the terms and conditions of the office/post. As stated in paragraphs 41 and 50 in Gopal Chandra Misra, "in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post" or "in the absence of a legal contractual or constitutional bar, a "prospective resignation" can be withdrawn at any time before it becomes effective". Further, as laid down in Balram Gupta, "If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter."

18. The petitioner's application for voluntary retirement, having been made in accordance with paragraph 33 of the Regulations, as also the fact that the contentions raised by both sides revolve around the language of paragraphs 33(2)(i), (ii) and (v), it would be apposite to reproduce the same for the facility of reference. The relevant extracts of paragraphs 33 (2)(i), (ii), (iii) and (v) of the Regulations read as under:-

"33. Superannuation and Retirement .....….

(2)

(i) An employee who has attained the age of 50 years shall have an option to retire anytime thereafter by giving to the Company three months' notice in writing.

(ii) Without prejudice to the sub regulation 2(i), the employee of the Company may voluntary retire at any time after the completion of 20 years of qualifying service (even though he has not attained the age of 50 years), after giving to the competent authority three months notice in writing. Provided that this sub regulation shall not apply to an employee who is on deputation or study leave abroad, unless after having been transferred or having returned to India, he has resumed the charge of the post in India and served for a period of not less than one year.

Provided further that this sub regulation, shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

(iii) The notice or voluntary retirement given under sub-Regulation (ii) shall not be valid unless it is accepted by the Competent Authority, Provided that where the Competent Authority does not communicate its decision not to accept such notice before the expiry or period specified in the notice, the retirement shall become effective from the date of expiry of such period.

.....

(v) An employee, who has elected to voluntarily retire, pursuant to

sub-Regulation 2 (ii) and has given notice for the purpose, shall not be entitled to withdraw the notice, except with the permission of the Competent Authority, provided that the request for such withdrawal shall be made before the intended date of his retirement."

19. The petitioner has, by placing reliance on paragraph 33(2)(v), contended that the Regulations clearly envisage that an employee seeking voluntary retirement would be entitled to withdraw the said request subject to such withdrawal being made prior to the intended date of retirement. On the other hand, the respondents have vehemently contended that the petitioner"s application for voluntary retirement was covered under paragraph 33(2)(i) of the Regulations which entitles an employee to seek withdrawal of its request for voluntary retirement; it is only cases governed by paragraph 33(2)(ii) when an application seeking withdrawal of an earlier request can be entertained by the management, but even this withdrawal is subject to the permission of the Competent Authority. The respondents have, therefore, contended that no employee has an absolute right to seek withdrawal of his application for voluntary retirement. Upon a careful perusal of the Regulations, I am unable to accept the respondents" contentions that paragraph 33(2)(v) is not applicable to cases where voluntary retirement has been sought under paragraph 33(2)(i). Once paragraph 33(2)(ii) states in no uncertain terms that it operates without prejudice to the provisions of paragraph 33(2)(i), it is evident that any request for withdrawal envisaged under paragraph 33(2)(v) would include requests for voluntary retirement made under both paragraphs 33(2)(i) and (ii) and, therefore, the respondents" plea that the petitioner was not entitled to seek withdrawal under Paragraph 33(2)(v) is wholly unmerited.

20. In any event, even if the respondents" plea that paragraph 33(2)(v) of the Regulations was not applicable to paragraph 33(2)(i) were to be accepted, it would only imply that there is no provision in the Regulations dealing with the withdrawal of an application made under paragraph 33(2)(i) while an application made under paragraph 33(2)(ii) can be withdrawn subject to conditions prescribed in paragraph 33(2)(v). Thus, as per the case sought to be pleaded by the respondent, once there is no specific provision for withdrawal of an application made under paragraph 33(2)(i), a necessary corollary thereof is that there is neither any specific bar nor any conditions attached to seeking withdrawal of a request for voluntary retirement made under paragraph 33(2)(i). In these circumstances, any requests for withdrawal of an application made under paragraph 33(2)(i) would necessarily be covered by general principles which provide that even in the absence of any specific provision in the regulations, an employee can seek withdrawal of his request for resignation or voluntary retirement. Reference in this regard may be made to the observations of the Supreme Court as contained in paragraph 8 in ***P.K. Mittal (supra)****, which read as under:-*

"8. The result of the above interpretation is that the employee continued to be in service till 21-4-1986 or 30-6- 1986, on which date his services

would have come normally to an end in terms of his letter dated 21-1-1986. But, by that time, he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the bank. It is true that there is no specific provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles, to withdraw his letter of resignation. That is why, in some cases of public services, this right of withdrawal is also made subject to the permission of the employer. There is no such clause here. It is not necessary to labour this point further as it is well settled by the earlier decisions of this Court in Raj Kumar v. Union of India [(1968) 3 SCR 857 : AIR 1969 SC 180 : 1969 Lab IC 310] , Union of India v. Gopal Chandra Misra [(1978) 3 SCC 301 : 1978 SCC (L&S) 303 : (1978) 3 SCR 12] and Balram Gupta v. Union of India [1987 Supp SCC 228 : 1988 SCC (L&S) 126]"

21. Thus, when looked at from any angle it is evident that the petitioner was well within her right to seek withdrawal of her request for voluntary retirement before its effective date. If paragraph 33(2)(v) is taken as not being applicable to the petitioner"s case, then her request had to be considered as per the general principles laid down by the Supreme Court, which as noted hereinabove prescribe that a request for resignation can be withdrawn anytime before it becomes effective. The petitioner"s voluntary retirement was to be effective from 07.09.2019, not only as per her application but even as per the alleged acceptance of the respondent. Her withdrawal application, therefore, having been made much earlier, was liable to be accepted. On the other hand, if paragraph 33(2)(v) is taken as being applicable to the petitioner"s case, the only rider therein is that the leave of the Competent Authority was required before seeking such withdrawal, but as rightly contended by the petitioner the Competent Authority cannot be permitted to exercise its discretion in this regard in a wholly whimsical and arbitrary manner. The petitioner has served the Company for 24 years without any complaint whatsoever against her and had been promoted as a General Manager, yet its impugned order assigns no reason whatsoever for rejecting her request. There is also no reason as to why the Company should not permit the petitioner to seek withdrawal of her request, especially since she sought the same within barely 6 days of her making the application for voluntary retirement. It is not even the case of the Company that they had appointed any new person to assume the duties of the petitioner or had in any manner invested in training any new employee for the post which she was holding. Merely because the respondent No.1 had issued an order on 11.06.2019 redistributing the duties of its employees, would not be a ground to deprive the petitioner of the right available to her under law. Once the Company"s Regulations do not require an employee to provide reasons at the time of seeking voluntary retirement or seeking withdrawal thereof, the petitioner"s failure to provide any reasons either at the time of submitting her application

seeking voluntary retirement or while seeking withdrawal thereof cannot be a ground to reject her request for withdrawal. In the facts of the present case, when the withdrawal was sought within a short span of time when neither any new personnel had been appointed nor any substantial reorganisation of personnel had been carried out by the Company, the rejection of the petitioner"s request for withdrawal was wholly unjustified. Even the contention of the respondents that the petitioner is habituated to requesting voluntary retirement as a manner of protesting her transfer remains unsubstantiated as nothing has been placed on record in support thereof."

14. Before the Delhi High Court the relevant rule applicable in the case was cited in Regulation 33 of the Regulations and Sub-clause (v) of Regulation 33 is pari materia of second proviso of Sub-clause (d) of Regulation 56 and the Delhi High Court has dealt the issue and has found that such condition may not be treated as rider if the application for voluntary retirement is withdrawn before its acceptance. In the said case before the Delhi High Court, while rejecting the application of that petitioner whereby resignation was withdrawn no condition was imposed, however, in the present case those conditions have been imposed, which could have not been imposed while disposing of the issue of voluntary retirement. Therefore, it appears that discretion of the competent authority rejecting the application of the petitioner dated 18.6.2019 is wholly whimsical and arbitrary.

15. Before parting with, it is needless to say that if the petitioner has shown serious indiscipline in his entire service career as his application dated 18.6.2019 and that application which has directly been addressed to the Chief Minister are an example of gross indiscipline as per learned counsel for the opposite parties, any appropriate orders can be passed by the authority concerned but strictly in accordance with law, however, while disposing of the application for withdrawal of the application of voluntary retirement, his entire service record and his behaviour, work and conduct may not be appreciated in a manner as if it is a case of compulsory retirement. The separate mode has been prescribed if the order of compulsory retirement is passed. The authority cannot use the application of voluntary retirement for retiring the employee compulsorily.

16. In view of the above, the order dated 10.7.2019 passed by opposite party no.4 is not sustainable in the eyes of law and liable to be quashed. Accordingly, the order dated 10.7.2019 passed by opposite party no.4 is hereby quashed.

17. The liberty is given to the opposite parties to pass a fresh order strictly in accordance with law within a period of six weeks from the date of production of certified copy of this order.

18. A writ in the nature of mandamus is issued commanding the opposite parties to permit the petitioner forthwith to continue on the post in question on which he was discharging his duties before submitting his application for voluntary retirement and pay him his salary and other consequential services benefits with promptness, say within a period of four weeks, as per law.

19. The writ petition is accordingly **allowed.**

20. No order as to costs.

(2019)11ILR A208

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI , J.

Service Single No.28414 of 2019

Sanjay Tewari ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Mishra, Sri Ghufran Hussain, Sri Vineet Bihari Patel.

Counsel for the Respondents:
C.S.C., Sri Puneet Chandra.

A. Service Law- Disciplinary Proceedings – Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 7(IV); U.P Fundamental Rules: Rule 56(a) – Commencement of Departmental Enquiry. Service or dispatch through permissible mode of service and not preparation or signing of the charge-sheet would constitute commencement of the Disciplinary Proceedings.

Whether a retired public servant can be visited with a charge- sheet in his afternoon of his last working day in office when he is understood to have retired? Merely for the fact that the charge sheet is dated a day prior to the date of retirement, would not amount to the initiation of the disciplinary proceedings unless a copy thereof was duly served upon the petitioner or at least the same was dispatched to him through the permissible mode of service. (Para 6, 18, 21). The issuance of charge-sheet in relation to an occurrence having taken place after more than a year of petitioner's transfer would stand vitiated for want of service before 12 O'clock on 28.02.2019 (date of retirement) and sending the charge-sheet by e-mail in the afternoon was thus hit by a jurisdictional error. (Para 15)

B. Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999: Rule 7(IV) - None of the punishments envisaged under Rules 1999 would at all stand attracted in a situation where a public servant has retired from service. Therefore, the purpose of initiating disciplinary proceedings under the Rules 1999 cannot be allowed to travel to invade upon the protection which the Rules provide for a retired public servant. (Para 10, 14)

C. Civil Service Regulations: Regulation 351-A - Once a public servant has retired, the proceedings can be initiated only by following the procedure under Regulation 351-A of the Civil Service Regulations, provided there is no bar -

The disciplinary proceedings with the issuance of charge-sheet treating him a public servant was erroneous and invades upon the power of Governor. (Para 21)

Petition allowed (E-4)

Precedent followed: -

1. Special Director & anr. Vs Mohd. Ghulam Ghouse & anr. (2004) 3 SCC 440 (Para 4)

2. U.O.I. & anr. Vs Kunisetty Satyanarayana (2006) 12 SCC 28 (Para 4)

3. Vijay Pal Singh Vs St. of U.P. & 3 ors. Writ-A No. 11382 of 2015 (Para 4)

4. U.O.I. & ors. Vs Dinanath Shantaram Karekar & ors. (1998) 16 LCD 1274 (Para 12, 21)

Precedent distinguished: -
1. State of M.P. Vs. Onkar Chand Sharma, (2001) 9 SCC 171 (Para 19)

Present petition challenges charge-sheet dated 27.02.2019 and show-cause notice dated 14.08.2019.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Manish Kumar learned Senior Counsel assisted by Sri Ghufran Hussain learned counsel for the petitioner, Sri N.K. Seth learned counsel assisted by Sri Puneet Chandra learned counsel for the opposite parties. Shri Alok Sharma learned Additional Chief Standing Counsel has put in appearance for the State.

2. At the very outset, a preliminary objection was raised by Sri N.K. Seth learned Senior Counsel appearing for the opposite parties that the present writ petition as against the charge-sheet and show cause notice is not maintainable. The show cause notice dated 14.8.2019 is contained as annexure 1 to this writ petition whereas the charge-sheet dated 27.2.2019 is contained as annexure 2.

3. It is well settled that ordinarily this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India would not entertain a writ petition arising out of the charge-sheet and show-cause notice but if the charge-sheet and show cause notice issued by an authority suffer from lack of jurisdiction, the Court may overrule an objection and proceed on merit.

4. Learned counsel for the opposite parties has placed reliance upon the judgments of the Hon'ble Apex Court in the case of **Special Director and another versus Mohd. Ghulam Ghouse and another reported in (2004)3 SCC 440** and case of **Union of India and another versus Kunisetty Satyanarayana reported in (2006)12 SCC 28** as well as the order passed by this Court in **Writ-A No. 11382 of 2015(Vijay Pal Singh versus State of U.P. and 3 others).** The judgments mentioned above propound the same principle as has been appreciated herein-above.

5. The present case however is a case where lack of jurisdiction in the issuance of charge-sheet and consequently show cause notice on the basis of inquiry report submitted is prima facie made out. Thus, the preliminary objection raised by learned Senior counsel for the opposite parties is overruled. The prayer for seeking time to file counter affidavit in a situation where pure question of law is involved would merely prolong the case for no purpose, hence the same is declined.

6. Proceeding to consider the matter on merit, it may be stated that the petitioner while holding the post of Chief Engineer attained the age of superannuation on 28.2.2019. It is on 28.2.2019 that a charge-sheet dated 27.2.2019 came to be served upon him. Merely for the fact that the charge-sheet is dated 27.2.2019 would not amount to the initiation of the disciplinary proceedings unless a copy thereof was duly served upon the petitioner or at least the same was dispatched to him through the permissible mode of service.

7. On the aspect of dispatch of the charge-sheet, the only mode adopted by the opposite parties as has been explained before this Court is through an email sent on 28.2.2019 at 12.20 p.m. That apart, the charge-sheet was also served upon the

petitioner on 28.2.2019 at 5.47 p.m. personally. Both the modes of service as disclosed before this Court by the opposite parties on the basis of instructions are clearly in the afternoon on 28.2.2019. There is no proof of service of charge-sheet through any other mode except what has been stated above.

8. This being the factual position, learned counsel for the petitioner taking aid of Rule 56(a) of the Fundamental Rules has argued that a public servant is deemed to have retired from service in the afternoon of the last working day of his service tenure. Therefore, the issuance of charge-sheet after public servant has retired is impermissible and would serve no purpose of the Discipline and Appeal Rules which postulate minor and major punishments.

9. For ready reference, Rule 56 of the Fundamental Rules is produced hereunder:-

"56. (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant, whose date of birth is the first day of a month, shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years:

Provided further that a Government Servant, who has attained the age of fifty-eight years on or before the first day of the November, 2001 and is on extension in service, shall retire from service on expiry of his extended period of service.

(a-1) No Government servant shall be granted extension in service beyond the age of retirement of sixty years:

Provided that a Government servant dealing with budget work or working as a full time member of a committee which is to be wound up within a short period of time may be granted, by the Government, extension of service for a period not exceeding thre*e months in public interest.*

Provided further that a Government servant holding highly specialized technical job whose replacement has not been possible to the arranged before his retirement even after efforts made in this regard, may be granted extension of service up to the age of sixty-two years, if such extension is unavoidable in public interest and the grounds for such extension are recorded in writing:

Note- Each case for extension of service under this clause shall be put up for orders to the Chief Minister through the Chief Secretary.

(a-2) Notwithstanding any thing to the contrary contained in clause (a) or clause (a-1) of this rule, a Government servant may, if considered necessary, in public interest, so to do, be granted extension of service up to the age of sixty-two years with the prior approval of the Cabinet.

Provided that in the cases of extension in service under clauses(a-1) and (a-2) of this rule, Government shall have the right to terminate the extension of service before expiry of such extension by giving a notice in writing of not less than three months in the case of a permanent or, of one month in the case of

a temporary Government servant, or pay and allowances in lieu of such notice".

10. There is no dispute on the aspect that the service Rules applicable to the government servants are equally applicable to the present petitioner who is serving in U.P. Rajya Vidyut Vitaran Nigam Limited. There is yet another ground which goes to the root of the impugned disciplinary proceedings initiated under U.P. Government Servant(Discipline and Appeal) Rules, 1999(hereinafter referred to as the Rules, 1999). The reason is that none of the punishments envisaged under the Rules-1999 would at all stand attracted in a situation where a public servant has retired from service. Looking to the nature of punishments envisaged under the Discipline and Appeal Rules, 1999 the interpretation of Rule 56(a) of the Fundamental Rules has to be made so as to serve the purpose of Discipline and Appeal Rules as well as Regulation 351-A of the Civil Service Regulations. The phrase 'afternoon' in common parlance is referable to a point of time after 12 O' clock in the day.

11. Looking to the factual position in the present case, once it is clear that the charge-sheet was attempted to be communicated to the petitioner after 12 O' clock in the day on 28.2.2019, there is no reason for this Court to understand the service of charge-sheet prior to 12 O' clock on 28.2.2019. The question of jurisdiction would thus arise as to whether a retired public servant can be visited with a charge-sheet in the afternoon of his last working day in office when he is understood to have retired.

12. Learned counsel or the petitioner in order to substantiate the argument has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Union of India and others versus Dinanath Shantaram Karekar and others** reported in **1998(16) LCD-1274**. The judgment cited by the petitioner lends support to the argument purforth.

13. Sri N.K. Seth, learned Senior counsel in reply to the submission has argued that the charge-sheet having been drawn on 27.2.2019 was in fact served upon the petitioner on 28.2.2019, as such, it is quite possible that the petitioner may have evaded service on the same very day. It is however not disputed that apart from the mode of service through e-mail or personal service, any other mode of service was adopted. It is well known that the service through email is the most expeditious mode of service which too has been invoked on 28.2.2019 at 12.20 pm. This Court would have appreciated dispatch through any other mode of service provided the e-mail was not sent but in the present case, the e-mail itself was sent in the afternoon. The last day of working in one's service tenure is recognized only up to the noon and this has a definite purpose that the officer soon thereafter becomes functus officio. Any other understanding of the rule would do violence to the very purpose of Fundamental Rule 56(a). The purpose of Discipline and Appeal Rules is not only to initiate the disciplinary proceedings but to achieve the purpose of punishments envisaged therein.

14. Even if it is assumed that the charge-sheet was served on 28.2.2019 yet none of the punishment as envisaged under the Rules, 1999 can be inflicted upon the petitioner. Once all the punishments envisaged under the Rules, 1999 are incapable of being inflicted upon

the petitioner, the purpose of initiating disciplinary proceedings under the Rules, 1999 cannot be allowed to travel to invade upon the protection which the Rules provide for a retired public servant. Nothing beyond the scope of Rules was in fact a subject matter of consideration before the competent authority at the time of taking such a decision.

15. Thus, the issuance of charge-sheet in relation to an occurrence having taken place after more than one year of petitioner's transfer would stand vitiated for want of service before 12 O' clock on 28.2.2019 and sending the charge-sheet by e.mail in the afternoon was thus hit by a jurisdictional error.

16. For ready reference, the punishments envisaged under the Rules 1999 are reproduced hereunder :-

3. Penalties. *-The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed upon the Government servants :*

Minor Penalties :

(i) Censure;

(ii) Withholding of increments for a specified period;

(iii) Stoppage at an efficiency bar;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders;

(v) Fine in case of persons holding Group 'D' posts;

Provided that the amount of such fine shall in no case exceed twenty-five percent of the month's pay in which fine is imposed.

Major Penalties :

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time scale or to a lower stage in a time scale;

(iii) Removal from the service which does not disqualify from future employment;

(iv) Dismissal from the service which disqualifies from future employment.

Explanation. - The following shall not amount to penalty within the meaning of this rule, namely :

(i) Withholding of increment of a Government servant for failure to pass a departmental examination or for failure to fulfil any other condition in accordance with the rules or orders governing tire service;

(ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar;

(iii) Reversion of a person appointed on probation to the service during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation;

(iv) Termination of the service of a person appointed on probation during or at the end of the period of probation in accordance with the terms of the service or the rules and orders governing such probation.

17. The only course open to the opposite parties is to proceed against the petitioner treating him to have retired from service in accordance with the rules as may be applicable to a retired public servant. The case at hand is not the one where the opposite parties have taken aid of Discipline and Appeal Rules, 1999

treating the petitioner having retired. The period subsequent to the afternoon of last day of service tenure is a privileged period for the public servant to commemorate his contribution and association with his colleagues and subordinate staff. He becomes functus officio in the afternoon. It is for this purpose that a public servant is understood to have retired in the afternoon of last working day otherwise a decision taken prior to retirement would make no difference whether it is issued before or after retirement. The disciplinary proceedings after the date of retirement have to be commenced on a different consideration altogether. It is for this reason that Regulation 351-A of Civil Service Regulations has used a guarded language. Regulation 351-A is reproduced below :-

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement.

Provided that -

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. Shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary proceedings,(Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission]

Explanation- For the purposes of this article-

(a) Departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date;

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which compliant is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to a Civil court".

18. Regulation 351-A maintains continuity of disciplinary proceedings initiated before retirement. It further provides that the disciplinary proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued. The charges in the present case were issued in the afternoon on 28.2.2011 when the petitioner had ceased to be in service and had assumed the status of a pensioner for having retired. Thus, the proceedings cannot be deemed to have been instituted. Therefore, once a public servant has retired, the proceedings can be initiated only by following the procedure under Regulation 351-A of the Civil Service Regulations, provided there is no bar.

19. There is yet another judgment rendered by Hon'ble the Apex Court reported in (2001), 9 SCC 171(State of M.P. versus Onkar Chand Sharma) which the Court may notice in absence of any assistance rendered by learned counsel for the parties.

20. In the abovementioned case, the dispute which fell for consideration before Hon'ble the apex Court was as to when the disciplinary proceedings can be said to have been initiated. The Hon'ble Apex Court in the circumstances of the case where an officer was placed under suspension has held that the disciplinary proceedings are to be treated to have been initiated on the date when the charge-sheet was signed.

21. In the present case, the petitioner was not placed under suspension, therefore, the initiation of the disciplinary proceedings is to be understood within the scope of the plain reading of the relevant Rules. Regulation 351-A of the Civil Service Regulations as well as Rule 7(IV) of the U.P. Government Servants Discipline and Appeal Rules, 1999 make it clear that unless the charge-sheet is issued, neither the disciplinary proceedings can be said to have been initiated nor the period of 15 days for reply can be computed from any other date. The issue of charge is thus relevant. It is to be noted that the issuance of charge-sheet in the present case on 28.2.2019 at 12.20 p.m. by e-mail leaves no manner of doubt that the charges framed were issued in the afternoon on 28.2.2019 and at that time, the petitioner had entered into the retiral age by virtue of Rule 56(a) of the fundamental Rules. Once the status of the petitioner was recognized as that of a retired public servant from the afternoon on 28.2.2019 i.e. last working day, this Court is of a clear opinion that the disciplinary proceedings with the issuance of charge-sheet treating him a public servant was erroneous and invades upon the power of Governor. This Court for the reasons aforesaid would thus draw a distinction insofar as the applicability of apex Court judgment mentioned above to the present case is concerned. Moreover, the earlier judgment of the apex Court reported in 1998(16) LCD-1274(supra) does not seem to have been considered in the later judgment. That apart the statutory Rules under consideration also stand at variance.

22. This Court would have adhered to the well settled principle of not entertaining this writ petition as against the charge-sheet coupled with consequential proceedings but for the fact that the charge-sheet in respect of an occurrence having taken place after more than one year of petitioner's transfer was

not served prior to noon on 28.2.2019, therefore, the impugned action lacks authority of law and could not be legally continued under Regulation 351-A of Civil Service Regulations read in conjunction with Discipline and Appeal Rules, 1999. The ground for interference is made out. In these circumstances, prolonging this case any further for no useful purpose would be unjust. However, liberty is open to the opposite party to proceed against the petitioner in accordance with law.

23. The writ petition is accordingly allowed. The impugned charges-sheet dated 27.2.2019 along with the consequential proceedings are hereby set aside. Consequences to follow. There shall be no order as to cost.

(2019)11ILR A215

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.11.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 31764 of 2019

Jai Prakash Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Pratap Singh

Counsel for the Respondents:
C.S.C., Sri J.B.S. Rathour

A. Service Law- Suspension - Disciplinary inquiry against a public servant can be initiated even by an authority higher to the appointing authority but so far as the order of suspension is concerned, that will have to be passed by the appointing authority or by the authority lower in rank that has been delegated with such power but not by any other authority. (Para 13)

In the present case, the suspension order has not been passed by the Appointing Authority but the Superior Authority to the Appointing Authority, therefore, the suspension order vitiates. (Para 14)

Petition allowed (E-4)

Precedent followed:-

1. Ashok Kumar Singh Vs St. of U.P. & ors. [(2006) 3 UPLBEC 2247] (Para 13, 14, 15, 16)

Present petition challenges suspension order dated 14.08.2019, passed by Additional Director of Education (Basic), U.P., Prayagraj.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Manish Kumar, learned Senior Advocate assisted by Sri Ajay Pratap Singh, Advocate for the petitioner, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the State-respondents and Sri J.B.S. Rathour, learned counsel for the opposite party No.4.

2. Learned counsel for the petitioner has filed the supplementary affidavit, today in the Court, the same is taken on record.

3. In compliance of order dated 19.11.2019, Sri J.B.S. Rathour has produced the copy of letter dated 21.11.2019 preferred by the District Basic Education Officer, Sultanpur addressing to his counsel wherein the authority has indicated that at the time of suspension of the petitioner he was serving on the post of Personal Assistant Grade-II. The letter dated 21.11.2019 is taken on record.

4. By means of this writ petition, the petitioner has assailed the impugned suspension order dated 14.08.2019 passed by the Additional Director of Education (Basic), U.P., Prayagraj.

5. The main ground to assail the suspension order is that the impugned suspension order has not been passed by the Competent Authority inasmuch as as per the learned counsel for the petitioner the petitioner was serving on the post of Steno-cum-Clerk when the suspension order was passed and placing any Clerk under suspension is an authority vested with the Joint Director of Education (Basic).

7. Sri Manish Kumar, learned Senior Advocate for the petitioner has strongly objected the contents of the instructions letter dated 21.11.2019 produced by Sri Rathour wherein it has been indicated that the petitioner was serving on the post of Personal Assistant Grade-II at the time of suspension by submitting that the petitioner was promoted on the post of Personal Assistant Grade-II vide order dated 16.10.2017 (Annexure No.8 to the writ petition), whereby as many as 103 Stenos have been promoted on the post of Personal Assistant.

8. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.9 of the writ petition, whereby the petitioner has preferred a representation to the District Basic Education Officer, Sultanpur forgoing his promotion order so made on 16.10.2017.

9. Learned counsel for the petitioner has further drawn attention of this Court towards Annexure No.10 of the writ petition, which are salary certificates of the petitioner issued on 02.01.2019, which indicate that the petitioner is serving on the post of Steno and has been getting salary as admissible for the post of Steno.

10. Further, Sri Manish Kumar, learned Senior Advocate has demonstrated the letter dated 25.06.2019 (Annexure No.2 to the writ petition) preferred by the Joint Secretary, Government of U.P., to the Director of Education (Basic), U.P., Lucknow apprising about the suspension of the petitioner wherein the designation of the petitioner has been indicated as Clerk. Not only the above, Annexure No.6 which is a preliminary inquiry report relating to one Sri Kaustubh Kumar Singh, the then District Basic Education Officer, Sultanpur the designation of the petitioner in the finding has been indicated as Clerk, therefore, Sri Kumar has submitted that the aforesaid letter of the department and the government order clearly indicate that the petitioner was serving on the post of Clerk.

11. Sri Manish Kumar has further drawn attention of this Court towards Annexure No.SA-1 of the supplementary affidavit, which is Uttar Pradesh Shiksha Lipik Varga Sewa Niymawali, 1985 and Appendix-Ka thereof clearly indicates that the Appointing Authority for the post of Steno is Regional Joint Director of Education. By means of Annexure No.SA-2 of the supplementary affidavit, the Government Order dated 12.12.1995 has been enclosed whereby the division of works amongst the Superior Authorities of the Education Department has been indicated. The appendix of the aforesaid Government Order clearly provides that the Joint Director of Education shall have

various powers and Item No.5 of the aforesaid Appendix clearly reveals that for making appointment, promotion and imposing any sort punishment the authority competent would be the Joint Director of Education.

12. Therefore, in view of the above, it is clear that the petitioner was serving on the post of Clerk when the suspension order has been issued by the Additional Director of Education (Basic), who is not the Competent Authority to pass such order being a Superior Authority to the Competent Authority.

13. Sri Manish Kumar, learned Senior Advocate has also drawn attention of this Court towards the Division Bench judgment of this Court in re: ***Ashok Kumar Singh vs. State of U.P. & others reported in [(2006) 3 UPLBEC 2247]*** referring paras-13 and 14 thereof whereby the Division Bench of this Court has categorically held that the order of suspension can be passed only by the Disciplinary Authority. However, the order to initiate the disciplinary proceedings may be passed by the Superior Authority. The relevant paras-13 and 14 of the judgment are being quoted below:-

"13. In the case of Ram Narain Tiwari (supra) this Court held that an authority higher in rank than the appointing authority cannot pass the order of suspension and if such order of suspension is passed, the same would be incompetent and void. In the case of Bharat Lal (supra) another Division Bench of this Court held that it is only the appointing authority which can pass an order of suspension. So far as the law laid down in the case of Director General ESI v. T. Abdul Razak (supra) is concerned, the Hon'ble Apex Court held that "the legal position is well settled that it is not necessary that the authority competent to impose the penalty must initiate the disciplinary proceedings and that the proceedings can be initiated by any superior authority who can be held to be the controlling authority who may be an officer subordinate to the appointing authority. (See State of M.P. v. Shardul Singh (1993) 1 SCC 419, P.V. Srinivasa Sastry v. Comptroller (1993) 1 SCC 419 and Auditor General and Inspector General of Police v. Thavasiappan) ((1996) 2 SCC 145:"

14. The initiation of disciplinary inquiry and passing of an order of suspension are two things. Disciplinary inquiry against a public servant can be initiated even by an authority higher to the appointing authority but so far as the order of suspension is concerned, that will have to be passed by the appointing authority or by the authority lower in rank which has been delegated with such power but not by any other authority."

14. In the judgment of Division Bench of this Court in re: ***Ashok Kumar Singh (supra),*** the reference of some judgments of Hon'ble Supreme Court has been given and therefore, there may not be any dispute to the effect that the suspension order can only be passed by the Appointing Authority. In the present case, the suspension order has not been passed by the Appointing Authority but the Superior Authority to the Appointing Authority, therefore, the suspension order vitiates.

15. On the other hand, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel has tried to defend the suspension order dated 14.08.2019 but in

view of the material available on record and also in the light of the decision of Division Bench of this Court in re: ***Ashok Kumar Singh (supra),*** he could not defend the said order.

16. Considering the rival submissions of learned counsel for the parties and perusing the material available on records as well as the judgment of Division Bench of this Court in re: ***Ashok Kumar Singh (supra),*** I am of the considered opinion that since the suspension order dated 14.08.2019 has not been passed by the Competent Authority, therefore, it is liable to be quashed and accordingly the impugned suspension order dated 14.08.2019, which is contained as Annexure No.1 to the writ petition, is hereby quashed.

17. However, the liberty is given to the Competent Authority to pass appropriate orders, if it is so warranted, considering the seriousness of the allegations but that order should be passed strictly in accordance with law.

18. The writ in the nature of mandamus is issued commanding the opposite parties reinstate the petitioner and post him at any place where the Competent Authority deems fit and proper but such order shall be passed with expedition preferably within a period of two weeks from the date of production of a certified copy of this order and the petitioner shall be entitled for all consequential benefits ignoring the suspension order dated 14.08.2019.

19. The writ petition is **allowed.**

20. No order as to cost.

(2019)11ILR A218

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE
THE HON'BLE ABDUL MOIN , J.

Service Single No.34236 of 2018

Sharwan Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar Srivastava, Sri Divyanshu Sahay.

Counsel for the Respondents:
C.S.C.,Sri Sudeep Seth.

A. Service Law - Payment of Salary – Constitution of India – Article 226 r/w Civil Procedure Code, 1908 - Order II Rule 2 - Maintainability of present/second petition – Held – Relief now claimed was barred on principle of *res-judicata* or constructive *res-judicata* as that relief was not sought in earlier petition filed by the petitioner. Consequently, the present petition would not be maintainable. (Para 22, 23)

The relief prayed by the petitioner pertain to fixation of salary in terms of 5th and 6th Pay Revision along with consequential benefits of dearness allowance, salary, gratuity, leave encashment, annual increments etc. The petitioner had approached this Court by filing two petitions, namely, WP (S/S) No. 2766 of 2011 and WP (S/S) No. 217 of 2015 praying for being given the benefit of 5th and 6th Pay Revision and in Writ Petition (S/S) No. 217 of 2015. It was categorically held that the said relief was barred on account of principle of res-judicata or constructive res-judicata, consequently the present petition would not be maintainable praying for the said relief. (Para 22, 23)

B. Administrative Law - It is settled preposition of law that whatever is

prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance. - If certain resolutions have been passed for extension of the benefit which has already been denied, the same would not give rise to any fresh cause of action as the said orders can only be considered to be a consequence to the initial order. (Para 24, 27)

C. Constitution of India – Article 226 – Scope upon earlier decision by Supreme Court - Liberty granted by the Apex Court in the order deciding Contempt Petition would only have to be seen in the context of what was there before the Apex Court when the said liberty was granted i.e. what was prayed in the petition, against the order of which, the contempt petition was filed. Cannot be enlarged. (Para 20, 26)

Writ Petition dismissed (E-4)

Precedent followed: -

1. Farhat Hussain Azad Vs St. of U.P. & ors., (2005) (2) AWC 1221 (Para 24)

2. P. Bandopadhya Vs U.O.I., (2019) SCC Online SC 398 (Para 25)

Precedent distinguished: -

1. U.O.I. Vs Assc. of Unified Telecom Service Providers of India & ors., (2011) 10 SCC 543 (Para 16, 26)

2. U.O.I. Vs Balbir Singh Turn (2018)

3. (11) SCC 99 (Para 16, 22)

(Delivered by Hon'ble Abdul Moin, J.)

1. Supplementary affidavit filed today by learned counsel for the petitioner be kept on record.

2. Heard Sri Divyashnu Sahay, learned counsel for the petitioner, learned Standing Counsel and Sri Himanshu Hemant Gupta, learned counsel appearing for the respondents/Corporation.

3. By means of the present petition, the petitioner has prayed for the following reliefs:-

"(i) Issue an appropriate writ mandamus direction or order to the Respondents directing them to disburse arrears of salary alongwith emoluments, gratuity, leave encashment as also annual increments to the petitioner in terms of the G.O. dated 10.7.1998 read with G.O. dated 17.12.1998 and Office Order dated 28.1.2017 (Annexure-16) and G.O. dated 08.12.2008 read with G.O. dated 29.12.2016 and Resolution dated 06.06.2018 of ITTUP (Annexure-23) after giving benefit of the policy of Assured Career Progression notified by G.O. dated 02.12.2000; and dearness allowance payable in terms of G.O. dated 22.9.2005 but not paid since 01.01.2001.

(ii) Issue an appropriate mandamus direction or order to the Respondents pay interest at the rate of 15% p.a. to the arrears of salary due to the Petitioner on account of Fifth Pay Revision w.e.f. 01.01.1996, Sixth Pay Revision w.e.f. 1.01.2006, and dearness allowance withheld from 01.01.2001.

(iii) Allow the present writ mandamus with costs.
(iv) Pass any other order as this Hon'ble Court may deem fit and necessary in the interest of justice"

4. The case set forth by the petitioner is that the petitioner is an employee of the Institute of Tool Room Training U.P. (hereinafter referred to as the ITTUP) who retired on 30.4.2011.

Earlier, the petitioner had filed Writ Petition No.375 of 1985 In re: Sharvan Kumar vs. Institute of Tool Room Training, U.P. and others before this Court praying for the following reliefs:-

"(i) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties no.1 to 3 not to make any hostile discrimination between the petitioner and the opposite parties no.4 to 6 regarding grant of annual increments in the wage revision.

(ii) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties no.1 to 3 to grant petitioner also atleast five annual increments.

(iii) issue any other writ, order or direction which this Hon'ble Court may deem fit in the circumstances of the case, in favour of the petitioner.

(iv) award costs of this petition to the petitioner."

5. The said writ petition was disposed of with a direction to the respondents to consider the representation of the petitioner. When the representation of the petitioner was rejected, the petitioner filed Writ Petition No.9651 of 1988 In re: Sharvan Kumar vs. State of U.P. and others, which writ petition was dismissed vide judgment and order of this Court dated 27.7.1999. Though the copy of the said judgments dated 27.7.1999 and 21.8.2008 have not been filed yet the learned counsel for the petitioner has passed on a copy of the said judgments which are taken on record. Upon a challenge being raised to the said judgment dated 27.7.1999 by the petitioner by filing Special Appeal No.354 of 1999, the said special appeal was also dismissed vide judgment and order dated 21.8.2008. The judgment and order dated 21.8.2008 passed in the special appeal was challenged by the petitioner by filing Civil Appeal No.8902 of 2010 In re: Sharwan Kumar vs. State of U.P. and others before the Hon'ble Apex Court. The Hon'ble Apex Court vide order dated 29.7.2015, a copy of which is Annexure-6 to the writ petition, did not interfere with the judgment dated 21.8.2008 passed in special appeal, but considering the submission of the learned counsel for the appellant that the salary of the appellant (Sharvan Kumar) was withheld for about 10 years and it was released only after the contempt petition was filed, directed the respondents to look into the matter and see that if the salary was not paid as per the revised pay scale and increments had not been given, the same would be calculated and released in favour of the appellant. For the sake of convenience, the order of the Hon'ble Apex Court dated 29.7.2015 is reproduced below:-

"This appeal by special leave is directed against the judgment and order dated 21.8.2008 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Special Appeal No.354 (SB) of 1999.

After hearing learned counsel for the parties, we do not find any reason to interfere with the impugned order. This appeal is, accordingly, dismissed.

However, learned counsel appearing for the appellant submitted that the salary of the appellant was with-held for about 10 years and it was

released only after the contempt petition was filed, that too, without giving any increment and revision of pay. The respondents are directed to took into the matter and see that if the salary was not paid, as per the revised pay scale and increments have not been given, the same shall be calculated and released in favour of the appellant within a period of two months from today."

6. It is contended that when the compliance of the said order of the Hon'ble Apex Court dated 29.7.2015 was not made, the petitioner was constrained to file Contempt Petition (C) No.111 of 2016 In re: Sharwan Kumar vs. Mahesh Kumar Gupta and others before the Hon'ble Apex Court. Incidentally in paragraphs 1 and 2 of the contempt petition, a copy of which has been filed as Annexure SA-4 to the supplementary affidavit 17.10.2019, following averments have been made:-

"1. That this Hon'ble Court vide its order dated 29.7.2015 passed in Civil Appeal No.8902 of 2010, inter alia, passed the following order:

"This appeal by special leave is directed against the judgment and order dated 21.8.2008 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Special Appeal No.354 (SB) of 1999.

After hearing learned counsel for the parties, we do not find any reason to interfere with the impugned order. This appeal is, accordingly, dismissed.

However, learned counsel appearing for the appellant submitted that the salary of the appellant was withheld for about 10 years and it was released only after the contempt petition was filed, that too, without giving any increment and revision of pay. The respondents are directed to look into the matter and see that if the salary was not paid, as per the revised pay scale and increments have not been given, the same shall be calculated and released in favour of the appellant within a period of two months from today."

True copy of the order dated 29.7.2015 passed by this Hon'ble Court in Civil Appeal No.8902 of 2010 is filed herewith and marked as ANNEXURE P-1 (Pg.14 to 16.).

2. That present contempt petition has been filed as the aforesaid order has been violated by Alleged/Contemnor No.1, 2 & 3 by not paying the revised pay scales and increments to appellant as directed by this Hon'ble Court.".

7. A counter affidavit to the contempt petition was filed by the respondents to which a rejoinder affidavit was also filed and ultimately the contempt petition was disposed of by the Apex Court vide order dated 27.11.2017, a copy of which is Annexure-7 to the writ petition, whereby the Hon'ble Apex Court recorded its satisfaction that the order has been satisfactorily complied with. However, it was also provided that in case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings before the appropriate forum. For the sake of convenience, order of the Hon'ble Apex Court dated 27.11.2017 passed in contempt petition is reproduced below:-

"We have seen the reply filed by the respondent no.3.

We are satisfied that the order has been substantially complied with. In case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings before the appropriate forum. The contempt petition is hereby dismissed with the aforesaid observations."

8. Meanwhile, the petitioner filed Writ Petition (S/S) No.2766 of 2011 In re: Sharwan Kumar vs. State of U.P. and others challenging an order dated 18.4.2011 passed by the ITTUP whereby the petitioner was retired at the age of 58 years instead of 60 years. Apart from the other reliefs, the petitioner in the said writ petition had also prayed for payment of salary on the basis of 5th and 6th Pay Commission. The said writ petition was disposed of by this Court vide judgment and order dated 29.1.2014 with a direction to the Principal Secretary, Industrial Development Department as well as the Secretary of the Department of Technical Education to take a decision in the matter. Copy of the judgment and order dated 29.1.2014 is Annexure-1 to the writ petition.

9. Aggrieved against the said judgment and order dated 29.1.2014, the petitioner filed Special Leave to Appeal (Civil) No.12015 of 2014 In re: Sharwan Kumar vs. State of U.P. and others which was dismissed as withdrawn after extending the time to enable the petitioner to submit a representation in pursuance to the judgment of this Court vide order dated 8.5.2014, a copy of which has been filed as Annexure-2 to the writ petition.

10. When the representation of the petitioner was rejected, he filed Writ Petition (S/S) No.217 of 2015 In re: Sharwan Kumar vs. State of U.P. and others, inter alia, praying for the following reliefs:-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.7.2014 passed by the opposite party no. 1and order dated 4.4.2014 passed by the opposite party no. 2 as contained in Annexure Nos. 1 and 2 respectively to this writ petition;

ii) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 18.4.2011 passed by the opposite party no.8 and subsequent order dated 30.4.2011 passed by an incompetent authority on behalf of opposite party no.8 as contained in Annexure Nos. 3 and 4 respectively to this writ petition ;

iii) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 23.5.2013 passed by opposite party no.8, order dated 2.7.2013 passed by the opposite party no.4, order dated 10.7.2013 passed by the opposite party no.8, order dated 29.7.2013 passed by the opposite party no.6 and order dated 12.8..2013 passed by opposite party no.8 as contained in Annexure 5,6,7,8 and 9 respectively to this writ petition;

iv) issue a writ, order or direction in the nature of mandamus directing the opposite parties to provide the benefits of retirement at the age of 60/62 years instead of 58 years ;

v) issue a writ, order or direction in the nature of mandamus directing the opposite parties to sanction

and pay the difference amount of encashment of leave forthwith, along with compound interest @ 18% per annum since the due date till the actual payment to the petitioner ;

vi) issue a writ, order or direction in the nature of mandamus directing the opposite parties to sanction and give the benefits of 5th and 6th Pay Commission report as paid to the other diploma level technical institutions ;

vii) issue a writ, order or direction in the nature of mandamus directing the opposite party no. 1 and 4 to take action against the opposite party nos. 7 and 8 for not completing the norms of AICTE and Board of Technical Education U.P., and to direct the opposite party no. 3 to take action against the opposite party nos. 5 and 6 for not complying the norms of AICTE and Board of Technical Education, U.P."

11. In the said petition, a preliminary objection was taken by the learned counsel for the respondents/Corporation of the petition being not maintainable based on the principles of res-judicata and constructive res-judicata as regards the maintainability of the second writ petition. This Court, after considering all aspects of the matter disposed of the said writ petition vide judgment and order dated 28.1.2016, a copy of which is Annexure-5 to the writ petition. So far as the payment of revised pay scale was concerned, with which the present controversy is concerned, the Court was of the view that as this issue (i.e. issue of benefits of payment of 5th and 6th Pay Commission) was raised by the petitioner in the earlier writ petition, therefore, **it was not open for the petitioner to raise it all over again as the same would be barred by the principles res-judicata or constructive res-judicata.**

12. Now, by means of the present petition, the petitioner has prayed for the reliefs as have already been quoted above.

13. Sri Gupta, learned counsel for the respondents/Corporation has taken a preliminary objection that the present petition primarily seeks the same relief pertaining to the 5th and 6th Pay Commission which in the earlier round of litigation, more particularly in the judgment and order dated 28.1.2016, has already been held to be barred by principles of res-judicata or constructive res-judicata. As regards the prayer of the petitioner for payment of leave encashment, annual increments, assured career progression and dearness allowance, Sri Gupta contends that once the petitioner had retired from service on 30.4.2011 and had earlier approached this Court by filing two petitions and the aforesaid reliefs had not been prayed for by him in the said petitions, consequently taking into consideration the provisions of Order II Rule 2 of the C.P.C. which are applicable in writ proceedings also, the present petition praying for the aforesaid reliefs would not be maintainable.

14. Replying to the aforesaid, Sri Sahay submits that the present petition has been filed taking into consideration the liberty granted by the Apex Court in its order dated 27.11.2017 and in view of the fresh resolution of the ITTUP dated 6.6.2018, a copy of which is Annexure-23 to the writ petition, as well as the Office Memorandum dated 20.1.2017 along with letter dated 16.11.2015, copies of which

have been filed as Annexure-16 and 15 respectively to the writ petition. It is also argued that this Court vide judgment and order dated 28.1.2016 had considered the order of Apex Court dated 29.7.2015 and had observed that the respondents are bound to comply with the same.

15. Replying to the aforesaid, Sri Gupta, learned counsel for the respondents/Corporation submits that the liberty dated 27.11.2017 as had been granted by the Hon'ble Apex Court has to be read in consonance to what had been directed by the Apex Court in its initial order against which the contempt petition had been filed. Sri Gupta submits that the earlier order of the Apex Court dated 29.7.2015, which has already been reproduced above, was for the purpose of **payment of salary for a period of 10 years as per the revised pay scale and increments** if not granted to the petitioner, which order had been passed in Civil Appeal No.8902 of 2010 against the order of this Court dated 27.7.1999 passed in Writ Petition No.9651 of 1988 as upheld in Special Appeal No.354 of 1999 vide judgment and order dated 21.8.2008. The petitioner when filed Contempt Petition (C) No.111 of 2016 although against the order dated 29.7.2015 yet has indicated before the Apex Court in the contempt petition that the contempt petition is being filed on account of the violation by the alleged contemnor by not **paying the revised pay scales and increments to the appellant.** Once there was no such order of the Apex Court for grant of revised pay scale rather the order was for grant of salary for a period of 10 years, consequently it is apparent that the correct pleading had not been made in the Apex Court while filing the contempt petition. Even otherwise, Sri Gupta argues, that even if the liberty granted by the Apex Court is seen, the said liberty was granted after seeing the reply of the respondents. In the meanwhile, the petitioner had already approached this Court praying for grant of 5th and 6th Pay Commission and two judgments had already been passed, although the first judgment only pertained to disposal of the representation but in the second petition itself it had been held conclusively by this Court that the prayer made by the petitioner for grant of 5th and 6th Pay Commission was barred by the principles of res-judicata and constructive res-judicata. Thus Sri Gupta argues that the liberty granted by the Apex Court through the order dated 27.11.2017 cannot be construed in the manner in which the learned counsel for the petitioner has argued.

16. To this, Sri Sahay argues that the order of the Apex Court dated 27.11.2017 has to be seen in the context of the order dated 23.10.2017 that had been passed in the contempt petition, copy of which has been filed as Annexure SA-9 to the supplementary affidavit dated 17.10.2019, and the liberty cannot be seen in isolation. It is contended that the Apex Court was fully conscious while requiring the respondents to file reply to the issues before it and thus the said liberty dated 27.11.2017 would entail the petitioner to approach this Court again despite the earlier two rounds of litigation and in the judgment and order dated 28.1.2016 the writ Court having conclusively held that the reliefs of the petitioner so far as it pertains to grant of 5th and 6th Pay Commission was barred on the principles of res-judicata and constructive res-judicata. It is also contended that the judgment and order dated 28.1.2016 as

passed by the writ Court had also been brought to the knowledge of the Apex Court and considering all the facts the said liberty had been granted. In this regard, Sri Sahay has placed reliance on a judgment of the Apex Court in the case of ***Union of India and others vs. Association of Unified Telecom Service Providers of India and others*** reported in ***(2011)10 SCC 543*** to contend that once once a liberty has been granted by the Apex Court, consequently all issues are open to be agitated. Reliance has also been placed on the judgment of the Apex Court in the case of ***Union of India vs. Balbir Singh Turn reported in 2018(11) SCC 99*** to argue that the relief of ACP prayed for by the petitioner is a part of pay structure as even if it was not prayed for in the earlier petitions and it is being a part of the pay structure, would also be covered by the liberty granted by the Apex Court vide order dated 27.11.2017.

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

18. From a perusal of the pleadings on record and the arguments raised by the learned counsel for the contesting parties, it comes out that the petitioner had earlier filed writ petition in the year 1985 praying for being granted 5 annual increments. The said petition was disposed of with a direction to the respondents to consider the representation of the petitioner. On the representation being rejected, the petitioner challenged the said order by filing writ petition in the year 1988 namely Writ Petition No.9651 of 1988, which petition was dismissed vide judgment and order dated 27.7.1999. Though a copy of the said writ petition has not been brought on record yet from a perusal of the judgment and order dated 27.7.1999 it comes out that the reliefs that had been prayed for by the petitioner in the said writ petition were for grant of increments in the wage revision, 5 annual increments and promotion, meaning thereby that there was no prayer for being granted the 5th and 6th Pay Revision as has been prayed for in the instant petition. Upon the said petition having been dismissed vide judgment and order dated 27.7.1999, the petitioner filed Special Appeal No.354 of 1999 which special appeal was also dismissed vide judgment and order dated 21.8.2008. The petitioner raised a challenge to the said judgment by filing Civil Appeal No.8902 of 2010 before the Apex Court and the Apex Court vide order dated 29.7.2015 did not interfere with the judgment and order dated 21.8.2008 passed in the special appeal but considering the submission of the learned counsel for the appellant that his salary was withheld for about 10 years, directed the respondents to look into the matter and see that if the salary was not paid as per the revised pay scale and increments had not been given, the same would be calculated and released in favour of the appellant. Thus the order dated 29.7.2015 passed by the Apex court would have to be seen in the context of the reliefs that had been prayed for by the petitioner before the writ Court which were **not** for payment of the 5th and 6th pay revision but were for grant of annual increments in the wage revision, grant of 5 annual increments and for grant of promotion. When the compliance of the order passed by the Apex Court dated 29.7.2015 was not made, the petitioner filed Contempt Petition (C) No.111 of 2016 alleging contempt of the order dated 29.7.2015 passed by the Apex Court which could only have been to the extent of the reliefs that had been prayed for by

the petitioner in the writ Court. However, the petitioner cleverly worded the contempt petition and indicated in paragraphs 1 and 2 of the contempt petition that the alleged violation by the respondents is by not paying the revised pay scale and increments to the appellant. At the risk of repetition, it is to be noted that in the writ Court in the petition of 1985 and thereafter in the year 1988, there was no prayer for payment of revised pay scales as per the 5th and 6th Pay Revision. After the Apex Court issued notice of contempt, the matter remained pending before the Apex Court. The petitioner being perfectly aware that no relief had either been prayed for by him in the writ petition of 1985 or 1988 for payment of the pay scales as per the 5th and 6th Pay Revision, filed Writ Petition (S/S) No.2766 of 2011 before this Court praying for various reliefs including payment of salary on the basis of 5th and 6th Pay Revision. Why this fact is essential is that the petitioner was perfectly conscious of the fact that the issue before the Apex Court in Civil Appeal No.8902 of 2010 was not covering the 5th and 6th Pay Revision and payment of salary on the basis of 5th and 6th Pay Revision. The said writ petition was disposed of by this Court vide judgment and order dated 29.1.2014 with a direction to the respondents to look into the matter. Being unsatisfied with the said order, the petitioner preferred Special Leave to Appeal (Civil) No.12015 of 2014 which was dismissed as withdrawn but after extending the time to enable the petitioner to present the matter in pursuance of the judgment of the writ Court. When the representation of the petitioner was rejected, he preferred another petition namely Writ Petition (S/S) No.217 of 2015, inter alia, praying for quashing the order whereby his representation was rejected as well as making a specific prayer, apart from other reliefs, of being given the benefits of 5th and 6th Pay Revision. Again, while filing the said petition, the petitioner was conscious of the fact that the issue before the Apex Court in Civil Appeal No.8902 of 2010 was not pertaining to 5th and 6th Pay Revision.

19. The writ Court in Writ Petition (S/S) No.217 of 2015 vide judgment and order dated 28.1.2016, so far as relief pertaining to revised pay scales was concerned, categorically held that it was not open for the petitioner to raise the said issue all over again as the same would be barred by principles of res-judicata and constructive res-judicata. However, considering the order dated 29.7.2015 passed by the Apex Court directing that the revised pay scale and increments shall be calculated and released in favour of the appellant, the writ Court observed that as there is already an order of the Apex Court, the respondents are bound to comply with the same. However, no positive mandamus was issued by the writ Court for compliance of any order. Sri Sahai has categorically stated that the judgment of this Court dated 28.1.2016 has attained finality as the same has not been challenged either before this Court by filing special appeal or before the Apex Court, hence the findings recorded therein pertaining to res-judicata or constructive res-judicata so far as it pertains to the 5th and 6th Pay Revision have attained finality. Subsequent thereto, the Apex Court decided the contempt petition after perusal of the reply filed by the respondents and being satisfied that the order (dated 29.7.2015) has been substantially complied with. However, it

was provided that in case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings before the appropriate forum.

20. What would be relevant is that the order of the Apex Court dated 27.11.2017 has to be seen in the context of the order dated 29.7.2015 against which the contempt petition had been filed by the petitioner. As already indicated above, the order dated 29.7.2015 cannot be construed to be an order with respect to 5th and 6th Pay Revision as no such prayer had been made in the petition against which special leave petition had been filed by the petitioner. Thus, the liberty granted by the Apex Court vide order dated 27.11.2017 that in case the petitioner is still aggrieved by the action taken, he can question it in the appropriate proceedings, has to be seen in the context of what had been prayed for in the writ petition against the order in which initially order dated 29.7.2015 had been passed by the Apex Court, meaning thereby that neither before the writ Court in the year 1988 in Writ Petition No.9651 of 1998 or before the Apex Court, the 5th and 6th Pay Revision were involved. This would also be apparent from the conduct of the petitioner that he was perfectly conscious of the fact that the Apex Court while dealing with the Civil Appeal No.8902 of 2010 was not seized with the relief pertaining to 5th and 6th Pay Revision as in the interregnum period, the petitioner had already filed two writ petitions before the writ Court i.e. Writ Petition (S/S) No.2766 of 2011 and Writ Petition (S/S) No.217 of 2015 in which apart from other reliefs, the relief pertaining to 5th and 6th Pay Revision had also been prayed for. Thus, by no analogy or by any stretch of imagination can the liberty of the Apex Court dated 27.11.2017 be considered as giving liberty to the petitioner to again file a writ petition for grant of 5th and 6th Pay Revision in view of the detailed discussion made above.

21. Having thus summed up the litigations as entered into between the petitioner and the respondents and the issues involved therein, the preliminary objection pertaining to maintainability of the present petition would have to be seen.

22. The present petition, as already indicated above, has been filed for payment of salary along with emoluments, gratuity, leave encashment as also annual increments after giving benefit of the policy of Assured Career Progression, dearness allowance and for arrears of salary on account of 5th and 6th Pay Revision. The Orders as have been referred to by the petitioner as detailed above pertain to the orders that had been passed by the ITTUP for extending the benefit of 6th Pay Revision. Thus, primarily the reliefs as have been prayed for by the petitioner pertain to fixation of salary in terms of the 5th and 6th Pay Revision along with consequential benefits of dearness allowance, salary, gratuity, leave encashment, annual increments etc. The reliefs can be viewed in two ways. Firstly, when the petitioner had approached this Court by filing two petitions, namely, Writ Petition (S/S) No.2766 of 2011 and Writ Petition (S/S) No.217 of 2015 praying for being given the benefit of 5th and 6th Pay Revision and in Writ Petition (S/S) No.217 of 2015 it was categorically held that the said relief was barred on account of principle of res-judicata or constructive res-

judicata, consequently the present petition would not be maintainable praying for the said relief. Once the ACP, dearness allowance, gratuity, leave encashment would all flow out after fixation of the pay of the petitioner in terms of the 5th and 6th Pay Revision keeping in view the judgment of the Apex Court in the case of ***Balbir Singh Turn*** (supra) but once the relief pertaining to 5th and 6th Pay Revision cannot be granted to the petitioner in the present petition keeping in view the judgment of this Court in Writ Petition (S/S) No.217 of 2015, consequently there cannot be any occasion for granting the consequences flowing therefrom in the present petition i.e. gratuity, leave encashment, annual increments, ACP etc.

23. Secondly, if the gratuity, leave encashment ACP and dearness allowance are said to not flow after giving benefit of 5th and 6th Pay Revision then too the present petition would not be maintainable taking into consideration the principle of Order II, Rule 2 of the CPC wherein in case the petitioner did not pray for any relief to the said effect in the earlier two petitions filed by him in the year 2011 and 2015, consequently he would be precluded from making the said prayer by means of the present petition. Thus in both the views, the present petition would not be maintainable taking into consideration the principle of res-judicata or constructive res-judicata and principle of Order II, Rule 2 of the C.P.C.

24. Suffice to state that it is no longer res-integra that the principle of constructive res-judicata enshrined in Order II, Rule 2 of the C.P.C. would also be applicable in writ proceedings. In this regard, the Full Bench of this Court in the case of ***Farhat Hussain Azad vs. State of U.P. and others reported in 2005((2) AWC 1221*** has held as under:-

"69. What is, however, disturbing us is the fact that some of the petitioners had earlier filed writ petitions for quashing the seniority list dated 14.12.2001 and even though these petitions had been dismissed by a detailed judgment and order dated 27.2.2004, the said petitioners have again filed these writ petitions claiming in substance the same releifs, i.e., re-determination of the seniority as referred to above herein.

70. Even if it is accepted that these reliefs had not been prayed for earlier as sought now, as contended by the learned Counsel for the petitioners, we are of the view that petitions are barred by the principles of constructive res judicata enshrined in Order II, Rule 2 of the Code of Civil Procedure (hereinafter called 'CPC'). The said Rule provides that suit must include the whole claim. If a relief which could have been claimed is not claimed, party cannot claim it in a subsequent suit. (Mohd. Khalil Khan v. Mahbub Ali Mian, AIR 1949 PC 78).

71. The Rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions.

72. A Constitution Bench of Hon'ble Supreme Court in Gurubux Singh

v. Bhooralal, AIR 1964 SC 1810, held that even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order I, Rule 2 of the Code of Civil Procedure. In Order II, Rule 2 CPC, as has been explained, in unambiguous and crystal clear language by the Hon'ble Supreme Court in D. Cawasji and Co. v. State of Mysore, AIR 1975 SC 813; Commissioner of Income Tax v. T.P. Kumaran, (1996) 10 SCC 561;Union of India and Ors. v. Punnilal and Ors., (1996) 11 SCC 112; Dilip Singh v. Mehar Singh Rathee and Ors., (2004) 7 SCC 650; and Executive Engineer ZP Engineering Division and Anr. v. Digambara Rao and Ors., (2004) 8 SCC 262.

73. It is settled proposition of law that what cannot be done "per directum is not permissible to be done per obliquum" meaning thereby, whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad ilud".

74. In Jagir Singh v. Ranbir Singh, AIR 1979 SC 381, the Apex Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance". While deciding the said case, the Hon'ble Supreme Court placed reliance on the judgment in Fox v. Bishop of Chester, (1824) 2 B 7 C 635, wherein it has been observed as under :

"To carry out effectually the object of a statute, it must be considered as to defeat all attempts to do or avoid doing in an indirect or circuitous manner that; which it has prohibited or enjoined."

75. Law prohibits to do something indirectly which is prohibited to be done directly. [Vide Commissioner of Central Excise v. ACER India Ltd., (2004) 8 SCC 173]. Similar view has been reiterated by the Apex Court in M.C. Mehta v. Kamal Nath and Ors., AIR 2000 SC 1997, wherein it has been held that even the Supreme Court cannot achieve something indirectly which cannot be achieved directly by resorting to the provisions of Article 142 of the Constitution, which empowers the Court to pass any order in a case in order to do "complete justice."

76. In view of the above, it is not permissible to seek the relief indirectly, for which earlier petitions have already been dismissed/pending."

25. Recently, the Apex Court in the case of ***P. Bandopadhya vs. Union of India reported in 2019 SCC Online SC 398*** has held as under:-

"61. The decision in S.V. Vasaikar & Ors. v. Union of India & Ors. [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79] was not challenged before the Supreme Court, and has since attained finality. Therefore, the relief sought by the Appellants before the High Court was barred by the principle of res judicata.

62. Reference can be made to the decision of the Constitution Bench in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors. wherein Sharma, J., on behalf of the five-judge bench, held:

"35...It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in Daryao v. State of UP held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32..." (emphasis supplied)

63. Albeit the decision of the Constitution Bench was in the context of a Writ Petition filed under Article 32, it would apply with greater force to bar a Writ Petition filed under Article 226, like the one filed by the present Appellants, by the operation of the principle of res judicata.

26. So far as the judgment of the Apex Court in the case of ***Association of Unified Telecom Service Providers of India*** (supra), which has been cited by the learned counsel for the petitioner in order to argue that the present petition would be maintainable taking into consideration the liberty granted by the Apex Court, there cannot be any quarrel to what has been laid down by the Apex Court in the aforesaid judgment but then again the aforesaid judgment would not be applicable in facts of the present, as have already been indicated above, whereby the said liberty which forms the sheet anchor of the argument of the learned counsel for the petitioner for the purpose of maintainability of the present petition, would only have to be seen in the context of what was there before the Apex Court when the said liberty was granted.

27. So far as the argument of the learned counsel for the petitioner that as a fresh resolution dated 6.6.2018 has been issued by the ITTUP and further as the office memorandum dated 20.1.2017 along with letter dated 16.11.2015 have been issued by the respondents for the purpose of 6th Pay Revision and the approval has also been sought from the Government all which give rise to a fresh cause of action, suffice to state that when the present petition for grant of 5th and 6th Pay Revision would itself be not maintainable taking into consideration the earlier judgment of this Court which has attained finality, consequently even if certain resolutions have been passed for

extension of the said benefit, the same would not give any fresh cause of action as the said orders can only be considered to be a consequence to the initial order of 5th and 6th Pay Revision. Thus all the aforesaid orders would not, in the opinion of this Court, give any fresh cause of action to the petitioner to maintain the present petition.

28. Accordingly, the preliminary objection raised by Sri Gupta, learned counsel for the respondents/Corporation is upheld. The writ petition is dismissed.

(2019)11ILR A231

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 35034 of 2016

Satya Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey.

Counsel for the Respondents:
C.S.C.

A. Service Law- Dismissal - It is the primary duty of the Disciplinary Authority to record reason of its own - if an authority has failed to consider the reply/explanation to the show cause notice while dealing with the matter of imposition of proposed penalty then it is a case where it has to be held that an authority has virtually failed to discharge its primary duty. (Para 13)

B. Interpretation of word 'ordinarily' - 'ordinarily' means and includes a situation where not only the procedure adopted is followed as per the prescribed one but there has been due application of mind, to make it just and fair to hold that there has been due process of law. (Para 14)

Petition allowed (E-4)

Matter Remitted.

Precedent followed:-

1. Umesh Kumar Singh Vs St. of U.P. & ors. (2018) 5 ADJ 587 (Para 13)

2. Alld. Bank & others Vs Krishna Narayan Tewari (2017) 2 SCC 308 (Para 15)

3. Mohammad Yunus Khan Vs St. of U.P., (2010) 10 SCC 539 (Para 15)

4. Managing Director, ECIL, Hyderabad Vs B. Karunakar, (1993) 4 SCC 727 (Para 17)

Present petition challenges orders dated 29.04.2011, passed by Disciplinary Authority, 27.07.2011, passed by appellate authority, 03.10.2012, passed in revision and 02.05.2016, while deciding the representation.

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

1. Heard Sri Satya Prakash Pandey, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution, the petitioner has questioned the decision making process in the matter of disciplinary proceeding which has culminated in the imposition of penalty of maximum punishment of dismissal from service.

3. Briefly stated facts of the case are that the petitioner, who was working as

Clerk with the Police Department, is alleged to have been assigned the duty relating to the files in respect of compassionate appointments under the office order dated 26.03.1997. It is alleged that one Jagan Singh had obtained compassionate appointment fraudulently and in the process of preparing forged documents, the petitioner had a crucial role being the Clerk dealing with the cases of compassionate appointments at that time. It is alleged that the appointment took place only because of the involvement of the people working in the office of the Police Department. The petitioner was issued with the charge sheet, to which the petitioner submitted reply and then the departmental inquiry was held in the matter. The petitioner while denied the charges, also duly participated in the inquiry and in the inquiry report, the charges against the petitioner were found to be proved.

4. The petitioner was issued with a show cause notice to which he submitted a detailed reply. However, disciplinary authority relying upon the inquiry report rejected the reply of the petitioner as not being satisfactory and imposed major penalty of dismissal from service vide order dated 24.04.2011. The petitioner against the said order preferred departmental appeal and then revision and both the forums dismissed the case of the petitioner vide order dated 27.07.2011 and 03.10.2012 respectively and finally the representation filed by the petitioner under the relevant rules also came to be dismissed on 2nd May, 2016.

5. Assailing the order passed by the disciplinary authority confirmed in appeal and revision, the learned counsel for the petitioner has argued that the findings returned by the inquiry officer were perverse as the petitioner had taken specific plea to the effect that he had been handed over the charge relating to the files of compassionate appointments by the then dealing clerk only on 20.11.1997, whereas, the records relating to the claim of compassionate appointment of Jagan Singh had already been completed on 19.05.1997 and forwarded to the Police Headquarter and which is quite proved from the letter of Police Headquarter dated 20.05.1997. The further plea taken was that file of Jagan Singh was not the file mentioned in the charge list. However, the disciplinary authority, according to petitioner, dealt with the reply of the petitioner to the show cause notice in a quite casual manner and without referring to the grounds taken and submissions made in the reply questioning the findings returned by the inquiry officer, has brushed aside the reply on the ground that the reasons/ facts stated in the explanation to the show cause notice, were not of such nature which might render any help to the petitioner and therefore, the explanation of the petitioner, being devoid of reasons, have been rejected and the penalty of dismissal has been awarded.

6. He further argues that the appellate authority has simply affirmed the order passed by the disciplinary authority in its order dated 27.07.2011 and therefore, the inherent defect with which the order of disciplinary authority suffered, did not stand cured and therefore, the order of appellate authority is also liable to be quashed. He further submits that the authority sitting in revision has again without discussing any fact stated in the explanation to the show cause notice has simply affirmed the

inquiry report and the order passed by disciplinary as well as appellate authority and the said order also deserves to be quashed. The order passed on his representation has also been questioned on the same grounds.

7. Per contra, the argument advanced by learned Standing Counsel is that the petitioner, in his reply to the show cause notice, has stated that his reply already submitted to the charge sheet should be taken as a reply to the show cause notice as well and nothing new has been stated in the explanation submitted to the show cause notice which could have required consideration by the disciplinary authority and, therefore, according to him the disciplinary authority is right in recording fact that the petitioner having not stated anything new which would have supported his claim and would have given benefit to him to question the inquiry report.

8. In such above view of the matter, therefore, it is submitted on behalf of the State that the disciplinary authority has rightly rejected the explanation submitted by the petitioner to the show cause notice.

9. It is further submitted that in matters of disciplinary proceedings, this Court would not ordinarily interfere in the findings of fact arrived by the Inquiry Committee and then affirmed by the disciplinary authority unless such perversity is pointed out which would go to the root of charges to question the finding on the proof of charges and then the propriety in conducting the inquiry and non consideration of such material aspect as would have vitiated the findings and would have contributed to the charge of lack of due procedure to be adopted by the disciplinary authority rendering entire action in law being bad. He submits that there is no such legal error much less a substantial one traceable in the entire conduct of disciplinary authority to interfere with the orders passed by the disciplinary authority confirmed in appeal and revision. The writ petition, therefore, according to him, deserves to be dismissed.

10. I have heard learned counsels for the parties and submissions advanced across the bar and perused the record.

11. The petitioner has brought on record the explanation submitted by him to the show cause notice before the disciplinary authority. From the perusal of the reply it is revealed that the petitioner has questioned the findings of the Inquiry Committee on various factual grounds which according to the petitioner, if considered, would have made the Inquiry Officer to arrive at a different finding of fact exonerating him from the charges but I find that in its order passed by the disciplinary authority, though various legal aspects have been mentioned regarding continuance of disciplinary proceeding along with criminal prosecution, but in its ultimate paragraph no. 3, the authority has recorded finding only in three lines. The Court fails to understand as to when the facts were detailed out in the explanation submitted to the show cause notice why the authority has chosen not to refer the same before arriving at a finding that the reply/ explanation submitted by the petitioner was not satisfactory.

12. In the above facts and circumstances, this Court finds merit in the submissions advanced by learned

counsel for the petitioner that the Disciplinary Authority has virtually failed to address the basic charge in the light of the explanation submitted by him and, therefore, it is rightly submitted that the Disciplinary Authority is not justified in rejecting the explanation submitted by the petitioner to the show cause notice in such a cursory manner.

13. Learned counsel for the petitioner has placed heavy reliance upon the judgment of this Court in the case of **Umesh Kumar Singh v. State of U.P. and others (2018 5 ADJ 587,** in which this Court while considering various other aspects has held that it is primary duty of the Disciplinary Authority to record reason of its own and if an authority has failed to consider the reply/ explanation to the show cause notice while dealing with the matter of imposition of proposed penalty then it is a case where it has to be held that an authority has virtually failed to discharge its primary duty. Such an exercise of power in the said case was held to be an arbitrary exercise of power that cannot pass testing the anvil of the Article 14 of the Constitution. As I have noticed in the present case that the Disciplinary Authority while referring to the various other aspects of the matter in the order impugned, it was necessary to refer the contents of the reply/ explanation submitted by the petitioner to the show cause notice, an effort much less than the discussion on the same. It appears that the Disciplinary Authority has got swayed away by the findings returned by the Inquiry Committee though that were questioned by the petitioner in his explanation to the show cause notice and in a very casual manner rejecting the same it held in one line that reply was unsatisfactory.

14. The argument advanced by learned Standing Counsel that this Court will not ordinarily interfere in matters of disciplinary proceedings cannot be questioned but the issue is what would be the import of the word 'ordinarily'. In several English dictionaries the word 'ordinarily' is defined as 'usually' or 'generally'. In my view ordinarily means and includes a situation where not only the procedure adopted is followed as per the prescribed one but there has been due application of mind, to make it just and fair to hold that there has been due process of law. A procedure prescribed would entail details of various steps to arrive at a final result but then to make it worth calling an action not judicially reviewable, every such steps in the process of arriving at final result, should have due application of mind. Findings, in inquiry, its approval rejecting the reply and imposition of penalty all require an articulated effort at the end of the authorities accountable under the rules. It is in the above sense if proceedings are held and the procedure adopted can be justified that this Court would not '**ordinarily**' interfere with the findings arrived at, by the disciplinary authority. However, on facts of this case, I do not see any due application of mind by the disciplinary authority.

15. The further argument advanced by the learned Standing Counsel that the appellate authority has dealt with the matter of the inquiry report and has found no error and, therefore, the order of Disciplinary Authority cannot be accepted either. The appellate authority has simply relied upon the findings returned by the Inquiry Committee and has affirmed the decision of the Disciplinary Authority without referring to the explanation

submitted by the petitioner. In the case of **Allahabad Bank & others v. Krishna Narayan Tewari (2017) 2 SCC 308,** the Court has already held that if there is no proper appreciation at the end of the Disciplinary Authority and if it has failed to record any reason for the conclusion drawn by it and if the appellate authority has simply referred to the findings returned by the Disciplinary Authority and Inquiry Committee, such authority has also faulted in discharge of its duty resulting in miscarriage of justice. Further, in the case of **Mohammad Yunus Khan v. State of U.P. (2010) 10 SCC 539,** the Court has already held that if there is a defect at the initial stage rendering proceedings bad, null and void, such an inherent defect with which the order suffers, cannot be cured at the appellate stage. So also, in my view, the orders passed by the authority in revision and representation are bad and deserves to be set aside.

16. In view of the above, the writ petition succeeds and is hereby allowed. The orders passed by the Disciplinary Authority dated 29th April, 2011 and of the appellate authority dated 27th July, 2011 and of the authority deciding the revision dated 3rd October, 2012 and 2nd May, 2016, Annexures- 2, 3, 5 and 7 respectively are hereby quashed.

17. The matter is remitted to the Disciplinary Authority to revisit the matter from the stage of show cause notice and explanation already submitted by the petitioner. The status of the petitioner shall be that of the suspended employee in the light the of judgment of the Apex Court in the case of **Managing Director, Ecil, Hyderabad v. B. Karunakar (1993) 4 SCC 727**, and shall be abide by the ultimate decision to be taken by the Disciplinary Authority as directed hereinabove within a period of three months from the date of production of certified copy of this order.

(2019)11ILR A235

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL , J.

Civil Misc .Writ Petition No. 35705 of 2013
Connected with
WRIT -A No.43960 of 2012

Manoj Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Irshad Ali, Sri Ashok Khare, Sri Deepak Kumar Srivastava, Sri Sidharth Khare, Sri Utkarsh Birla.

Counsel for the Respondents:
C.S.C., Sri Vishal Tandon.

A.ServiceLaw-Appointment/Recruitment - Irrigation Department Patrols Service Rules, 1953: Rule 5, 12, 14, 15 - 'Wait list' is not 'wait list in perpetuity'.

Petitioners approached the Court in the year 2013-14 for appointment against four vacancies which occurred in the year 2012-13, on the basis of a 'wait list' dated 21.10.2011. High Court held that the expression "wait list" (wait list of approved candidates) used in Rule 14 to the list which is prepared for the purpose of appointment under sub-rule (1) & (2) of Rule 15 cannot be given the meaning as contended by the petitioners, of being a "wait list in perpetuity" for substantive appointment against the future vacancies. (Para 33, 36)

B. Service Law – Appointment – Wait List- Under the statutory scheme though the "wait list" prepared under Rule 14 (kha) of "approved candidate" has not been given a limited life but it cannot be accepted that the said "wait list" is to be used for filling the vacancies not available in the year of recruitment.

(Para 35)

By the reading of 15(1), (2) and (3) together, there remains no doubt that "wait list" as contemplated in Rule 14 (kha) is to be used for the purpose of permanent appointment against existing or anticipated vacancies, and may be used for any adhoc or temporary appointment against substantive vacancies, which may occur in the department at a later point of time. The purpose of keeping the "wait list" is, thus, for making stop-gap-arrangement. (Para 40, 41)

C. General Rule of construction od statute is not only to look at the words but to look at the context. The Court must have regard to the aim, object and scope of statute in its entirety.

(Para 44-47)

Petition dismissed (E-4)

Precedent followed: -

1. Jagir Singh & ors. Vs St. of Bihar & anr. AIR (1976) SC 997 (Para 44)

2. St. of W.B. Vs U.O.I. AIR (1963) SC 1241 (Para 45)

3. U.O.I. Vs Elphinstone Spinning & Weaving Co. Ltd. & ors. (2001) 4 SCC 139 (Para 46)

4. Corocraft Ltd. Vs Pan American Airways Inc. (1968) 2 ALL E R 1059 (Para 46)

5. St. of Haryana Vs Sampuran Singh (1975) 2 SCC 810 (Para 46)

6. National Insurance Co. Ltd. Vs Anjana Shyam & ors. (2007) 7 SCC 445 (Para 47)

Precedent referred: -

1. Naseem Ahmad & ors. Vs St. of U.P. & anr. (2011) 2 SCC 734 (Para 18)

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

1. Heard Sri Ashok Khare learned Senior Advocate assisted by Sri Utkarsh Birla learned Advocate for the petitioners and Sri Vishal Tandon learned Brief Holder for the State-respondents.

2. The two connected writ petitions have been filed in the months of August, 2012 and May, 2013 by (12+4) petitioners; respectively, for the common relief seeking a writ of mandamus commanding the respondents to give appointment to them to the post of Sinchpal (Patrol) in pursuance of the selection proceeding initiated vide advertisement dated 20.9.2011 published in the daily newspaper 'Amar Ujala' within a specified period and to pay them salary regularly month by month from the date of their appointment.

3. During the pendency of the present writ petition, the amendment application dated 25.3.2014 had been filed in Writ Petition No. 43960 of 2012 (Syyad Rizwan Abbash and Others vs. State Of U.P. and Others) seeking for a writ of certiorari for quashing of the order dated 2.4.2012 passed by the Executive Engineer, Sharda Canal Division, Shahjahanpur for cancellation of the wait list of 26 persons in Group 'C' with immediate effect.

4. From the record, it appears that the said amendment application is pending. No counter affidavit to the amendment application has been filed. The question to consider the relief sought

by way of amendment would be considered in the later part of this judgment at an appropriate stage.

5. The facts in brief relevant is to decide the controversy at hands are that all the petitioners claimed to have been selected by the Selection Committee constituted to assess their general suitability and that they were kept in the wait list of the selected candidates.

6. As per the submission of four petitioners in Writ Petition No. 35705 of 2013 (Manoj Kumar and 3 Others vs. State Of U.P. and 3 others), they were interviewed by the Selection Committee between 14.6.2009 to 18.6.2009 and the wait list dated 21.10.2011 of selected candidates containing their names is appended as Annexure-'2' to the said writ petition.

7. As per the claim of 12 petitioners in Writ Petition No. 43960 of 2012, they were interviewed by the Selection Committee between 18.10.2011 to 25.10.2011 and three wait lists of the same date 29.10.2011, were prepared by the Selection Committee (appended as Annexure-'4' to the said writ petition) which contained their names.

8. All the petitioners claimed that after their selection, they had successfully undergone three months training as unpaid apprentices and were given certificates on completion of the said training. They had also cleared the departmental examination held on 29.2.2012, result of which was declared on 1.3.2012. The contention is that the wait-lists dated 21.10.2011 and 29.10.2011, as aforesaid, were prepared in accordance with the Rule 14 of the Irrigation Department Patrols Service Rules, 1953 (In short as "the Rules, 1953"), which provides for preparation of a wait list of the candidates selected by the selection committee as per Rule 12 of the Rules, 1953. The said list had been prepared against the existing as also future vacancies of the department.

9. In Writ Petition No. 35705 of 2013, it is stated in paragraph '11' that in the Irrigation Department, there were 25 posts of Sinchpal (Patrols), 8 posts of Sinch Paryavekshak and one post of Ziledar. Out of total 34 posts in view of the provisions of Rule 14 of the Rules, 1953, 20% candidates (of the total posts), who were found suitable in the selection proceedings, had to be kept in the wait list, accordingly, six candidates were placed in the wait list prepared on 21.10.2011 pursuant to the selection proceedings held between 14.6.2009 to 18.6.2009.

10. In Writ Petition no. 43960 of 2012, it is contended in paragraph '12' that in Sharda Nahar Khand, Shahjahanpur, there were 94 posts of Sinchpal (Patrols), 22 Amins, 3 Ziledars and 11 Munsies. Thus, total 130 posts were duly sanctioned by the State Government. 20% of the said total number of posts comes to 26 and accordingly, a wait list of selected candidates (26 in number) was prepared.

11. In the counter affidavits to the aforesaid writ petitions, the averments as noted above have not been denied.

12. In reply to paragraph '12' of the Writ Petition No. 43960 of 2012, it is stated therein that 8 posts of Sinchpal (Patrols) were vacant and hence the same

were advertised to be filled through a regular selection. However, the said selection was challenged in Writ Petition No. 60334 of 2011 (Sichai Sangh and others vs. State of U.P. and others), the services of six Sinchpal appointed pursuant to the said selection were terminated vide order dated 26.10.2012. Remaining 2 selected candidates had been transferred to another division and resultantly services of all 8 persons selected as Sinchpal pursuant to the advertisement dated 20.9.2011 had been dispensed with. The wait list of 26 persons had been cancelled vide order dated 2.4.2012. Further the notification dated 14.9.2011 issued by the Engineer-in-Chief, Department of Irrigation, U.P., whereunder the advertisement dated 20.9.2011 was issued, had also been stayed by this Court in Writ Petition No. 60334 of 2011 vide order dated 3.11.2011.

13. In the counter affidavit to the Writ Petition No. 35705 of 2013, it is contended that the wait list dated 21.10.2011 of 26 candidates had lapsed with the completion of the selection proceedings i.e. preparation of the select list and, moreover, it had lost its validity after a period of one year. As eight selected candidates were given appointment and joined against the vacant posts and no one was given appointment from the wait list, the petitioners therein cannot claim appointment.

14. Further four posts of Sinchpal, which became vacant in the year 2012-13 could not be filled from the wait list of the previous years selection 2010-11.

15. In the rejoinder, the petitioners taking aid of the Rule 14 of Rules, 1953 submit that the wait list was to be kept alive in perpetuity and the stand of the respondents that it had outlived its life after one year, is incorrect.

16. In the supplementary rejoinder affidavit filed in Writ Petition No. 35705 of 2013, it is contended that out of total 94 posts of Sinchpal in Sharda Nahar Khand, Shahjahanpur, 55 posts became vacant during pendency of the present writ petition. The selected candidates, whose appointments were cancelled vide termination order dated 13.9.2012 filed a Writ Petition No. 60830 of 2012 (Vinay Kumar Singh and others vs. State of U.P. and others), which had been allowed vide judgment and order dated 26.11.2012, resulting in restoration of their appointment. Resultantly, six selected persons had been reinstated vide office orders dated 27.4.2013.

17. In the light of the above pleadings, it is vehemently contended by the learned Senior Advocate for the petitioners that as per the scheme of Rule 14 of the Rules, 1953, the wait listed candidates were to be appointed against the subsequent vacancies, till the said lists were exhausted. It was not open for the respondents either to cancel the wait list of 26 persons (dated 29.10.2011) by order dated 2.4.2012 or to take stand with regard to the six wait listed persons (of the list dated 21.10.2011) that the same had outlived its life after one year from the date of selection. It is, thus, contended that all the writ petitioners herein were entitled to get appointmemt against the vacancies to the post of Sinchpal (Patrol) which arose in the department subsequent to selection of eight candidates against the then existing vacancies, till the aforesaid wait lists were exhausted.

18. Reliance has been placed on the observations made by the Apex Court in paragraphs '20' and '21' of the report in **Naseem Ahmad and others vs. State of Uttar Pradesh and another1** to submit that where the wait list has no limited life under the statutory rule, the appointment of wait listed candidates against the subsequent vacancies cannot be held illegal.

19. Sri Vishal Tandon learned Brief Holder for the State-respondents, on the other hand, vehemently contends that the wait list contemplated in Rule 14 of the Rules, 1953 is in fact the select list was prepared by the Selection Committee for the purpose of appointment made under Rule 15 of the Rules, 1953, as against the substantive permanent vacancies and further on temporary or adhoc basis in stop-gap-arrangement only. The wait listed candidates cannot claim appointment against subsequent substantive vacancies as the said list stood exhausted with the completion of selection. Moreover, the wait listed candidates could claim appointment only against the existing and anticipated vacancies in a year of recruitment which was 2011-12 in the present case. As against the vacancies of the subsequent years, the petitioners cannot be considered as the said vacancies have to be notified for Direct recruiment as per Rule 5 of the Rules, 1953.

20. Having heard learned counsel for the parties and perused the record, in view of the stand taken by the learned Senior Advocate for the petitioners that all wait listed candidates herein are entitled to substantive appointment under the Rules, 1953, inasmuch as, the wait list is a list of selected candidates in perpetuity, it would be apt to go through the entire scheme of the Rules, 1953 which governs the recruitment to th

21. Rule 2(kha) of the definition clause of the Rules, 1953 provides the meaning of "Committee" "being the Selection Committee" constituted under the rules. Rule 5 states that appointment to the services under the Rules, 1953 would be by direct recruitment. Rules 8 to 11 provides for eligibility/qualification and the maximum age limit for appointment in the services under the Rules, 1953.

22. Rules 12, 13, 14 and 15 relevant for the purpose of present controversy are to be quoted hereunder:-

*"**12**- भर्ती की रीति- समिति निम्नलिखित बातों का ध्यान रखते हुये उम्मीदवारो में से चुनाव करेंगी:- (1) अच्छा शरीर- गठन,*

(2) फुर्तीलापन (Active habits), और।

(3) जगह के लिये समान्य रुप से उपयुक्तता (General suitability)

चुने गये उम्मीदवारों की समिति डिवीजनों में तैनात करेगी और समिति का संयोजक (convener) चुने गये उम्मीदवारों के नामों की तथा डिवीजनों की सूचना सुपरिन्टेंडिंग इंजीनियर को देगा, जिनमें उन्हें तैनात किया गया हो।

***13**- अन्तेवासी (अपरेंटिस) की हैसियत से काम करना और विभागीय परीक्षा (apprentice ship and departmental examination)- चुने गये उम्मीदवार उस डिवीजन में, जहाँ व तैनात किये गये हो, किसी अनुभवी पतरौल के अधीन तीन महीने अवैतनिक (unpaid) अन्तेवासी (apprentice) की हैसियत से काम करेंगे। इस अवधि के*

अन्त में उन्हे नहर के पतरौल के कार्य और कर्तव्यों के सम्बन्ध में एक क्रियात्मक परीक्षा (Practical examination) पास करनी होगी। इस परीक्षा का संचालन इस प्रयोजन के लिये एक्जीक्यूटिव इंजीनियर द्वारा नियुक्त किये गये एक डिप्टी रेवेन्यू अफसर और एक जिलेदार करेंगे। परीक्षा में सफल होने वाले उम्मीदवारों को एक प्रमाण-पत्र (certificate) दिया जायेगा।

14- प्रतीक्षा-सूची- *(क) नियम 12 के उपबन्धों के अधीन चुने गये उम्मीदवारों के नाम, इस शर्त के अधीन कि वे नियम 13 में निर्धारित विभागीय परीक्षा पास कर ले अनुमोदित (Approved) उम्मीदवारों की सूची में उन व्यक्तियों के नीचे, जिनके नाम सूची में पहले से है, अन्त की तारीख के क्रम से निम्नलिखित ब्योंरो सहित दर्ज कर लिये जायेंगे-*

(1) उम्मीदवार का नाम।

(2) पिता का नाम।

(3) शिक्षा सम्बन्धी प्रमाण - पत्र के अनुसार जन्म की तारीख।

(4) शिक्षा सम्बन्धी योग्यतायें।

(5) घर का पता।

(6) विशेष विवरण (Remark)

(ख) डिवीजन की अनुमोदित सूची उम्मीदवारों की किसी भी दशा में जिलेदारो, अमीनों, पतरौलों और मुन्शियों के डिवीजनल कैडर के योग के 20 प्रतिशत से अधिक न होगी।

(ग) ऐसे उम्मीदवारो के नाम इस सूची से काट दिये जायेंगे जो कोई उपयुक्त कारण बताये बिना स्थानापन्न रिक्त पदों पर काम करने से इनकार करेंगे या किसी रिक्त पद स्थानापन्न रुप से काम किये बिना 25 वर्ष की आयु प्राप्त लेंगे। एक्जीक्यूटिव इंजीनियर यदि चाहे, तो ऐसे उम्मीदवारों को इस नियम के लागू होने से मुक्त कर सकता है। जो 25 वर्ष की आयु प्राप्त करने से पहले किसी रिक्त पद पर स्थानापन्न रुप से काम कर चुके हों।

15- नियुक्ति- *(1) स्थायी पदों के रिक्त होने पर एक्जीक्यूटिव इंजीनियर, इस सेवा में जहां तक सम्भव हो, नियम 14 के अधीन तैयार की गई सूची में से उम्मीदवारों को नियुक्त करेगा। इस सेवा में वे उस क्रम से लिये जायेंगे जिस क्रम में उनके नाम इस सूची में दिये हों।*

(2) एक्जीक्यूटिव इंजीनियर अस्थायी या स्थानापन्न रुप में रिक्त पदों पर ऐसे व्यक्तियों को नियुक्त कर सकता है जो इन नियमों के अधीन सेवा में स्थायी रुप से नियुक्त किये जाने के योग्य हों।

(3) यदि कोई स्वीकृत उम्मीदवार उपलब्ध न हो, तो एक्जीक्यूटिव इंजीनियर स्थानापन्न या अस्थायी रुप से रिक्त पद पर किसी ऐसे व्यक्ति को संयुक्त कर सकता है, जिसका नाम प्रतीक्षा-सूची में न हो, परन्तु ऐसी नियुक्ति छः महीने से अधिक अवधि के लिये न होगा।"

23. A conjoined reading of the above noted provisions indicate that under Rule 12 which provides for method of recruitment, the Selection Committee has to prepare a list of suitable candidates division-wise after assessment of general suitability of the candidates.

24. In the instant case, the said assessment was made with the interview of the candidates.

25. Rule 13 states that the selected candidates (as per Rule 12) shall be sent for three months training as unpaid apprentice and at the end of the said training, they shall be required to pass a practical examination. All those

candidates who have been declared successful will be given a certificate.

26. Rule 14(ka) provides that all selected candidates under Rule 12 shall be kept in a list below the approved candidates (whose names have already been kept there), subject to the condition that they will clear/pass departmental examination (practical examination as aforesaid).

27. Rule 14(kha) further states that the Division wise approved list of candidates shall not be of more than 20% of the total posts in the divisional cadre including all Ziledars, Amin (Patrols) and Munshi.

28. Rule 14(ga) states that names of all such candidates shall be deleted from the aforesaid list who refuse to work in stop-gap-arrangement or on adhoc basis or attain the age of 25 years without ever working on adhoc basis against a vacant post.

29. Rule 15 provides for appointment both on regular as well as adhoc basis in a stop-gap-arrangement. As per sub-rule (1) of Rule 15 appointment against the permanent vacant post will be made from the list of candidates prepared under Rule 14, as far as possible, in the same order as they have been placed in the said list.

30. Sub-rule (2) of Rule 15 provides that temporary appointment against the vacant posts can be made by the Executive Engineer only of such persons who are eligible to get permanent appointment. Sub-rule (3) of Rule 15 further states that in case of non-availability of approved candidates, the Executive Engineer can make appointment on temporary or adhoc basis against a vacant post of such person whose name has not been found in the wait list, subject to the condition that such an appointment would not be made for more than a period of six months.

31. The aforesaid scheme of the Rules, 1953, thus, makes it clear that the select list which has been termed as "wait list" in Rule 14(ka) is a tentative list prepared by the Selection Committee as per Rule 12 of the Rules, 1953 of those candidates who are found suitable by it. The condition is that the said wait listed candidates shall be kept below the approved candidates in one list. The "wait listed candidates" shall have to complete apprenticeship and clear departmental examination for being termed as "approved candidates" for the purpose of appointment under rule 15 (1)&(2) of the Rules, 1953. The appointment against substantive vacant post on permanent basis has to be made from the list mentioned in Rule 14(kha) which is a list of "approved candidates" after fulfilling conditions of Rule 14(ka).

32. From the further reading of sub-rules (2) and (3) of Rule 15, it is clear that even temporary or adhoc appointment against a substantive vacancy has to be made by the Executive Engineer from the list of eligible candidates prepared under Rule 14. But in any case appointment against substantive vacancies, can be made only through direct recruitment as per Rule 5 of the Rules, 1953. That means, the vacancies have to be notified for inviting applications from eligible candidates. The candidates kept in the wait list under Rule 14(ka) prepared under Rule 12 by the Selection

Committee have to complete training and pass practical examination so as to become eligible or "approved candidates" for being kept in the Division wise list prepared under Rule 14(kha).

33. From the reading of clause (ga) of Rule 14 alongwith sub-rule (2) and (3) of Rule 15, it appears that the aforesaid list of "approved candidates" is being kept alive for the purpose of making temporary arrangement against the vacant posts subject to regular selection. The expression "wait list" used in Rule 14 to the list which is prepared for the purpose of appointment under sub-rule (1) & (2) of Rule 15 cannot be given the meaning as contended by the petitioners, of being a "wait list in perpetuity" for substantive appointment against the future vacancies. In other words, the "wait list of approved candidates" as contemplated under Rule 14 (ka) and (kha) cannot be said to be a "wait list in perpetuity" for appointment against substantive vacancies under Rule 15(1) of the Rules, 1953 which do not exist in the given year of selection.

34. In the opinion of the Court, the expression "wait list" has been used in Rule 14 in view of scheme of clause (ka) which contemplates that a list of suitable candidates be prepared by the Selection Committee subject to them passing the departmental examination under Rule 13 and Clause (kha) which provides for preparation of a "wait list of approved candidates" to the extent of 20% of the total posts, who can be given appointment on temporary or adhoc basis against substantive vacancies occuring from time to time. And for this reason only clause (ga) of Rule 14 provides that if an "approved candidate" refuse to work on adhoc basis or had not worked as such uptil the age of 25 years, his name would be deleted from the said list.

35. Under the statutory scheme though the "wait list" prepared under Rule 14(kha) of "approved candidate" has not been given a limited life but it cannot be accepted that the said "wait list" is to be used for filling the vacancies not available in the year of recruitment i.e. for future vacancies occurring in the department over the years, on substantive basis, more so, when appointment in services is by direct recruitment. The scheme of direct recruitment in service as per Rule 5 of the Rules, 1953 itself contemplates notification of substantive vacancies and assessment of suitability of all applicants as per Rule 12 and 13 of the Rules, 1953 for filling the same.

36. The expression "wait list" in Rule 14 of the Rules, 1953 by no stretch of imagination can be said to be a "wait list in perpetuity", to be used or exhausted against future substantive vacancies which were not either anticipated or likely vacancies. Such an interpretation to the said expression would lead to incongruity and ambiguity.

37. To be more precise, the Rules 1953 in essence are for providing procedure for direct recruitment to the services concerned (in question). Rule 12 to 14 of the Rules, 1953 provide for different stages of selection. At the first stage of selection as per Rule 12, the wait list of suitable candidates under clause (ka) of Rule 14 is to be prepared. As is clear from the language of Rule 14 (ka), the candidates who were found suitable by the Selection Committee under Rule 12 have to be kept below the candidates who have been approved for selection,

subject to the conditions that they clear the departmental examination under Rule 13.

38. Rule 14(kha) speaks of "अनुमोदित सूची" means list of "approved candidates" of those who have been selected finally after clearing all stages of selection, i.e. those who have to be given appointment against substantive vacancies in order of their merit. The list as contemplated in Rule 14(ka) and 14(kha) are, thus, two different lists prepared at two stages of selection.

39. The lists in question i.e. the wait lists dated 21.10.2011 and 29.10.2011 in the instant case, can be clearly understood as the "wait list" prepared at the first stage of selection [as per Rule 14(ka)] after assessment of suitability of all candidates by the Selection Committee. The candidates kept in the said list cannot have any legitimate expectation for appointment against the vacancies notified in the advertisement dated 20.9.2011.

40. They can at best, only be understood as the "prospective candidates" waiting for their place in the final select list of "approved candidates" [as per Rule 14(kha)] after completion of training and passing of the departmental examination. There is no dispute about the fact that all the petitioners herein had completed requisite training and also passed the departmental examination but they could not get a chance for selection against the existing vacancies as "approved candidates" who were higher placed in the list were given appointment against the existing vacancies. It is not the case of the petitioners that any of the appointee was below them in the merit list or ineligible for appointment. The appointment of none of them has been challenged.

41. Going further, though the expression "wait list" in rule 14 is used both for the list prepared at the first stage under sub-clause(ka) of "suitable candidates" and the final list under sub-clause (kha) of the "approved candidates" to the extent of 20% of the total posts in the Divisional cadre. But by reading of Rule 15(1), (2) and (3) together, there remains no doubt that the "wait list" as contemplated in Rule 14(kha) is to be used for the purpose of permanent appointment against existing or anticipated vacancies, and may be used for any adhoc or temporary appointment against substantive vacancies, which may occur in the department at a later point of time. The purpose of keeping the "wait list" is, thus, for making stop-gap-arrangement.

42. This becomes more clear from the reading of sub-rule (3) of Rule 15 which provides that if a candidate from the "wait list" is not available (who is eligible for regular appointment), short term appointment in temporary or adhoc basis can be made not exceeding six months.

43. Giving any other interpretation to the expression "wait list" would render the entire rule of procedure for selection to the services by direct recruitment unworkable.

44. The General Rule of construction of statute is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the

meaning according to what would appear to be the meaning intended to be conveyed by the rules of the words under the circumstances. Reference **Jagir Singh and others vs. State of Bihar and another2.**

45. In **State of West Bengal vs. Union of India3**, the then Chief Justice Mr. B.P. Sinha, speaking for the majority has said that in considering the true meaning of words or expression used by the Legislature, the Court must have regard to the aim, object and scope of the statute to be read in its entirety. The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire Statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs.

46. The Constitution Bench in **Union of India vs. Elphinstone Spinning and Weaving Co. Ltd**. and others4 has held that when the question arises as to the meaning of a certain provision in a Statute it is not only legitimate but proper to read that provision in its context. The context means; the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy. With reference to **Corocraft Ltd. vs. Pan American Airways Inc.5** and **State of Haryana vs. Sampuran Singh6 , i**t is noted therein that:-

"The duty of judges is to expound and not to legislate is a fundamental rule. There is no doubt a marginal area in which the courts mould or creatively interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing."

47. In **National Insurance Co. Ltd vs. Anjana Shyam and others7,** taking note of the proposition propounded in 1846 by Dr. Lushington in Queen V. Eduljee Byramjee [(1846) 3 MIA 468] it is held that the proposition that to ascertain the true meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself, has been accepted and reiterated by the Apex Court in innumerable cases.

48. Even in the judgment relied by the learned Senior Advocate for the petitioners, the Supreme Court has observed that the "wait list" as contemplated therein can be co-related to the number of vacancies either available in the year of recruitment or likely to become available in the succeeding year i.e. in proportion to the existing and anticipated vacancies. In the said case, the Apex Court had permitted the appellants therein to continue as they were appointed within one year of the declaration of the result.

49. In the light of the aforesaid, the claim of the petitioners that the select list or the wait list prepared under Rule 14 was to be kept alive in perpetuity so as to give appointment to all wait-listed candidates against future vacancies occurring in the year 2013 onwards, is not worthy of acceptance.

50. Before parting with this judgment, relevant is to note that the wait list of 26 candidates (with reference to the

Writ Petition No. 43960 of 2012) was cancelled vide order dated 2.4.2012, which was admittedly received by the said petitioners in the month of October, 2012. The said order was also brought on record of the said writ petition along with the counter affidavit filed in the month of November, 2012.

51. For the reasons best known to the petitioners therein, they did not challenge the said order within a reasonable period of time. The amendment application filed on 25.3.2014, therefore, cannot be allowed to assail the said order as no explanation has been offered by the petitioners for inordinate delay in seeking amendment.

52. For the four petitioners in Writ Petition No. 35705 of 2013 who are claiming appointment on the basis of the list dated 21.10.2011, relevant is to note that they had approached this Court in the year 2013-14 for appointment against four vacancies which occurred in the year 2012-13. Their prayer for appointment against the future vacancies made after a period of approximately two years from the date of declaration of result, is not acceptable.

53. For the above discussions, both the writ petitions are found devoid of merits and hence **dismissed.**

(2019)11ILR A245

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI , J.

Writ A No.50249 of 2015

M/S Saharanpur Estates And Construction & Ors. ...Petitioners
Versus
Rent Control and Evicition Officer/ A.D.M., Saharanpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Vinod Kumar Srivastava.

Counsel for the Respondents:
C.S.C., Sri Manish Kumar Nigam, Sri Manoj Kumar Rajvanshi, Sri N.C. Rajvanshi, Sri Some Narayan Mishra.

A. Civil Law-Rent control/Tenancy - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 29A; Partnership Act, 1932 - Section 69(2) – Suit filed by an unregistered firm is maintainable for enforcement of statutory right u/s 29A(5) of the U.P. Act XIII of 1972?

The suit filed by an unregistered firm is not barred u/s 69(2) of Act, 1932, if it is based on a statutory right or a common law right. S. 29A(5) gives a statutory right to the landlord or the tenant to move an application before the District Magistrate to determine the annual rent payable. The application filed was for enforcement of statutory right and not for enforcement of a right arising out from rent agreement/contract. (Para 9, 10)

Petition allowed (E-4)

Matter Remitted

Precedent followed: -

1. M/s Raptakos Brett & Company Ltd. Vs Ganesh Property, AIR (1998) SC 3085 (Para 10)

2. M/s Haldiram Bhujiawala & anr. Vs. M/s Anand Kumar Deepak Kumar & anr. AIR (2000) SC 1287 (Para 10)
3. Punjab & Sindh Bank Vs M/s Manoram Agencies & ors. (2008) 4 ADJ 248 (Para 10)

Present petition challenges order dated 13.04.2015, passed by Rent Control and Eviction Officer, Saharanpur, dismissing application u/s 29A.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

"Whether in view of the provision of Section 69(2) of the Partnership Act, 1932, an unregistered firm can maintain a suit or a case for enforcement of statutory right under Section 29A(5) of the U.P. Act XIII of 1972" is one of the main questions involved in the present writ petition.

1. Heard Sri Ashish Kumar Singh, learned counsel for the applicant-landlords/ petitioners and Sri N.C. Rajvanshi, learned senior advocate assisted by Sri Vishesh Rajvanshi, learned counsel for the tenant-respondent Nos.2 to 6.

FACTS:-

2. Briefly stated facts of the present case are that the original owner and landlord of the disputed immovable property being khasra plot No.800, area 0.584 hectares situate in village Daramilkana Ander Hadud Saharanpur, was one Sri Raja Ram son of Babu Moti Ram who had let out the disputed property to the respondent No.2 herein by a registered rent deed dated 12.12.1945 for a period of 50 years from 01.01.1946. Thus, the period of tenancy expired on 31.12.1995. After the death of the original owner and landlord Sri Raja Ram, the disputed property was inherited by his successors, namely the applicant-petitioner No.2 and proforma respondent Nos.7, 8 and 9. Thus, they became the owners and landlords of the disputed property. The owners and landlords formed a partnership firm, i.e. the petitioner No.1 herein by a partnership deed dated 01.09.2012 which includes the owners and landlords also as partners. The partnership firm and the owners and landlords filed an application under Section 29A of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'U.P. Act XIII of 1972') before the Rent Control and Eviction Officer, Saharanpur, which has been dismissed by the impugned order dated 13.04.2015, not on merits but on maintainability on two grounds - firstly, applicant-petitioner No.1 - partnership firm is not a registered partnership firm and, therefore, the partnership deed dated 01.09.2012 is not admissible in evidence under Section 69(2) of the Partnership Act, 1932 (hereinafter referred to as 'the Act 1932') and, secondly, the landlord-tenant relationship is not proved.

3. Aggrieved with the aforesaid order dated 13.04.2015 passed by the Additional District Judge (A)/ Rent Control and Eviction Officer, Saharanpur, the applicant-landlords/ petitioners have filed the present writ petition.

SUBMISSIONS:-

4. **Learned counsel for the applicant-petitioners submits as under:**

(i) Provisions of Section 69(2) of the Act 1932 has no application in the present set of facts inasmuch as the application under Section 29A of U.P. Act XIII of 1972, was filed by the applicant-petitioners for enforcement of a statutory right. It was not an application

for enforcement of a contract. Even the rent contract under the rent deed dated 12.12.1945, has expired on 31.12.1995.

(ii) The applicant-petitioner No.1 is the partnership firm consisting of true owners and landlords of the disputed property. The applicant petitioner No.2 is admittedly co-owner and landlord of the disputed property. Further, it is admitted case of the tenants-respondents that they were paying rent to the petitioner-landlords. Therefore, the tenant-landlord relationship was proved on record. But, without examining the facts, the Rent Control and Eviction Officer abruptly drawn conclusion that there is no landlord-tenant relationship. Such a finding is perverse and therefore, deserves to be set aside.

(iii) The impugned order is wholly arbitrary and illegal and, therefore, it deserves to be quashed.

5. **Sri N.C. Rajvanshi, learned senior advocate admits** that the applicant-petitioner No.2 is the co-owner and the landlord of the disputed property but supports the impugned order. He submits that there was a rent agreement between the landlord and tenant-respondents dated 12.12.1945 and, therefore, the application filed by the applicant-petitioners shall be deemed to be an application for enforcement of a right under a contract dated 12.12.1945. He supports the impugned order.

DISCUSSION AND FINDINGS:-

6. I have carefully considered the submissions of the learned counsels for the parties.

7. Undisputedly, the applicant-petitioner No.2 herein is the co-owner and the landlord of the disputed property. He is also partner in the petitioner No.1 firm along with other co-owners. It is also not in dispute that the respondent-first set was the tenant of the disputed property and was paying rent under the rent agreement dated 12.12.1945 to the owners and landlords. Thus, the finding of the Rent Control and Eviction Officer in the impugned order that landlord-tenant relationship could not be proved by the applicant-petitioners, is perverse and wholly without application of mind. Therefore, this finding is set aside.

8. By the impugned order, the application of the applicant-petitioners under Section 29A of U.P. Act XIII of 1972 has been dismissed also on another ground that the partnership deed dated 01.09.2012, is not admissible and the application is not maintainable in view of the provisions of Section 69(2) of the Act 1932. This finding of the Rent Control and Eviction Officer, Saharanpur is not wholly illegal but also shows his poor understanding of the provisions of Section 69(2) of the Act 1932 and Section 29A of the U.P. Act XIII of 1972.

9. Sub-Section (2) of Section 69 of the Act 1932 provides that ***"No suit to enforce a right arising from a contract*** shall be instituted in any court by or on behalf of a firm against any third party unless firm is registered and persons suing are or have been shown in the Register of Firm as partners in the firm." Thus the bar created under Sub-Section (2) of Section 69 of the Act 1932, is only in respect of enforcement of a right arising from a contract. It does not bar filing of a suit by an unregistered firm for

enforcement of statutory right. Section 29A(5) of the U.P. Act XIII of 1972, gives a statutory right to the landlord or the tenant to move an application before the District Magistrate to determine the annual rent payable in respect of such land @ 10% per annum of the prevailing market value of the land, and such rent shall be payable, except as provided in sub-Section (6) from the date of expiration of the term for which the land was let or from the commencement of this section, whichever is later. This sub-Section (5) casts a statutory right duty the District Magistrate to adjudicate the application so filed by the landlord or the tenant. Thus, the application filed by the applicant-petitioners was for enforcement of statutory right and not for enforcement of a right arising from a rent agreement/ contract dated 12.12.1945. Even the aforesaid rent agreement/ contract dated 12.12.1945 has expired by efflux of time on 31.12.1995. Therefore, the finding of the Additional District Magistrate (A)/ Rent Control Eviction and Eviction Officer, Saharanpur on the point of maintainability of the application of the applicant-petitioners for reason that the applicant petitioner No.1 is not an registered partnership, is wholly arbitrary, illegal and in conflict with the provisions of Section 69(2) of the Act 1932 and Section 29A of the U.P. Act XIII of 1972.

10. In **M/s Raptakos Brett and Company Ltd. v. Ganesh Property, AIR 1998 SC 3085,** Hon'ble Supreme Court examined the maintainability of suit filed by a registered firm in the context of provisions of Section 69(2) of the Partnership Act 1932 and held that the suit filed by an unregistered firm is not barred under Section 69(2) of the Act 1932 if it is based on a statutory right or a common law right. It also observed that the right to evict a tenant upon expiry of the lease was not a right "arising from a contract" but was a statutory right conferred under the provisions of Transfer of Property Act, 1882. The decision in **M/s Raptakos Brett and Company Ltd**. (supra) was referred with approval in **M/s Haldiram Bhujiawala and another v. M/s Anand Kumar Deepak Kumar and another, AIR 2000 SC 1287.** Similar view has been taken by a bench of this court in **Punjab and Sind Banki and another vs. M/s. Manoram Agencies and others, 2008 (4) ADJ 248.**

11. For all the reasons afore-stated, the writ petition is allowed. The impugned order dated 13.04.2015 in Case No.1 of 1998 (M/s Saharanpur Estates vs. Saharanpur Cold Storage Ltd.) under Section 29A of U.P. Act XIII of 1972 passed by the Additional District Magistrate (A)/ Rent Control and Eviction Officer, Saharanpur, cannot be sustained and is hereby quashed. Matter is remitted back to the respondent No.1 to decide the aforesaid Case No.1 of 1998 in accordance with law, expeditiously, preferably within four months from the date of presentation of a certified copy of this order, after affording reasonable opportunity of hearing to the parties.

Order on Application No.9 of 2018 under Section 340, Cr.P.C. filed by the tenant-respondent

Learned counsel for the tenant-respondent states that the application may be dismissed as not pressed.

In view of the aforesaid, **the application is dismissed as not pressed.**

(2019)11ILR A249

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2019

BEFORE
THE HON'BLE SUNEET KUMAR , J.

Writ A No. 54211 of 2016

Shakuntala Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma, Sri Satyendra Singh, Sri Anil Kumar Bajpai.

Counsel for the Respondents:
C.S.C., Sri Sri Prakash Singh, Sri Abhinav Ojha, Sri Rajmani Yadav.

A. Service Law– Pension - Uttar Pradesh Urban Planning and Development Act, 1973: Sections 5(1), 5-A, 24, 55, 56, 59(4); Uttar Pradesh Development Authorities Centralized Services Retirement Rules, 2011: Rule 1(iii), 4, 7, 16, 21, 30; U.P. Development Authorities Centralized Services Rules, 1985: Rules 3, 34, 37; Uttar Pradesh Palika (Centralized) Services Retirement Benefit Rules, 1981: Rules 7, 37.

Government Orders pertaining to pension/family pension applicable to Government Servants would automatically apply to the members of the Centralized Services of Development Authority – Joint reading of Rule 4 and 7 of the U.P. Development Authorities (Centralized Services) Retirement Benefit Rules, 2011 along with Section 24 of Development Act, 1973 makes it evident that the rules/orders applicable to the employees of the State Government and the formula for computation of pension and family pension would apply by reference to the employees of the Development Authority. (Para 40)

B. Legislation by incorporation and legislation by reference - There is a distinction between legislation by incorporation and that by reference inasmuch as in the latter case the amendments made in the earlier legislation would be applicable to the referring legislation. The Retirement Benefit Rules, 2011 makes applicable the Government Orders insofar it relates to pension/family pension, by reference. The subsequent amendments made thereto would therefore also apply. (Para 43)

The Development Authority has not, and cannot, adopt a formula other than that applicable to the government servants while computing pension and family pension of its employees. The Development Authority lacks the power of authority to override, deviate or rewrite the Rules framed by the State Government governing and regulating pension/family pension. (Paras 48, 49)

C. Development Authority does not require any approval of the State Government before the recommendations of the respective Pay Commissions are made applicable to the government servants through various Government Orders - Development Authority constituted under the Development Act, 1973 is an autonomous body. The State Government does not fund the Development Authorities. The Retirement Benefit Rules, 2011, nowhere prohibits the Development Authorities from implementing the Government Orders without the prior approval of the State Government. Rather, the Rule mandates that the Government Orders, pertaining to pension/family pension issued in respect of Government Servants gets applicable and enforced upon the employees of the Development Authority by operation of law, no further act of approval is required at the end of the State Government or the resolution of the Development Authority. (Paras 53, 55)

D. The test for a valid classification may be summarized as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved - It is not open for the Authorities

to distinguish between the retirees only on the basis of the date of the retirement by fixing an artificial cut-off date not founded on an intelligible differentia so as to distinguish persons that are grouped together. All pensioners are eligible to receive revised family pension based on the formula approved by the State Government. Conversely, it is always open for the State Government to decide uniformly for government servants and other employees of the Local Bodies and the Development Authorities, the date from which beneficial provision in the Government Order would apply so long as the treatment is equal and uniform. No relief can be given beyond what is conferred by the Government Order.

(Paras 64, 67, 70)

Writ Petition Allowed. (E-4)

Precedent followed:

1. Pepsu Road Transport Corporation Patialia Vs Mangal Singh and others, (2011) 11 SCC 702 (Para 41)

2. Union of India Vs. Charanjeet S. Gill, (2000) 5 SCC 742 (Para 42)

3. Public Service Commission, Uttaranchal Vs JCS Bora, (2014) 8 SCC 644 (Para 42)

4. Bajaya Vs Gopikabai, (1978) 2 SCC 542 (Para 44)

5. Western Coalfields Limited Vs Special Area Development Authority, Korba, (1982) 1 SCC 125 (Para 44)

6. Chandra Pal Singh and others Vs State of U.P. through Principal Secretary Housing Civil Secretariat & others (Service

7. Bench No. 12645 of 2016 decided on 16 March 2018) (Para 67)

8. Shivashray Rai and others Vs State of U.P. through Principal Secretary Housing Civil Secretariat (Service Single No. 9033 of 2016 decided on 16.08. 2017) (Para 67)

9. State of U.P. through Principal Secretary Housing Civil Secretariat Vs Shivashray Rai and others (decided on 26.11.2018) (Para 67)

10. State of Uttar Pradesh Vs Preetam Singh and others, (2014) 14 SCC 774 (Para 54)

11. M.P. Tandon, Allahabad Vs State of U.P., Lucknow and others, 1984 (10) ALR 185 (Para 60)

12. Deoki Nandan Prasad Vs. State of Bihar, AIR 1971 SC 1409 (Para 61)

13. State of Punjab Vs Iqbal Singh, AIR 1976 SC 667 (Para 61)

14. FCI Vs Ashis Kumar Ganguly and others, (2009) 7 SCC 734 (Para 62)

15. All Manipur Pensioners Association through its Secretary Vs The State of Manipur and others (Civil Appeal No. 10857 of 2016 decided on 11 July 2019) (Para 63)

16. D.S. Nakara and others Vs Union of India, (1983) 1 SCC 305 (Para 65)

17. D.D. Tewari Vs Uttar Haryana Bijli Vitran Nigam Ltd., (2014) 3 SCC (L&S) (Para 72)

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

1. Heard Sri Samir Sharma, learned Senior Counsel assisted by Shri Satyendra Singh, learned counsels for the petitioner, Shri Sri Prakash Singh, learned counsel appearing for the fifth respondent and Shri Abhinav Ojha, learned counsel appearing for the Allahabad Development Authority and the learned Senior Counsel for the state respondents.

2. The petitioner, primarily seeks a direction in the nature of mandamus, commanding the respondents to compute her pension/family pension admissible her as per the Government Orders applicable to the Government Servants, issued from time to time.

3. The facts that emerge from the pleadings and averments of the learned

counsel for the parties, briefly stated, is that the husband of the petitioner, Shri Surendra Singh, a member of the Development Authorities Centralized Services1 of the Development Authority, retired on attaining the age of superannuation on 30 September 2001, from the post of Chief Engineer at Allahabad Development Authority2 (presently, "Prayagraj Development Authority'). The employee rendered 24 years 5 months and 5 days qualifying service. The last basic salary drawn by the employee was at Rs. 16,300/- in the pay-scale 14300-400-18300.

4. Pursuant to Government Orders dated 17 March 1983 and 29 September 1983, the employees of the Centralized Services retiring from Development Authorities were paid pension at par with Government Servants until 4 April 1999. The State Government vide Government Order dated 5 April 1999, withdrew the pension of the employees of the Development Authorities. Aggrieved, the association of pensioners challenged the Government Order in **Praveen Kumar Agrawal vs. State of U.P.3,** decided on 20 November 2010.

5. The Court quashed the Government Order dated 5 April 1999. The operative portion of the order reads thus:

"A writ in the nature of certiorari is issued quashing the impugned order dated 5.4.1999 and 9.11.2004 with consequential benefits. A writ in the nature of mandamus is issued commanding the opposite parties to ensure the payment of regular pension to the petitioners and other similarly situated employees forthwith in accordance with Rules applicable to Government employees. Let decision be taken in pursuance of the observations made in the body of the present judgment expeditiously say, within three months from the date of receipt of a certified copy of this order. Respondents shall also ensure the payment of arrears of salary expeditiously say, within six months. "

6. Consequently, the State Government in exercise of powers conferred under Section 55 read with Sub-section (1) of Section 5 of the Uttar Pradesh Urban Planning and Development Act, 19734, framed the Uttar Pradesh Development Authorities Centralized Services Retirement Rules, 20115. In compliance of the judgment and pursuant to Sub-clause (iii) of Rule 1 of the Retirement Benefit Rules, 2011, Government Order dated 22 December 2011, came to be issued by the State Government conferring pension to all the employees of the Development Authorities, including those, who retired prior to the commencement of the Retirement Benefit Rules, 2011.

7. Pursuant to the Government Order and Retirement Benefit Rules, 2011, husband of the petitioner made an application on 6 February 2012, in the prescribed proforma for computation of his pension. However, died on 29 July 2012, before the pension could be sanctioned. After the death of her husband, petitioner applied for arrears of pension and family pension. The respondent authorities kept the matter pending. The fourth respondent, Finance Controller, Allahabad Development Authority, for the first time on 19 December 2015 sent the Pension Pay Order (PPO) to the office of the fifth

respondent, Finance Controller, Lucknow Development Authority for approval. It appears that the PPO came to be rejected by the fifth respondent. The fourth respondent again on 17 March 2016 prepared a PPO which was sent to the fifth respondent for approval which again came to be returned/rejected with objections on 10 June 2016 stating therein that the family pension of the petitioner was wrongly computed. In the meantime, the State Government and other Local Bodies including the Development Authorities, accepted and implemented the recommendations of the 6th Pay Commission. Accordingly, petitioner apprised the fourth respondent to compute the family pension in the light of Government Orders dated 8 December 2008 read with 21 January 2016. It appears that nothing was done by the respondent authorities despite the petitioner being made to run from post to pillar. Finally, petitioner lodged a formal complaint before the third respondent, Vice Chairman, Allahabad Development Authority. It appears, thereafter, the fourth respondent vide communication dated 6 September 2016 computed the pension of the husband of the petitioner at Rs. 13677/- plus dearness allowance and family pension at Rs. 11052/- plus dearness allowance.

8. The harassment of the petitioner at the hands of the respondent authorities did not end there, the PPO dated 17 March 2016, which came to be rejected earlier was approved by the fifth respondent vide communication dated 6 September 2016. Accordingly, the bank was informed vide communication/order dated 26 September 2016. It is urged that authorities to further harass the petitioner had deliberately referred the family pension as "basic retirement pension' and petitioner was referred to as "retired Chief Engineer' in the communication issued to the bank. Consequently, the bank declined to honour the communication in view of the blatant errors. According to the petitioner it was wilful and deliberate. It is urged that even after filing the instant writ petition in November 2016, the alleged mistakes was not rectified, consequently, the petitioner did not receive family pension. It was on the intervention of this Court that the arrears of pension was paid to her but the communication to the bank was not rectified/corrected, petitioner, therefore, was not receiving pension on month to month basis.

9. That apart the, primary grievance of the petitioner is that while computing the pension and family pension, the respondent authorities have not followed the computation tabulation provided in the Government Orders issued since 8 December 2008 until 21 January 2016. According to the petitioner revised basic pension of her husband is required to be computed at Rs. 23050, and the revised basic family pension at Rs. 13830 upon implementation of the 6th Pay Commission recommendations w.e.f. 1 January 2006 by the State Government.

10. In the aforesaid backdrop, petitioner primarily seeks the following reliefs:

" i. Issue an appropriate writ, order or direction in the nature of certiorari, quashing clause-6 of the Government Order dated 5 July 2016 (Annexure No. 1 to the writ petition) so far as it denies the payment of arrears of revised pension w.e.f. 01.01.2006 to the late husband of the petitioner.

ii. issue an appropriate writ, order or direction in the nature of mandamus commanding upon the respondents to disburse all the benefits engrafted in the Government Order dated 5.7.2016, including the arrears of the pension payable to the late husband of the petitioner w.e.f. 1.10.2001 along with 12% interest forthwith.

iii. Issue an appropriate writ, order or direction in the nature of mandamus commanding the respondents to re-determine and pay the pension of the petitioner strictly in accordance with the Government Order dated 21.1.2016 issued by the State Government along with 12% interest."

11. It is urged by the learned counsel for the petitioner that the husband of the petitioner was a member of the Centralized Services, he retired from the post of Chief Engineer in 2001. After promulgation of Retirement Benefit Rules, 2011, husband of the petitioner and the petitioner is entitled to pension/and family pension, respectively as per Government Orders. Under the Retirement Benefit Rules, 2011, read with the Government Orders issued from time to time, the employees of the Centralized Services are entitled to pension at par with the Government Servants, including, revised pension pursuant to the recommendations of the respective Pay Commissions. It is contended that the respondents have arbitrarily not computed/revised the pension/family pension of the petitioner pursuant to the formula/computation provided by the Government orders duly accepted and notified by the State Government.

12. It is further urged that it is admitted by the respondents that the recommendations of the Pay Commissions (VI and VII) have been duly applied to the employees of the Development Authorities in the State of Uttar Pradesh. It is not being disputed by the respondents that employees of the Centralized Services retiring as on date are receiving pension computed as per the recommendations of the 7th Pay Commission. In view thereof, it is urged that the employees, who retired earlier cannot be discriminated, being members of the same pension scheme, hence, are entitled to revised pension. The respondents cannot create a class within a class of pensioners, who stand on equal footing in the common pension scheme that came to be implemented in 2011 and is applicable uniformly to all the pensioners including those, who retired prior to the promulgation of Retirement Rules, 2011. Accordingly, it is submitted that petitioner is entitled to revised pension computed and implemented at par with State Government employees.

13. In rebuttal, learned Standing Counsel appearing for the first and second respondent, and learned counsels appearing for the third, fourth and fifth respondents submit that Development Authorities are autonomous bodies and the Government Orders issued from time to time pertaining to salary and pension are not automatically applicable upon the employees of the Development Authorities. It is upon adoption of the Government Orders by respective Development Authorities, the employees are entitled to pension/family pension. The Development Authorities are not bound to accept the Government Orders in totally issued intermittently revising the family pension, including, computation formula thereof. It is open to

the respective Development Authority, depending upon the financial capacity to partially adopt the Government Order.

14. Learned counsel appearing for the third, fourth and fifth respondents submit that the Development Authority has not revised the pension and family pension of retirees and they continue to receive the pension plus dearness allowance that they were entitled to at the time of retirement or upon the death of the employee. The approval and sanction of the State Government with regard to revised pension/family pension pursuant to the recommendation of the 7th Pay Commission is pending with the State Government. It is accordingly urged that the petition lacks merit and is liable to be dismissed.

15. Rival submissions falls for consideration.

16. The point for determination is (i) whether the Government Orders pertaining to pension/family pension applicable to Government Servants would automatically apply to the members of the Centralised Services of the Development Authority (ii) whether Development Authority is required to take approval from the State Government before implementing the Government Orders revising the pension/family pension pursuant to the recommendations of the Pay Commission accepted by the State Government.

17. Before proceeding to consider the rival contentions and submissions, it would be apposite to examine the Act, Rules and Government Orders governing the employees of the Development Authorities, in particular, members of the Centralized Services with regard to salary, pension and family pension.

18. State Legislature promulgated the Development Act, 1973 (U.P. Act 30 of 1974). The Act was enacted for the development of certain areas of Uttar Pradesh according to plan and for matters ancillary thereto. The State Government constituted Development Authorities in the State in relation to Development Area, constituted as per the provisions of Section 4, upon notification in the Gazette.

19. Section 5 of Development Act, 1973, provides for staff of the Development Authority. Section 5 reads thus:

"5. Staff of the Authority:

(1) The State Government may appoint two suitable persons respectively as the Secretary and the Chief Accounts Officer of the Authority who shall exercise such powers and perform such duties as may be prescribed by regulations or delegated to them by the Authority or its Vice-Chairman.

(2) Subject to such control and restrictions as may be determined by general or special order of the State Government, the Authority may appoint such number of other officer and employees as may be necessary for the efficient performance of its functions and may determine their designations and grades.

(3) The Secretary, the Chief Accounts Officer and other Officers and employees of the Authority shall be entitled to receive from the funds of the

Authority such salaries and allowances and shall be governed by such salaries and allowances and shall be governed by other conditions of service as may be determined by regulations made in that behalf."

20. On bare reading, Section 5 empowers the State Government to appoint Secretary and Chief Accounts Officer of Development Authority, who shall exercise such powers and duties as may be prescribed by the regulations or delegated to them by the Development Authority subject to such control and restrictions as may be determined by the general or special order of the State Government. The Development Authority has been conferred power to make appointment of officers and employees as may be necessary for the efficient performance of its functions and determine their designations and grades. The Secretary, Chief Accounts Officer and other officials and employees of the Development Authority shall be entitled to receive salaries and allowances from the funds of the Development Authority and shall be governed by such other conditions of service as may be determined by the regulations made in that behalf.

21. Section 5-A confers power upon the State Government by notification to create one or more Centralized Services for such posts, other than the post mentioned in Sub-section (4) of Section 59, common to all the Development Authorities. The post as per Sub-section (6) is transferable from one Development Authority to another Development Authority. Relevant portion of Section 5-A for the purposes of instant case is being extracted:

"5-A. Creation of Centralised Services:

(1) Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, ***the State Government may at any time, by notification create one or more 'Development Authorities Centralised Services for such posts, other than the posts mentioned in Sub-Section (1) of Section 59, as the State Government may deem fit, common to all the Development Authorities, and may prescribe the manner and conditions of recruitment to and the terms and conditions of service of person appointed to such service.***

(2) Upon creation of a Development Authorities Centralised Service, a person serving on the posts included in such service immediately before such creation, not being a person governed by the U.P. Palika (Centralized) Services Rules, 1966. or serving on deputation, shall, unless he opts otherwise, be absorbed in such service.-

(a) .....

(b) .....

(3) xxxxx

(4) xxxxx

(5) xxxxx

(a) .....

(b) .....

(6) It shall be lawful for the State Government or any officer

authorised by it in this behalf, to transfer any person holding any post a Development Authorities Centralised Service from one Development Authority to another."

22. On specific query, the learned counsel for the State-respondents informs that there are twenty four Development Authorities in the State having single Centralized Services common to all Development Authorities governed by the same conditions of service.

23. Chapter VII of Development Act, 1973, provides for Finance, Accounts and Audit. Section 24, thereunder, provides for pension and provident fund. Section 24 reads thus:

*"**24. Pension and Provident Funds: -***

(1) The Authority may constitute for the benefit of its whole time paid members and of its officers and other employees in such manner and subject to such conditions, as the State Government may specify, such pension or Provident funds as it may deem.

(2) Where any such person, or provident fund has been constituted, the State Government may declare that the provisions of the Provident Funds Act, 1925, shall apply to such fund as if it were Government Provident Fund."

24. Section 56 confers power upon the Development Authority to make regulations with the previous approval of the State Government for administration of the affairs of the Development Authority including salaries, allowances and conditions of service of its employees. Relevant portion of Section 56 is extracted:

"56.Power to make regulations.-

(1) An Authority may,with the previous approval of the State Government, make regulations not inconsistent with this Act and the rule made thereunder for the administration of the affairs of the Authority.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely-

(a) .....

(b) .....

(c) the salaries, allowance and conditions of service of the Secretary, Chief Accounts Officer and other officers and employees:

(d) .....

(e) .....

(f) .....

(g) .....

(h) .....

(i) .....

(3) xxxxxx"

25. The State Government in exercise of power conferred under

Section 5A of Development Act, 1973, notified the U.P. Development Authorities Centralized Services Rules, 19856, on 25 June 1985, applicable to all the Development Authorities [Sub Rule (2) of Rule 1]. The cadre and strength of service has been provided under Rule 3. The age of superannuation and retiring pension is provided under Rule 34. Rule 37 mandates that any matter not covered by these Rules or by special orders, the members of service shall be governed by the rules, regulations and orders applicable generally to the Government Servants of Uttar Pradesh. Rule 34 & 37 of the Centralised Services Rules, 1985, is extracted:

*"**34. Age of retirement.-** (1) Subject to the provisions of Sub-rules (2) and (3), the age of retirement from service of all officers and other employees of the service shall be sixty years beyond which no one shall ordinarily be retained in the service.*

(2) xxxxxx

(3) xxxxxx

*(4) **A retiring pension and/or other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules applicable to every officer or other employees who retires or is required or allowed to retire under this rule.***

Explanation--(1) xxxxxx

(2) xxxxxx

*37. **Regulation of other matters.-** (1) If any dispute of difficulty arises regarding interpretation of any of the provisions of these rules, the same shall be referred to the Government whose decision shall be final.*

(2) In regard to the matters not covered by these rules or by special orders, the members of service shall be governed by the rules, regulations and orders applicable generally to U.P. Government servants serving in connection with the affairs of the State.

(3) Matters not covered by sub-rules (1) and (2) above shall be governed, by such orders as the Government may deem proper to issue."

26. Rule 31 provides for leave, leave allowances, officiating pay, fee and honorarium as is admissible to the Government Servants of like status under the U.P. Financial Hand Book, Volume II, Parts II and IV.

27. Admittedly, all the employees working earlier in Nagar Palika, Nagar Nigam and later on, whose services were merged/absorbed with the Centralised Services, were being paid regular pension in view of the provisions of Section 59 of Development Act, 1973, and pursuant to Government Orders dated 17 March 1983 and 29 September 1983, until April 1999. Thereafter, pension was stopped and was not being paid to the employees of the Development Authority.

28. Prior to April 1999, until framing of the Retirement Benefit Rules 2011, under the Development Act, 1973, the provisions of the Uttar Pradesh Palika (Centralized) Services Retirement Benefit Rules, 19817, was applicable to the employees of the Development Authorities. Family pension is provided

under Rule 7 of Chapter III which reads thus:

''भाग–तीन
पारिवारिक पेंशन

7. पारिवारिक पेंशन–

किसी केन्द्रीयित सेवा में नियुक्त किसी व्यक्ति के परिवारिक पेंशन उत्तर प्रदेश के कार्यकलापों के सम्बन्ध में सेवारत सरकारी सेवकों पर लागू संयुक्त नियमों द्वारा विनियमित होगी।''

"Part - 3
Family pension

7. Family pension-

The family pension of any person appointed in any Centralized Service shall be regulated in terms of common rules applicable to serving Uttar Pradesh government servants attending to its affairs."

(Translation by the Court)

29. The Government order dated 4 April 1999, stopping the pension was set aside in **Praveen Kumar Agrawal2**, State Government, thereafter, framed the Retirement Benefits Rules, 2011, which governs the payment of pension/family pension of the employees of the Development Authorities. **Part–I** deals with **''Pension and Gratuity'.** Rule 4 provides calculation of pension and gratuity according to the procedure and formula applicable to employees of the State Government. Relevant portion of Rule 4 is extracted:

"4. Calculation of Pension and Gratuity-

(1) The amount of superannuation, retirement, invalid and compensation pension and gratuity shall be appropriate amount calculated according to the procedure and formula applicable to the employees of the Uttar Pradesh Government.

xxx xxx xxx xxx

xxx xxx xxx xxx

(2) xxx xxx xxx xxx

(3) The expression "invalid and compensation pension" will have the same meaning as is assigned to it in respect of the employees of the State Government."

30. **Part-III** of the Retirement Benefit Rules, 2011, provides for family pension, regulated by the relevant rules applicable to Government Servants of the State of Uttar Pradesh. Rule 7 is extracted:

"7. The Family Pension to the family of a member of the service shall be regulated by the relevant rules applicable to Government Servants services in connection with the affairs of the State of Uttar Pradesh."

31. The Government in exercise of power conferred under proviso to Sub-clause (3) of Rule 1 of Retirement Benefit Rules, 2011, and in compliance of the decision rendered in **Praveen Kumar Agrawal2,** issued Government Order conferring the benefit of pension/family pension to all the employees of Development Authority, who retired prior to 11 November 2011. In other words, the Retirement Benefit Rules, 2011, covered all the employees and members of the Centralized Services retiring prior to 2011

and thereafter. Husband of the petitioner pursuant thereunder applied for pension, however, died on 29 July 2012. Petitioner, thereafter, pursued the matter with the respondent-authorities for arrears, pension and family pension, revised from time to time, with effect from the date of retirement of the husband of the petitioner i.e. 30 September 2001.

32. The State Government vide Government Order dated 8 December 2008, accepted the recommendation of the Sixth Central Pay Commission proposed by the Uttar Pradesh Pay Committee. The Government Order was made applicable to all the employees of the State Government retired prior to 1 January 2006. Along with Government Order, a tabular chart showing existing Basic Pension/Family Pension without dearness allowance, Basic Pension/Family Pension with dearness allowance and the consolidated Pension/Family Pension was appended for computation of pension/revised pension. The Government Order further provided that the amount of family pension shall not be lower than 30% of the sum minimum of the pay in the pay-band and grade pay corresponding to the pay scale in which the government servant retired prior to 1 January 2006. Clause 4(1) of the Government Order, however, provides a rider that pension will be reduced pro rata where the pensioner had less than 33 years of service. According to the petitioner, minimum basic pension of the deceased-employee would be computed as under:

Pension vide 5th Pay Commission i.e. Prior to 01.01.2006	As per formula in Clause 4(1) w.e.f. 01.01.2006 (as per Pension Table)	As per proviso of Para4-(1) (after pro-rata reduction as per rider of 33 years of service)	As per Proviso of Clause 4-(1). (without applying rider of 33 years service)
Rs.6,051/-	Rs.13,677/-	Rs.17,113/-	Rs.23,050/-

33. Similarly, the minimum basic family pension of the petitioner w.e.f. 1 January 2006 works out to be:

As per formula in Clause 4(1)	As per Proviso of Clause 4(1)
Rs.11,052/-	Rs.13,830/-

34. Relevant portion of Government Order dated 8 December 2008 is extracted:

उत्तर प्रदेश शासन
वित्त (सामान्य) अनुभाग–3
लखनऊः दिनांक : 8 दिसम्बर 2008
कार्यालय–ज्ञाप

विषय : वेतन समिति उत्तर प्रदेश, 2008 की संस्तुतियों को स्वीकार किये जाने के फलस्वरूप दिनांक 01.01.2006 के पूर्व सेवानिवृत्त राज्य सरकार के सिविल पेंशनरों/पारिवारिक पेंशनरों की पेंशन/पारिवारिक पेंशन का अभिनवीकरण/ पुनरीक्षण।

1– उपरोंक्त विषय पर अधोहस्ताक्षरी को यह कहने का निदेश हुआ है कि राज्यपाल महोदय ने वेतन समिति उत्तर प्रदेश 2008 की संस्तुतियों को स्वीकार करते हुए दिनांक 01.01.2006 के पूर्व सेवानिवृत्त / मृत सभी सिविल

पेंशनरों / पारिवारिक पेंशनरों की पेंशनों के अभिनवीकरण / पुनरीक्षण के संबंध में निम्न आदेश प्रदान किए हैं।

2– गगग गगग गगग

3– गगग गगग गगग

4–(1) ऐसे पेंशनरों / पारिवारिक पेंशनरों की पेंशन / पारिवारिक पेंशन जो दिनांक 01.10.2006 के पूर्व से पेंशन / पारिवारिक पेंशन प्राप्त कर रहे हैं, का समेकन दिनांक 01.01.2006 से निम्नलिखित धनराशियों को सम्मिलित करके किया जायेगा :–

(प) वर्तमान पेंशन / पारिवारिक पेंशन,

(पप) महॅगाई पेंशन जहॉ अनुमन्य हो,

(पपप) वर्तमान महॅगाई राहत जैसा कि औसत ।प्ब्प्536 (वर्ष 1982–100 के आधार पर) मूल पेंशन /मूल पारिवारिक पेंशन तथा महॅगाई पेंशन के 24 प्रतिशत के बराबर अनुमन्य है शासनादेश संख्या–सा–3–1746 / दस–2005–308 / 2004, दिनांक 02 दिसम्बर 2005 के अनुसार महॅगाई राहत के 50 प्रतिशत के बराबर धनराशि को महॅगाई पेंशन में परिवर्तित करते हुए,

(पअ) पेंशन / पारिवारिक पेंशन, के 40 प्रतिशत के फिटमेन्ट वेटेज की धनराशि भी सम्मिलित होगी।

जिन प्रकरणों में वर्तमान पेंशन की धनराशि में 50 प्रतिशत की महॅगाई राहत की धनराशि सम्मिलित है उन प्रकरणों में फिटमेन्ट वेटेज की धनराशि की गणना मूल पेंशन पर अर्थात महॅगाई पेंशन की धनराशि घटाकर की जाएगी।

इस प्रकार अगणित पेंशन / पारिवारिक पेंशन, को दिनांक 01.01.2006 से मूल पेंशन माना जाएगा।

किन्तु प्रतिबन्ध यह होगा कि पेंशनर की पेंशन की धनराशि सेवानिवृत्ति के समय उसके पुराने वेतनमान के प्रतिस्थापित पे बैण्ड के न्यूनतम तथा संबंधित ग्रेड पे क योग के 50 प्रतिशत की धनराशि से कम नहीं होगी। जहॉ अर्हकारी सेवा 33 वर्ष से कम है वहॉ यह धनराशि अनुपारित रूप से कम कर दी जाएगी किन्तु किसी भी दशा में यह रू03500 / – प्रतिमाह से कम नहीं होगी।

इसी प्रकार पारिवारिक पेंशन की धनराशि संबंधित सरकारी सेवक के दिनांक 01.01. 2006 से पुराने वेतनमान के प्रतिस्थापित पे बैण्ड के न्यूनतम तथा संबंधित ग्रेड पे के योग के 30 प्रतिशत किन्तु किसी भी दशा में यह रू0 3500 / – प्रतिमाह से कम नहीं होगी।''

Government of Uttar Pradesh
Vitta (Samanya) Anubhag - 3
Lucknow: Dated: 8th December 2008

Office Memo

Subject: Up-gradation/revision of pension/family pension of the civil pensioners/family pensioners of the state government retired prior to 01.01.2006, consequent to the approval of the recommendations made by the Pay Committee, Uttar Pradesh, 2008.

1- On the above-mentioned subject, the undersigned is directed to say that Hon'ble Governor while accepting the recommendations of the Pay Committee, Uttar Pradesh, 2008 for up-gradation/revision of all the civil pensioners/family pensioners retired/deceased before 01.01.2006, has given the following orders:

2- xxxxxx

3- xxxxxx

4-(1) The pension/family pension of those pensioners/family pensioners who have been obtaining pension/family pension since prior to 01.10.2006, shall be consolidated by aggregating the following amounts: -

(i)- Current pension/family pension,

(ii)- Dearness pension, wherever admissible,

(iii)- The dearness relief, currently admissible, is equal to 24 percent of original pension/original family pension and dearness pension on the basis of AICPI536 (on the basis of 100 in 1982); and by converting the amount equal to 50 percent of the dearness relief into dearness pension in terms of the Government Order No. Sa-2-1746/X-2005-308/2004, dated 02nd December, 2005,

(iv)- The amount of fitment weightage being 40 percent of the pension/ family pension shall also be included in the said pension/ family pension.

In the cases wherein dearness relief @ 50 percent is included in the present pension amount, the amount of fitment weightage shall be calculated on basic pension i.e. after deducting the amount of dearness relief from pension.

The pension/ family pension thus calculated shall be taken to be the basic pension w.e.f. 01.01.2006.

Provided that the pension of the pensioner shall be not less than 50 percent of the total of minimum of pay-band corresponding to his old pay-scale and corresponding grade pay at the time of his superannuation. Where his service is less than 33-year qualifying service, this amount shall be reduced in the same ratio but in any circumstance it shall not be less than Rs 3500/-.

Similarly, the amount of the family pension shall in any condition be not less than 30 percent of the total of minimum of pay band replacing the old pay scale of the government servant as on 01.01.2006 and corresponding grade-pay, subject to minimum of Rs 3500/- per month."

[Translation by the Court]

35. Table, part of the Government Order, computes the existing Basic Pension/Family Pension without Dearness Pension/Family Dearness (Column-1), Basic Pension/Family Pension without Dearness Pension/Family Dearness Pension (Column-2), and Revised Consolidated Pension/Family Pension (Column-3) in so far it relates to the ex-employee and the petitioner is extracted:

BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension
(1)	(2)	(3)	(1)	(2)	(3)	(1)	(2)		(1)	(2)	(3)

4890	7335	11052								

BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension	BP (pre 2006) without DP	BP (pre 2006) with DP	Revised Consolidated Pension
(1)	(2)	(3)	(1)	(2)	(3)	(1)	(2)	(3)	(1)	(2)	(3)
6051	9077	13677									

36. The Finance Department of the State Government vide resolve dated 7 February 2009, has accepted the recommendations of the 6th Pay Commission and is applicable on all Local Bodies, including, the Development Authorities. It further clarifies that the State Government shall not be responsible to provide funds to meet the expenses which has to be borne by the respective Local Bodies/Development Authorities. Relevant portion of the resolve dated 7 February 2009 is extracted:

पढ़ा गया *: वेतन समिति (2008) के द्वितीय प्रतिवेदन भाग–1 में की गई संस्तुतियॉं।*

पर्यालोचनार्थ– *शासन द्वारा वेतन समिति के द्वितीय प्रतिवेदन भाग–1 में नगरीय स्थानीय निकाय, जिला पंचायत, जल संस्थान तथा विकास प्राधिकरणों के विभिन्न श्रेणी के कर्मचारियों/ अधिकारियों के संबंध में की गयी संस्तुतियों पर विचार किया गया। शासन ने वेतन समिति के द्वितीय प्रतिवेदन भाग–1 में की गयी संस्तुतियों को निम्नानुसार स्वीकार कर लिया है:–*

(1) पुनरीक्षित वेतन संरचना में वेतन बैण्ड तथा ग्रेड वेतन में निर्धारित वेतन विनांक 01–1–2006 अथवा दिये गये विकल्प की तिथि से देय होगा एवं महंगाई भत्ते की संशोधित दरें वेतन समिति की संस्तुति के अनुसार राज्य कर्मचारियों के समान देय होंगी।

(2).....

(3) पुनरीक्षित वेतन संरचना में वेतन निर्धारण राजकीय कर्मचारियों/अधिकारियों के संबंध में वेतन समिति के प्रथम प्रतिवेदन के माध्यम से की गयी संस्तुतियों पर शासन द्वारा लिये गये निर्णय के अनुसार किया जाएगा।

(4).....

(5) ***नगरीय स्थानीय निकाय, जिला पंचायत, जल संस्थान तथा विकास प्राधिकरणों के विभिन्न श्रेणी के ऐसे कार्मिक/पेंशनर/पारिवारिक पेंशनर जिन्हें पेंशन की सुविधा पूर्व से राजकीय कर्मचारियों के सादृश्य अनुमन्य है, के लिए पेंशन पुनरीक्षण की वही प्रक्रिया अपनायी जायेगी जो प्रक्रिया राजकीय कार्मिकों/पेंशनरों/पारिवारिक पेंशनरों के संबंध में लागू की गयी है। साथ ही अन्य ऐसे सेवा नैवृत्तिक लाभ, जो पूर्व से राजकीय कार्मिकों के सादृश्य अनुमन्य हैं, का पुनरीक्षण भी राजकीय विभागों के कार्मिकों/पेंशानरों/पारिवारिक पेंशनरों के संबंध में वेतन समिति के प्रथम प्रतिवेदन के माध्यम से की गयी संस्तुतियों पर शासन द्वारा लिये गये निर्णय के अनुसार किया जाएगा।***

(6).....

(7).....

(8).....

(9.).....

(10).....

(11).....

(12) विकास प्राधिकरणों के कर्मचारियों/ अधिकारियों को पुनरीक्षित वेतन संरचना, भत्ते एवं सुविधाओं तथा अन्य लाभ इस प्रतिबन्ध के साथ अनुमन्य कराये जायेंगे कि उक्त पर आने वाले व्ययभार को वहन करने हेतु राज्य सरकार द्वारा किसी भी प्रकार की वित्तीय सहायता नहीं दी जायेगी तथा ऋणदाता वित्तीय संस्थाओं के देयों अथवा शासकीय देयों, यदि कोई हों, के भुगतान में कोई व्यवधान उत्पन्न नहीं होगा। प्राधिकरणों को अपने कार्मिकों को पुनरीक्षित वेतन संरचना का लाभ अनुमन्य कराये जाने से अधिष्ठान व्यय में होने वाली वृद्वि के आधार पर ऋणदाता संस्थाओं एवं शासकीय देयों, यदि कोई हो, के भुगतान में कोई छूट नहीं दी जाएगी।

(13).....

(14).....

(15).....

(16).....

(17).....

(18).....

आदेश

आदेश दिया जाता है कि यह संकल्प जन–साधारण की सूचना के लिए उत्तर प्रदेश गजट में प्रकाशित किया जाय। संकल्प तथा वेतन समिति का द्वितीय प्रतिवेदन भाग–1 वित्त विभाग की वेब साइट पर रखा जाय और सम्बन्धित विभागों को भी भेजी जायें।

यह भी आदेश दिया जाता है कि वेतन समिति के द्वितीय प्रतिवेदन भाग–1 तथा संकल्प की प्रतियॉ, सम्बन्धित सेवा संघों और जनता के लिए बिक्री हेतु उपलब्ध रखी जायें।

37. The State Government, thereafter, issued corrigendum dated 19 July 2010, along with a Table showing the revised pay structure and corresponding minimum pensions. Item No. 18 of the Table shows the corresponding minimum revised basic pension admissible to the husband of the petitioner at Rs.23,000+D.A. per month. Similar Government Order/Corrigendum dated 12 October 2010, came to be issued by the State Government revising minimum basic pension. Item No. 12 of the enclosed Table to the Government Order shows the minimum basic family pension admissible to the petitioner at Rs.13,830/-. Thereafter, State Government again issued a Government Order/Corrigendum dated 7 November 2014 & 14 July 2014 revising the pension and family pension of certain lower pay scales which is not applicable to the facts of the instant case. Subsequently, the State Government issued Government Order dated 21 January 2016, clarifying that family pension shall not be less than thirty percent of the basic pension. The Table enclosed along with the Government Order reflects that the revised basic pension of the husband of the petitioner is at Rs. 23,050/- and revised basic family pension admissible to the petitioner is at Rs.13,830/-.

38. Grievance of the petitioner is that petitioner is entitled to the revised pension computed by the State Government as against the pension/family pension computed/approved and sanctioned by the respondents at Rs.13,677/- and 11,052/- respectively.

39. Having considered the provisions of the Act, Rules and the Government Orders, I proceed to consider the rival submissions of the parties.

40. Facts, interse, parties are not in dispute. This Court in **Praveen Kumar Agrawal2** held that the members of the Centralized Services are entitled to pension admissible to the employees of the State Government. Retirement Benefit Rules, 2011, in particular Rule 4 and 7 categorically provides that the amount of pension and family pension shall be **"calculated according to the procedure and formula applicable to the employees of the Uttar Pradesh Government".** The family pension is regulated by the **"relevant rules applicable to the Government Servants services in connection with the affairs of the State of Uttar Pradesh".** On joint reading of Rule 4 and 7 along with Section 24 of Development Act, 1973, it is evident that the rules/orders made applicable to the employees of the State Government and the formula for computation of pension and family pension thereunder would apply by reference to the employees of the Development Authority. The Rules are binding upon the Development Authorities. Prior to the enactment of Retirement Benefit Rules, 2011, similar provision was contained in the Rules, 1981, and Rules, 1985, which was applicable upon the employees of the Development Authority. Rule 37 of Rules, 1981 clearly provided that family pension admissible to the employees of the State Government and the rules framed thereunder would apply. In other words, the employees including the members of the Centralized Services were receiving pension/family pension and revised family pension at par with the government servants determined by the State Government from time to time. The employees of Development Authorities, thereafter, are entitled to pension/family pension at the rate admissible to Government Servants.

41. In ***Pepsu Road Transport Corporation Patialia vs. Mangal Singh and others8,*** the Supreme Court held that Rules/Regulations validly made is legislative in nature and binding upon the statutory bodies and the employees.

"The Regulations validly made under statutory powers are binding and effective as the enactment of the competent legislature. The statutory bodies as well as general public are bound to comply with the terms and conditions laid down in the Regulations as a legal compulsion. Any action or order in breach of the terms and conditions of the Regulations shall amount to violation of Regulations which are in the nature of statutory provisions and shall render such action or order illegal and invalid. Even in the case of non-statutory Regulations, specifically providing for the grant of pensionary benefits to the employee qua his employer shall be governed by the terms and conditions encapsulated in such non-statutory Regulations."

42. It is clear that the government order/resolution of Development Authority cannot supersede provisions of Act/or statutory Rules. The view is fortified by the judgment of the Supreme Court in ***Union of India versus Charanjeet S. Gill9*** and ***Public Service Commission, Uttaranchal Versus JCS Bora10***, the relevant portion reads thus:

"28.....It is settled proposition of law that the executive orders cannot supplant the Rules framed under the proviso to Article 309 of the Constitution of India. Such executive orders/ instructions can only supplement the Rules framed under the proviso to Article 309 of the Constitution of India."

43. Where an earlier legislation is incorporated into a later legislation, the provisions of earlier law which are incorporated into the later law become part and parcel of the later law. The amendments made in the earlier law after the date of incorporation, which are not expressly made applicable to the subsequent Act, cannot, by their own force, be read into the later Act. Similarly, repeal of the earlier Act by a third Act does not affect the incorporating Act. There is a distinction between legislation by incorporation and that by reference inasmuch as in the latter case the amendments made in the earlier legislation would be applicable to the referring legislation. Applying the principle in the instant case the Retirement Benefit Rules, 2011, makes applicable the Government Orders, insofar it relates to pension/family pension, by reference. The subsequent amendments made thereto would therefore also apply.

44. Supreme Court in ***Bajaya v. Gopikabai11*** explained the distinction between legislation by reference and incorporation.

"Legislation by referential incorporation falls in two categories, (a) where a statute by specific reference incorporates the provisions of another statute as of the time of adoption : and (b) where a statute incorporates by general reference the law concerning a particular subject, as a genus. In case (a) the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. But in the category (b) it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the generic law on the subject adopted by general reference."

(Refer: **Western Coalfields Limited vs. Special Area Development Authority, Korba12)**

67. The Division Bench of this Court in ***Chandra Pal Singh & others vs. State of U.P. through Principal Secretary Housing Civil Secretariat & others13,*** was called upon to consider the plea of retired employees of the U.P. Avas Evam Vikas Parishad, a statutory authority constituted under the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965, whether the petitioners therein were entitled to revised pay as per Sixth Pay Commission w.e.f. 1 January 2006. The Government order dated 8 December 2008, which is relied upon in the instant case, was considered. The Court was of the view that statutory regulations framed by the Parishad providing pension/family pension admissible to the officers and employees of the State Government stands incorporated by reference. Relevant portion of para-24 is extracted:

"Considering the submissions of the parties, we are of the considered opinion that statutory regulations for the employees of the Parishad have been notified on 19th May, 2009, by virtue of which, employees of the Parishad are held entitled to payment of pension/family

pension and gratuity as is admissible to the officers and employees of the State Government which has not been disputed also. The relevant Government Orders, as well as statutory scheme i.e. U.P. Civil Services Regulation, Pensions Rules, U.P. Retirement Benefit Rules, 1961, New Family Pension Scheme, 1965 and all orders of Finance Department in relation to pension/family pension/ gratuity as are applicable to the employees of the State Government stands incorporated by reference..... Except for the Government Order No. 1508 dated 8th December, 2008, there is no other Government Order regulating grant of financial benefits under the Sixth Pay Commission Report or payment of pension and gratuity to the employees of the State Government. This Government Order, therefore, would apply in its entirety to the employees of the Parishad by virtue of statutory Regulations of 2009. The exclusionary part under the Government Order dated 8th December, 2008 insofar as it exempts its applicability upon the employees of Public Enterprises and local bodies, would have to be read down and held to be inapplicable, so far as employees of the public corporations are concerned. This construction would be obvious in as much as the employees of Parishad would have to be treated at par with the employees of the State Government and the Government Orders issued for the employees of Government Corporations etc by bureau of Public Enterprises would have no applicability."

(Refer: ***Shivashray Rai and others vs. State of U.P. through Principal*** **Secretary Housing Civil Secretariat14 affirmed in Special Appeal No. 610 of 201815).**

45. The pleadings setforth by the respondents is relevant. Counter affidavit filed by the the Principal Secretary Department of Housing and Urban Planning, Government of Uttar Pradesh, has stated that the Government Orders issued from time to time, in particular Government Order dated 8 December 2008 and 21 January 2016, are applicable upon the retired employees of the State Government and is not applicable to the petitioner. However, it has been accepted that the pensioners of Centralized Services are governed by the Retirement Benefit Rules, 2011. Para 8 and 29 are extracted:

"8. That in reply to the contents of the paragraph no.-4 of the writ petition, it is submitted that the government orders dated 08.12.2008 and 21.01.2016 have been issued in respect of retired employees of State Government. ***Retirement benefits of pensioners of Development Authority Service are governed by Uttar Pradesh development Authorities Centralized Service Retirement Benefits Rules 2011. The Government Orders issued in respect of pensioners of state government are not applicable on pensioners of Development Authorities Service.***

29. That in reply to the contents of the paragraph no.-37 of the writ petition, it is stated that the detailed reply has already been given in the preceding paragraphs of the instant counter affidavit. However, it is further stated that as far as Clause 4(i) of the said Government Order is concerned it is clarified that at that point of time calculation was made as per the procedure of the government order but this does not mean that the future

amendments made by the State Government from time to time will automatically apply in totality upon the Development Authorities because Development Authorities are self financed autonomous body who are dependent on their own sources of income. The Development Authorities are totally dependent upon their own financial resources to make the payment of salary of their employees and their other expenses. These bodies do not receive any financial aid from the State Government for the purpose of payment of salary and the pension to their employees. ***The Government Orders issued by the State Government are not directly applicable upon the employees of the Authorities unless and until, it has been adopted/approved by the Board of the authorities keeping in view of their own financial condition."***

46. The second respondent, Principal Secretary Department of Finance, Government of Uttar Pradesh filed counter affidavit stating therein that the Finance Department is an advisory department and the service matters of employees and departmental rules are administered by the concerned administrative departments. The pensionary benefits admissible to the employees of the Centralized Services is governed by the Retirement Benefit Rules, 2011. Paragraphs 4 and 7 of the counter affidavit filed by second respondent are extracted:

"4. That, as per the information made available by the Housing and Urban Planning Department, Government of Uttar Pradesh, Late Surendra Singh, petitioner's husband, joined his services in the Centralized Services of the development authority on 25/04/1977 and retired on 30/09/2001 on superannuation from Allahabad ***Development Authority. He passed away on 29/07/2012. Late Surendra Singh was granted pension as per the U.P. Development |Authority Centralize Service Retirement Benefits Rules, 2011, hereinafter referred to as the "Rules of 2011****", which are applicable to the members of the Centralized Services of Deveoopment Authorities of Uttar Pradesh. After his death, his wife Mrs. Shakuntala Singh, who is the petitioner in the instant writ petition is being paid family pension as per the said rules.*

7. That the petitioner is claiming the benefit of pension as per the Government Order dated 08/12/2008, which is applicable to the State pensioners and this Government order is not binding upon the development authorities."

47. The third and fourth respondents in their counter affidavit do not deny the facts and state that the pension of the ex-employee and the family pension of the petitioner was calculated as per the recommendations of Sixth Pay Commission w.e.f. 1 January 2006 on pro rata basis after reducing the qualifying service of the ex-employee being less than 33 years. It is further stated that the Government Orders dated 8 December 2008 does not apply to the members of the Centralized Services. Paragraphs 24, 33, 35, 40 of the counter affidavit filed by the third and fourth respondent are extracted:

"24. That in reply to the contents of paragraph no's. 37 & 38 of the writ petition, it is stated that the

averments made in paragraphs under reply are incorrect and are denied. ***The true and correct facts are that the government order dated 08.12.2008 has further been substituted by the government orders dated 19.07.2010, 14.07.2014 & 21.01.2016.*** *The judgment was delivered by the Lucknow bench of this Hon'ble court on 20.11.2010 and thereafter the G.O. dated 14.07.2014 and 21.01.2016 have been issued.* ***As the government orders dated 14.07.2014 and 21.01.2016 have not yet been applicable to the employees of the Development Authorities, the payment of pension etc. has to be done as per the old procedure.*** *The same is clearly explicit from the letter No.575/,Q0lh0@ds0is0@,y0Mh0,0@201 6&2017 issued by the Lucknow Development Authority whereby the arrears of pension for the period of 01.10.2001 to 29.10.2016 for a sum of Rs. 28,21,540/- payable to the petitioner has been issued.*

33. That in reply to the contents of paragraph no. 51 of the writ petition, it is stated that the averments made in paragraph under reply are not admitted in the manner stated. ***Only this much is admitted that the government orders dated 14.07.2014 and 21.01.2016 are not applicable to the petitioner, as the same are subsequent to the judgment delivered by the Hon'ble Lucknow bench of this Hon'ble court. The crux of the matter is that the government order issued by the state government upto 12.10.2010 alone can be applied.*** *Thus the settled position is that the pension of the husband of the petitioner has been calculated by applying the formula vkSlr ifjyfC/k;k x sosk lekgh (vf/kdre 66)@2 x 66o As is evident from the letter No. 575/fo0fo0lh0@ds0ih0@,y0Mh0,0@2016&17 @ issued by the Lucknow Development Authority.*

35. Only this much is admitted that the statement government has issued the government order dated 8.12.2008. However, the G.O. dated 8.12.2008 is in respect of the employees of the statement government and is not applicable to the employees of the centralized/non Centralized Services of the Development Authority.

40. Accordingly the pension of the husband of the petitioner as per the 6th pay commission was calculated from 01.01.2006 on basic pension of Rs. 6051/- revised to 13,677.00 plus D.A. upto 29.07.2012. Surendra Singh the husband of the petitioner died on 29.07.2012 and therefore the family pension was calculated on Rs. 11052.00 plus D.A. As per above the Area of Rs. 28,21,540.00 has been paid by L.D.A."

48. On perusal of the averments made in the counter affidavit, there appears to be consensus amongst the respondents that Retirement Benefit Rules, 2011, apply to the petitioner. Further, the Government Orders issued subsequent to the High Court judgment i.e. after 2010 has not been applied to the employees of the Development Authority. In other words the contention of the petitioner that subsequent Government Orders pertaining to pension/family pension has not been applied by the respondents in computing the revised pension/family pension has been admitted. The stand of the respondents is self contradictory and in teeth of the mandatory provision of the Retirement Benefit Rules, 2011, as per their own saying, mandating that Government

Orders applicable to the Government Servant would apply to the employees of the Development Authority.

49. In the instant case, the respondents have taken oscillating and contradictory stand but on specific query, it is admitted by the learned counsel for the respondents that no alternate formula for computation of pension/family pension, other than that provided by the State Government, was followed and applied to the petitioner. The fifth respondent custodian of pension fund has not evolved a formula for computation of pension and family pension insofar as it relates to the employees of the Development Authorities. It is rather not open to the respondent-Development Authority on reading of the provisions of the Retired Benefit Rules, 2011, to adopt a formula other than that applicable to the Government Servants. In the event of the Development Authorities doing so, it will violate of the mandatory provisions of Retirement Benefit Rules, 2011, read with Section 24 of Development Act, 1973. The Development Authority lacks power and authority to override, deviate or rewrite the Rules framed by the State Government governing and regulating pension/family pension. It is accordingly held.

50. The implementation of the recommendations of the 7th Pay Commission insofar it relates to retirees, is pending approval with the State Government. It is, though, admitted that the Development Authority has sufficient funds to meet the expenses of the recommendations of the 7th Pay Commission from its own sources to pay revised pension to its employees.

51. The fifth respondent in the compliance affidavit has stated that the fifth respondent has been corresponding with the State Government for providing benefit of the increased/revised pension/family pension according to the recommendation of the 7th Pay Commission to the retired employees/family members of the Centralized Services. The approval from the State Government is awaited. It is further stated that the fifth respondent, Secretary, Lucknow Development Authority, vide communication dated 10 October 2017, addressed to the Joint Secretary Housing and Urban Planning Government of Uttar Pradesh has conveyed that the Development Authority is having the capacity to bear the expenses to finance the enhanced pension/revised family pension recommended by the 7th Pay Commission to the employees retired prior to 1 January 2016. Similar, subsequent communications until 24 August 2019, has been brought on record. Paragraphs 26 and 27 of the compliance affidavit are extracted:

"26. That the pension has been paid to the petitioner, in accordance with the Sixth Pay Commission.

27. That as stated aforesaid, several letters have been sent to the state government for providing the approval for applicability of seventh pay commission to the employees of Centralized Services, and the same is still pending for approval before the state government."

52. In the backdrop of the stand taken by the fifth respondent, the ancillary question that arises is as to whether, the Development Authority is bound to take approval of the State

Government before implementing the recommendations of the respective Pay Commissions made applicable to the government servants through various Government Orders.

53. On having scanned the provisions of Development Act, 1973, and the Retirement Benefit Rules, 2011, it is clearly evident that Development Authority constituted under the Development Act, 1973, is an autonomous body, having separate fund and common Pension Fund. The salary, pension etc. of its employees are funded by the Development Authority from their own resources. The State Government does not fund the Development Authorities. The Retirement Benefit Rules, 2011, framed by the Government, being legislative, is binding upon the Development Authorities uniformally and even upon the State Government. The Retirement Benefit Rules, 2011, nowhere prohibits the Development Authorities from implementing the Government Orders without the prior approval of the State Government. Rather, what the Rule mandates is that the Government Orders, pertaining to pension/family pension issued in respect of Government Servants gets applicable and enforced upon the employees of the Development Authority by operation of law, no further act of approval is required at the end of the State Government or the resolution of the Development Authority. The stand of the respondents that the Government Orders do not apply to Development Authority and it is only upon adoption thereof by the respective Development Authority lacks merit. Further, the stand is negation of the concept of a common Centralized Services created by the State Government for all the Developments Authorities by enacting Rules 1985. The members thereunder are governed by uniform conditions of service, including, salary and pension. In view thereof, it is not open to the Development Authority to alter the condition of service by passing a resolution against the Act/Rules. Despite repeated query no such resolution defying the Government Orders referred herein above, has been placed on record.

54. In **State of Uttar Pradesh versus Preetam Singh and others16,** one of the issues before the Supreme Court was, as to whether, the Uttar Pradesh Avas Evam Vikas Parishad constituted under Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965, is required to take prior approval of the State Government before formulating the Pension Scheme for its employees in lieu of Contradictory Provident Fund (C.P.F.). The Court upon perusal of the Adhiniyam held that the previous approval of the State Government to frame regulations governing the conditions of service of its employee, including, pension was not required to be obtained by Parishad from the State Government.

55. In the facts of the instant case, the State Government in exercise of its powers under Development Act, 1973, framed the Retirement Benefit Rules, 2011, which govern the computation and payment of pension/family pension to the employees and their dependents. The Rules nowhere requires that the Government Orders issued by the State Government from time to time governing pension and family pension is required to be implemented by the Development Authority after obtaining approval from the State Government. Since the fifth respondent has taken a stand that they

have the requisite amount in the Pension Fund, constituted under Rule 16 of Retirement Benefit Rules, 2011, the Development Authority can immediately without any approval implement the Government Orders revising the pension/ family pension of its employees pursuant to the Government Orders implementing the 7th Pay Commission. Rather the Government Orders comes into force the moment it is issued by the State Government.

56. The next question that arises is as to whether the Development Authorities can artificially fix cut of date to deprive the retirees revised pension. It is accepted by the respondents that the employees retired prior to 1 January 2006 are receiving pension/family pension as per the recommendations of the 6th Pay Commission, though, subsequent Government Orders providing the formula for computing pension/family pension, including, minimum family pension has not been applied to the retirees of Development Authority. The provision constituting the Pension Fund may be perused, in order to appreciate the submission.

57. Part VI of Retirement Benefit Rules, 2011, provides for establishment of Pension Fund and the procedure for payment therefrom. The fund is established under the control of the fifth respondent i.e. Finance Controller, Lucknow Development Authority, which is a common pension fund known as the "Uttar Pradesh Development Authorities Centralized Services Pension Fund'. Rule 16 is extracted:

"16. Pension Fund- *There shall be established under the control of the Finance Controller, Lucknow Development Authority a common pension fund to be known as the "Uttar Pradesh Development Authorities Centralized Services Pension Fund", hereinafter referred to as the "fund'. The amount of pensionary contributions payable by the Authority under rule 11 shall be credited into this fund."*

58. Rule 21 provides for sanction and preparation of Pension Payment Order. Relevant Portion of Rule 21 is extracted:

"21. Pension payment order- *After the amount of pension/family pension/gratuity has been sanctioned under rule 13 of these rules "pension payment order in Form "M" shall be issued by the Vice Chairman. Development Authority for the payment of pension/family pension/gratuity sanctioned in each case. The copies of this order shall be endorsed to the pensioner. Finance Controller, Lucknow Development Authority: the Bank and Director, Local Fund Accounts, Uttar Pradesh:*

Provided that the Vice Chairman, Development Authority may, if he is satisfied that there is a possibility of considerable delay in sanctioning pension/family pension/gratuity in a particular case, sanction, interim pension/family pension/gratuity against a declaration in Form ''N' made by the member of service concerned; but this amount shall not be more that 75 percent of the amount of the pension and gratuity assessed. Similarly, before sanctioning interim family pension and gratuity a declaration in Form "O' shall be taken from the legal heir of the deceased member of service."

59. Rule 30 provides for investment of pension fund which reads thus:

"30. Investment of Pension Fund- The amounts of pension fund shall be invested in Government securities or in long term deposits/time deposit/and other savings accounts in a Scheduled Bank/Post Office as the Finance Controller, Lucknow Development Authority may deem proper but the balance in the current account shall always be maintained as much as it is sufficient to meet the requirements of monthly pension to be paid to the members of service. Investments have entered in an Investment Register will maintained in Form "T".

60. Division Bench of this Court in **M.P. Tandon, Allahabad vs. State of U.P., Lucknow and others17,** wherein, writ of mandamus was sought by the petitioner therein to make payment of pension and other benefits including gratuity, family pension in accordance with the latest Government order. The State Government had changed the formula for calculation of pension as a result of which the enhanced amount of pension became payable to those Government servants who retired from service on or after March, 1979. The Government order denied the benefits of revised scale of pension to those Government servants who retired on or before the cut of date.

61. The question before the Court was whether the classification of pensioners made by the State Government on the basis of their retirement, before or after the specified dates, is reasonable and whether it has any nexus with the object sought to be achieved. The Division Bench placing reliance on the decision rendered in ***Deoki Nandan Prasad v. State of Bihar18, and State of Punjab v. Iqbal Singh19*** allowed the petition and issued direction to pay the liberalized pension to the petitioner being part and parcel to the common pension scheme.

62. Similarly in the case of ***FCI Versus Ashis Kumar Ganguly and others20,*** the Hon'ble Apex Court in paragraph 29 has held as under:

"29. A statutory authority or an administrative authority must exercise its jurisdiction one way or the other so as to enable the employees to take recourse to such remedies as are available to them in law, if they are aggrieved thereby. The question which, however arises for consideration is as to whether having exercised its jurisdiction in favour of a class of employees, a statutory authority can deny a similar relief to another class of employees. In a case of this nature, in our opinion, the writ court was entitled to declare such a stand taken by the statutory authority as discriminatory on arriving at a finding that both the classes are entitled to the benefit of a statutory rule."

63. Recently, in ***All Manipur Pensioners Association through its Secretary vs. The State of Manipur and others21,*** the short question posed before the Supreme Court was, whether the State Government would be justified in creating two classes of pensioners, viz., pre-1996 retirees and post-1996 retirees for the purpose of payment of revised pension, salary on the ground of financial constraint. The State Government justified the cut-off date for payment of revised pension solely on the ground of

financial constraint. On no other ground, the State tried to justify the classification.

64. The Supreme Court rejecting the cut of date held as follows:

"Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes, viz., one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension, In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form a one class who are entitled to pension as per the pension rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a very classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved."

65. ***D.S. Nakara and others v. Union of India22*** was followed, wherein, the Supreme Court held that homogeneous class of pensioners cannot be divided arbitrarily for the purpose of upward revised pension. Para-42 of the judgment reads thus:

"42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle?..... If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who, retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory."

66. It is not being disputed by the respondents that the recommendation of the 6th Pay Commission and 7th Pay Commission in respect of the employees of Development Authorities has been accepted by the State Government and implemented by the Development Authorities pursuant to the Government orders w.e.f. 1 January 2006 and 1 January 2016 respectively. But in the same breath, it is urged that the retired

employees are not being paid revised pension pursuant to the Government Orders, however, the employees of the Development Authorities who have retired after 1 January 2006 & 1 January 2016 respectively are being paid revised pension as per the recommendation of the respective Pay Commissions. In other words, the date implementing each of the Pay Commission recommendation has been taken to be the cut of date to deprive the pensioners the benefits of revised pension/family pension. Such an artificial classification is not founded on an intelligible differentia so as to distinguish persons that are grouped together from and others left out. Petitioner, therefore, is entitled to revised family pension based on the formula approved by the State Government in implementing 6th / 7th Pay Commissions.

68. The contention of the petitioner that her family pension should be computed as per the formula applicable to the Government Servants has merit, which cannot be denied in view of the mandatory provisions. The Retirement Benefit Rules, 2011, does not confer upon the Development Authority power and authority to determine its own formula for computation of pension/family pension. The Rule by reference adopts the formula pertaining to pension/family pension applicable to the employees of the State Government. The Government Orders apply to the Development Authority automatically on being issued without any further approval of the Government or resolution of the Development Authority.

69. In view thereof, the Government Order dated 8 December 2008 and subsequent clarificatory Government Orders until 5 July 2016 would apply to the petitioner in computation of family pension. The tabular chart, made part of the Government Orders dealing with the computation and revision would apply in totality without modification. It is not in dispute that the ex-employee retired on the last drawn salary at Rs. 16300 in pay-scale 14300-18300, which as per the Government Order dated 8 December 2008, the corresponding pay-band of the above pay-scale is at 37400-67000 and grade-pay at 8700. Further, para 4(1) of the Government Order clearly provides that while computing pension the amount so calculated, in no case, shall be less than 50% of the minimum pay in the pay-band plus the grade-pay corresponding to the pre-revised pay-scale from which the petitioner retired. The pro-rata principle of deducting pension on the length of service was done away with. According to the petitioner, as per the formula stipulated in the Government Orders, the minimum revised pension of her husband would be at Rs. 23050/- and minimum revised family pension at Rs. 13830/-.

70. The petitioner finally has sought quashing of Clause (6) of Government Order dated 5 July 2016, insofar it denies arrears of revised pension w.e.f. 1 January 2006, to the ex-employee (husband). It is not the case of the petitioner that the Government Order denying arrears of revised pension is being paid to the Government Servants. It is not a case of discrimination and it is always open for the State Government to decide uniformly for the Government Servants and other employees of the Local Bodies and Development Authorities the date from which the Government Order would apply. In case, the contention and relief sought by the petitioner is accepted, then in that event the Government Servants would be discriminated against. Further,

Retirement Benefit Rules, 2011, provides that the Government Orders pertaining to pension and family pension applicable to Government Servants would apply to the employees of the Development Authorities. In that event, petitioner cannot claim anything beyond that what is conferred by the Government Order. In view thereof, the plea for arrears of revised pension w.e.f. 1 January 2006 is untenable, accordingly, rejected.

71. It is not being disputed by the respondent-Development Authority that the retiral dues was paid to the petitioner in two installments at a belated stage after four years from the due date. That apart, petitioner has been subjected to harassment at the hands of the fifth respondent by sending defective and wrong PPO and communication to the bank which deprived her of her monthly family pension for considerable long period. The PPO was not rectified despite knowledge and information to the fifth respondent. In the circumstances, petitioner is entitled to interest on delayed payment.

72. In ***D.D. Tewari v. Uttar Haryana Bijli Vitran Nigam Ltd.23,*** Supreme Court held that the pension and gratuity are not bounty to be distributed by the Government to its employees on their retirement, but are valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof is to be dealt with the penalty of payment of interest. The Court directed payment of interest @ 9% on the delayed payment within stipulated period failing which interest thereon @ 18% per annum would need to be paid.

73. Having due regard to the facts and law, the writ petition is allowed subject to the following orders:

i.) the respondents are directed to compute the pension of the ex-employee and family pension of the petitioner strictly, in accordance with the formula set forth in the Government Orders made applicable to Government Servants implementing recommendations of 6th and 7th Pay Commissions;

ii.) on computation/determination as per (i) above, petitioner shall be entitled to arrears of pension/family pension as provided for in the Government Orders;

iii.) petitioner shall be entitled to interest @ 8% per annum on the delayed payment of post retiral dues from the due date;

iv.) arrears of pension/family pension and the interest payable on the delayed payment of retiral dues shall be computed and paid to the petitioner within two months, from the date of service of certified copy of the order, failing which, petitioner shall be entitled to interest @ 12% on the entire amount from the due date;

v.) the prayer for quashing Clause (6) of Government Order dated 5 July 2016 is rejected;

74. Cost of litigation assessed at Rs. 50,000/- to be paid to the petitioner by the third respondent, Allahabad Development Authority.

(2019)11ILR A275

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL , J.

Civil Misc.Writ Petition No. 66745 of 2012
Connected with

WRIT -A No.9223 of 2013
AND
WRIT -A No.9228 of 2013
AND
WRIT -A No.9206 of 2013
AND
WRIT -A No.13433 of 2013

Neeta James ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Anurag Ojha, Sri Ashok Khare.

Counsel for the Respondents:
C.S.C., Sri Anshul Nigam, Sri Rekha Singh, Sri Shivam Yadav.

A. Service Law - Education Service - Payment of Salary - U.P. Recognized Basic School Recruitment (Junior High School) (Recruitment and Conditions of Service of Teachers) Rules, 1978: Rule 4(1); U.P. Basic Education Act, 1972; U.P. Junior High School (Payment of Salary of Teachers and other employees) Act, 1978 - Unamended Rule 4(1) of the Rules, 1978 did not recognize the B.Ed qualification as a training qualification for recruitment of teachers in recognized Junior Basic Schools.

The use of words "such as" in Rule 4(1) (original Rule, 1978) cannot be said to be inclusive and is not open for scrutiny before this Court. Relying upon various precedents the Court held that prescribed training qualification under the unamended Rule 4(1) of the Rules, 1978 did not recognize the B.Ed qualification as a training qualification for recruitment of teachers in recognized Junior Basic Schools. The Amending Rules' of 2008 was not clarificatory and the appointment made prior to the said amendment would be governed by the unamended rule. (Para 29)

B. Service Law - Education Service – Termination – Petitioners had not obtained appointment by any fraudulent method. Therefore, the impugned order and the consequential orders of the Manager of the Institution discontinuing their services w.e.f. 10.11.2012 were quashed. (Para 34)

Petition partly allowed with directions not to be treated as precedent (E-4)

Precedent followed: -

1. Sanjay Kumar Tyagi Vs St. of U.P., (2005) 1 ESC 713 (Para 12, 27, 29)

2. Ram Surat Yadav Vs St. of U.P., (2014) 1 ADJ 1 (Para 12, 27, 29)

3. Pramod Kumar (Para 28)

4. Mohd. Sartaj & anr. Vs St. of U.P. & ors., (2006) 2 SCC 315 (Para 27, 28)

5. PM Latha & anr. Vs St. of Kerala, (2003) 3 SCC 541 (Para 27, 28)

6. Yogesh Kumar & ors. Vs Govt. of NCT, Delhi & ors., (2003) 3 SCC 548 (Para 27, 28)

7. Dilip Kumar Ghosh & ors. Vs Chairman, (2005) 7 SCC 567 (Para 27, 28)

8. Smt. Madhubala Upadhyay Vs St. of U.P., decided on 19.01.(2009) (Para 27, 29)

9. Akhilesh Kumar Pandey Vs St. of U.P., (2009) 9 ADJ 9 (Para 27, 29)

Precedent referred: -

1. Basic Education Board, U.P. Vs Upendra Rai & ors., (2008) 3 SCC 432 (Para 24)

2. Shiv Kumar Sharma & ors. Vs St. of U.P. & ors., (2013) 6 ADJ 310 (Para 25)

3. Irrigineni Venkata Krishna & ors. Vs Government of A. P. & anr., (2010) 1 ESC 42 (SC) (Para 24)

Precedent cited: -

1. Jitendra Kumar Soni & ors. Vs St. of U.P. & ors., (2010) 7 ADJ (Para 13)

2. Alka Singh Vs St. of U.P. & 4 ors., Writ Petition No. 14989 of 2018 (Para 14)

Precedent distinguished: -

1. Rishikant Sharma Vs St. of U.P. & ors., (2011) 6 ADJ 1 (Para 28)

Present petition challenges order dated 22.10.2012, passed by Director of Education (Basic) U.P., Lucknow.

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

1. Heard Sri Ashok Khare learned Senior Advocate assisted by Sri Siddharth Khare learned Advocate for the petitioners in the leading writ petition, Sri Utpal Chatterji learned Advocate for the petitioners in the connected Writ Petition Nos. 9223 of 2013 (Smt. Parveen Philip vs. State of U.P. Thru Principal Secretary & others) and 9228 of 2013 (Smt. Veena Menon vs. State of U.P. Thru. Principal Secretary & others), Sri T.K. Mishra learned Advocate for the petitioner in the connected Writ Petition Nos. 13433 of 2013 (Smt. Santosh Singh vs. State of U.P. Thru. Secy & others), Sri Shivam Yadav learned Advocate for the District Basic Education Officer, Meerut and Finance & Accounts Officer (Basic), office of the District Basic Education Officer, Meerut and learned Standing Counsel for the State respondent nos. 1 and 2.

2. The above noted five connected petitions have been filed against the common order dated 22.10.2012 passed by the Director of Education (Basic) U.P, Lucknow whereby the representations moved by the petitioners for payment of salary from the State Exchequer had been rejected on the ground that they did not fulfill the minimum eligibility qualification as per the U.P Recognized Basic School Recruitment (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 (In short termed as Rules, 1978 hereinafter).

3. The petitioners contend that they had been appointed as Assistant Teacher on 1.7.1989 (for petitioners Neeta James, Ms.Venna Menon and Smt Santosh Singh) and 11.11.1989 and 25.6.1989 (for remaining two petitioners Rubina Swami and Parveen Philip) in Church city Junior High School, Sadar Meerut. They claim to possess requisite eligibility qualification for appointment as Assistant Teacher in the aforesaid institution which is a recognized and aided Junior High School and is governed by the provisions of the U.P Basic Education Act, 1972 and the rules framed thereunder. The U.P Junior High School (Payment of Salary of Teachers and other employees) Act, 1978 is applicable to the said institution. The institution-in-question was brought on the grant-in-aid list with effect from 1988.

4. It is not disputed that the temporary appointment of all the petitioners was approved by the District Basic Education Officer by orders passed in the year 1990 and they were working continuously and getting salary from the State Exchequer. In the year 2007, husband of one of the Assistant Teachers namely Priyadarshini Sharma working in the same institution filed a Writ Petition no.21422 of 2007 to challenge the appointment of 21 Assistant Teachers including the petitioners herein. The said writ petition was disposed of by the judgment and order dated 1.7.2007 wherein this Court had directed the Director of Education (Basic) to call for the records from the office of Basic Education Officer and examine the

illegality of the appointment and payment, if any, made to the teachers and other staff of the said institution. Pursuant to the said directions, the Director of Education (Basic) passed an order dated 2.11.2007 holding 18 Assistant Teachers being ineligible for appointments in terms of 1978' Rules and that they were not entitled to receive salary with the further directions of making recovery of salary already paid to them.

5. Aggrieved, the petitioners herein filed writ petitions separately challenging the order dated 2.11.2007 wherein initially interim order was passed directing for payment of salary in Untrained-grade to the petitioners. One of the writ petition was, however, finally allowed after exchange of pleadings vide judgment and order dated 1.6.2012. Similar orders were passed in ten writ petitions tagged in a bunch. While setting aside the order passed by the Director of Education dated 2.11.2007, the matter was relegated for fresh decision after giving opportunity of hearing to the petitioners therein. Consequently, order impugned dated 22.10.2012 had been passed.

6. The learned Senior Advocate, Sri Ashok Khare and Sri Utpal Chatterji learned Advocate for the petitioners vehemently submit that there was absolutely no reason for raising controversy after approximately two decades of appointment and continuous working of the petitioners. They submit that some of the petitioners possessed B.Ed degree at the time of their appointment and this was the reason for holding all of them ineligible in terms of the Rules, 1978. It is contended that minimum qualification criteria as provided in the Original Rule 4 of 1978 Rules was inclusive, in as much as, the rule reads as under:-

***4. Minimum qualification**:- (1) The minimum qualification for the post of Assistant teacher of a recognised school shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination (with Hindi and a teacher's training course recognised by the State Government or the Board such as Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate or Certificate of Training).*

(2) The minimum qualifications for the appointment to the post of Headmaster of a recognized school shall be as follows:

(a) A degree from a recognised University or an equivalent examination recognized as such;

(b) A teacher's training course recognised by the State Government or the Board, such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate; and

(c) Three years' teaching experience in a recognised school.

7. From the language employed in Rule 4(1) of the original Rule, 1978. It is contended that words "such as" used therein gives a clear indication that the eligibility training qualification prescribed therein was only illustrative and not exhaustive. It, therefore, could not be said that if a candidate possessed B.Ed degree or any other training course which was recognized by the State Government or the Board, he or she was ineligible for appointment. For the first time, amendment of Rule 4 in 1978 Rules

had been brought by the notification dated 12.6.2008 which came into effect from 12.6.2008 from the date of publication in the Gazette. Under the amended Rule, the minimum eligibility training qualification was made exhaustive with the words "as follows" by including a regular B.Ed degree course from a duly recognized institution, with educational qualification being graduation degree to replace the original rule wherein intermediate or equivalent examinations was the educational qualification. The submission, thus, is that with the addition of B.Ed degree as one of the training qualification in the minimum eligibility criteria, it could not be said in the year 2012 that the petitioners were ineligible to continue as Assistant Teachers as B.Ed was not a recognized training qualification.

8. It is further contended that the entire enquiry had been initiated at the instance of Sanjay Sharma, husband of the above referred teacher who herself was having B.Ed degree, as her wife was harbouring vengeance against other teachers. She was shown favour by the office order dated 22.10.2007 on the plea that she had rendered long services. The said order obtained by the petitioners under Right to Information Act has been appended as Annexure-'12' to the writ petition no.13433 of 2013. The attention of the Court is invited to the contents of the said order which records the fact that Smt. Priyadarshini Sharma who was appointed as Assistant Teacher Church City, Junior High school, (Meerut) did not possess eligibility qualification at the time of appointment. She was appointed in the year 1999 on the strength of the approval order of the District Basic Education Officer wherein her qualification was shown as Intermediate and B.T.C. In the year 2005, an enquiry was instituted by the State Government wherein she submitted her B.A and B.Ed certificates, it was, then, transpired that she had completed B.Ed course in the year 1993. She further denied having produced B.T.C certificate as her training qualification at the time of her appointment. It is contended that despite concealment a lenient view was taken and though direction was given to her to deposit salary received from the State Exchequer but no action was taken against her. By placing the said order, it is further vehemently contended by the learned Senior Advocate for the petitioners that the respondents have acted in a discriminatory manner in denying salary to the petitioners while protecting appointment of the complainant who did not possess requisite training qualification at the time of appointment.

9. Sri Utpal Chatterji, learned Advocate for the petitioners in the connected petitions submits that the petitioners to whom he represents were having training qualification such as N.T.T, (Nursery teachers' training) and B.T.C (Basic Training Course) from another State, ie; outside the State of U.P. The contention is that the Director of Education (Basic) while passing the order impugned had conveniently ignored this aspect of the matter. Though the individual training qualification of each of the petitioners has been narrated in the order impugned but while concluding for rejection of claim for salary of the petitioners he simply ignored that they possessed B.T.C or NTT training qualification. With regard to the said petitioners, the order impugned is simply

required to be set aside on the ground of non-application of mind.

10. Learned Standing counsel, on the other hand, defended the order impugned on the plea that appointments of the petitioners were made in the institution-in-question after it had been brought on the grant-in-aid list in the year, 1988. Admittedly, all the provisions of the Rules, 1978 were applicable at the time of appointment of the petitioners wherein B.Ed was not the eligibility training qualification. Any subsequent amendment in the rules would be of no benefit to the petitioners for the settled legal position that the eligibility qualification is to be determined with reference to date of appointment. Illegality in the appointment of petitioners cannot be regularised as possession of minimum eligibility qualification both (educational and training) was a pre-requisite to the appointment. The enquiry into the matter, ie; correctness of appointment of the petitioners was conducted pursuant to the orders passed by this Court and once after the said enquiry it was found that the petitioners were ineligible, there was no option before the respondent but to deny them salary from the State Exchequer.

11. The counsel for the District Basic Education Officer relying on the averments in the counter affidavit filed on behalf of the said respondents submits that the petitioners are getting salary of untrained teacher pursuant to an interim order dated 13.5.2013 passed in Writ Petition no.16757 of 2013 though the answering respondents since the beginning stressed that they were not entitled to remain in service and could not be granted benefit of regular teacher. It is contended that in view of the requirement of the Rule, 1978 the petitioners cannot be paid full salary of the trained teacher. The amendment application filed by the petitioners in the connected writ petitions seeking for the relief for payment of full salary of trained teacher is, thus, being repelled.

12. Reference has been made to the Division Bench judgment of this Court in ***Sanjay Kumar Tyagi vs State of U.P reported in (2005) 1 ESC 713***, by the respondent to submit that B.Ed degree cannot be considered as a "Teachers Training Course" for the purpose of possessing "minimum qualification" under the 1978, Rules. The submission is that the said view of the Division Bench has been upheld by the Full Bench of this Court in ***Ram Surat Yadav vs State of U.P reported in (2014) 1 ADJ 1.***

13. Sri Utpal Chatterji, learned counsel for the petitioner in rejoinder placed reliance on the Full Bench of this Court in ***Jitendra Kumar Soni and others vs State of U.P and others reported in 2010 7*** ADJ to submit that the teachers training course from an Institution outside the State of U.P cannot be said to be invalid for appointment of Assistant Teachers within the State of U.P.

14. Sri Ashok Khare, learned Senior Advocate in rejoinder placed the judgment of a learned Single Judge in Writ petition no.14989 of 2018 (Alka Singh vs State of U.P and 4 others) to submit that the petitioner therein who was holder of B.Ed degree and was appointed prior to 2008, was protected taking clue from the order of the Apex Court in Civil Appeal no. 3904 of 2013 wherein the Apex Court has held that the appointment

of the appellants therein ought not be disturbed only on the ground of alleged disputed lack of qualification when they have been in service for a long period.

15. Heard learned counsels for the parties and perused the record.

16. Before examining the merits of the arguments of learned counsels for the parties, it would be apt to go through the provisions governing appointment of teachers in a recognized Basic School with upto-date amendments and also the legal pronouncements pertaining to the field. The U.P Basic Education Act, 1972 was enacted for establishment of the Board of Basic Education and to deal with the matters connected therein. As per section (2), the definition Clause, the "Basic Education" means education up to the VIIIth Class imparted in schools other than high schools or intermediate college. "Junior Basic School" means a Basic School in which education is imparted up to Class-V. "Junior High School" means a basic school in which education is imparted to boys and girls or to both from Class-VI to Class-VIII. Section 3 contemplates setting of the Board of Basic Education. The function of the Board under Section 4 (1) is to organize, coordinate and control the imparting of basic education and teachers' training in the State in order to raise its standards and to co-relate it with the system of education as a whole in the State.

17. In exercise of powers conferred under section 19 of the Act 1972, to carry out the purposes of the Act, three sets of Rules have been framed regulating the recruitment and conditions of service of persons appointed to the post of teachers. The "U.P recognized Basic schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975" was framed to govern the recognized Basic Schools imparting education up to Class-V, not being an institution belonging to or wholly maintained by the Board or any local body. The "U.P recognized Basic Schools (Junior High Schools) Recruitment and Conditions of Services of Teachers Rules 1978" was framed to govern the service conditions of teachers of recognized Junior High School, ie; an institution other than a High School or Intermediate College imparting education from Class-VI to Class-VIII (both inclusive). The "U.P Basic Education Teachers Service Rules, 1981" was framed to govern the service conditions of teachers of the Junior Basic Schools imparting instructions in Nursery and Class I to VIII established by the U.P Board of Basic Education. The academic/eligibility qualifications for appointment to the post of Assistant Teacher in a Nursery and Junior Basic Schools (I to V) established by the Board as per 1981' Rules are as follows:-

(i) Mistress of Nursery School Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto together with certificate of teaching (Nursery) from recognised training institution of Uttar Pradesh and any other training course recognised by the Government as equivalent thereto and teacher eligibility test passed conducted by the Government or by the Government of India.

(ii) Assistant Master and Assistant Mistress of Junior Basic School established by law in India or a degree recognised by the Government equivalent thereto together with any other training course recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC. Two year Diploma in Education (Special Education) approved by the Rehabilitation Council of India or four year degree in Elementary Education (B.EI.Ed.), two year Diploma in Elementary Education (by whatever name known) in accordance with the National Council of Teacher Education (Recognition, Norms and Procedure) Regulations, 2002 or any training qualifications to be added by National Council for Teacher Education for the recruitment of teachers in primary educationand teacher eligibility test passed conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government.	(ii)(a) Bachelors degree from a University

18. In 1981' Rules, a Junior Basic School has been defined to mean a Basic School where instructions are imparted from Class-I to V; whereas a "Senior Basic School" means a Basic School where instructions are imparted from Class-VI to VIII. A "Nursery school," on the other hand, means a school in which children ordinarily of the age up to 8 years are taught in the Class lower than Class-'I'.

19. In so far as Rules, 1975 governing service conditions of teachers of a recognized Junior Basic School (Class-I to V) is concerned, Rule 9 thereof provides that for appointment on a teaching post in any recognized school a person must possess such qualification as are specified by Board in this behalf and previous approval to whose appointment has been granted by the District Basic Education Officer in writing.

20. Under Rules, 1978 pertaining to service conditions of teachers in a recognized Senior Basic School or Junior High School, (Class VI to VIII) the minimum qualification as provided in Rule 4 of the Original Rule has been quoted in the foregoing part of this judgment.

21. Rule 5 of the Original Rules, 1978 further puts a condition that no one shall be appointed as Assistant Teacher in substantive capacity in any recognized school; unless (a) he possess minimum qualification prescribed for such post; (b) he is recommended for such appointment by the Selection Committee.

22. On 3rd September, 2001 the N.C.T.E (National Council for Teacher Education), a national expert body set up

by the Central Government under Section 3 of the N.C.T.E Act, 1993 notified "The National Council for Teacher Education (Determinations of minimum qualifications for recruitment of teachers in schools) Regulations, 2001" in exercise of power conferred under clause d(i) of sub-section (2) of Section 32 read with section 12 (d) of "The National Council for Teacher Education, Act 1993". Regulation 2 of the Regulations' 2001 provides that the same shall be applicable for recruitment of teachers in all formal schools established, run or aided or recognized by the Central or State Governments and other authorities for imparting education at elementary (primary and upper primary/middle school), secondary and senior secondary stages. Regulation 3(i) provides that the qualifications for recruitment of teachers in educational institutions mentioned in Regulation 2 shall be as prescribed in the First Schedule for teaching schools subjects. Regulation 4 provides that the existing recruitment Rules may be modified within a period of three years so as to bring them in conformity with the qualifications prescribed in the Schedules therein. Meanwhile, teachers appointed in accordance with the existing recruitment qualifications, subsequent to the issuance of the Regulations, would be required to acquire the qualifications as prescribed in the Schedules. As per the First Schedule to the Regulations, 2001, a teacher for Primary Classes must possess educational qualification up to Intermediate level with the teachers training qualification of Diploma or Certificate in basic teachers' training of a duration of not less than two years or Bachelor of Elementary Education. Whereas, a teacher in the Upper Primary (Middle school section) may possess an alternative qualification of a degree of Bachelor in Education (B.Ed) or its equivalent. The note appended to the First Schedule reads as follows:-

Level	**Minimum Academic And Professional Qualifications**
I Elementary a. Primary	(i) Senior Secondary School certificate or Intermediate or its equivalent; and (ii) Diploma or certificate in basic teachers' training of a duration of not less than two years. OR Bachelor of Elementary Education (B.El.Ed)
b. Upper Primary (Middle School section)	i.Senior Secondary School certificate or Intermediate or its equivalent; and ii.Diploma or certificate in elementary teachers training of a duration of not less than two years. OR Bachelor of Elementary Education (B.El.Ed) OR Graduate with Bachelor of Education (B.Ed) or its equivalent.
II Secondary/ High School	II Secondary/High School Graduate with Bachelor of Education (B.Ed.) or its equivalent OR Four years' integrated B.Sc., B.Ed or an

	equivalent course.
I**II Senior Secondary/ PUC/Inter mediate**	Master's Degree in the relevant subject with Bachelor of Education (B.Ed) or its equivalent. OR Two years' integrated M.Sc.Ed. Course or an equivalent course.

Note:

1. For appointment of teachers for primary classes, basic teachers' training programme of 2 years' duration is required. B.Ed is not a substitute for basic teachers' training."

23. Thus, B.Ed was included as permissible qualification for appointment of teachers to the Upper Primary (Middle school section) w.e.f 3.9.2001 under the N.C.T.E Regulations' 2001. The said regulations, however, contemplated that there were existing recruitment rules enforced in various States of the country and, therefore, provided under Rule 4 that the existing recruitment rules may be modified within a period of three years so as to bring them in conformity with the qualifications prescribed in the Schedules.

24. The effect of the said enactment was considered by the Apex Court i***n Basic Education Board, U.P vs Upendra Rai and others and (2008) 3 SCC 432.*** The Supreme Court held that the N.C.T.E Act does not deal with ordinary educational qualifications like primary schools, High Schools, Intermediate Colleges or universities and would, consequently, not override the U.P Basic Education Act and the Rules made thereunder. It was held that the N.C.T.E Act and U.P Basic Education Act operate in two different fields, first with regard to teachers training institute and the second with regard to ordinary Primary Schools in the State of U.P, the concept of primacy under Article 254 of the Constitution, as such, has no application. The correctness of the judgment in Upendra Rai was referred to the larger bench by the Supreme Court in ***Irrigineni Venkata Krishna and others vs. Government of Andhra Pradesh and another reported in (2010) 1 ESC 42 (SC) .*** During pendency of the said reference, Parliament enacted the National Council for Teaching Education (Amendment) Act, 2011 (Act no.18 of 2011), w.e.f 01.06.2012. The Amending Act introduced Sub-section (4) in Section 1 to provide that the Act shall apply, inter alia, to schools imparting pre primary, primary, upper primary, secondary or senior secondary institutions and colleges providing Senior Secondary or Intermediate education. Section 12-A was also inserted which provides as follows:-

"12 A. For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recog

25. The Amending Act 2011, thus, came into force with prospective effect. The validity of the provisions of the N.C.T.E Act and the amendment Act have been upheld by Full Bench of this Court in ***Shiv Kumar Sharma and others***

vs State of U.P and others reported in 2013 (6) ADJ 310 wherein it is held that the N.C.T.E is fully empowered to prescribe qualifications for the persons to be recruited as teachers from pre-primary to the Intermediate school or college level.

26. The Rule 4 of 1978' Rules has been substituted w.e.f 12.6.2008 and sub-Rule (1) of Rule 4, thereafter, reads as follows;

"4.Minimum qualification:- *(1) The minimum qualification for the post of Assistant teacher of a recognized school shall be Graduation Degree from a University recognized by U.G.C and a teachers training course recognized by the State Government or U.G.C or the Board as follows:-*

1.Basic Teaching Certificate.

2.A regular B.Ed degree from a duly recognized Institution.

3.Certificate of Teaching

4.Junior Teaching Certificate

5.Hindustani Teaching Certificate

Rule 4 has further been substituted by notification dated 5.12.2012 (w.e.f 5.12.2012). The amended sub-Rule 1 as it now stands reads as follows:-

"4.Minimum qualification*:-* *(1) The minimum qualifications for the post of Assistant teacher of a recognized school shall be Graduation Degree from a University recognized by U.G.C and a teachers training course recognized by the State Government or U.G.C or the Board as follows:-*

1.Basic Teaching Certificate.

2.A regular B.Ed degree from a duly recognized Institution.

3.Certificate of Teaching.

4.Junior Teaching Certificate

5.Hindustani Teaching Certificate

And

Teacher eligibility test passed conducted by the Government of Uttar Pradesh or by the Government of India.

27. The question with regard to the eligibility qualification for recruitment of teachers in a Junior High School prior to the enactment of the NCTE Amending Act 18 of 2011 and the Right of Children to Free and Compulsory Education, Act' 2009 came up for consideration before a Full Bench of this Court in ***Ram Surat Yadav and others vs State of U.P and others reported in (2014) 1 ADJ 1,*** in view of the conflicting decisions of the Division Benches of this Court. After considering the minimum eligibility qualification provided in Rules' 1978 and the decisions of the Apex court in ***Mohd Sartaj and another vs State of U.P and others reported in (2006) 2 SCC 315***, it was held therein that once the Rules which have been framed under the Statute prescribes the eligibility qualifications, those qualifications have to be adhered and a candidate who does not fulfill the required qualification has no entitlement to hold the post even if such an appointment is made, it would be contrary to law. It was held that the plea that B.Ed Course can be taken as a superior course to the B.T.C had been expressly turned down in the judgments of the Supreme court in ***PM Latha and another vs State of Kerala*** *reported in* ***2003 3 SCC 541, Yogesh Kumar and others vs Govt. of NCT, Delhi and others*** *reported in* ***2003 3 SCC 548, Dilip kumar Ghosh and others vs Chairman*** *reported in* ***2005 7 SCC 567.*** *The decisions of the Division*

Benches in ***Sanjay Kumar Tyagi vs State of U.P and others*** *reported in* ***2005 1 ESC 713*** *and in* ***Smt Madhubala Upadhyay vs State of U.P decided on 19th January, 2009*** *and* ***Akhilesh Kumar Pandey vs State of U.P reported in (2009) 9 ADJ 9*** had been held to be good law wherein the effect of subsequent amendment of Rules' 1978 in 2008 was considered and it was held that the Amending rules of 2008 would not apply to a situation where an appointment was made under the unamended rule. It was held that the Amendment of 2008 was not clarificatory. The B.Ed degree was not a prescribed training qualification under the original Rule 4(1) of the Rules' 1978.

28. In this background, the judgment of the Division Bench in ***Rishikant Sharma vs State of U.P and others*** reported in ***2011 (6) ADJ 1*** wherein it was held that since the question whether the B.Ed Degree course can be taken as a superior course to B.T.C was a long standing dispute and it was later included as eligibility qualification in the year 2008, the teachers appointed prior to amended qualification would be treated as eligible, was held as not laying down the correct principle of law. The said decision was overruled by the Full Bench; firstly, on the fundamental principle that when requirement of eligibility is prescribed in the Statutory Rules which govern selection, appointment of a person who does not fulfill the norms of eligibility cannot be regarded as lawful; Secondly, that when a selection process is initiated in pursuance of an advertisement which lays down the conditions of eligibility, a person who does not fulfill the required qualifications can have no legitimate entitlement to hold the post; Thirdly, that the view taken by the Division Bench in ***RishiKant Sharma (supra)*** was contrary to the law laid down by the Apex Court in the line of authority as noted in ***PM Latha, Yogesh Kumar, Dilip Kumar Ghosh and Pramod Kumar (supra)***; Fourthly, on the ground that the decision in ***Mohd Sartaj (supra)*** had been distinguished on erroneous grounds.

29. In this backdrop, the question whether the B.Ed degree can be regarded as eligibility qualification for appointment to the post of Assistant Teachers in a recognized Junior High School under the Rules 1978, is no longer res integra. The contentions of the learned Advocates for the petitioners that the essential qualification prescribed in unamended original Rule 4(1) of 1978' Rules is inclusive for the use the words "such as" therein is not open for scrutiny before this Court. With the decisions of the Division Benches in ***Sanjay Kumar Tyagi*** (supra), ***Smt Madhubala and Akhilesh Chandra Pandey*** (supra), held to be good law in ***Ram Surat Yadav*** (full bench), it is settled that the prescribed training qualification under the unamended Rule 4(1) of the Rules' 1978 did not recognize the B.Ed qualification as a training qualification for recruitment of teachers in a recognized Junior Basic Schools. The Amending Rules' of 2008 was not clarificatory and the appointment made prior to the said amendment would be governed by the unamended rule.

30. It, therefore, cannot be said that the persons who possess B.Ed degree as training qualification were eligible for appointment to the post of Assistant Teacher in a recognized Junior High School.

31. In the present bunch, the petitioner namely Ms. Neeta James had

completed Bachelor of Education (B.Ed) course in the year 1991-92 and was appointed in the year 1989. The objection taken by the respondent with regard to identity of the said petitioner in the order impugned for difference in her name in the educational certificates is not sustainable as it is clear from the record that she was daughter of Sri S.G.Beechan. But it is held that having completed B.Ed training course that too after appointment, she was not entitled for appointment to the post of Assistant Teacher to teach in Junior and Senior Basic School ie Class-I to VIII, however, having been qualified N.T.T (Nursery Teachers' Training) course she could have been appointed to teach children at the Elementary or Nursery level only. Further having noticed the fact that the said petitioner was appointed in the year 1989 and had continued to work as Assistant Teacher uninterruptedly till the year 2007 when dispute regarding her qualification was raised on a petition filed by husband of a fellow teacher, and also that the said petitioner is working and must have been at the verge of retirement, this Court finds it proper to let her continue as an untrained teacher in the institution-in-question. It is also noteworthy that by the order impugned, the approval granted by the District Basic Education Officer in the year 1990 to the appointment of said petitioner has not been cancelled or revoked. There is no whisper of any misrepresentation or concealment on the part of the said petitioner. It would, therefore, be appropriate that the petitioner namely Ms. Neeta James be allowed to continue as an untrained Assistant Teacher in the School namely Church City, Junior High School, Meerut till she attains the age of superannuation. At the same time, the management of the Institution shall be liable to pay salary to the said petitioner for the entire period of her working in the institution-in-question, regularly, month by month and shall not in any way interfere in the working of the petitioner on the premise that her appointment on the post of Assistant Teacher in Junior High School was invalid. It would be open for the Management to take work of Nursery Teacher from her.

32. Similar is the position with regard to another petitioner Ms.Rubina Swami who has appended her educational and training certificates as Annexure-'1' to the writ petition filed by her. After passing intermediate, she had completed Nursery Teachers' Training Course in the year 1985-86. She, therefore, cannot be said to have possessed the requisite training qualification for appointment to the post of Assistant Teacher in a Junior High School (Class-I to VIII) but she is found qualified to teach children of Elementary/Nursery Classes. For the fact of continuance of the petitioner Ms.Rubina Swami since 11.11.1989 and that she must have been at the verge of retirement, it is provided that she shall be allowed to continue as Assistant Teacher in the school-in-question and salary of an untrained teacher shall be paid to her by the Management, regularly month by month till she attains the age of superannuation. It is clarified that the petitioner shall be given due assignments and there shall be no interference in the working of the said petitioner by the Management till her superannuation.

33. As far as the remaining two petitioners namely Ms. Parveen Philip and Ms. Veena Menon are concerned, the educational and training certificates

appended by them alongwith the writ petition indicate that they had completed "Basic Teachers Training Course" prior to their appointments in the year 1988 and 1989; respectively. The certificates issued by the Bihar Pradesh Shiksha Parishad appended as Annexure-'3' to the writ petitions filed by them are not disputed in the counter affidavit. The order impugned though records that they had completed B.T.C. Course from the State of Bihar but there is no consideration of the said training qualification not being recognized in the State of U.P. Only reason for rejection of claims of these petitioners in the order impugned is that B.Ed was not approved training qualification for appointment of Assistant Teachers in Junior High School prior to 12.6.2008 and that the amendments in the rules are prospective in nature and for the said reason, the said petitioners were held ineligible for appointment. Looking to the reasons given in the order impugned as also the training certificates appended by the said petitioners Ms. Veena Menon and Ms.Parveen Philip, it cannot be said that they were not eligible for appointment as Assistant Teachers, in as much, as they possess requisite Basic Teachers Training Course Certificate, approved qualification for holding the post of Assistant Teacher in a Basic School. The qualification possessed by them being akin to the training qualification required in the unamended Rules, 1978 they are found eligible and are held entitled to continue and salary attached to the post in question from the State Exchequer.

34. It is not the stand of the Management that they had obtained appointment by any fraudulent method. The action of the Management in discontinuance of their services on the basis of the order of the Director of Education, therefore, cannot be sustained. The prayer made by the petitioners namely Ms. Veena Menon and Ms. Parveen Philip for quashing of the order dated 22.10.2012 passed by the Director of Education (Basic) as also the consequential orders of the Manager of the Institution discontinuing their services w.e.f 10.11.2012, thus, are found unsustainable. While quashing the aforesaid orders with respect to the two petitioners namely Ms.Parveen Phillip and Ms.Veena Menon, they are held entitled to continue till the age of superannuation and payment of salary of trained teacher from the State Exchequer.

35. As regards the petitioner Ms. Santosh Singh, as per the certificates appended by her as Annexure-'1' to the writ petition, it is evident that she had completed "Nursery Teachers' Training Course" in the year 1989, ie: prior to her appointment as Assistant Teacher w.e.f July, 1989. As far as Basic Teachers Training Course (page-'20' of the paper book), she had completed the same in the year 1994-95, ie after getting appointment. She was continuing in the institution-in-question as an Assistant Teacher on the strength of the approval being granted by the Basic Education Officer, Meerut vide letter dated 6.6.1990.

36. It is, therefore, difficult to accept that she had completed "Basic Teachers Training" Qualification while discharging the duties of a full time teacher in the institution-in-question. At the best, she could have been appointed for teaching children in pre-primary or nursery classes. Having due regard to the fact Ms. Santosh Singh is working in the institution-in-

question as an Assistant Teacher since the year 1989, it is provided that she be allowed to continue to work as Assistant Teacher till she attains the age of superannuation. The salary from the State Exchequer, however, is not admissible to her. She will, accordingly, be entitled for salary of an untrained teacher to be paid by the Management of the institution-in-question for the period of continuance.

37. Lastly, it is provided that all the petitioners herein who have been paid salary from the State Exchequer pursuant to the interim orders passed by this Court shall be entitled to retain the same; ie, there shall be no recovery of the salary already paid to them till the date of passing of this order.

38. It is clarified that the aforesaid directions are given in the peculiar facts and circumstances of the present case and shall not be treated as precedent in any other matter.

39. Subject to above observations and directions, all the five writ petitions are **disposed of.**

40. There shall be no order as to costs.

(2019)11ILR A289

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Revision No. 561 of 2014
with
Civil Revision No. 141 of 2007

Kshetriya Sri Gandhi Ashrma & Anr.
...Revisionists

Versus

Ajay Kumar & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri Tarun Verma, Sri M.K. Gupta, Sri Pankaj Agrawal, Ms. Utkarshani Singh

Counsel for the Opposite Parties:
Sri Ajay Kumar Singh, Sri A. Chaturvedi, Sri Ashish Kumar Singh, Sri Madhur Prakash, Sri Sah O.P. Agarwal

A. Property Law-Registration Act,1908 - Sections 17 & 49 - admissibility of - unregistered document - if a document compulsorily required to be registered under section 17 of the Act, 1908, is not registered, then it is not admissible into evidence under section 49 of the Act -However, unregistered document can be used as an evidence of collateral purpose.

B. Transfer of Property Act,1882- Sections 106 & 116 - effect of - in absence of registration, the tenancy shall be deemed to be a month to month tenancy the termination of which is governed by section 106 of the Act-if a tenant continues in possession after determination of lease, a tenancy by holding over is created.

Civil Revision dismissed (E-6)

List of cases cited:-

1.S. Kaladev Vs. U.R. Somasundaram and Ors,(2010) 5 SCC 401

2. Thulasidhara and Anr. Vs. Narayanappa and Ors,(2019) 6 SCC 409

3. Shiv Ram and Ors Vs. Lakshman and Ors,2013 (6) ADJ 348 Para 21

4. Rahul Dixit & Anr. Vs. Shri Chandra Kumar Agarwal 2019 (1) A.R.C. 160 Para 13 to 17

5. Rajesh Kumar Gupta Vs. Shri Satish Chandra Khera, 2009, A.C.J. 1185, Para 7

6. Punjab National Bank Vs. Smt. Geeta Devi, Civil Revision No. 130 of 2012 decided on 30.03.2012

7. Central Bank of India Vs. Manohar Lal & Ors. 1997 All C.J. 1257, Para 13,14,17

8. Bajrang Shyamsunder Agarwal Vs. Central Bank of India & Anr. Para 21 &34

9. K.B. Saha and Sons Private Limited Vs. Development Consultant Limited, (2008) 8 SCC 564 Para 29 to 34

10. Kale & Ors. Vs. Deputy Director of Consolidation (1976) 3 SCC 119

11. S. Shanmugam Pillai And Ors. Vs. K. Shanmugam Pillai And Ors (1973) 2 SCC 312

12. Ahmedsaheb Vs. Sayed Ismail(2012) 8 SCC 516 Para 5 to 19

13. Mattapalli Chelamayya And Anr. Vs. Mattapalli Venkataratnam, 1972 3 SCC 799 Para 10

14. Bajaj Auto Limited Vs. Behari Lal Kohli,1989 4 SCC 39 Para 7 and 8

15. Rai Chand Jain Vs. Miss Chandra Kanta Khosla (1991) 1 SCC 422 Para 10

16. M/S Sms Tea Estates P. Ltd Vs. M/S Chandmari Tea Co. P.Ltd, (2011) 14 SCC 66 Paras 11,22 and 23

17. Samir Mukherjee Vs. Davinder K. Bajaj & Ors.(2001) 5 SCC 259 Para 6 and 7

18. M/S Park Street Properties Pvt. Ltd. Vs. Dipak Kumar Singh And Anr, (2016) 9 SCC 268

19. Bhawanji Lakhamhi & Ors. Vs. Himatlal Jamnadas Dani & Ors. (1972) 1 S CC 388 Para 13

20 Ganga Dutt Murarka Vs. Kartik Chandra Das

21. Burmah Shell Oil Distributing Vs. Khaja Midhat Noor And Ors(1988) 3 SCC 44 Para 5 and 6

22. Anthony Vs. K.C. Itloop and sons and Ors (2000) 6 SCC 394 Para 8 to 16

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

" If on expiry of lease period of a registered lease deed, a request for further lease for nine years on fresh terms and conditions is made by the tenant without registration of lease under Section 17 read with Section 49 of the Registration Act, 1908, then what shall be the status of the tenant, the tenancy and his eviction? Is the main controversy involved in the present revision."

1. Heard Sri Pankaj Agarwal, learned counsel for the defendants/revisionists and Sri Madhur Prakash, learned counsel for the plaintiffs/ opposite parties in Civil Revision No.561 of 2014, and, Sri Madhur Prakash, learned counsel for the plaintiffs-revisionists
and Sri Pankaj Agarwal, learned counsel for the defendants/respondents in Civil Revision No.141 of 2007.

2. Both the aforesaid civil revisions have been filed under Section 25 of Provincial of Small Causes Courts Act, 1887 (hereinafter referred to as 'the Act 1887') and arise from the impugned judgment dated 31.01.2007 in S.C.C. Suit No.04 of 2006 (Ajay Kumar and others. vs. Kshetriya Sri Gandhi Ashram and another). Therefore, with the consent of the learned counsels for the parties, both the revisions are being heard together.

3. On removal of defect in Civil Revision Defective No.4 of 2007, it has been numbered as **Civil Revision No.561**

of 2014 which has been filed by the defendantstenants/ revisionists challenging the impugned judgment, whereby the S.C.C. Suit No.04 of 2006 was decreed and and the defendants-tenants/revisionists were directed to be evicted and were held liable to pay balance amount of rent from 01.01.2006 to 16.01.2006 and, thereafter, damages @ Rs.18,515/- per month from 17.01.2006 till actually vacating the disputed accommodation.

4. Civil Revision No.141 of 2007 has been filed by the plaintiffs-landlords/revisionists challenging the impugned judgment, whereby damages have been awarded to the tune of monthly rent of Rs.18,515/- as against the damages claimed @ 32 per square feet, i.e. Rs.64,000/- per month.

Facts of the Case:-

5. Briefly stated facts of the present case are that plaintiff Nos. 2 and 3, namely Aditya Kumar and Anupam Kumar are the sons of plaintiff No.1 Ajay Kumar. They are co-owners and landlords of House No.C-21/4A-1, Maldahiya Varanasi. A registered lease deed dated 13.02.1981 of the disputed shop, was **executed by the plaintiff No.1** Ajay Kumar for himself and on behalf of his two sons (other co-owners, namely Aditya Kumar and Anupan Kumar, who were minor at that point of time) **in favour of the defendants/revisionists**, namely Kshetriya Sri Gandhi Ashram (a Society registered under the Societies Registration Act having its office at Shalimar, Ghazipur, through its Secretary), whereby an area of 2000 square feet being part of aforesaid house No.C-21/4A-1, Maldahiya Varanasi, **was let out** by the plaintiff/respondents to the defendants/revisionists **for a period of nine years** at the monthly rent of Rs.4,000/- for the first three years, Rs.4,600/- for the second term of three years and Rs.5,290/- for the third term of three years. **The term of the aforesaid registered lease deed expired on 12.02.1990**

6. **Thereafter, on 06.03.1990** the defendants/revisionists sent a letter to the plaintiffs/respondents requesting for tenancy for further nine years on certain terms and conditions. On this letter, plaintiff No.1 for himself and on behalf of two minor sons (plaintiff Nos.2 and 3) gave their acceptance on 03.02.1990. Accordingly, the defendants/revisionists continued as a tenant of the disputed shop for a further period of 9 years ending in February, 1999.

7. **The defendants/revisionists again wrote a letter dated 23.02.1999 to the plaintiff No.1 Sri Ajay Kumar requesting him to extend the tenancy of the disputed shop for a period of nine years on certain terms and conditions. This letter/ offer was accepted only by the plaintiff No.1.** As per this letter dated 23.02.1999, the defendants/revisionists offered to pay for first three years monthly rent @ Rs.4,000/-, monthly maintenance Rs.6,000/- and monthly security Rs.4,000/-. In the next three years, the rent was offered Rs.4,600/- per month, maintenance expenses Rs.6,900/- per month and security expenses Rs.4,600/- per month. For the last three years, the rent was offered to be Rs.5,300/- per month, maintenance expenses Rs.7,915/- per month and security expenses Rs.5,300/- per month, total Rs.18,515/- per month.

8. By a **notice dated 12.12.2005 sent by registered post, the plaintiffs gave 30 days' notice determining the tenancy and clearly indicated that they do not want to keep the defendants/revisionists as tenant of the disputed shop.** It was further stated that if the disputed shop is not vacated and its vacant possession is not handed over, then after expiry of 30 days the defendants/revisionists shall be liable to pay damages @ Rs.32/- per square feet, i.e. Rs.64,000/- per month.

9. **Since the aforesaid notice was not complied with by the tenants-defendants/ revisionists, therefore, the plaintiffs-respondents filed S.C.C. Suit No.4 of 2006** (Ajay Kumar and two others vs. Kshetriya Sri Gandhi Ashram and another) praying for a decree of eviction against the defendants and decree for arrears of rent and damages. The pleadings were exchanged and the evidences were led by the parties. Thereafter, the aforesaid S.C.C. suit was decreed by the impugned judgment dated 31.01.2007. Eleven issues were framed in the said suit. **Crucial issues were with regard to period of tenancy on the basis of letter/ lease dated 23.02.1999 and default in payment of rent** which all were decided in favour of the plaintiffs and against the defendants. Aggrieved with the aforesaid impugned judgment, the **tenants-defendants/ revisionists have filed Civil Revision No.561 of 2014** for setting aside the judgment **and the plaintiffs have filed Civil Revision No.141 of 2007 on the quantum of** damages.

10. With the consent of learned counsels for the parties, the following questions are framed for determination in these two revisions:

Questions:

(a) Whether a lease for nine years by letter dated 23.02.1999 is a valid lease?

(b) Whether under the facts and circumstances of the case, the letter/ lease dated 23.02.1999 (paper No.39ka/ 45ka) is a document inadmissible in evidence under Section 17 of the Indian Stamp Act, 1899 and, therefore, it was rightly held by the court below to be not admissible in evidence?

(c) Whether under the facts and circumstances of the case, even if the lease deed dated 23.02.1999 is found to be not valid in law, yet the tenancy of the defendants-revisionists would be governed by the provisions of Section 116 of the Transfer of Property Act, 1882 and in that event all the terms and conditions of the original lease deed dated 13.02.1981, would apply to the parties and in that situation, the tenancy could be determined only on breach of the conditions of the registered lease deed dated 13.02.1981 by the defendants-tenants?

(d) Whether under the facts and circumstances of the case, the plaintiffs were entitled for damages @ Rs.32/- per square feet per month for an area of 2000 square feet, i.e. Rs.64,000/- per month or any other amount higher than the rent of Rs.18,515/-?

Submissions on behalf of the tenants-defendants/ revisonists:-

11. Sri Pankaj Agarwal, learned counsel for the defendantstenants/ revisionists submits, as under:-

(i) After filing the original lease letter dated 23.02.1999 being paper No.45ka, the plaintiffs are stopped to deny its execution even though this letter bears only the signature of plaintiff No.1 -

Sri Ajay Kumar who has always been representing his sons, namely the plaintiff Nos.2 and 3 and all the plaintiffs have been regularly accepting the rent and other amounts at the revised rates. The lease/ letter dated 23.02.1999 was not the result of any fraud by the tenants-defendants/ revisionists rather it was executed/ accepted by the plaintiffs by their own free-will. Therefore, the plaintiffs are stopped from raising any objection against the lease/ letter dated 23.02.1999.

(ii) In view of own admission of the plaintiffs regarding execution of the renewed lease deed/ letter dated 23.02.1999 and filing it as paper No.45ka, the non-registration of the aforesaid renewed lease deed/ letter dated 23.02.1999 looses its importance. Therefore, the paper No.45ga was a document admissible in evidence but the court below committed a manifest error of law to hold otherwise. Reliance is placed upon the judgment of Hon'ble Supreme Court in **S. Kaladev vs. U.R. Somasundaram and others, (2010) 5 SCC 401 (Paras-16 and 17), Thulasidhara and another vs. Narayanappa and others, (2019) 6 SCC 409 (Paras 9.3 to 9.4)**, in which it has been held that in cases, where execution of a deed is established by admission then non-registration is of no consequence. Reliance is also placed upon a judgment of this court in **Shiv Ram and others vs. Lakshman and others, 2013 (6) ADJ 348 (Para-21)** holding that even an inadmissible document could be looked into for collateral purposes.

Alternative argument of the tenants-defendants/ revisionists

(iii) Even after the term of original lease deed dated 13.02.1981 expired on 12.02.1990, the tenant continued in possession and the plaintiffs-landlords have always been regularly accepting the enhanced rent and other amounts. Therefore, the status of the tenants-defendants/ revisionists would be "tenant holding over" under Section 116 of the Transfer of Property Act, 1882 and not an unauthorised occupant. The tenants-defendants/ revisionists continued in possession of the disputed accommodation with the assent of the plaintiffs-landlords. Therefore, the tenancy could be determined only as per provisions of Section 106 of the Transfer of Property Act, 1882 and not otherwise. Since there is a contract between the parties as evident from the lease deed dated 13.02.1981, therefore, unless any of its conditions are violated, the tenancy could not be determined by the plaintiffs-landlords.

On Revision No.141 of 2007

(iv) Damages for the period covered by lease/ letter dated 23.02.1999, cannot be granted as the occupation of the disputed accommodation by the tenants-defendants/ revisionists was not unauthorised occupation. For the period subsequent to the expiry of the period of Lease/ letter dated 23.02.1999, damages can be determined at an appropriate rate in a separate suit and not in the suit in question. Therefore, the defendants are not liable to pay damages @ Rs.32 per square feet, which has no basis and in any case, it is highly excessive.

12. **Learned counsel for the plaintiffslandlords/ respondents submits as under:**

i. The lease has expired on 03.02.1999. Mere acceptance of rent, thereafter, would not mean that a valid lease deed came into existence. The terms of the lease deed, which expired on 12.02.1990, came to an end by expiry of the period of tenancy under the said lease deed.

ii. Even if the submission of the learned counsel for the tenants/petitioners with reference to the provisions of Section 116 and Section 106 of the Act 1882 is considered, it would only mean that after expiry of the lease deed on 12.02.1990, the tenancy was on month to month basis and the tenancy could be determined by notice under Section

iii. By notice dated 12.12.2005 the plaintiffs/landlords determined the tenancy of the defendants-revisionists. After expiry of the period given in the notice the tenants-revisionists became an illegal occupant. Since the disputed shop was not vacated by the defendants-tenants/ revisionists, therefore, the plaintiffs filed S.C.C. Suit No. 04/2006 which has been lawfully decreed by impugned judgment dated 31.01.2007.

iv. The findings recorded in the impugned judgment dated 31.01.2007 are findings of fact based on consideration of relevant evidences on record which cannot be interfered in revisional jurisdiction. The findings recorded in the impugned judgment do not suffer from any perversity.

13. In support of his submissions, learned counsel for the plaintiff-landlord/respondent relied upon judgment of this Court dated **07.12.2018 in Civil Revision No. 126 of 2010 (Rahul Dixit & another v. Shri Chandra Kumar Agarwal) reported in 2019 (1) A.R.C. 160 (paragraph nos. 13 to 17), Rajesh Kumar Gupta v Shri Satish Chandra Khera, 2009, A.C.J. 1185 (paragraph no. 7), Punjab National Bank v. Smt. Geeta Devi in Civil Revision No. 130 of 2012 decided on 30.03.2012, Central Bank of India v. Mahohar Lal & Ors. 1997 All C.J. 1257 (paragraph nos. 13, 14, and 17)** and a judgment of Hon'ble Supreme Court in **Criminal Appeal No. 1371 of 2019 (Bajrang Shyamsunder Agarwal v. Central Bank of India & Anr.), judgment dated 11.09.2019 (paragraph nos. 21 and 34).**

Discussion and findings

14. I have carefully considered the submissions of the learned counsel for the parties.

15. Before I proceed to examine the questions framed above, it would be appropriate to reproduce the relevant provisions of Section 17 and Section 49 of the Registration Act, 1908 (hereinafter referred to as the Act, 1908) (as amended by U.P. Act 57 of 1976) and Section 106 and 116 of the Transfer of Property Act 1882 (hereinafter referred to as the Act 1882), as under :-

Registration Act 1908

Sec.17. Documents of which registration is compulsory

(1) 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) .....…
(b) .....…
(c) .....…
(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
(e) **PROVIDED** that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

Sec. 49. Effect of non-registration of documents required to be registered (As made applicable in Uttar Pradesh, by U.P. Act 57 of 1976)

No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], or of any law for the time being in force to be registered shall-

(a) affect any immovable property comprised therein, or
(b) confer any power or create any right or relationship, or
(c) be received as evidence of any transaction affecting such property or conferring such power or creating such right or relationship, **unless it has been registered**:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1982), to be registered may be received as evidence of any collateral transaction not required to be effected by registered instrument.

Transfer of Property Act,1882

Sec. 106:- Duration of certain leases in absence of written contract or local usage.--

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.
(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in subsection (1) shall commence from the date of receipt of notice.
(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.
(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]

Sec. 116. Effect of holding over.--If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the

lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106. Illustrations

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

COMMENTS

Holding Over: The holding over, if inferred by the conduct of parties, will bring out a new tenancy even though many of the terms thereof the expired lease deed exist. Therefore, to constitute a valid assent under section 116 of the Act, bilateral contract must exist between the lessor and the lessee: R.S. Iron Industries Pvt. Ltd. v. Calcutta Pinkjarapole Society, AIR 2013 Cal 94.

Tenant at sufferance: A person who is a tenant at sufferance has no estate or interest in the leasehold property. A tenant holding after the expiry of his term is a tenant at sufferance, which is a term useful to distinguish a possession rightful in its inception but wrongful in its continuance from a trespass which is wrongful both in its inception and in its continuance. A co-owner can maintain a suit by himself in ejectment of a trespasser or a tenant at sufferance; B. Valsala v. Sundram Nadar Bhaskaran, AIR 1994 Ker 164.

Questions (a) and (b)

16. Questions (a) and (b) are interlinked and therefore, both are being considered together.

Principles of admissibility of an unregistered document and consequence of non registration:

17. In **K.B. Saha and Sons Private Limited v. Development Consultant Limited, (2008) 8 SCC 564 (para 34)** the Hon'ble Supreme Court considered its various judgments as well as judgments of various High Courts and laid down the law as under:

I. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.

II. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

III. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

IV. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

V. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause

would not be using it as a collateral purpose.

18. The principles laid down in the case of ***K.B. Saha & Sons (P.) Ltd.*** (supra) as reproduced above, have been reiterated by Hon'ble Supreme Court in **S.Kaladevi vs V.R.Somasundaram & Ors. (2010) 5 SCC 401** (para 13).

19. Thus, in view of the provisions of Sections 17 and 49 of the Act, 1908 and the law laid down by the Hon'ble Supreme Court in ***K.B. Saha & Sons (P.) Ltd.*** (supra) and **S.Kaladevi** (supra) it can be safely concluded that **if a document compulsorily required to be registered under Section 17 of the Act, 1908, is not registered, then it is not admissible into evidence under Section 49 of the Act, 1908**. However, such unregistered document can be used as an evidence of collateral purpose in terms of the proviso to Section 49. A collateral transaction must be independent, or divisible from, the transaction to effect which the law required registration. A collateral transaction must be a transaction not itself required to be effected by a registered document, i.e., the transaction creating etc. any right, title or interest in immovable property of the value of 100/- Rupees and upwards. If a document compulsorily required to be registered under Section 17 of the Act, is not registered, then it is not admissible into evidence, for want of registration, and none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose. As per exceptions provided in the proviso to Section 49 of the Act 1908, an unregistered document affecting immovable property and required under the Act 1908 or the Act 1882 to be registered, may be received as evidence of any collateral transaction not required to be affected by a registered instrument.

20. **Exceptions of non admissibility of an unregistered document** can be summarised as under:

I. Those as provided in the proviso to Section 49 of the Act, 1908.

II. Certain family arrangements with regard to properties and family settlement resulting in complete estoppal. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in **Kale & Others v. Deputy Director Of Consolidation(1976) 3 SCC 119, S. Shanmugam Pillai And Ors v. K. Shanmugam Pillai And Ors (1973) 2 SCC 312** and **Thulasidhara v. Narayanappa, (2019) 6 SCC 409 (paras 9.3 and 9.4).**

III. An unregistered sale deed can be received in evidence in suit for specific performance as proof of oral agreement to sale, vide para 34 of the judgment in case of ***K.B. Saha & Sons (P.) Ltd.*** (supra) and para nos. 12 to 15 of the judgment in **S.Kaladevi** (supra).

IV. A lease deed of an immovable property for any term exceeding one year can be made only by an registered instrument in view of the provisions of Section 105 readwith Section 107 of the Act, 1882, subject to the proviso to Section 107 **but claim arising from an unregistered lease deed of a period exceeding one year can be granted on the basis of other uncontroverted evidence available on record supporting the claim of rent** and determination of the question whether there was in fact lease other wise than through such lease deed. Reference in this

regard may be had to the judgment of Hon'ble Supreme Court in **Ahmedsaheb v. Sayed Ismail (2012) 8 SCC 516** (paras 5 to 19).

V. If under the evidence Act a document is receivable in evidence for a collateral purpose, then Section 49 of the Act 1908, shall not bar it, vide **Mattapalli Chelamayya And Anr. v. Mattapalli Venkataratnam, 1972 3 SCC 799** (para 10).

Admissibility of an unregistered lease deed/ rent deed for a period of one year or more and claim of right there under by the tenant.

21. Section 105 of Act 1882 defines the word "lease". It provides that lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Section 107 provides that a lease of immovable property, from year to year, or for any term exceeding one year, or reserving yearly rent can be made only by a registered instrument.

22. Section 49 of the Act 1908 provides for the consequence of non registration of documents required to be registered under Section 17. It provides (as amended by U.P. Act 57 of 1976) that no document required by Section 17 or by any provision of the Transfer of Property Act 1882 to be registered shall, affect any immovable property comprised therein, or confer any power or create any right or relationship, or be received as evidence of any transaction affecting such property or conferring such power, **unless it has been registered, provided that an unregistered document affecting immovable property and required under the Act 1908 or the Act 1882 to be registered may be received as evidence of any collateral transaction not required to be effected by registered instrument.** Thus, as an exception an unregistered document affecting immovable property as aforesaid may only be received as evidence of any collateral transaction not required to be effected by registered instrument.

23. Therefore, the alleged letter dated 23.02.1999 allegedly creating a lease of the disputed shop for nine years is not admissible into evidence under Section 49 of the Act, 1908. **None of its terms can be admitted in evidence. Therefore, all its terms i.e. the terms of the letter/ lease dated 23.02.1999 were inadmissible. There can be no estoppal against the statute.** An unregistered lease deed can be relied upon for limited purpose for showing that the possession of the lessee is lawful possession or for some collateral transaction.

24. The conclusions as reached in just preceding paragraphs are also fortified by the law laid down by Hon'ble Supreme Court in **Bajaj Auto Limited vs Behari Lal Kohli**, **1989 4 SCC 39** (paras 7 and 8), **Rai Chand Jain vs Miss Chandra Kanta Khosla (1991) 1 SCC 422** (para 10),**K.B. Saha and Sons Private Limited v. Development Consultant Limited, (2008) 8 SCC 564** (paras 29 to 34), **M/S Sms Tea Estates P.Ltd vs M/S Chandmari Tea Co.P.Ltd , 2011 14 SCC 66** (paras 11, 22 and 23).

25. In **Samir Mukherjee vs Davinder K. Bajaj & Ors, (2001) 5 SCC**

259 (para 6 and 7) Hon'ble Supreme Court held as under:

"6. Section 106 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession."

7. In the case in hand we are concerned with an oral lease which is hit by the first paragraph of Section 107 of the Transfer of Property Act. Under Section 107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving yearly rent, such a lease has to be only by a registered instrument. **In absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106 the rule of construction embodied therein would not be attracted**. The above is the legal position on a harmonious reading of both the sections."

26. In **M/S Park Street Properties (Pvt) Ltd. vs Dipak Kumar Singh And Anr , 2016 9 SCC 268** Hon'ble Supreme Court held that **in absence of registration of a document, what is deemed to be created is a month to month tenancy, the termination of which is governed by Section 106 of the Act. Since the alleged unregistered letter dated 23.02.1999 providing for lease of the disputed shop for a period of 9 years is an unregistered document, therefore, the tenancy can be deemed to be a month to month tenancy and the termination of tenancy is governed by Section 106 of the Act, 1882.** Paragraph 17 and 19 of the judgment of Hon'ble Supreme Court in the case of **M/S Park Street** (supra) are reproduced below:

"17. A perusal of Section 106 of the Act makes it clear that it creates a deemed monthly tenancy in those cases where there is no express contract to the contrary, which is terminable at a notice period of 15 days. The section also lays down the requirements of a valid notice to terminate the tenancy, such as that it must be in writing, signed by the person sending it and be duly delivered. Admittedly, the validity of the notice itself is not under challenge. The main contention advanced on behalf of the respondents is that the impugned judgment and order is valid in light of the second part of Section 107of the Act, which requires that lease for a term exceeding one year can only be made by way of a registered instrument.

19. It is also a well settled position of law that in the absence of a registered instrument, the courts are not precluded from determining the factum of tenancy from the other evidence on record as well as the conduct of the parties. A three Judge bench of this Court in the

case of Anthony v. KC Ittoop & sons (4), held as under:

"A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehors the instrument parties can create a lease as envisaged in the second paragraph of Section which reads thus..... When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

..... Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains un-rebutted." (emphasis laid by this Court) **Thus, in the absence of registration of a document, what is deemed to be created is a month to month tenancy, the termination of which is governed by Section 106 of the Act."** (emphasis supplied by me)

27. For all the reasons, aforestated **I hold that the alleged lease of the disputed shop by letter dated 23.02.1999 for a period of 9 years is not admissible in evidence in view of the provisions of Section 107 of the Act 1882 and Sections 17 and 49 of the Act, 1908. Therefore, the Court below has not committed any error of law to hold that the aforesaid alleged lease deed/ letter dated 23.02.1999 is not admissible in evidence. Question nos. a and b are answered accordingly.**

Question no. c.

28. The contractual tenancy created by the plaintiffs-landlords in favour of the tenant-defendant/ revisionist by a registered lease deed dated 13.02.1981 came to end on expiry of its period of 9 years i.e. on 12.02.1990. Further, continuance of the defendanttenant/ revisionist under letter dated 06.03.1990 and thereafter, by letter dated 23.02.1999 accepted only by the plaintiff no. 1, resulted in month to month tenancy. In

absence of any valid registered lease deed it become a month to month tenancy under Section 106 of the Act 1882. Similar view has been taken by Hon'ble Supreme Court in the case of **M/S Park Street** (supra) wherein, Hon'ble Supreme Court clearly held (para 19) that in absence of registration of a document, what is deemed to be created is a month to month tenancy, the termination of which is governed by section 106 of the Act, 1882. In view of the settled law as discussed above, the condition of the registered lease deed dated 13.02.1981 shall also not be admissible in evidence and none of its terms and conditions can be pressed or any right there under can be claimed by the defendant-tenant/revisionist since the said registered lease deed expired by efflux of time on 12.02.1990.

Effect of holding over

29. Section 116 of the Act 1882 provides that if a lessee or under lessee of an immovable property remains in possession thereof after the determination of the lease granted to lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or other wise assents for continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified under Section 106 of the Act 1882. **Thus, applying Section 116 of the Act, 1882 on the fats of the present case, the best case of the defendant-tenant/ revisionist may be that he is a tenant from month to month.** Undisputedly, the letter dated 23.02.1999 issued by the defendant-tenant/ revisionist and accepted by the plaintiff no. 1 for lease of the disputed shop for 9 years, is an unregistered document. **Therefore, in absence of registration, the tenancy shall be deemed to be a month to month tenancy and its termination is governed by Section 106 of the Act 1882 as also held by Hon'ble Supreme Court in the case of M/s Park Street (supra).** If a tenant remains in possession after determination of the lease, he is called a **tenant on sufferance**. If a tenant continues in possession after determination of the term with the consent of the landlord then he is a **tenant at will or a tenant holding over.** Since, the disputed accommodation is a shop, therefore, in terms of section 106 readwith section 116 of the Act 1882, the tenancy in question would be a month to month tenancy which has been lawfully determined by the plaintiffs-landlords by notice dated 12.12.2005.

30. In **Bhawanji Lakhamhi & Ors vs Himatlal Jamnadas Dani & Ors. 1972 1 SCC 388 (para 13)**, Hon'ble Supreme Court has held as under:

" Learned counsel for the appellants argued that whenever rent is accepted by a landlord from a tenant whose tenancy has been determined, but who continues in possession, a tenancy by holding over is created. The argument was that the assent of the lessor alone and not that of the lessee was material for the purposes of Section 116. We are not inclined to accept this contention. We have already shown that the basis of the, section is a bilateral contract between the erstwhile landlord and the erstwhile tenant If the tenant has the statutory right to remain in possession, and if he pays the rent, that will not normally be referable to

an offer for his continuing in possession which can be converted into a contract by acceptance thereof by the landlord. We do not say that the operation of Section 116 is always excluded whatever might be the circumstances under which the tenant pays the rent and the landlord accepts it. We have earlier referred to the observations of this Court in ***Ganga Dutt Murarka v. Kartik Chandra Das*** regarding some of the circumstances in which a fresh contract of tenancy may be inferred. We have already held the whole basis of Section 116 of the Transfer of Property Act is that, in case of normal tenancy, a landlord is entitled, where he does not accept the rent after the notice to quit, to file a suit in ejectment and obtain a decree for possession, and so his acceptance of rent is an unequivocal act referable only to his desire to assent to the tenant continuing in possession. That is not so where Rent Act exists; and if the tenant says that landlord accepted the rent not as statutory tenant but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it. No attempt has been made to establish it in this case and there is no evidence, apart from the acceptance of the rent by the landlord, to indicate even remotely that he desired the appellants to continue in possession after the termination of the tenancy. Besides, as we have already indicated, the animus of the tenant in tendering the rent is also material. If he tenders the rent as the rent payable under the statutory tenancy, the landlord cannot, by accepting it as rent, create a tenancy by holding over. In such a case the parties would not be id idem and there will be no consensus. The decision in Ganga Dutt Murarka v. Kartik Chandra Das, Which followed the principles laid down by the Federal Court in Kai Khushrao Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden and another(1) is correct and does not require reconsideration."

31. In **Burmah Shell Oil Distributing vs Khaja Midhat Noor And Others (1988) 3 SCC 44** (para 5 and 6) Hon'ble Supreme Court held that **after expiry of the lease period under the registered lease deed, the tenancy automatically stood determined. When thereafter, lessee is allowed to continue to be in possession of the property without executing any fresh registered lease deed, the lessee must be treated as holding over month to month.**

32. In **Anthony v. K.C.Itloop and sons and Ors. 2000 6 SCC 394 (para 8 to 16)** Hon'ble Supreme Court considered a case where a lease of a building for a period of 5 years was granted by an unregistered instrument and held that such an instrument can not create the lease on account of three-pronged statutory inhibitions i.e. section 107 of the Act 1882, section 17 (1) and section 49 of the Act 1908. However, Supreme Court held that when lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the Court to determine whether there was in fact a lease other wise than through such deed. It further held on facts of that case that the tenant was inducted into the possession of the building by owner thereof and the tenant was paying monthly rent or had agreed to pay rent in respect of the building, therefore, the legal character of the tenants possession has to be attributed to a jural relationship

between the parties and such a jural relationship, on the fact and situation of the case can not be placed anything different from that of lessor and lessee falling within purview of section 107 of the Act 1882. Thus, applying the principles laid down in case of Anthony (supra), the presumption would be that a lease not exceeding one year stood created by conduct of the parties. Therefore, the plaintiffs-landlords lawfully determined the lease by notice dated 12.12.2005. Since the disputed shop was not vacated by the defendant-tenant/ revisionist despite notice dated 12.12.2005, therefore, the plaintiffs-landlords filed SCC Suit No. 4 of 2006 which has been lawfully decreed by the impugned judgment dated 31.01.2007. The question no. (c) is answered accordingly.

Question no. (d)

33. The contention of the plaintiffs-landlords that for his entitlement to damages @ Rs. 32/- per square feet per month for an area of 2000 square feet i.e. Rs. 64,000/- per month or any other amount higher than Rs. 18,515/- per month, is not supported by any evidence. The plaintiffs-landlords failed to lead any evidence to justify his demand of damages at the rate of Rs. 32/- per square feet per month. Therefore, the Court below has not committed any error of law in not accepting the claim for damages @ Rs. 32 per square feet per month. Thus, I do not find any manifest error of law in the impugned judgment with regard to quantum of damages.

34. For all reasons aforestated, I do not find any merit in both the Civil Revisions. Therefore, the Civil Revision No. 561 of 2014 filed by the tenant and Civil Revision No. 141 of 2007 filed by the landlords, are ***dismissed.*** However, there shall be no order as to costs.

(2019)11ILR A303

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE PANKAJ BHATIA, J.

Habeas Corpus Writ Petition No. 719 of 2019

Mahmood ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gaurav Kakkar,Sri Saurabh Kesarwani

Counsel for the Respondents:
A.S.G.I., Sri Deepak Mishra, G.A., Sri Prahlad Kumar Khare

A. Criminal Law -National Security Act, 1980 - Section 3(2) - Indian Penal Code,1860 - Sections 323/376 r/w Section ¾ POCSO Act- quashing of detention order - accused committed rape-people started sloganeering against the nature of offence - due to adverse affect on the public order, respondent authorities passed the detention order against his release on bail- the propensity of a person repeating the offence can be gathered either by criminal antecedents or some other material -District Magistrate has recorded that if the petitioner is enlarged on bail, there is likelihood of the petitioner indulging in similar offences thereby adversely affecting the public order, but there is no material on record to justify the said satisfaction as the petitioner did not have any criminal antecedents-detention order passed by the District Magistrate does not satisfy the test as laid down by the Apex Court and the rigours of law which are required to be established before taking a decision of preventive detention. (Para 6,12, 14 to 33)

Habeas Corpus petition allowed (E-6)

List of cases cited:-

1.Sudhir Kumar Saha Vs. The Commissioner of Police, Calcutta and Ors, AIR 1970 SC 814

2. Rameshwar Shaw Vs. District Magistrate, Burdwan and Ors, AIR 1964 SC 334

3. Akhtar Hussain Vs. Union of India and Ors, judgment passed in Habeas Corpus Writ Petition No. 3547 of 2018

4. Arun Ghosh Vs. State of W.B., AIR 1970 SC 1228

5. Dr. Ram Manohar Lohiya Vs. State of Bih., 1966 CrLJ 608

6. Shashi Agarwal Vs. State of U.P and Ors, 1988 (1) SCC 436

7. Haji Akhalak Vs. Union of India and Ors, judgement passed in Habeas Corpus Writ Petition No. 55685 of 2017

8. Istakaar and Anr. Vs. Union of India and Ors, judgment passed in Habeas Corpus Writ Petition No. 3094 of 2018

9. Sudhir Vs. Union of India and Ors,Judgement passed in Habeas Corpus Writ Petition No. 3181 of 2018

10. Dharmendra Suganchand Chelawat & Suganchand Kanhaiyyalal Vs. Union of India, AIR 1990 SC 1196

11. Attorney General For India Vs. Amratlal Prajivandas and Ors, 1994 (5) SCC 54

12. Surya Prakash Sharma Vs. State of U.P. and Ors, 1994 (Supp.) (3) SCC 195

13. Huidrom Konungjao Singh Vs. State of Manipur and Ors, (2012) 7 SCC 181

14. Rekha Vs. State of T.N. { (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596}

15. Yumman Ongbi Lembi Leima Vs. State of Manipur and Ors,(2012) 2 SCC 176

16. Munagala Yadamma Vs. State of A.P. and Ors,(2012) 2 SCC 386

17. Kumail Vs. State of U.P. & Ors, judgment in Habeas Corpus Petition No. 437 of 2019

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Saurabh Kesarwani for the petitioner, Sri Deepak Mishra, learned A.G.A. for the respondents 2, 3 and 4, Sri Prahlad Kumar Khare for the Union of India and perused the record.

2. The present habeas corpus petition seeks release of the petitioner Mahmood currently in detention in pursuance to the detention order dated 20th May, 2019 passed by the District Magistrate, Bijnor (respondent no. 3) in exercise of powers under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as the "N.S.A. Act').

3. A perusal of the record reveals that an F.I.R. dated 27.3.2019 was registered as Case Crime No. 178 of 2019, under Sections 323/376 IPC read with Section 3/4 POCSO Act, at Police Station Najibabad, District Bijnor. In pursuance to the said F.I.R., the detenue (petitioner) was arrested on 29.3.2019 and is in detention since then. It has been brought on record that after the arrest of the petitioner, during the investigation of the case, the statement of prosecutrix namely Wasiya, aged about 10 years, was recorded under Section 161 Cr.P.C. on 28.3.2019 (Annexure-10 to the petition). The Investigating Officer also recovered the blood stained clothes of the prosecutrix from the home of the informant on 28.3.2019 and the statement under Section 164 Cr.P.C. of the victim was recorded on 30th March, 2019 (Annexure-13 to the petition).

4. A perusal of the F.I.R. in question reveals that the informant disclosed that on 26.3.2019 at about 7:30 P.M. the younger sister of the informant, namely, Wasiya, aged about 10 years, had gone to purchase certain things to Jalalabad Bazar and when after sufficient time having elapsed, she did not return back home, then the informant and his brother Islam went in search of Wasiya. They reached the softy shop of one Prakash, who informed them that a little while ago, a small girl had come with a boy, who has purchased softy for her and has taken her with him. It was also stated that there were two persons, namely, Altaf son of Ismail and Mukeem son of Ehsan, both residents of Jalalabad, who informed that they had seen the petitioner taking the girl with him after purchasing a softy. On receiving the said information, they searched for the girl here and there and found her in a bad condition behind the shop of Sarfaraj Hardware. She was physically injured and mentally disturbed with many marks on her face and other places of her body. On questioning, Wasiya informed that the petitioner, whom the girl recognizes, had done wrong things to her. With the said allegations, the F.I.R. was lodged against the petitioner. Thereafter, the informant gave a statement which was in consonance with the allegations levelled in the F.I.R. He also stated that when the girl was brought back home, the wife of the informant was informed that blood was coming out of the private parts of the girl.

5. The Investigating Officer also recorded the statement of the prosecutrix Km. Wasiya under Section 161 Cr.P.C., wherein she deposed that she was sent for purchasing certain goods where Mahmood, the petitioner, met her and give money to her and purchased a softy for her and thereafter at a secluded place assaulted her and on her shouting he left her. Subsequently, the statement of the prosecutrix was also recorded under Section 164 Cr.P.C., wherein she deposed that the petitioner had done wrong things to her. She further stated that at about 11:00 A.M. she had gone to the Bazar to find her sister where the petitioner, under the pretext of purchasing softy, took her with him and thrashed her and, after removing her clothes, did wrong things to her.

6. To secure detention of the petitioner under the N.S.A. Act, the Inspector In-charge of Police Station Najibabad, District Bijnor, sent a report, dated 8.5.2019, to the S.P. Bijnor (Annexure-3 to the petition). In the said report, besides the details of the aforesaid offence committed by the petitioner, it was stated that on account of the said incident, the public order was disturbed as the people of the area started sloganeering and protesting by shutting their shops against the nature of offence that was allegedly committed by the petitioner. It was also reported that on account of the said incident, the people were closing their doors and were worried about the safety of their children and were also apprehensive in sending their children to the school. It was also reported that to control the situation additional force had to be deployed and people had to be assured with regard to arrest of the accused. It was also reported that the said incident was widely published in the newspaper on the next date, which corroborates that there had been adverse affect on the public order on account of the said incident. Finally, it was reported

that the petitioner is in custody at the District Jail, Bijnor and is trying for his release on bail; that he has filed a bail application through his advocate in the Court of Additional District & Sessions Judge, Court No. 1/POCSO Court, Bijnor, which is pending for hearing; and there the accused is likely to be released on bail. It was reported that on being free from the prison, there is all likelihood that he may commit the offence again which will disrupt the public order.

7. The Superintendent of Police, District Bijnor, vide his report dated 16.5.2019 sent to the District Magistrate, Bijnor (Annexure-6 to the petition) after repeating what has been reported to him reported that the petitioner is in custody in the District Prison and is trying for his release on bail, for which an application has been filed through his advocate and if he is released on bail, then there are all chances of his repeating similar offences which are likely to have an adverse affect on the public order. Thus he recommended petitioner's detention under the N.S.A. Act.

8. Based upon the said two reports, District Magistrate formulated the grounds of detention and proceeded to pass an order of detention on 20th May, 2019.

9. In the grounds of detention, the District Magistrate after narrating the entire incident and what was reported to him observed that there is all likelihood of the petitioner being released on bail and there are chances that on being released on bail, a similar offence may be repeated which will have an adverse affect on the public order.

10. The detention order dated 20th May, 2019 was duly confirmed by the State of U.P. vide order dated 29.5.2019 (Annexure-2 to the petition).

11. Counsel for the petitioner has argued that the petitioner has no criminal antecedents; that based upon a solitary incident, the respondent authorities were not justified in passing the detention order, as the petitioner is already facing criminal trial for the offences; that there is no reason recorded by the District Magistrate as to on what basis he was satisfied that the petitioner is likely to be released on bail; that the incident in question can in the worst case scenario be termed as a law and order problem and in no way can it be treated as to have disturbed public order; and that there is no material on record for the District Magistrate to have been satisfied that on being released on bail, the petitioner would commit a similar offence. He has also argued that as the petitioner was already under custody there was no valid reason to passing a detention order. He has also informed the Court that the bail application filed by the petitioner and pending at the time of passing of the detention order was not pressed and as on date there is no bail application pending consideration before any court.

12. Counsel for the petitioner has extensively relied upon the judgment of the Apex Court in the cases of **Sudhir Kumar Saha v. The Commissioner of Police, Calcutta and Ors, AIR 1970 SC 814, Rameshwar Shaw v. District Magistrate, Burdwan and Ors, AIR 1964 SC 334** and judgment of this Court in the case of **Akhtar Hussain v. Union of India and Others, judgment dated**

5.12.2018 passed in Habeas Corpus Writ Petition No. 3547 of 2018.

13. Learned A.G.A. on the other hand has argued that the offences committed by the petitioner were so heinous that they had an adverse affect on the public order which is described in detail in the grounds of detention as well as the report submitted before the District Magistrate. He has further argued that the incident in question cannot be treated like a normal case of rape inasmuch as the petitioner was a stranger to the prosecutrix and thus offence committed by him has to be seen keeping in mind the depravity of the mental state of the petitioner. He has thus argued that his release would be detrimental to the public order. Hence, he has prayed that the petition be dismissed.

14. Learned A.G.A. placed reliance on the judgment of the Apex Court in the case of ***Arun Ghosh v. State of West Bengal, AIR 1970 SC 1228*** so as to contend that where activities of a person are such that it breeds a sense of insecurity in the mind of girls of the community at large, the same would affect public order. The learned A.G.A. relied on decision of this Court dated 17.09.2019 passed in Habeas Corpus Writ Petition No. 562 of 2019: Aashif v. State of U.P. and others so as to contend that even a solitary incident could form basis of satisfaction to preventively detain a person.

15. Considering the submissions made at the bar as well as on perusal of the record and on plain reading of the provisions of the N.S.A. Act, what is to be seen is whether the offence in question warranted detention of the petitioner in exercise of powers under Section 3(2) of the N.S.A. Act.

16. It is well settled that personal liberty as guaranteed under Article 21 read with Article 22 of the Constitution of India is sacrosanct and is at the highest pedestal of the freedoms guaranteed under the Constitution of India and the same can be taken away only as per the procedure prescribed by law. Section 3(2) of the N.S.A. Act is as follows:-

"(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.--For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act."

17. From a plain reading of the provisions of the Act, it is clear that the

Central Government or the State Government prior to passing of the detention order has to be satisfied that any person, if not detained, is likely to act in any manner which is:-

a. prejudicial to the security of the State; or

b. prejudicial to the maintenance of the public order; or

c. prejudicial to the maintenance of supply and services essential to the community.

18. Now, we shall consider the various precedents cited at the Bar.

19. The Hon'ble Apex Court in the case of **Arun Ghosh (Supra)** while deciding the question of validity of a detention order passed in the case of a person who was facing charges on the grounds such as anti social activities including rioting, assault and undue harassment of respectable young ladies in the public street of Malda town, having been made accused of doing such acts on as many as eight occasions, proceeded to observe as under:-

"An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different.

Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies.

It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society."

20. The Apex Court further recorded that all the acts of molestation were directed against the family of one person and not against the women in general from the locality and even the assaults were individual and after recording that the conduct may be reprehensible but it does not add up to the situation where it may be said that the community at large was being disturbed proceeded to quash the detention order.

21. The Apex Court relying on the earlier judgment of ***Dr. Ram Manohar Lohiya v. State of Bihar, 1966 CrLJ 608*** held that whether an "act' has adversely affected the "public order' is to be determined in the facts of each case.

22. The learned counsel for the petitioner has argued that the present case is based upon a solitary incident and by no stretch of logic can it be said that the said act would affect the community at large.

23. The next decision relied upon by the counsel for the petitioner is in the case of ***Akhtar Hussain (Supra).*** In the said case, the detention order was passed against a person who was a Gram Pradhan and had assaulted a young girl in connection with which an F.I.R. was registered against the said Gram Pradhan under Sections 376, 452, 506, 504 I.P.C. and Section 3 /4 POCSO Act. In pursuance of the said F.I.R., a detention order was passed under N.S.A. Act. It was argued before the Court that it was a case of solitary incident and there was nothing on record to show that the detaining authority had applied its mind with regard to the criminal antecedents of the accused. It was also argued that the detaining authority erred while recording the satisfaction that there was a likelihood of the petitioner being released on bail and on release would again indulge in similar offences affecting the public order. The Court after considering the submissions made before it, by relying upon the judgments of the Apex Court in the cases of **Shashi Agarwal v. State of U.P. and others, 1988 (1) SCC 436 and Rameshwar Shaw v. District Magistrate, Burdwan & another, AIR 1964 SC 334** and also judgments of this Court in **Habeas Corpus Writ Petition No. 55685 of 2017, Haji Akhlakh vs. Union of India** and others (decided on 30.3.2018); **Habeas Corpus Writ Petition No. 3094 of 2018, Istakaar and Another vs. Union of India and others** (decided on 4.9.2018); and **Habeas Corpus Writ Petition No. 3181 of 2018, Sudhir vs. Union of India and others** (decided on 8.10.2018), observed as under:-

"We are constrained to observe that no material justifying the apprehension that detenue would indulge in prejudicial activities in case of his being released on bail was placed before the respondent no.3. In our opinion the bald statement made in the grounds of detention that the petitioner upon being released on bail would repeat his criminal activities prejudicially affecting the maintenance of public order, was not enough to justify passing of an order of preventive detention against him. We stand fortified in our view by the law laid down by the Apex Court in the case of ***Shashi Agarwal Vs. State of U.P. and others reported in 1988 (1) SCC 436 and Rameshwar Shaw Vs. District Magistrate, Burdwan & another reported in AIR 1964 SC 334."***

24. The Court had also considered the judgment of the Apex Court in the case of ***Dharmendra Suganchand Chelawat & Suganchand Kanhaiyyalal vs. Union of India, AIR 1990 SC 1196***, wherein it was held that to detain a person already in jail the detention order must pass the following tests: (i) that the detaining authority was aware of the fact that the detenue is already in detention; and (ii) that there were compelling reasons justifying such detention despite the fact that the detenue is already in detention. The expression "compelling reasons" in the context of making an order of detention with regard to a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it has to

be satisfied that (a) the detenue is likely to be released from custody in near future and (b) 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. In Akhtar Hussain's case (supra) this Court on the basis of material on record found that there was nothing to hold that there was any likelihood of the petitioner, after release on bail, indulge in prejudicial activities affecting the public order. Thus, the detention order, which was based on a solitary case, was quashed. .

25. The next judgment referred to buttress the argument is the judgment of this Court in the case of **Kumail (Supra)** wherein this Court, while dealing with a detention order passed against a person who was already in judicial custody, upon a conspectus of case laws culled out the legal principles as under:

"A conspectus of the decisions of the apex court noticed above would show that the law is that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. The reason to believe that there is likelihood or real possibility of the person being released on bail must be based on cogent material and not mere ipse dixit of the authority. Such satisfaction can be drawn on the basis of reports of the sponsoring authority, the nature of the offence(s) in connection with which the detenu is in jail as also the facts and circumstances of that case including grant of bail to co-accused or general practice of courts in such matters. But once challenge is laid with regard to existence of such satisfaction, then the detaining authority in its return / affidavit must disclose existence of such satisfaction and the materials on the basis of which it has been drawn. However, if in the return it is demonstrated that satisfaction was drawn and there existed material to draw such satisfaction, the same cannot ordinarily be interfered with on the ground of insufficiency of material."

26. After noticing the legal position, the Court proceeded to quash the detention order.

27. The next case cited at the bar is the judgment in the case of **Aashif (Supra)** wherein this Court after noticing the decision of the nine-judges Bench of the Apex Court in the case of ***Attorney General For India v. Amratlal Prajivandas and others, 1994 (5) SCC 54*** as well as the case of ***Surya Prakash Sharma v. State of U.P. and Others, 1994 (Supp.) (3) SCC 195*** on the issue as to when on the basis of solitary case a detention order may be justified, held as under:-

"From the decisions noticed above, what is clear is that though ordinarily a solitary act may not be sufficient to sustain an order of preventive detention but where that act is of such a nature that it is reflective of, or has manifestation of, an organized criminal activity, or is so grave that it reflects the propensity of that person to repeat such an act, then even a solitary act could well be made basis for passing an order of preventive detention."

28. In another case, the Hon'ble Supreme Court while considering the validity of detention order in a case where person is already in custody, in the case of ***Huidrom Konungjao Singh v. State of Manipur and Others, (2012) 7 SCC 181***, placing reliance on earlier judgment in the case of Rekha v. State of T.N., held as under:-

"9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:

(1) The authority was fully aware of the fact that the detenu was actually in custody.

(2) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

(3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist the detention order would stand vitiated. The present case requires to be examined in the light of the aforesaid settled legal proposition.

12. In Rekha v. State of T.N. [(2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] this Court while dealing with the issue held: (SCC pp. 250-51 & 254-55, paras 7, 10 & 27)

"7. A perusal of the above statement in Para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the court concerned. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused. ...

* * *

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. ... A mere ipse dixit statement in the grounds of detention

cannot sustain the detention order and has to be ignored.

* * *

27. In our opinion, there is a real possibility of release of a person on bail who is already in custody [Ed.: Matter between two asterisks emphasised in original as well.] provided he has moved a bail application which is pending [Ed.: Matter between two asterisks emphasised in original as well.] . It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground."

(emphasis added)

Thus, it is evident from the aforesaid judgment that it is not the similar case i.e. involving similar offence. It should be that the co-accused in the same offence is enlarged on bail and on the basis of which the detenu could be enlarged on bail.

15. In the instant case, admittedly, the said bail orders do not relate to the co-accused in the same case. The accused released in those cases on bail had no concern with the present case. Merely, because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenu applied for bail could have been released on bail. Thus, as the detenu in the instant case has not moved the bail application and no other co-accused, if any, had been enlarged on bail, resorting to the provisions of the Act was not permissible. Therefore, the impugned order of detention is based on mere ipse dixit statement in the grounds of detention and cannot be sustained in the eye of the law."

29. In yet another case, a three-judges bench of the Hon'ble Apex Court in its judgment, reported in **(2012) 2 SCC 176, Yumman Ongbi Lembi Leima v. State of Manipur and others,** proceeded to hold as under:-

"6. On a perusal of the grounds of detention, it is clear that the subjective satisfaction of the detaining authority is founded on the belief that after having availed of the bail facility, the appellant's husband could indulge in commission of further prejudicial activities. An alternative preventive measure was, therefore, immediately needed in the circumstances.

23. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that the (sic exercise of) extraordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of Yumman Somendro being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention.

24. Article 21 of the Constitution enjoins that:

*"21. **Protection of life and personal liberty.**--No person shall be*

deprived of his life or personal liberty except according to procedure established by law."

In the instant case, although the power is vested with the authorities concerned, unless the same are invoked and implemented in a justifiable manner, such action of the detaining authority cannot be sustained, inasmuch as, such a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution.

25. When the courts thought it fit to release the appellant's husband on bail in connection with the cases in respect of which he had been arrested, the mere apprehension that he was likely to be released on bail as a ground of his detention, is not justified.

26. In addition to the above, the FIRs in respect of which the appellant's husband had been arrested relate to the years 1994, 1995 and 1998 respectively, whereas the order of detention was passed against him on 31-1-2011, almost 12 years after the last FIR No. 190(5)98 IPS under Section 13 of the Unlawful Activities (Prevention) Act. There is no live link between the earlier incidents and the incident in respect of which the detention order had been passed.

27. As has been observed in various cases of similar nature by this Court, the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention.

28. In our view, the detaining authority acted rather casually in the matter in issuing the order of detention and the High Court also appears to have missed the right to liberty as contained in Article 21 of the Constitution and Article 22(2) thereof, as well as the provisions of Section 167 of the Code of Criminal Procedure."

30. The Hon'ble Supreme Court further in the case of ***(2012) 2 SCC 386, Munagala Yadamma v. State of Andhra Pradesh and Others*** held as under:-

"7. Having considered the submissions made on behalf of the respective parties, we are unable to accept the submissions made on behalf of the State in view of the fact that the decision in Rekha case [(2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , in our view, clearly covers the facts of this case as well. The offences complained of against the appellant are of a nature which can be dealt with under the ordinary law of the land. Taking recourse to the provisions of preventive detention is contrary to the constitutional guarantees enshrined in Articles 19 and 21 of the Constitution and sufficient grounds have to be made out by the detaining authorities to invoke such provisions."

31. On the basis of the judgments cited above, what is to be considered is

whether the preventive detention of the petitioner under National Security Act was justified considering the fact that the petitioner was already in detention. A close perusal of the reasons for detention does not reveal that there was any material before the District Magistrate except the bail application (Annexure-61 to the grounds of detention) to record a satisfaction that the petitioner was likely to be released on bail. The reasons for detention do not disclose any application of mind keeping in view the fact that the petitioner did not have any criminal antecedents except for this solitary case, in which the petitioner was an accused. As to how the District Magistrate could record a satisfaction that the petitioner if enlarged on bail is likely to repeat the offence of the nature of which the petitioner is accused, adversely affecting the public order, is any body's guess.

32. The propensity of a person repeating the offence can be gathered either by criminal antecedents or on some other material showing the propensity of the accused to commit or repeat an offence. We are afraid no such material existed on record before the District Magistrate leading to an inference or justifying the satisfaction that detenue if released on bail shall indulge in similar act.

33. In the present case although the District Magistrate has recorded that the petitioner is likely to be released on bail but there is no material as to how the said finding was recorded when only the bail application was before him. There was no material placed before the District Magistrate either by the Superintendent of Police or the Inspector except their opinion which cannot be said to be "material' enough to form a subjective satisfaction, particularly, when offences in respect of sexual assault punishable under POCSO Act are considered very serious and bail is not ordinarily granted in such cases. Although, the District Magistrate has recorded that if the petitioner is enlarged on bail, there is likelihood of the petitioner indulging in similar offences thereby adversely affecting the public order, but there is no material on record to justify the said satisfaction as the petitioner did not have any criminal antecedents and there was no other report on record to indicate the propensity of the petitioner for repeating the offence of the nature for which he was accused and facing trial.

34. On the consideration of the law as extracted above as well as the material placed before us, we have no hesitation in holding that the detention order passed by the District Magistrate does not satisfy the test as laid down by the Apex Court and the rigours of law which are required to be established before taking a decision of preventive detention. The detention order is thus liable to be quashed.

35. The habeas corpus petition is allowed and the detention order dated 20th May, 2019 is quashed. The petitioner shall be released forthwith unless wanted in any other case.

(2019)11ILR A314

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON’BLE PANKAJ BHATIA, J.

Habeas Corpus Writ Petition No. 799 of 2019

Bhupendra ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Yadav, Sri Avinash Kumar Pandey, Sri Mahendra Pratap, Sri Chaman Lal Chaudhary

Counsel for the Respondents:
A.S.G.I., G.A., Sri Jitendra Prasad Mishra

A. Criminal Law -National Security Act, 1980 - Section 3(3) r/w section 3(2) - quashing of the detention order -illegal mining on the Yamuna river - ordinarily, a bail granting order, particularly, when it is a speaking order, concerning non-bailable offence, is a relevant material which ought to be palced before the detaining authority before issuance of the order of detention and in absence whereof the satisfaction gets vitiated due to non-application of mind on relevant material-detaining authority failed to take notice of the contents of the bail application and the bail order passed in favour of the petitioner. (Para 2 to32)

Habeas corpus petition allowed (E-6)

List of cases cited:-

1. State of T.N. Vs. Kethiyan Perumal,(2004) 8 SCC 780

2. Rameshwar Shaw Vs. District Magistrate, Burdwan and Ors, AIR 1964 SC 334

3. Binod Singh Vs. District Magistrate, Dhanbad,(1986) 4 SCC 416: 1986 SCC (Cri) 490

4. N. Meena Rani Vs. Govt.of T.N., (1989) 4 SCC 418: 1989 SCC (Cri) 732

5. Kamarunnissa Vs. Union of India, (1991) 1 SCC 128: 1991 SCC (Cri) 88

6. Rekha Vs. State of T.N. { (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596}

7. Champion R. Sangama Vs. State of Meghalay and Anr.,(2015) 16 SCC 253

8. Union of India and Anr. Vs. Dimple Happy Dhakad(Cri.Ap. No. 1064 of 2019)

9. Kumail Vs. State of U.P. & Ors, judgment in Habeas Corpus Petition No. 437 of 2019

10. Ahamed Nassar Vs. State of T.N., (1999) 8 SCC 473

11. A. Sowakath Ali Vs. Union of India, (2000) 7 SCC 148

12. M. Ahamedkutty Vs. Union of India,(1990) 2 SCC 1

13. P.U. Abdul Rahiman Vs. Union of India,1991 Supp (2) 274

14. Rushikesh Tanaji Bhoite Vs. State of Mah.,(2012) 2 SCC 72

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

1. We have heard Sri Mahendra Pratap, assisted by Sri Anurag Yadav, Sri Avinash Kumar Pandey and Sri Chaman Lal Chaudhary, for the petitioner; Sri Jitendra Prasad Mishra for Union of India; Sri Deepak Mishra, learned AGA for the respondents no. 2, 3 and 4; and have perused the record.

2. The instant petition seeks quashing of the detention order dated 06.06.2019 passed by the District Magistrate, Gautam Budh Nagar in exercise of his power conferred upon him by sub-section (3) of section 3 of the National Security Act, 1980 (in short the 'Act 1980') read with sub-section (2) of section 3 thereof. The petition also challenges the order of confirmation as well extending the period of detention from three months to six months starting from the date of detention with a prayer that the petitioner be set at liberty.

3. Before we proceed to notice the grounds of detention, we may observe that from a perusal of paragraphs 3 and 14 of the return filed by the Jailor, District Jail, Gautam Budh Nagar it appears that while the petitioner was confined in District Jail, Gautam Budh Nagar, pursuant to judicial orders of remand passed in connection with six cases, namely: (i) Case Crime No. 52 of 2019 under section 25/ 27 Arms Act, P.S. Knowledge Park, Ghaziabad; (ii) Case Crime No.977 of 2015 under section 307, 353 IPC, P.S. Kasna, District Gautam Budh Nagar; (iii) Case Crime No.247 of 2018, under sections 430, 379, 411, 447 IPC and section 3 of Public Property Prevention of Damages Act, P.S. Knowledge Park, District Gautam Budh Nagar; (iv) Case Crime No.264 of 2018, under sections 2/3 Gangsters Act, P.S. Knowledge Park, District Gautam Budh Nagar; (v) Case Crime No.20 of 2019, under sections 147, 148, 149, 364, 302, 323, 504, 506 IPC, P.S. Knowledge Park, district Gautam Budh Nagar; and (vi) Case Crime No.50 of 2019, under sections 147, 148, 149, 186 188, 332, 353 I.P.C., P.S. Kowledge Park, District Gautam Budh Nagar, he was served with the impugned order of detention. The return reveals that till the date of swearing the return, which is 20th September 2019, the petitioner apart from being detained under the provisions of the Act, 1980 is in judicial custody in six cases mentioned above. The grounds of detention served upon the petitioner though, in paragraph 6 enumerates the criminal history of the petitioner of 16 cases but, in paragraph 10 thereof, awareness of the petitioner being in jail is with respect to only three of those six cases, namely, case crime no.264 of 2018 (supra); case crime no.20 of 2019 (supra); and case crime no.247 of 2019. That apart, satisfaction that the petitioner is likely to be released on bail has been drawn by observing that the petitioner has been granted bail in case crime no.247 of 2018 (supra) and has applied for bail in case crime nos.20 of 2019 and 264 of 2016 wherein dates have been fixed for their consideration. Even the report of the S.S.P. Gautambudh Nagar, dated 04.06.2019, at page 43 of the paper book, discloses that the petitioner is currently incarcerated in only three cases, which is in direct conflict with the statement made by the Jailor in his return as noticed above. Thus, it is clear that the detaining authority at the time of passing the detention order and formulating the grounds of detention was not aware that the petitioner is in under detention in three other cases also. Moreover, no satisfaction has been recorded by him with regard to likelihood of the petitioner being released on bail in those three cases.

4. Coming to the grounds of detention, a perusal thereof would reveal that satisfaction to detain the petitioner under section 3(2) of the Act, 1980 has been drawn on the basis of petitioner's activity of illegal sand mining from Yamuna river bed with reference to case crime no.247 of 2018 by referring to past criminal history of the petitioner which discloses, that apart from other offences, there were cases registered against the petitioner in the past also in respect of illegal mining. However, the main ground is with reference to the activity of the petitioner that gave rise to case crime no.247 of 2018 (supra), dated 11.07.2018.

5. The allegation in the grounds of detention is that on 11.7.2018, the employees of the Irrigation Department

had found that at a distance of 15.800 kilometer from the embankment, which has been made to protect Noida region from the flood water of river Yamuna, an artificial embankment, by dumping mud, has been made by sand mafia on the river bed to carve out a road to carry out illegal sand mining operations from the river bed, which had the disturbed the flow of the river thereby diverting the river flow and allowing stagnation of water. It is alleged that this illegal check on the even course of the river water has potential to disturb the ecology of the river system, its flora and fauna, and may even spread diseases and thereby disturb the public order. It is alleged that the petitioner with his father has been involved in such activity and because of their strong hold and past antecedents no body dares to report against them or be a witness against them, therefore, as the petitioner is currently in jail in three cases, out of which he has obtained bail in case crime no.247 of 2018 and has applied for bail in the remaining two cases mentioned above, and there is likelihood that he would be released on bail and repeat such activity, with a view to prevent him from repeating such act, which has potentiality to disturb public order, his detention under the Act was considered necessary.

6. The learned counsel for the petitioner has submitted that the grounds of detention nowhere alleges that the illegal mining on the river bed was being done by challenging the police authorities or the officials of the Mining Department. It has been argued that although it has been narrated that the alleged illegal mining had the potential to cause floods, spread of diseases but there is nothing in the grounds of detention which may reflect that any such event actually occurred. It has also been argued that the grounds of detention enumerates the past criminal history of the petitioner but the relevant details of those cases such as the current status of those cases, the FIR of those cases, bail orders, etc have not been supplied. Hence, there is suppression of relevant material. It has also been urged that the petitioner was in jail in connection with six cases but, while recording satisfaction that there is likelihood of the petitioner being released from jail, awareness of incarceration in respect of three cases only has been shown and no awareness of his incarceration in three other cases has been shown. This has vitiated the satisfaction due to non application of mind on relevant material. It has also been urged that copy of the bail application and the bail order passed in respect of case crime no.247 of 2018 has not been placed before the detaining authority, which was a relevant material, and, therefore, the satisfaction has vitiated for non consideration of relevant material. In a nutshell, the points placed by the learned counsel for the petitioner to assail the order of detention can be summarized as follows:

(a) The illegal mining activity of the petitioner referred to in the grounds of detention does not have the potential to disturb public order as is the case taken inasmuch as it is a mere breach of law and order for which detention under the Act, 1980 is not justified. More so, when only apprehension of disturbance of the ecological system is expressed and not that it was actually disturbed.

(b) The grounds of detention reflects that the petitioner has a criminal history of 16 cases but neither the relevant documents / materials with

reference to the narrated criminal history have been provided nor the current status of those cases have been disclosed, particularly, when several of the cases mentioned were over five years old and were therefore stale.

(c) The detaining authority has shown awareness with regard to incarceration of the petitioner in Case Crime Nos. 264 of 2018; 20 of 2019; and 247 of 2018 (in respect of which bail order had already been passed), whereas from the counter filed by the Jailor it transpires that at the time of passing and issuance of the order of detention, since much before, the petitioner was incarcerated in District Jail, Gautam Budh Nagar in connection with three other cases also. Lack of awareness in respect of incarceration of the petitioner in three other cases and non-recording of satisfaction with regard to the petitioner's likely release on bail in those three other cases also, has vitiated the detention order as there, therefore, existed no real possibility that the petitioner was likely to be released from jail in near future and indulge in activity prejudicial to the maintenance of public order.

(d) That the bail application and the bail order in respect of case crime no.247 of 2018, which was relevant material as it contained the defence of the petitioner, has not been supplied to the detaining authority hence the subjective satisfaction is vitiated for non-application of mind on relevant material.

(e) That on similar grounds an order of detention was passed against the father of the petitioner, namely, Sanjay Chaudhary, on 28.8.2018, which was challenged by him through Habeas Corpus Petition No. 4024 of 2018, which was allowed on 11.4.2019, after exchange of affidavits, but the District Magistrate has not been apprised by the sponsoring authority that the detention of co-accused, Sanjay Chaudhary, has been set aside, therefore, the satisfaction of the District Magistrate stands vitiated for non-application of mind on relevant material.

7. **Per contra,** Sri Deepak Mishra, learned AGA, who has appeared on behalf of the respondents no. 2, 3 and 4, and the learned counsel for the Union of India, submitted that the grounds of detention are referable to breach of public order inasmuch as the activity of the petitioner had the potentiality to disrupt the ecology of the river system resulting in flood, stagnation of water, disruption of supply of potable water and spread of diseases, therefore the activity of the petitioner affects the community at large. Hence, the District Magistrate was legally justified in taking a decision to pass an order of detention to prevent the petitioner from indulging in activity prejudicial to the maintenance of public order.

8. It has been contended on behalf of the state respondents that the past criminal antecedents have been enumerated to demonstrate that the petitioner has propensity for such illegal mining activities and is likely to repeat the same on being released whereas for the purposes of taking decision to impose order of detention the current activity of the petitioner in connection with case crime no.247 of 2018 has been taken into account which by no means can be considered stale.

9. Sri Mishra further contended that the order of detention passed against the father of the petitioner was not set aside on merits but on the ground that there had

been delay in consideration of the representation submitted by the detenu therefore continued detention of that petitioner was rendered illegal. Hence, the same was not a relevant material.

10. In respect of petitioner's counsel submission that the detention order is vitiated because no awareness has been shown that the petitioner was already in jail in three other cases, the learned AGA submitted that the district magistrate has shown awareness that the petitioner is in jail and that there is likelihood of his being released on bail therefore the detention order would not vitiate even if he has not recorded satisfaction in respect of three other cases.

11. In respect of non-supply of copy of bail order and bail application of the petitioner in case crime no.247 of 2018 it has been submitted that as to how the said bail application and bail order was relevant has not been demonstrated and therefore nothing much turns on that.

12. We have given thoughtful consideration to the rival submissions and perused the record carefully.

13. From a perusal of the record, we find that the Case Crime No. 247 of 2018, which has been made basis for passing the order of detention, was registered at the instance of Dheeraj Kumar, Sinch Pal, an employee of the Irrigation Department. The FIR of that case was lodged on 12.7.2018 against unknown person. The allegation in the FIR is to the effect that for the purposes of providing protection to the area (Noida) from the water of river Yamuna, a dam has been put at Yamuna Doab near Hindon river. At a distance of about 15.800 kilometer from that dam, near Village Tilbara, illegal sand mining was being carried out. The FIR alleges that a pavement was made on the river bed to carry out mining operations which had affected proper flow of the river. In the FIR, it is alleged that unknown persons use the pavement for mining in the night hours though no mining machine was seen during day hours.

14. In the grounds of detention it has been stated that during investigation it was found that these mining operations were carried out by the petitioner in association with his father and others in an organized manner with the help of machines and excavators and the operations were so large scale that the river flow was affected thereby causing serious threat to the ecology and the river system. Though it may not have been shown that this activity was accompanied by act of violence but there is subjective satisfaction shown with regard to serious ecological impact which had the potentiality to affect the community at large. In ***State of T.N. v. Kethiyan Perumal, (2004) 8 SCC 780***, the apex court had approved the detention order where it was passed on the ground that large scale illegal felling of sandalwood trees was impacting the ecological system which had the potentiality to disturb the public order. In the instant case, it is not illegal sand mining alone but also diversion of the river stream for that end. Such activity, in our view, would have the potentiality to disturb the public order as it would affect the life of the community at large by exposing them to the threat of floods, breeding of mosquitoes in stagnant pool of water, contamination of water resources resulting in spread of diseases, etc. We may observe that power to detain a person under section 3(2) of

the Act, 1980 can be exercised to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community. As the object of the Act, 1980 and its provisions is to prevent an act prejudicial to the maintenance of public order or security of State or supplies and services essential to the community, and not to punish for its breach, once satisfaction is recorded that a person's activity has the potentiality to prejudice the maintenance of public order, power under section 3 (2) of the Act, 1980 can lawfully be exercised notwithstanding whether any substantial damage to the river system and its ecology had actually taken place or not. Under the circumstances, the contention of the learned counsel for the petitioner that petitioner's activity was not at all referable to the grounds on which a detention order could be passed under the Act, 1980 is rejected.

15. However, we find merit in the points (c) and (d) raised by the petitioner's counsel, as culled out above. But before we proceed to disclose the reasons as to why those grounds have appealed to us, it would be useful for us to examine the law as to when a preventive detention order can be passed against a person who is already in jail in connection with some case. The law as to when a preventive detention order can be passed in respect of a person who is already in jail started developing from the observations made by a Constitution Bench of the Apex Court in the case of ***Rameshwar Shaw v. D.M. Burdwan, AIR 1964 SC 334.*** In ***Rameshwar Shaw's case (supra),*** the apex court held as follows:

"13. The question which still remains to be considered is: can a parson in jail custody, like the petitioner, be served with an order of detention whilst he is in such custody? In dealing with this point, it is necessary to State the relevant facts which are not in dispute. The petitioner was arrested on January 25, 1963. He has been in custody ever since. On February 15, 1963 when the order of detention was served on him, he was in jail custody. On these facts, what we have to decide is: was it open to the detaining authority to come to the conclusion that it was necessary to detain the petitioner with a view to prevent him from acting in a prejudicial manner when the petitioner was locked up in jail? We have already seen the logical process which must be followed by the authority in taking action under Section 3(l)(a). The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by an order of detention. If this question is answered against the petitioner, then the detention order can be properly made. It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not

detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under Section 3(1)(a), and this basis is clearly absent in the case of the petitioner. Therefore, we see no escape from the conclusion that the detention of the petitioner in the circumstances of this case, is not justified by Section 3(1)(a) and is outside its purview. The District Magistrate, Burdwan who ordered the detention of the detenu acted outside his powers conferred on him by Section 3(1)(a) when he held that it was necessary to detain the petitioner in order to prevent him from acting in a prejudicial manner. That being so we must hold that Mr Garg is right when he contends that the detention of the petitioner is not justified by Section 3(1)(a)."
(Emphasis Supplied)

16. Following the decision rendered in ***Rameshwar Shaw's case (supra), in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : 1986 SCC (Cri) 490***, in absence of recording of satisfaction by the detaining authority, either in the grounds of detention or the order of detention, with regard to the detenu being already in jail and that there was imminent possibility of his being released on bail, a two-judges Bench of the Apex Court scrutinized the affidavit filed by the District Magistrate to find out whether there existed any satisfaction in that regard. Upon finding that there existed none, the apex court quashed the order of detention. The relevant portion of the judgment is extracted below:

"5.....From the affidavit of the District Magistrate it does not appear that either the prospect of immediate release of the detenu or other factors which can justify the detention of a person in detention were properly considered in the light of the principles noted in the aforesaid decision and especially in the decisions in Rameshwar Shaw v. District Magistrate, Burdwan and Ramesh Yadav v. District Magistrate, Etah, though there was a statement to the effect that the petitioner was in jail and was likely to be enlarged on bail. But on what consideration that opinion was expressed is not indicated especially in view of the fact that the detenu was detained in a murder charge in the background of the fact mentioned before. His application for bail could have been opposed on cogent materials before the court of justice.

6. In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified.

7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. ***If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent.*** *Eternal vigilance on the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. I****n the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody.*** *Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration.*

8. .....

9. The order of detention, therefore, is set aside....."
(Emphasis Supplied)

17. In ***N. Meera Rani v. Govt. of T.N., (1989) 4 SCC 418 : 1989 SCC (Cri) 732***, a three-judges Bench of the Apex Court in paragraphs 22 and 23 of the judgment, as reported, observed /held as follows:

"22. We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities,

the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position.
23. Applying the above settled principle to the facts of the present case we have no doubt that the detention order, in the present case, must be quashed for this reason alone. The detention order read with its annexure indicates the detaining authority's awareness of the fact of detenu's jail custody at the time of the making of the detention order. However, there is no indication therein that the detaining authority considered it likely that the detenu could be released on bail." (Emphasis Supplied)

18. In ***Kamarunnissa v. Union of India, (1991) 1 SCC 128 : 1991 SCC (Cri) 88***, a two-judges Bench of the Apex Court, after going through the earlier decisions including the decision in Rameshwar Shaw's case (supra), observed and summarized the legal principles as follows:

"12. In Vijay Narain Singh this Court stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in Ramesh Yadav v. District Magistrate, Etah this Court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State of Maharashtra the same principle was reiterated. In Binod Singh v. District Magistrate, Dhanbad it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedoms of the citizens. This Court, therefore, emphasized that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained. That is why in Abdul Razak Abdul Wahab Sheikh v. S.N. Sinha, Commr. of Police this Court held that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of actual detention and that cogent and relevant material disclosed the necessity for making an order of detention. In that case the detention order was quashed on the ground of non-application of mind as it was found that the detaining authority was unaware that the detenu's application for being released on bail was rejected by the Designated Court. In N. Meera Rani

v. State of Tamil Nadu the case law was examined in extenso. This Court pointed out that the mere fact that the detenu was in custody was not sufficient to invalidate a detention order and the decision must depend on the facts of each case. Since the law of preventive detention was intended to prevent a detenu from acting in any manner considered prejudicial under the law, ordinarily it need not be resorted to if the detenu is in custody unless the detaining authority has reason to believe that the subsisting custody of the detenu may soon terminate by his being released on bail and having regard to his recent antecedents he is likely to indulge in similar prejudicial activity unless he is prevented from doing so by an appropriate order of preventive detention. In Shashi Aggarwal v. State of Uttar Pradesh it was emphasized that the possibility of the court granting bail is not sufficient nor is a bald statement that the detenu would repeat his criminal activities enough to pass an order of detention unless there is credible information and cogent reason apparent on the record that the detenu, if enlarged on bail, would act prejudicially. The same view was reiterated in Anand Prakash v. State of Uttar Pradesh and Dharmendra case. In Sanjay Kumar Aggarwal v. Union of India the detenu who was in jail was served with a detention order as it was apprehended that he would indulge in prejudicial activities on being released on bail. The contention that the bail application could be opposed, if granted, the same could be questioned in a higher forum, etc. was negatived on the ground that it was not the law that no order of detention could validly be passed against a person in custody under any circumstances.

13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. What this Court stated in the case of Ramesh Yadav was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention."

19. In ***Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596***, before a three-judges Bench of the Apex Court a question arose whether a preventive detention order can be lawfully passed against a person already in jail even if he had not applied for bail. While holding that, in certain circumstances, it can be passed, in paragraphs 8 to 11 of the judgment, the apex court observed / held as follows:

"8. It has been held in T.V. Sravanan v. State, A. Shanthi v. Govt. of T.N., Rajesh Gulati v. Govt. of NCT of Delhi, etc. that if no bail application was pending and the detenu was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. These decisions appear to have followed the Constitution Bench decision in Haradhan Saha v. State of W.B. wherein it has been observed: (SCC p. 209, para 34):

"34. ... where the person concerned is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or public order."

9. On the other hand, Mr Altaf Ahmed, learned Senior Counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in A. Geetha v. State of T.N. and Ibrahim Nazeer v. State of T.N. wherein it has been held that even if no bail application of the petitioner is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

11. In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained."

20. In ***Champion R. Sangama Vs. State of Meghalay and another (2015) 16 SCC 253,*** the Apex Court, after following its decision in ***Kamarunnissa's case (supra)***, quashed the order of detention upon finding that the detenu was already in jail and the detaining authority had not recorded satisfaction that there was reliable material before the authority on the basis of which it would have reason to believe that there was real possibility of his release on bail. The relevant portion of the decision is found in paragraphs 14 and 15 of the judgment, as reported, and the same is extracted below:

"14. In the instant case, though the detention order and even the grounds of detention record the factum of the appellant's being in custody, no satisfaction has been recorded by the detaining authority that there was reliable material before the authority on the basis of which it would have reasons

to believe that there was real possibility of his release on bail. It is not mentioned as to whether any bail application was even moved by the appellant or not, what to take out likely fate of such an application. The order is also conspicuously silent on the aspect as to whether there was any probability of indulging in activity if the appellant would be released on bail. On the contrary, we are amazed that the averments made in the counter-affidavit which are self-defeating and clinching the issue against the respondent at p. 171 Para 3 of the paper book which reads as under:

"3. I state that the submission of the learned Senior Counsel for the petitioner that the detaining authority was satisfied that there was some likelihood of the petitioner being released on bail and thereafter the detention order was passed to prevent such contingency is completely unfounded. In fact the detention order was passed on 29-1-2013 and from the detention order it no way reflects that with a view to pre-empt the petitioner from getting the bail in the pending 8 criminal cases that the detention order 2013 was passed. In fact after noticing the fact that the petitioner was arrested by the police in various unlawful activities and crimes like extortion, dacoity, kidnapping, murder and robbery with deadly weapons for ransom, for disruption of public order, etc. and being satisfied that if the petitioner is allowed to remain at large he would act in a manner prejudicial to the security of the State and shall be a constant threat to peace that the detention order was passed under Section 3(1) of the Meghalaya Preventive Detention Act, 1995."

15. We, thus, have no option but to hold that the detention order suffers from material illegality, thereby vitiating the same. This appeal is accordingly allowed, setting aside the impugned judgment of the High Court and quashing the detention order."

21. In the case of **Union of India and Another v. Dimple Happy Dhakad (Criminal Appeal No.1064 of 2019, arising out of SLP (Cri) No.5459 of 2019**, decided on 18th July, 2019, the detention under question was under the COFEPOSA Act and the detenu was already in jail in connection with an offence punishable under Section 135 of the Customs Act, 1962, for which the maximum sentence is seven years, in the context of the facts of that case, without disturbing the law already settled earlier, the Apex Court observed, in paragraph 35 of its judgment, that though in the detention orders, the detaining authority has not specifically recorded that the "detenu is likely to be released", it cannot be said that the detaining authority has not applied its mind. The Apex court in that case found that the detaining authority had noticed the antecedents of the detenues and recorded its satisfaction that detenues Happy Dhakad and Niyasar Aliyar have high propensity to commit such offences in future. The Apex Court observed in paragraph 36 of the judgment that the satisfaction of the detaining authority that the detenu is already in custody and he is likely to be released on bail and, on being released, he is likely to indulge in the same prejudicial activities is the subjective satisfaction of the detaining authority and, when based on materials, is not to be interfered with. In that background, the Apex Court set aside the order of the High Court, which had quashed the detention order on the ground that the detaining authority had not

expressly recorded a finding that there was real possibility of the detenues being released on bail.

22. After noticing all the above decisions, a Division Bench of this court in **Habeas Corpus Petition No.437 of 2019 : Kumail v. State of U.P. & others, decided on 1.8.2019**, summarized the legal position as under:

"A conspectus of the decisions of the apex court noticed above would show that the law is that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. The reason to believe that there is likelihood or real possibility of the person being released on bail must be based on cogent material and not mere ipse dixit of the authority. Such satisfaction can be drawn on the basis of reports of the sponsoring authority, the nature of the offence(s) in connection with which the detenu is in jail as also the facts and circumstances of that case including grant of bail to co-accused or general practice of courts in such matters. But once challenge is laid with regard to existence of such satisfaction, then the detaining authority in its return / affidavit must disclose existence of such satisfaction and the materials on the basis of which it has been drawn. However, if in the return it is demonstrated that satisfaction was drawn and there existed material to draw such satisfaction, the same cannot ordinarily be interfered with on the ground of insufficiency of material."

23. Thus, from the law noticed above, what is clear is that where a person is already in jail at the time of issuance of preventive detention order, the detaining authority must not only be aware that the person is already in jail but must, inter alia, have reason to believe on the basis of reliable material placed before it that there is a real possibility of his being released on bail. It necessarily follows that where a person is in jail in connection with many criminal cases, satisfaction that he is likely to be released on bail would have to be drawn by keeping in mind all those cases because how could one gain freedom by getting bail in one case when there are other cases also to detain him in jail. Hence, the detaining authority ought to be aware of all those cases, particularly those that relate to non-bailable offences, in connection with which the detenu is already in jail, at the time of passing/ issuance of the order of preventive detention. A fortiori, the sponsoring authority is under an obligation to provide information to the detaining authority of all those cases in connection with which the detenu is already in jail, particularly those which concern non-bailable offences, so that the detaining authority has all the material before it, at the time of passing/ issuance of detention order, to draw satisfaction

whether an order of preventive detention is required or not.

24. In ***Ahamed Nassar v. State of T.N., (1999) 8 SCC 473,*** the apex court observed: "A man is to be detained in the prison based on the subjective satisfaction of the detaining authority. Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision."

25. In ***A. Sowkath Ali v. Union of India, (2000) 7 SCC 148***, the apex court had observed: "This Court has time and again laid down that the sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on its own opinion. *All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before him.* Of course a document which has no link with the issue cannot be construed as relevant."

26. From the law noticed above, it is clear that at the time of issuance of the detention order the sponsoring authority has to place before the detaining authority all those materials that are in its possession and are likely to affect the mind of the detaining authority whether to pass the order of detention. In absence whereof, the subjective satisfaction gets vitiated due to non-application of mind on relevant material.

27. In the instant case, we find from the return of the Jailor that the petitioner was under judicial custody in connection with six cases whereas, in the grounds of detention, awareness regarding detention has been shown with reference to three cases only. Moreover, from the report of the sponsoring authority also it does not appear that the detaining authority was informed that the petitioner was in jail in connection with three other cases also, as noticed above. It thus becomes clear that the information in respect of incarceration of the petitioner in three other cases was not placed before the detaining authority at the time of passing the order of detention. We may put on record that the three other cases with regard to which no awareness is shown by the detaining authority were case crime nos. 51 of 2019; 977 of 2015 (appears to be 2014 from the chart); and 50 of 2019. All these cases related to non-bailable offences. In case crime no.977 of 2014 one of the charging section was 307 IPC in which, ordinarily, bail is not for the asking. Therefore, in absence of awareness about incarceration of the petitioner in those cases also and non-disclosure of satisfaction that there is likelihood of the petitioner being released on bail in those cases also, one of the necessary conditions that must exist to enable exercise of power to detain a person already in jail, under preventive detention laws, is lacking, which, in our view, has vitiated the impugned order of detention inasmuch as it was possible that had the detaining authority been made aware that there were three more cases to prevent the

petitioner from coming out of jail he might not have considered necessary to pass the order of detention. We, accordingly, accept the point (c) raised by the learned counsel for the petitioner to challenge the order of detention.

28. In respect to point (d) raised by the learned counsel for the petitioner to assail the detention order, we find that admittedly the petitioner was granted bail in case crime no.247 of 2018 by the time of issuance of the detention order. In paragraph 39 of the petition the petitioner has stated that neither the bail order nor copy of the bail application was placed before the detaining authority of which there is no specific denial in paragraph 28 of the counter affidavit which deals with paragraph 39 of the petition. Rather, in paragraph 28 of the counter affidavit, it is stated that since the bail application was filed by the petitioner himself therefore he is aware of its contents hence he suffered no prejudice by its non-supply to him. The said reply is neither here nor there as the petitioner had stated that the bail application and bail order, which was relevant material, was not placed before the detaining authority, but to evade a reply to the said statement an altogether different statement has been made. Thus, it can be assumed that copy of the bail application and bail order passed in reference to case crime no.247 of 2018 was not placed before the detaining authority.

29. Ordinarily, a bail application contains the defence of the applicant and when that gets allowed by the court, the bail application and the bail order assumes importance to demonstrate possibility of false implication. Sometimes, bail is conditional. Those conditions, at times, may be relevant as to whether, keeping in mind those conditions, a detention order is required. Hence, the apex court has held ***(vide M. Ahamedkutty v. Union of India, (1990) 2 SCC 1; P.U. Abdul Rahiman v. Union of India, 1991 Supp (2) 274; Rushikesh Tanaji Bhoite v. State of Maharashtra, (2012) 2 SCC 72)*** that, ordinarily, a bail application and bail granting order, particularly, when it is a speaking order, concerning a non-bailable offence, is a relevant material which ought to be placed before the detaining authority before issuance of the order of detention and in absence whereof the satisfaction gets vitiated due to non-application of mind on relevant material.

30. As we have already found that there is no specific denial to the statement made in paragraph 39 of the writ petition that the bail application and the bail order of the petitioner in reference to case crime no.247 of 2018, which was relevant, was not placed before the detaining authority, in our considered view, on this ground also, the subjective satisfaction of the detaining authority stood vitiated as it failed to take notice of the contents of the bail application and the bail order passed in favour of the petitioner pertaining to case crime no.247 of 2018.

31. Since we have already found that the impugned detention order got vitiated on account of withholding of relevant material / information from the detaining authority, we do not propose to examine the other two points urged by the learned counsel for the petitioner.

32. For the reasons recorded above, the habeas corpus petition is allowed. The impugned detention order dated

06.06.2019 and the subsequent order of confirmation and extension of the period of detention are hereby quashed. The petitioner shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

(2019)11ILR A330

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 15191 of 2019

Sri Kant ...Tenant/Petitioner
Versus
Mool Chand & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohd. Sarwar Khan

Counsel for the Respondents:
Sri Dharmendra Kumar Dwivedi

A. Civil Law-UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Rule 15 (3) - Rent case- release application under Section 21(1) of the Act- decided within two months from the date of its presentation- expeditious disposal of rent cases is the statutory mandate- the defendant-tenant/petitioner is very affluent person- grossly abused the process of Court to delay the disposal of the P.A. Case filed by the poor landlord- contesting the case from last more than 35 years to get the disputed shop so as to carry on his business but on one pretext or the other the defendant-tenant/petitioner is not allowing the matter to be concluded-The appeal is being kept pending by moving successive applications-Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure-duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases.
(Para 11,20)

Writ petition dismissed with exemplary cost of Rs.50,000/- (E-7)

List of cases cited:-

1. Avinash Chandra Tiwari Vs ADJ (2010) 2 ARC 84

2. Mohd. Ali Vs Prescribed Authority, Moradabad & ors. Writ - A No. 31854 of 2017

3. M/s. Gujrati Namkeen Bhandar Vs Ratan Lal Gupta & 3 ors. (Matters Under Article 227 No. 5625 of 2017)

4. Dnyandeo Sabaji Naik and another Vs Pradnya Prakash Khadekar & ors. (2017) 5 SCC 496 (paras 12,13 & 14)

5. Haryana State Cooperative Labour & Construction Federation Limited Vs Unique Cooperative Labour and Construction Cooperative Society Limited & anr. (2018) 14 SCC 248.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Mohd. Sarwar Khan, learned counsel for the defendant-tenant/petitioner and Sri Dharmendra Kumar Dwivedi, learned counsel for the plaintiffs-landlords/respondents.

2. Briefly stated facts of the present case are that the plaintiff - Deepchand was the owner and landlord of house bearing Municipal No.246/1 (New No.276/1), Mohalla - Tartala, Pargana -

Haveli, District - Jaunpur. There is a shop in the said house in which one Ram Krishna Rokadia (original tenant) was a tenant at a monthly rent of Rs.10/-. After the death of the original tenant, the tenancy was succeeded by his three sons, namely, Purshottam, Ram Niwas and Sri Niwas. The aforesaid original owner and landlord filed a P.A. Case No.16 of 1984 for eviction of the defendant-tenant/petitioner on the ground of his bonafide need of the disputed shop for setting up business. It was stated in paragraph 5 of the Release Application dated 01.08.1984, that the plaintiff No.1 is intermediate pass and trained in electronics and want to do his business, plaintiff nos. 2 and 4 are Karigar (Artisan) of sweetmeat but due to non availability of a shop they are unemployed and plaintiff no.3 is carrying on tea stall on Chabutara (raised platform) of Arya Samaj Mandir. The plaintiff gave details of huge immovable properties and houses owned by the defendant-tenant in Jaunpur City and Malegaon in Nasik. They stated that the defendant no.3 - Sri Niwas is a Government Servant employed as Entertainment Inspector. It has also been stated that the defendants owned a big house at the main road, Mandi Naseeb Khan, Jaunpur, measuring 90 feet x 25 feet in which about 50 shops have been constructed. Thus, briefly on these facts the plaintiffs-landlords/respondents filed the aforesaid P.A. Case No.16 of 1984, under Section 21(1) of the U.P. Act XIII of 1972, which was allowed by the Prescribed Authority by judgment dated 28.07.1986, against which the defendant-tenant/petitioner filed a Rent Appeal No.16 of 1986 which was allowed by judgment and order dated 06.12.2005 and the matter was remanded to the Prescribed Authority. The order of remand was challenged by the plaintiffs in Writ - A No.14687 of 2006, which was dismissed by this Court by Order dated 02.01.2013. During remand proceedings before the Prescribed Authority, the defendant-tenant moved successive applications. One such application was moved for issue of Commission which was ultimately allowed by this Court by order dated 01.10.2015 in Writ Petition No.56071 of 2015 and the Commission submitted his report dated 21.11.2015. In the mean time on 29.07.2015, the defendant-tenant filed an additional written submissions making averment that the Gumti (Kiosk) kept on Chabutara of Arya Samaj for carrying out tea stall by the plaintiff, has been converted in Pakka construction.

3. Thereafter on 20.12.2016, the defendant-tenant/petitioner filed an application 380 Ga and also an application 384 Ga for issue of Commission which were rejected by order dated 05.01.2017, passed by the Prescribed Authority/Civil Judge (S.D.), Jaunpur. In the said order the Prescribed Authority observed that earlier a Commission was issued in the year 1985 which submitted its report being paper No.91 Ga and 92 Ga that the plaintiff has kept a Gumti over the Arya Samaj Mandir land/Chabutara to carry on tea stall. The Prescribed Authority also observed about the **conduct of the defendant-tenant** as under:-

" मुकदमा 33 वर्षो से लम्बित है और विपक्षी कोई न कोई प्रार्थना–पत्र देकर मुकदमें को विलम्बित करता चला आ रहा है। विपक्षी का प्रार्थना–पत्र मैलाफाइडी है और पोषणीय नही है। ----------

प्रार्थना–पत्र 380ग और 384ग दोनों ही प्रार्थना–पत्र विपक्षी पक्ष की ओर से वाद को लम्बित रखने की मंशा से प्रस्तुत किया जाना दर्शित होता है और पत्रावली के सम्यकरूपेण परिशीलन से विपक्षी पक्ष का जो आचरण दर्शित होता है, वह यह दर्शित होता है कि पूर्व में भी विपक्षी पक्ष का आचरण येन–केन–प्रकारेण वाद को विलम्बित रखने का रहा है। विपक्षी पक्ष न केवल वाद के विचारण को इस न्यायालय के समक्ष विलम्बित कर रहा है, बल्कि माननीय उच्च न्यायालय की मंशा को भी विफल करना चाहता है और जिसे स्वीकार नहीं किया जा सकता है। उपरोक्त परिस्थितियों में प्रार्थना–पत्र 380ग एवं 384ग निरस्त होने योग्य है ही परन्तु उक्त दोनो प्रार्थना–पत्र भारी हर्जाने के साथ निरस्त होने योग्य है ताकि इस प्रकिया को हतोत्साहित किया जा सके कि आशयपूर्वक कोई भी पक्षकार वाद को विलम्बित न करें और न ही माननीय उच्च न्यायालय की मंशा को विलम्बित करने का प्रयास कर सके।''

4. Against the aforesaid order of the Prescribed Authority, dated 05.01.2017, rejecting the application 380 Ga and 384 Ga, the defendant-tenant/petitioner - Sri Kant filed Writ - A No.2381 of 2017 and the writ petition was disposed of observing that there is no good reason to entertain it. However, it was left open to the petitioner to challenge the correctness of the order and raise appropriate pleading before the appellate court in the event the Prescribed Authority takes a decision against the tenant-petitioner. Thereafter, the aforesaid P.A. Case No.16 of 1984 was allowed by judgment and order dated 03.04.2017, passed by the Prescribed Authority/Civil Judge (S.D.), Jaunpur, and the disputed shop was released. A finding of fact was also recorded that the tea stall being carried on over the Chabutara of Arya Samaj Mandir is temporary and it is not owned by the plaintiff and Plaintiff's bonafide need for the disputed shop and comparative hardship to be in his favour was found proved.

5. Aggrieved with the judgment and order of the Prescribed Authority dated 03.04.2017, the defendant-tenant/petitioner Sri Kant filed a Rent Control Appeal No. 1 of 2017 (Sri Kant and others Vs. Mool Chand and Others).

6. **In the said appeal, the defendant-tenant/petitioner again started moving successive applications. He moved application 46 Ga for the same purpose for which he earlier moved an application 380 Ga and 384 Ga which were rejected by the Prescribed Authority by order dated 05.01.2017 and the Writ - A No.2381 of 2017, challenging it was disposed of by order dated 18.01.2017 as aforementioned. The application 46 Ga has been rejected by order dated 20.04.2019, passed by the 4th Additional District Judge, Jaunpur. Against this order the defendant-tenant/petitioner moved a recall application 55 Ga which has been rejected by the impugned order dated 09.07.2019.**

7. Aggrieved with these two orders, namely, the orders dated 20.4.2019 and 09.07.2019, the defendant-tenant/petitioner has filed the present writ petition under Article 226 of the Constitution of India.

8. Despite insistence learned counsel for the tenant-petitioner has not made any submission except that the matter may be considered leniently.

9. Learned counsel for the plaintiffs-landlords/respondents supports the impugned orders.

10. I have carefully considered the submissions of learned counsels for the parties.

11. Rule 15 (3) of the UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, provides that every release application under Section 21(1) of the Act shall as far as possible be decided within two months from the date of its presentation. Thus, expeditious disposal of rent cases is the statutory mandate.

12. I have very briefly noted facts of the present case which leaves no manner of doubt that the defendant-tenant/petitioner is very affluent person. He has grossly abused the process of Court to delay the disposal of the P.A. Case filed by the poor landlord. The poor landlord is contesting the case from last more than 35 years to get the disputed shop so as to carry on his business but on one pretext or the other the defendant-tenant/petitioner is not allowing the matter to be concluded. The appeal is being kept pending by moving successive applications. Liberty was granted to the defendant-tenant/petitioner by this Court by order dated 18.01.2017 in Writ A No.2381 of 2017 to challenge the correctness of the order dated 05.01.2017 in appeal if the Prescribed Authority takes decision against him but instead of arguing the appeal on merits the defendant-tenant/petitioner continued with his design to move successive applications to delay disposal of the Appeal. He moved application 46 Ga for the same purpose for which he earlier moved application 380 Ga and 384 Ga which were rejected on merit.

13. Deliberately, the defendant-tenant/petitioner has not filed copy of the judgment and order dated 03.04.2017, passed by the Civil Judge (S.D.)/Prescribed Authority, Jaunpur, deciding the P.A. Case No.16 of 1984. However, on being asked a photo stat copy of it has been produced by the learned counsel for the defendant-tenant/petitioner.

14. In the impugned order, the appellate court has recorded cogent reasons for rejecting the application 46 Ga. Therefore, the impugned order dated 20.04.2019 requires no interference. Since the order dated 20.04.2019 was passed on merit, therefore, the recall application 55 Ga was lawfully rejected by the Appellate Court by the impugned order dated 09.07.2019.

15. Apart from above, It is settled law that local inspection or Commission by court is made only in those cases where on the evidence led by the parties, Court is not able to arrive at a just conclusion either way or where the court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or Commission. Local inspection or issue of Commission by the court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence.

16. In the case of **Avinash Chandra Tiwari Vs. ADJ 2010(2) ARC 84** the Lucknow bench of this court referred to several decisions on the question of issue of commission and held as under:

"11. To go for local inspection or issue of commission for the proper disposal of the controversy pending is a sole prograative of the Court to decide whether to move the same or not. Hence, it is late in a day to quarrel that it is not mandatory on the part of the Court to issue commission. When an application is moved for the said purpose. The local inspection or commission by court is made only in those cases where on the evidence led by the parties, Court is not able to arrive at a just conclusion either way or where the court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or commission. Local inspection or issue a commission by the court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence. (See Randhir Singh Sheoran Vs. 6th Additional District Judge, 1997(2) JCLR 860 and Radhey Shyam Vs. A.D.J., Court no. 13, Lucknow and others, [2010(2) A.D.J., 758].

12. Further, in the present case as stated herein above, the opposite party no. 1 on the basis of the material facts on record given a categorical finding that at this stage, it is not necessary to issue commission, accordingly, rejected the application for issue of the Advocate/Commissioner, moved by the petitioner. Further the court below held that if the application for issue of commission is allowed the same will linger the matter unnecessary, as appeal is pending since the year 2006. The said view taken by the opposite party no. 1 is in accordance with law as laid down by this Court in the case of Sonpal Vs. 4th Additional District Judge, Aligarh and others, 1992 2 ARC, 596.

13. In the case of Smt. Shamshun Nisha Vs. Ist Additional District Judge, Lucknow and others 1992, (1) ARC page 423, it is held as under :

"By means of the present writ petition, the petitioner challenges the order, dated 13.05.1991, passed by Ist Additional District Judge, Lucknow, contained in Annexure No. 6 by which the petitioner's request for local inspection was rejected by the appellate Court. The appellate Court pointed out that the petitioner had been given sufficient opportunity to rebut the evidence of the expert. However, the fact is not disputed that the appeal is still pending and in appeal only an application for local inspection of the site by the Advocate Commissioner has been rejected. Therefore, in my opinion, the said order cannot be challenged in the writ petition."

14. So far as, the judgment which is relied upon by the learned counsel for the petitioner, the M/s Harihar Sugandh (p) Ltd, Anandi Das Kannauj through it's M.D. Vs. Add. Civil Judge (Senior Division), Court no. 3, Kanpur Nagar [2004(57) ALR 224], (435) Special Duty Collector LA.(Supra) and Radheshyam Rastogi (supra) are not applicable in view of the peculiar facts and circumstances of the instant case.

15. Further in the case of Anandi Das Kannauj through it's M.D. Vs. Add. Civil Judge (Senior Division), Court no. 3, Kanpur Nagar [2004(57) ALR 224], it was held that if an application for issue a commission is rejected then, the same can not be res-judicata for moving another application for issue of the commission for collection of evidence, and in the case of Okhla Enclave Plot holder Welfare Association Vs. Union of India and Others(2009 LAR 51(SC) the Hon'ble Supreme Court after

hearing and examining issues involved in the present case deemed fit to direct appointment of Commissioner, however, in the present case the court below on the basis of the material evidence on record, come to the conclusion that there was no necessity for issue of the commission so the petitioner cannot derive any benefit form the above said judgments.

16. Accordingly, as it is a sole domain of the Court to issue a commission or not and the local inspection or commission can not be claimed as a matter of right by a party, so there is neither any illegality nor infirmity in the order under challenge.

17. For the foregoing reason, the present writ petition filed by the petitioner lacks merit and is dismissed."

17. The principles aforementioned are also supported by the law laid down by this Court in **Mohd. Ali Vs. Prescribed Authority, Moradabad and others, Writ - A No. 31854 of 2017 decided on 29.08.2017 and in M/s. Gujrati Namkeen Bhandar Vs. Ratan Lal Gupta & 3 Ors (Matters Under Article 227 No. 5625 of 2017) decided on 12.09.2017.**

18. Thus, for all the reasons aforestated, I find that the present writ petition is a frivolous petition which has been filed to delay disposal of the Rent Control Appeal No.1 of 2017 arising from the P.A. Case No.16 of 1984. The prescribed Authority has also observed in the order dated 05.01.2017 (relevant portion quoted in para 3 above) about the conduct of the tenant petitioner regarding abuse of process of court.

19. In the case of **Dnyandeo Sabaji Naik and another Vs. Pradnya Prakash Khadekar and others 2017(5) SCC 496 (paras 12,13 & 14)** Hon'ble Supreme Court commended all courts to deal strongly with frivolous petition. The judgement in the case of **Dnyandeo Sabaji Naik (supra)** has been followed by Hon'ble Supreme Court in the Case of **Haryana State Cooperative Labour and Construction Federation Limited Vs. Unique Cooperative Labour and Construction Cooperative Society Limited and another, (2018)14 SCC 248.**

20. In the case of **Dnyandeo Sabaji Naik (supra), Hon'ble Supreme Court held that "Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth. Courts across the legal system - this Court not being an exception - are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure.** Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit

from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and of how successive applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behaviour. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice".

21. Hon'ble Supreme Court commended all courts to deal frivolous filings in the same manner. The law laid down by Hon'ble Supreme Court in **Dnyandeo Sabaji Naik (supra)**, is a binding precedent under Article 141 of the Constitution of India. The subordinate courts are also bound to deal frivolous petitions and abuse of process of Court in the manner as has been commended by Hon'ble Supreme Court as aforesaid.

22. For all the reasons aforestated, I do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby dismissed with exemplary cost of Rs.50,000/- for blatant abuse of process of Court by defendant-tenant/petitioner to delay the disposal of the appeal and for filing frivolous petition. The cost shall be deposited by the defendant-petitioner with the court below within two months from today and on deposit it may be withdrawn by the plaintiffs.

23. It is further provided that the appellate court shall decide the aforesaid Rent Control Appeal No. 1 of 2017, in accordance with law, without being influenced by any of the observations made in the body of this order; within three months from the date of presentation of a certified copy of this order without granting any unnecessary adjournment to either of the parties.

(2019)11ILR A337

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 52198 of 2014

Kishan Chandra ...Petitioner
Versus
Dinesh Chandra & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Kant Singh, Sri Abu Bakht, Sri Pramod Kumar Jain, Sri R.K. Jain

Counsel for the Respondents:
Sri Swapnil Kumar, Sri Sudhanshu Kumar, Ms. Trapti Gupta

A. Civil Law-U.P. Act XIII of 1972 - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- Release application under Section 21- Rent case-Crucial date for release of the accommodation in a rent case on the ground of bonafide need of the landlord- effect of the death of the landlord during pendency of writ petition - legality of direction given by the Appellate Court to the landlord to provide alternative accommodation to the tenant.
(Para 24,26,27)

B. Crucial date for bonafide need in an application for release and effect of subsequent event of death of landlord- "actus curiae neminem gravabit" that "an act of the Court shall prejudice no man" shall also come into operation The need of the landlord for premises in question must exist on the date of application for eviction, which is the crucial date and it is on the said date the tenant incurred the liability of being evicted therefrom- Even if the landlord died during the pendency of the writ petition in the High Court, the bona fide need cannot be said to have lapsed as the business in question can be carried on by his widow or any other son. (Para 24,27)

C. Whether Appellate Court can direct the landlord to provide an alternative accommodation to the tenant in the premises owned or partly owned by his son or wife -.No power has been conferred to issue a direction to the landlord to provide an alternative accommodation to the tenant as a condition for release of the disputed accommodation- the direction of the appellate court to the landlord to provide an accommodation to the respondent-tenant is without jurisdiction. (Para 26,27)

Petition allowed with costs (E-7)

Precedent followed: -

1. Shakuntala Bai & ors. Vs Narayan Das & ors. (2004) 5 SCC 772

2. Shantilal Thakordas & ors. Vs Chimanlal Maganlal Telwala (1976) 4 SCC 417

3. Kamleshwar Prasad Vs Pradumanju Agarwal (Dead) by LRs., (1997) 4 SCC 413

Precedent over -ruled: -

1. Phul Rani & ors. Vs Naubat Rai Ahluwalia, (1973) 1 SCC 688 (Para-21)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

"Crucial date for release of the accommodation in a rent case on the ground of bonafide need of the landlord, effect of the death of the landlord during pendency of writ petition and legality of direction given by the Appellate Court to the landlord to provide alternative accommodation to the tenant, are the main questions involved in this petition."

1- Heard Sri Pramod Kumar Jain, learned Senior Advocated, assisted by Sri

Rishi Kant Singh, learned counsel for the petitioner and Sri Sudhanshu Kumar holding brief of Sri Swapnil Kumar, learned counsel for the defendant-tenant/respondent.

Order on Substitution Application No.03 of 2019

2- The sole petitioner Sri Kishan Chandra has died leaving behind his heirs and legal representatives as mentioned in the prayer clause of the application.

3- Learned counsel for the defendant-tenant-respondent has no objection to the aforesaid substitution application. Therefore, the **Substitution Application is allowed**. Necessary correction in the array of parties be carried out.

Order on Writ Petition

FACTS OF THE CASE

4- Briefly stated facts of the present case are that the original plaintiff Kishan Chandra was the owner and landlord of the disputed house situate in Qasba Jalesar District Etah, measuring 14' x 38". In the said house, the entire ground floor portion, except a shop measuring 3' 9" x 10' 3", was occupied by the father of the petitioner, namely, Sri Prem Chandra as tenant at a monthly rent of Rs.20/-. The aforesaid` other shop measuring 3' 9"x10' 3" was occupied by another tenant Sri Girraj Kishore.

5- The original plaintiff Kishan Chandra was carrying on his business of cloth from a tenant shop which was owned by one Sri Hari Om, who filed a release application under Section 21 of the U.P. Act XIII of 1972 being Case No.47 of 1983, which was decreed and the appeal filed by the original plaintiff/petitioner was dismissed and the shop has been vacated by the plaintiff. Thus, the petitioner was in the need of a shop to start his business.

6- The original tenant Prem Chandra died and the tenancy of the disputed shop was succeeded by his sons, namely, Padam Chandra Jain, Subhash Chandra Jain, Dinesh Chandra Jain, one daughter Smt. Shailesh Jain and the widow Smt. Prabhawati Devi.

7- On the ground of bonafide need of the disputed shop for his business and also for employment of his sons, the original plaintiff/petitioner filed P.A. Case No.02 of 1994 (Kishan Chandra Jain v. Padam Chandra Jain and others), which was decreed after about 20 years by judgment dated 23.2.2006, passed by the Prescribed Authority/Civil Judge (Junior Division), Etah and the disputed shop was directed to be vacated.

8- Against the aforesaid judgment dated 22.3.2006 one of the defendant-tenant/respondent no.1 filed Rent Control Appeal No.02 of 2006 (Dinesh Chandra v. Kishan Chandra and others), which was conditionally allowed by the impugned judgment dated 23.8.2014, passed by the District Judge, Etah directing as under :

"यह रेन्ट कन्ट्रोल अपील अंशतः सशर्त स्वीकार की जाती है तथा विद्वान नियत प्राधिकारी/सिविल जज (जुनियर डिवीजन), एटा द्वारा पारित आदेश दिनांकित **23-02-2006** अंशतः इस प्रकार संशोधित किया जाता है कि भवन स्वामी/प्रत्यर्थी, अपीलार्थी/किरायेदार को विकल्प में

रामगोपाल की किरायेदारी वाली दुकान जिस पर चार मंजिल दुकान की इमारत बनी है अथवा अपनी पत्नी व अपने पुत्र प्रदीप के स्वामित्व वाली दुकान जिसमें चार मंजिल भवन बन रहा और उसमें दो मंजिल पूर्ण हो चुकी है, में से कोई एक दुकान भूतल पर अपीलार्थी/किरायेदार को मार्केट रेट के किराये पर दो माह के अन्दर उपलब्ध करा दे तो अपीलार्थी/किरायेदार प्रश्नगत दुकान को रिक्त करके उसका कब्जा भवन स्वामी/प्रत्यर्थी को दे दे। यदि भवन स्वामी इस विकल्प को स्वीकार नहीं करता है तो यह अपील स्वीकार समझी जायेगी।"

9- Aggrieved with the aforesaid impugned judgment, the original plaintiff/landlord has filed the present writ petition.

10- During pendency of the petition, the original plaintiff Kishan Chandra died on 08.01.2019, leaving behind his widow Vijay Lakshmi, four sons, namely, Pradeep Kumar, Sanjay Kumar, Mukesh Kumar and Rajnedra Kumar and five daughters, namely, Km. Rajni, Km. Alta, Km. Pinki, Km.Bobby and Rupesh Kumari who have been substituted.

11- The P.A. Case No.47 of 1983 filed by the original plaintiff **for release of the small shop in occupation of the tenant Giriraj Kishore** was allowed by the Prescribed Authority. The tenant Girraj Kishore brought the matter up to this Court by filing Writ-A No.49335 of 2014 (Girraj Kishore v. Kishen Chandra) which was dismissed by this Court by order dated 15.9.2014 holding as under:

"Heard Sri A.K. Gupta, learned counsel for the petitioner. Sri P.K. Jain, Senior Advocate, assisted by Sri Rishi Kant Singh, learned counsel has appeared for the respondent.

The petitioner has filed this writ petition challenging the judgments and orders of the courts below allowing the release application of the respondent under Section 21(1)(a) of the U.P. Act No.13 of 1972 (hereinafter referred to as the Act) whereby the shop in dispute has been ordered to be released in favour of the respondent after holding his need to be bona fide and that he would suffer comparatively more hardship than the petitioner.

The submission of Sri A.K. Gupta, learned counsel for the petitioner is that there are two shops. One bigger and the other smaller which is in dispute. The respondent had applied for the release of both the shops. The release application in respect of both of them have been allowed but the appellate court while allowing the release application in respect of the bigger shop has issued direction that the respondent will provide the tenant of the said shop with an alternative accommodation elsewhere on the prevailing market rent whereas no such direction while releasing the smaller shop in dispute has been given though both the judgments are identical and similarly worded.

I have perused the impugned judgments and orders of the courts below.

In allowing the release application under Section 21(1)(a) of the Act it is not incumbent upon the court to direct for providing any alternative accommodation to the tenant. No provision of law has been shown where the tenant can get an alternative accommodation in the event the application of the landlord for the release of the shop has been allowed under Section 21(1)(a) of the Act.

The argument that direction to this effect has been given in favour of the tenant of the bigger shop is of no substance. First for the reason that there is no provision to such an effect. Secondly, the case of the petitioner is different from that of the tenant of the other shop. The petitioner is found to be having an alternative accommodation where he can shift his business. Therefore, it was not considered proper and necessary to issue any direction for providing some alternative accommodation to him.

Sri A.K. Gupta has argued that the appellate court in recording the above finding has not considered the affidavit of the petitioner which was before the prescribed authority that he has no alternative shop with him.

The prescribed authority in its judgment on consideration of the entire evidence has recorded a finding that the petitioner is in possession of a one another shop apart from the shop in dispute which is on rent and that he is having two residential houses which are big enough with sufficient rooms vacant and as such has accommodation available with him to easily shift his business.

In view of above finding of the prescribed authority, it is clear that the petitioner is having an alternative accommodation and therefore, it was not necessary for the appellate court to have issued any direction for providing any additional alternative accommodation to the petitioner.

Sri Gupta, in the end prayed for some reasonable time to vacate the shop in dispute.

Sri Jain, though opposes the prayer but leaves it upon the discretion of the court to grant some reasonable and suitable time if necessary.

In view of above, four months from today is allowed to the petitioner to vacate the shop in dispute provided an undertaking on affidavit is given before the prescribed authority within a period of one month that the petitioner would vacate and handover peaceful possession of the shop in dispute within time allowed as above and at the same time pays all the upto date dues.

Accordingly, the writ petition has no merit and is dismissed with the above condition. "

(Emphasis supplied by me)

SUBMISSIONS-

12- Sri P.K. Jain, learned counsel for the plaintiff-landlord/petitioner submits that during pendency of the release application, the sons of the original plaintiff, namely, Rajendra Kumar and Pradeep Kumar purchased some accommodation in which they raised certain constructions and are occupying those premises for their self use. The original plaintiff was the owner of half portion of the shop under tenancy of Sri Ram Gopal, which was a very small shop measuring 5' x 9' 8" as has also been stated in paragraph-4 and 24 of the writ petition which has not been specifically denied by the defendant-tenant/respondent in paragraph nos. 4 and 16 of the counter affidavit. After the said shop was subsequently vacated by the tenant Ram Gopal, the original plaintiff's son Rajendra Kumar is carrying on business in it after reconstruction. In the inner side of the said shop a stair case has been made to go on the upper floor as reflected in the photographs also. There is no separate passage for the upper floor. That apart, now there are ten co-owners

and landlords of the shop vacated by Sri Ram Gopal. Thus, the appellate court has wrongly directed to provide an alternative accommodation to the defendant-tenant/landlord-respondent no.1 either in the building (Ram Gopal's shop) or in the building owned by Pradeep Kumar or Rajendra Kumar. The lower court has not recorded any finding to reject the bonafide need of the plaintiff. There is no provision under the Rent Control Act, which empowers the court to issue such a direction as given in the impugned judgment. Such a direction is in conflict with law laid down by this Court in Girraj Kishore's case (supra). Except a very small portion, the entire ground floor portion has been occupied by the defendant-tenant/respondent no.1, while the plaintiff was having no place for his business. He, therefore, submits that the impugned judgment of the appellate court deserves to be set aside and the judgment of the trial court deserves to be restored.

13- **Sri Swapnil Kumar, learned counsel for the defendant-tenant/respondent no.1** submits that only the defendant-tenant/respondent no.1 is occupying the disputed shop. The other defendant-tenant/respondent nos. 2, 3, 4 and 5 are not carrying on the business from the disputed shop. Bonafide need of the original plaintiff came to an end on account of his death on 08.01.2019. The original plaintiff and his two sons have several accommodation and, therefore, the appellate court has rightly directed that the disputed shop be released subject to the condition that the plaintiff may provide an alternative accommodation to the defendant-tenant/respondent no.1. The plaintiffs have constructed four storied building on the accommodation vacated by the tenant Ram Gopal and, therefore, the court below rightly directed for providing a shop to the defendant-tenant/respondent in the aforesaid four storied building.

14- The **small shop of the tenant Girraj Kishore, adjoining the disputed shop has also been vacated**. Therefore, there is no need of the plaintiff for the disputed shop. The sons and daughters of the original plaintiff have become the co-owner and landlord of the disputed shop. Thus, since, the sons themselves have become the owner and landlords of the disputed shop, therefore, the need of the original plaintiff cannot be looked into.

DISCUSSION AND FINDINGS-

15- I have carefully considered the submissions of the learned counsel for the parties.

16- There is no dispute of landlord-tenant relationship between the plaintiff-petitioner and the defendants-respondents. There is also no dispute that the original plaintiff/petitioner was carrying on business in a rented shop which was got vacated by its owner and landlord and, therefore, he was in bonafide need of the disputed shop to carry on his business.

Reg. Building of Ram Gopal's Shop

17- The original plaintiff owned the disputed shop and half portion in the shop under tenancy of one Ram Gopal. The other half portion of the shop of Ram Gopal was subsequently, purchased by the eldest son of the original plaintiff, namely, Rajendra Kumar. **Thus, Rajendra Kumar and the original**

plaintiff became co-onwer of the disputed shop which is a four storied building admittedly measuring 5' 9" x 18' and from inside the shop on the ground floor a stair case has been made for approach to the upper floor. This shop being very small having no separate access and partly owned by the aforesaid Rejendra Kumar, who is carrying on business from it, could not have been directed by the court below for providing a portion in it to the defendant-tenant/petitioner as an alternative accommodation for vacating the disputed shop of the plaintiff Kishan Chandra.

Reg. Building owned by the plaintiff's son Pradeep Kumar

18- So for as the other building owned by the other son of the plaintiff, namely, Sri Pradeep Kumar is concerned, it has not been disputed before me that Sri Pradeep Kumar is carrying on his business from it. He is co-owner. The other co-owner is the wife of the original plaintiff. Therefore, there was also no occasion for the court below to issue direction for providing a shop in the accommodation owned by Sri Pradeep Kumar.

Bonafide Need

19- It could not be established by the defendant-tenant/respondent no.1 that the plaintiff was having no bonafide need for the disputed shop. The release application was filed by the plaintiff for his bonafide need for starting cloth business and also for the employment of his sons. Finding of fact has been recorded by the Prescribed Authority that the plaintiff is in bonafide need of the disputed shop. This finding of fact has not been set aside by the appellate court by the impugned judgment in Rent Control Appeal No.02 of 2006. Therefore, findings of fact recorded by the Prescribed Authority in P.A. Case No.02 of 1994 on the point of bonafide need, requires no interference and is upheld.

Crucial date for bonafide need in an application for release and effect of subsequent event of death of landlord.

20- The submission in this regard made by the learned coiunsel for the tenant-respondent, has no substance. In the case of **Kamleshwar Prasad v. Pradumanju Agarwal (Dead) by LRs., (1997) 4 SCC 413 (Paragraph No.3)**, Hon'ble Supreme Court laid down the law that the fact that the landlord needed premises in question for starting a business in the eye of law must be the day of application for eviction which is the crucial date when the tenant incurred the liability of being evicted from the premises. Even if the landlord died during pendency of the writ petition in the High Court, the bonafide need cannot be said to have lapsed as the business in question can be carried on by his widow or any other son.

21- **In Phul Rani & Ors. vs Naubat Rai Ahluwalia, 1973(1) SCC 688**, a two Judges Bench of Hon'ble Supreme Court framed three questions. While answering one of the questions, it held that the requirement of the occupation of the other members of the family of the original landlord was his personal requirement and ceased to be the requirement of the members of his family on his death. The law so laid down in Phul Rani's case (supra), was over ruled

by a larger bench in **Shantilal Thakordas & Ors vs Chimanlal Maganlal Telwala 1976 (4) SCC 417.** The Larger Bench in **Shantilal Thakordas & Ors. (supra)** held as under:

"If the law permitted the eviction of the tenant for the requirements of the landlord "for occupation as a residence for himself and members of his family" then the requirement was both of the landlord and the members of his family. On his death, the right to ' sue did survive to the members of the family of the deceased landlord. We are unable to take the view that the requirement of the occupation of the members of the family of the original landlord was his requirement and ceased to be the requirement of the members of his family on his death."

22- In **Shakuntala Bai and others v. Narayan Das and others, (2004) 5 SCC 772 (Paragraph Nos. 10.1 and 11),** Hon'ble Supreme Court held as under:

"10.1 With regard to this category of cases it was held that the estate is entitled to the benefit which, under a decree, has accrued in favour of the plaintiff and, therefore, the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit. Even otherwise, this appears to be quite logical. In normal circumstances after passing of the decree by the trial Court, the original landlord would have got possession of the premises. But if he does not and the tenant continues to remain in occupation of the premises it can only be on account of the stay order passed by the appellate Court. In such a situation, the well known maxim "actus curiae neminem gravabit" that "an act of the Court shall prejudice no man" shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant and claim possession of the premises on the cause of action which had been originally pleaded and on the basis whereof the lower Court had decided the matter and had passed the decree for eviction. However in regard to the case before the court it was held that the requirement pleaded in the ejectment application on which the plaintiff founded his right to relief was his personal requirement and such a personal cause of action must perish with the plaintiff. On this ground it was held that the plaintiff's right to sue will not survive to his heirs and they cannot take the benefit of the original right to sue.

11. In Shantilal Thakordas v. Chimanlal Maganlal Telwala (1976) 4 SCC 417, a larger Bench overruled the decision rendered in Phool Rani v. Naubat Rai Ahluwalia insofar it held that the requirement of the occupation of the members of the family of the original landlord was his personal requirement and ceased to be the requirement of the members of his family on his death. The Court took the view that after the death of the original landlord the senior member of his family takes his place and is well competent to continue the suit for eviction for his occupation and occupation of the other members of the family. Thus, this decision held that the substituted heirs of the deceased landlord were entitled to maintain the suit for eviction of the tenant. The ratio of this decision by a larger Bench does not in any manner affect the view expressed in Phool Rani (1973)1 SCC 688 that where the death of the landlord occurs after a decree for

possession has been passed in his favour, his legal representatives are entitled to defend further proceedings like an appeal and the benefit accrued to them under the decree. In fact, the ratio of Shantilal Thakordas (1976)45 417 would reinforce the aforesaid view. There are several decisions of this Court on the same line. In Kamleshwar Prasad v. Pradumanju Agarwal 1997(4) SCC 413 it was held that the need of the landlord for premises in question must exist on the date of application for eviction, which is the crucial date and it is on the said date the tenant incurred the liability of being evicted therefrom. Even if the landlord died during the pendency of the writ petition in the High Court, the bona fide need cannot be said to have lapsed as the business in question can be carried on by his widow or any other son. In Gaya Prasad v. Pradeep Srivastava (2001) 2 SCC 604 it was held that the crucial date for deciding as to the bonafides of requirement of landlord is the date of his application for eviction. Here the landlord had instituted eviction proceedings for the bona fide requirement of his son who wanted to start a clinic. The litigation continued for a long period and during this period the son joined Provincial Medical Service and was posted at different places. The subsequent event i.e. the joining of the service by the son was not taken into consideration on the ground that the crucial date was the date of filing of the eviction petition. Similar view has been taken in G.C. Kapoor v. Nand Kumar Bhasin (2002)1 SCC 610. Therefore, the legal position is well settled that the bona fide need of the landlord has to be examined as on the date of institution of proceedings and if a decree for eviction is passed, the death of the landlord during the pendency of the appeal preferred by the tenant will make no difference as his heirs are fully entitled to defend the estate."

23- Thus, in view of the decision made above and respectfully following the law laid down by Hon'ble Supreme Court in the judgments referred above, I hold that the legal position is well settled that the bonafide need of the landlord has to be examined as on the date of institution of proceedings and if a decree of eviction is passed, the death of the landlord during the pendency of the appeal or writ petition or a petition under Article 227 preferred by the tenant will make no difference. The heirs of the landlord will be fully entitled to claim possession of the premises on the cause of action which had been originally pleaded and on the basis whereof the lower court had decided the matter and had passed the decree for eviction. Death of the landlord during the pendency of the petition before this Court, would not mean that the bonafide need has lapsed, as the business in question can be carried on by his widow or any other son. Landlord's death will not make any difference as his heirs are fully entitled to defend the estate. If the subsequent event like the death of landlord is to be taken note of at every stage till the decree attains finality, there will be no end to litigation.

24- In the present set of facts the P.A. Case No.02 of 1994 was instituted by the landlord-petitioner and after about 20 years it was decreed by the Prescribed Authority/Civil Judge (Junior Division), Etah by judgment dated 23.2.2006. However, due to pendency of Rent Appeal No.02 of 2006 filed by the tenant-respondent, the decree could not be instituted and the tenant could not be

evicted. Eight years were exhausted to decide the appeal and now from five years the present petition is pending before this Court and ultimately, the landlord died recently on 8.1.2019. The tenant continued in occupation of the disputed premises because of some interim order in the appeal. In such a situation the well known maxim "**actus curiae neminem gravabit" that "an act of the Court shall prejudice no man" shall also come into operation.**

25- In view of the discussions, all the submissions made by the tenant-respondent are rejected.

Whether Appellate Court can direct the landlord to provide an alternative accommodation to the tenant in the premises owned or partly owned by his son or wife.

26- The directions given by the appellate court to the plaintiff for providing an alternative accommodation is in conflict with the law laid down by this Court in the case of the other tenant Girraj Kishore (supra), which has been reproduced in para 11 above. Therefore, the impugned judgment of the appellate court can also not be sustained in view of the law laid down by this Court in Girraj Kishore's case (supra) and the discussion made above. Besides, it is well settled that the appeal is a creation of Statute. Section 22 of the U.P. Act XIII of 1972, provides for a statutory remedy of appeal against an order passed under Section 21 or Section 24 of the Act. Section 21 does not provide for a direction to the landlord to make available an alternative accommodation to the tenant as per provision of Section 22 read with Section 10 of the Act, the appellate court may confirm, vary or rescind the order, or remand the case. No power has been conferred to issue a direction to the landlord to provide an alternative accommodation to the tenant as a condition for release of the disputed accommodation. Therefore, the direction of the appellate court to the landlord to provide an accommodation to the respondent-tenant is without jurisdiction. Thus. the appellate court has exceeded its jurisdiction to issue such a direction.

Conclusion in Brief

27- The discussion and conclusions made above are briefly summarized as under:

(i) Finding of fact has been recorded by the Prescribed Authority that the plaintiff is in bonafide need of the disputed shop. This finding of fact has not been set aside by the appellate court by the impugned judgment in Rent Control Appeal No.02 of 2006. Therefore, findings of fact recorded by the Prescribed Authority in P.A. Case No.02 of 1994 on the point of bonafide need, requires no interference and is upheld.

(ii) The need of the landlord for premises in question must exist on the date of application for eviction, which is the crucial date and it is on the said date the tenant incurred the liability of being evicted therefrom. Even if the landlord died during the pendency of the writ petition in the High Court, the bona fide need cannot be said to have lapsed as the business in question can be carried on by his widow or any other son. In Gaya Prasad v. Pradeep Srivastava (2001) 2 SCC 604 it was held that the crucial date for deciding as to the bonafides of

requirement of landlord is the date of his application for eviction.

(iii) The bonafide need of the landlord has to be examined as on the date of institution of proceedings and if a decree of eviction is passed, the death of the landlord during the pendency of the appeal or writ petition or a petition under Article 227 preferred by the tenant will make no difference. The heirs of the landlord will be fully entitled to claim possession of the premises on the cause of action which had been originally pleaded and on the basis whereof the lower court had decided the matter and had passed the decree for eviction.

(iv) Death of the landlord during the pendency of the petition before this Court, would not mean that the bonafide need has lapsed, as the business in question can be carried on by his widow or any other son. Landlord's death will not make any difference as his heirs are fully entitled to defend the estate. If the subsequent event like the death of landlord is to be taken note of at every stage till the decree attains finality, there will be no end to litigation.

(v) In the present set of facts the P.A. Case No.02 of 1994 was instituted by the landlord-petitioner and after about 20 years it was decreed by the Prescribed Authority/Civil Judge (Junior Division), Etah by judgment dated 23.2.2006. However, due to pendency of Rent Appeal No.02 of 2006 filed by the tenant-respondent, the decree could not be instituted and the tenant could not be evicted. Eight years were exhausted to decide the appeal and now from five years the present petition is pending before this Court and ultimately, the landlord died recently on 8.1.2019. The tenant continued in occupation of the disputed premises because of some interim order in the appeal. In such a situation the well known maxim "actus curiae neminem gravabit" that "an act of the Court shall prejudice no man" shall also come into operation.

(vi) The directions given by the appellate court to the plaintiff for providing an alternative accommodation is in conflict with the law laid down by this Court in the case of the other tenant Girraj Kishore (supra), which has been reproduced in para 11 above. The appeal is a creation of Statute. Section 22 of the U.P. Act XIII of 1972, provides for a statutory remedy of appeal against an order passed under Section 21 or Section 24 of the Act. Section 21 does not provide for a direction to the landlord to make available an alternative accommodation to the tenant as per provision of Section 22 read with Section 10 of the Act, the appellate court may confirm, vary or rescind the order, or remand the case. No power has been conferred to issue a direction to the landlord to provide an alternative accommodation to the tenant as a condition for release of the disputed accommodation.

28- For all the reasons aforestated, the impugned judgment dated 23.8.2014 in Rent Control Appeal No.02 of 2006 (Sri Dinesh Chandra v. Kishan Chand and others), passed by the District Judge Etah, cannot be sustained and is hereby set aside. The judgment of the Prescribed Authority/Civil Judge (Junior Division), Etah, dated 23.2.2006 passed in P.A. Case No.2 of 1994 (Sri Kishan Chandra v. Sri Padam Chandra Jain and others), is restored and upheld. The petition is allowed with costs.

(2019)11ILR A347

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.10.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl Misc.Anticipatory Bail Application No. 38181 of 2019

Lavink Tyagi ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Harish Chandra Shukla, Sri Manoj Kumar Rai

Counsel for the Opposite Parties:
A.G.A., Sri Harish Kumar Yadav, Sri Akhilesh Kumar Singh

A. Criminal Law -Indian Penal Code,1860-Sections420,376,493,494,495,496 & Code of Criminal Procedure,1973 -Section 438 - grant of anticipatory bail-neither evidence nor circumstances are to be meticulously analysed in hair splitting manner because it may prejudice investigation, enquiry and trial.

B. While dealing with anticipatory bail, the nature and gravity of accusation, the antecedents of the applicants, possibility of the applicant to flee from justice and where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.(Para 3 to 6)

Application rejected (E-6)

List of cases cited:-

1. Seema(Smt.) Vs. Ashwani Kumar (2008) 1 SCC 180

2. Pramod Suryabhan Pawar Vs. State of Mah. & Anr.(2019) Law Suit (SC)1504

3. Joti Parshad Vs. State of Haryana, AIR 1993 SC 1167

4. State of U.P. Vs. Naushad,AIR 2014 SC 384

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Vakalatnama filed today by Sri Akhilesh Kumar Singh and Sri Harish K. Yadav on behalf of O.P. No. 2 is taken on record.

2. Heard learned counsel for applicant, learned AGA for the State and learned counsel for O.P. No. 2 over this application under section 438 Cr.P.C. by Lavink Tyagi moved for grant of anticipatory bail in Case Crime No. 1290 of 2019, u/s 420, 376, 493, 494, 495, 496 I.P.C., P.S. Kotwali Shamli, District Shamli.

3. Learned counsel for applicant argued that accused applicant is innocent. He has been falsely implicated in this very case crime number, whereas the complainant herself is a Police Constable, well educated and law knowing lady. The alleged occurrence is said to be of the year 2014, whereas this report has been lodged in the year 2019. There was no misconception of fact regarding marriage entered in between nor there was any deception nor there was any unreasonable belief about the fact stated by the complainant. It has specifically been stated in the F.I.R. lodged upon her written report as well as in her statement recorded u/s 164 Cr.P.C. that she entered in marriage with applicant Lavink Tyagi and she was blessed with a son. Subsequently she was again blessed with

a son. Then after this situation changed, when behaviour of applicant Lavink Tyagi was changed in changed circumstances. She made application before the S.P. concerned and the applicant Lavink Tyagi was put under suspension. Subsequently, this suspension was revoked as complainant could not establish the fact of misconception of fact or marriage under deception made by accused. She was entered with marital status of 'unmarried' in her service record, whereas the accused- applicant was shown with marital status of 'married' in his service record. The complainant, being a police constable and fully acquainted with legal procedure, was expected to go through marital status of applicant given in his service record and she did it. Hence, it was never misconception of fact nor any deception by applicant. It was a bonafide marriage and it never converts the physical relation in definition of rape provided under section 375 I.P.C. and under exception (2) appended to the section. It was with conscience and consensual physical relation with wife and with no deception. There was no reason to believe deception. Hence the department did not lodge report for this offence. Rather this report was subsequently lodged by complainant. The judgment of Apex Court reported in ***(2008) 1 SCC 180, Seema (Smt.) Vs. Ashwani Kumar,*** makes a provision that marriage must be registered, even if there occurred some marriage. It was not got registered by complainant, who herself is a police constable and well known about law. Hence, it was lack on her part itself. Further judgment of Apex Court reported in ***2019 Law Suit (SC) 1504, Pramod Suryabhan Pawar Vs. State of Maharashtra & another,*** has elaborately discussed 'misconception of fact' and 'reasonable belief', wherein the circumstances making conclusion about misconception of fact and ingredients of deception with circumstances creating a reason to believe has been elaborately discussed by their Lordships. In the present case too, there is no question of any misconception. Learned counsel for applicant pressed para 26 of the judgment reported in ***AIR 1993 SC 1167, Joti Parshad Vs. State of Haryana,*** wherein 'reason to believe' has been elaborately discussed. Hence, there is no offence punishable u/s 376 I.P.C. For rest of offences, mentioned as above, there is lack of ingredients for those offences. Hence, this anticipatory bail application with prayer for quashing the rejection order passed by learned Sessions Judge, who failed to appreciate the facts and law placed before it. Thereby for allowing application moved by applicant for grant of anticipatory bail.

4. Learned counsel for O.P. No. 2 has vehemently opposed above arguments with this contention that it was a sheer misconception of fact under which complainant entered in marriage with accused and cohabited. Accused was Sub Inspector of Police and complainant, being a police constable, was under control and supervision of accused-applicant. Hence, the offence punishable u/s 376(3) I.P.C. will also come into play. Whereas argument advanced is regarding offence punishable u/s 376(2) I.P.C. itself. The previous marriage and blessing of two kids had been concealed by accused and upon his assurance and stating of facts, this second marriage was performed by the applicant. She was blessed with one son. But under connivance and deception this was reported to be dead, whereas he was alive.

Again she was blessed with another son. Then after she was compelled to hide from the scene and to elope from the life of accused- applicant, for which threat was extended. In between, a telephonic call was received from the erstwhile wife of accused-applicant, who disclosed about previous marital status and two kids from the earlier marriage. Then after this report was got lodged and prior to it a complaint was made to the department i.e. Police Head of District Shamli, who initiated an enquiry and the accused-applicant was put under suspension. Subsequently, it was revoked. Hence, the offences, for which this case crime number has been registered, are of heinous nature particularly committed by a government servant. There is mandatory prohibition of bigamy by a U.P. State Government Servant.

5. Learned AGA has vehemently opposed bail with this contention that marital status, shown in service record, was of the time of entering in the service and at that time this complainant-constable was unmarried and that is why she entered her marital status 'unmarried'. But the disclosure of marital status of accused was not under her knowledge. Rather it was under knowledge of applicant that he was married and his marital status was of 'married'. But this fact was concealed by him and subsequent marriage was got entered. Hence this non-mentioning of marital status of complainant is of no avail.

6. Having heard learned counsel for the parties and gone through the material placed on record, it is apparent that this application is for grant of anticipatory bail. At this juncture, neither evidence nor circumstances are to be meticulously analysed in hair splitting manner by this court, because it may prejudice investigation, enquiry and trial. Hence, U.P. State amendment in Code of Criminal Procedure by Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018 has brought insertion in section 438 of Cr.P.C. with a provision of consideration by the court, while dealing with anticipatory bail application, the nature and gravity of the accusation; the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; the possibility of the applicant to flee from justice; and where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested; either reject the application forthwith or issue an interim order for the grant of anticipatory bail. There are certain exceptions in which the provisions of this section 438 Cr.P.C. is not applicable. The ingredients for grant or non- grant of anticipatory bail have been given in this amendment. Hence, this Court is to consider as to whether those ingredients for grant or for rejection of anticipatory bail is there? The Apex Court in ***State of U.P. Vs. Naushad, AIR 2014 SC 384*** has propounded that if consent is given by the prosecutrix under a misconception of fact, it is vitiated. Accused committed sexual intercourse with the prosecutrix by giving false assurance that he would marry her, after she got pregnant, he refused to do so. From this it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relationship with her consent, which was consent obtained under misconception of fact, as defined under section 90 of the I.P.C. In the present

case, marriage in between is not denied, previous marriage and two kids are also not denied. The accused being a government servant is not denied. He being legally bound not to marry during lifetime of his wife under U.P. Government Servant Service Conduct Rule, 1956 is not denied. He entered in marriage with complainant is also not denied. He said himself to be unmarried and under his assurance and persuasion this marriage took place, has been said by prosecutrix in her report and in her statement recorded under section 164 Cr.P.C. She was blessed with a child, who was born alive, but was reported to be dead by accused-applicant. It has been said by her in her report. Subsequently, she was blessed with another child. Then after she was compelled to be away from the life of accused, for which threat was extended. This has been mentioned in the report as well as in her statement recorded u/s 164 Cr.P.C. Under all these facts and circumstances it seems a case in which no indulgence is required from this Court.

7. Accordingly, this application is rejected.

8. However, it is made clear that the trial court as well as Investigating Officer will not be influenced from any finding recorded in this order.

(2019)11ILR A350

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.10.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 123 OF 2007

Pawan Tewari ...Revisionist

Versus

State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Karuna Shankar Rastogi

Counsel for the Opposite Party:
Government Advocate, Sri V.K. Shahi

A. Criminal Law-Code of Criminal Procedure,1973 - Section-227/228 – Application - while considering an application for discharge, the court is required to consider the record of the case to decide whether the allegations against accused are made out or not-it is not required to weigh and sift all the evidence-if the material placed before the court discloses grave suspicion against the accused, the court is justified in framing the charge-application of discharge is dismissed-it is well settle that the confession of a co-accused is a substantive evidence against other co-accused persons in the same trial.

(Para 31,32,33,34)

Revision dismissed (E-6)

List of cases cited:-

1. State of Tamilnadu Vs. Jayalalitha, (2000) 5 SCC 440

2. Param Hans Yadav and Sadanand Tripathi Vs. State of Bih. And Ors, (1987) 2 SCC 197

3. Satish Mehra Vs. Delhi Administration & Anr (1996) 9 SCC 766

4. State of Bih. Vs. Ramesh Singh, (1977) 4 SCC 39

5. Amit Kapoor Vs. Ramesh Chander,(2012) 9 SCC 460

6. State Vs. Selvi,(2018) 13 SCC 455

7. Asim Shariff Vs. NIA,(2019) 7 SCC 148

8. Tarun Jit Tejpal Vs. State of Goa and Ors, (2019) SCC OnLine SC 1053

(Delivered by Hon'ble Dinesh Kumar Singh, J.)

1. The present revision petition has been filed against the order dated 31.01.2007 passed in Sessions Trial No.1058 of 2006 by Additional District and Sessions Judge, Court No.23, Lucknow whereby an application of discharge filed by the revisionist under Section 227 Cr.P.C. has been dismissed.

2. Brief facts of the case are that, the complainant, respondent No.2 gave a written report at the police station on 07.04.2006 bringing it to the notice of the police that her husband, Mr. Sudhir Kumar Sharma went out from the residence on 04.04.2008 at around 4:45 P.M. and, he did not come back till giving the complaint at the police station.

3. On the basis of aforesaid complaint, Sub-Inspector, A.K. Sachan registered the information in G.D. and started investigation. From the investigation and examination of the call record of Mr. S.K. Sharma, the investigating officer was of the opinion that Mr. S.K. Sharma was kidnapped for ransom. In this kidnapping etc., prima facie involvement of Devvrat Mishra, Executive Engineer and his son residents of 21 Hydel Colony, Vivekanand Puri Road, Mahanagar, Lucknow, Baccha Pandey s/o Ramjage Pandey who was relative of Devvrat Mishra and, Pawan Tiwari, the revisionist herein who was friend of son of Devvrat Mishra was found.

4. After finding prima facie involvement of these persons, a complaint was given for registering the FIR under Section 364A IPC. The investigating officer, thereafter, recorded the statement of the wife of S.K. Sharma, Dr. Savita Sharma who initially gave the complaint at the police station regarding her husband going missing with effect from 04.04.2006.

5. Dr. Savita Sharma was residing at Banaras Hindu University and working as Assistant Curator in-charge of Coin Section, Bharat Kala Museum. She gave the statement that her husband, Mr. Sudhir Kumar Sharma was Chairman of the Electricity Board. He got retired from the service on 28.02.2004 and was residing at Vivekanandpuri, Hydel Colony. Along with him, servant Subhash was also living. On 04.04.2006 and 05.04.2006 she spoke to them. On 06.04.2006 she spoke to her husband from Banaras. She was asked by her husband to come to Lucknow. She reached Lucknow by Kashi Vishwanath Express. When she was in tempo from Charbagh Railway Station to reach Vivekanandpuri, Hydel Colony, a telephone call came at around 9-10 P.M. from Mr. S.K. Sharma asking her where was she. She told her location to him and, then he said that she was required to arrange Rs.15,00,000/-. He directed her to go to Citi Bank in the morning. When she asked that where was he, he said that he would talk to her later. He said that she should reach home. He also said that without taking money, they would not leave him alive. On 07.04.2004 again Mr. S.K. Sharma rang her at around 9-10 A.M. and said that she should go to Citi Bank and withdraw money from the Bank. On 07.04.2006 she went to the residence of Mr. Devvrat Mishra who had called her. Mr. Devvrat Mishra was subordinate to her husband and was also residing at Hydel Colony. She gave

mobile numbers of her and Devvrat Mishra to investigating officer. Mr. Devvrat Mishra told her that Mr. S.K. Sharma called him and said that he was in some difficulty as he had been abducted. Mr. S.K. Sharma had asked him to make arrangement of money. Mr. Mishra further said that S.K. Sharma had asked him not to give information to the police otherwise, his life would be in jeopardy.

6. Devvrat Mishra further told Dr. Savita Sharma that S.K. Sharma had asked him to arrange Rs.15,00,000/-. In this respect, Devvrat Mishra had spoken to the Manager of Citi Bank and, he said that Police should not be informed. When the conversation between Devvrat Mishra and Dr. Savita Sharma was taking place, Rohit Mishra son of Devvrat Mishra was present there and, he heard everything.

7. On 07.04.2006, Dr. Savita Sharma went to the Citi Bank along with Devvrat Mishra. The Manager of the Bank told her that it would take sometime to encash the mutual funds. She further said that Subhash told her one of the two persons who came to pick up Mr. S.K. Sharma looked like Rohit Mishra. She also said that Rohit Mishra was watching her movements. After 07.04.2006 no telephone call was received by her from her husband or anybody and, Rohit Mishra went absconding. She apprehended that Devvrat Mishra and his son were involved in abduction/kidnapping of her husband and, the fact that they took her to the City Bank etc., was sufficient indication of their involvement.

8. The investigating officer thereafter, recorded the statement of Subhash Yadav who was the servant at the household of Mr. S.K. Sharma. He said that on 04.04.2006 at around 4:00 P.M., S.K. Sharma came from the office and, told him that two people would come in a black car to pick him up. As soon as they would come, he should inform him because he had to go with those people. Sometime thereafter, one car came. He described the two occupants of the car. One occupant was aged around 23-24 years, came to the residence asking whether S.K. Sharma resided here? By that time, S.K. Sharma was ready to go dressed in blue shirt and black pant. He instructed Subhash to prepare food for dinner and, thereafter, he had not come back. He further said that he spoke to S.K. Sharma twice or thrice on the said date then, S.K. Sharma said that he would come back in the night. On 05.04.2006 again he called on the mobile number of S.K. Sharma from a P.C.O. as land line of the house was out of order but S.K. Sharma did not pick up the phone, however, somebody else picked up the phone. Next day, at round 11-12 A.M., he called S.K. Sharma. Mr. S.K. Sharma told him that he was in Delhi, and he would come on 6th April. He gave the mobile numbers of S.K. Sharma and telephone number of the residence as well. On 06.04.2006 also he did not come, however, two persons came on a motorcycle, Bajaj CT-100 of black color. They had keys of room and almirah of S.K. Sharma. When they asked them not to open the room and almirah, then they made him to talk to S.K. Sharma. S.K. Sharma asked him to allow them to open almirah. Then almirah got opened but no money was found there. Out of these two persons who came on a motorcycle, one was the same who came in the car to take Mr. S.K. Sharma. He described the second person who came in the

motorcycle having fair complexion who had covered his face and was wearing helmet, he was looking like the son of Devvrat Mishra. When he reached the house of Devvrat Mishra on asking of Dr. Savita Sharma, he did not find Rohit Mishra in the house. He spoke to Devvrat Mishra on his mobile. Mr. Devvrat Mishra told him that S.K. Sharma had taken money from several persons and he had been kidnapped.

9. Rohit Mishra gave statement to the investigation officer that he along with his friend, Pawan Tiwari, the revisionist herein and his father had a dream that he should pursue MBA from Spain. For the aforesaid purpose, money was required. To collect money they thought of kidnapping a wealthy person. He said that Mr. S.K. Sharma, Chairman of Electricity Board who was living nearby was set to retire on 28.02.2006. He had taken huge amount from several persons in the name of giving employment. He was also involved in a scam of Rs.3,00,00,000/- at Obra. He had deposited huge amount in mutual funds. He also said that he used to visit frequently the house of S.K. Sharma, therefore, he thought of kidnapping of S.K. Sharma.

10. After retirement, S.K.Sharma was to get around 25-30 Lakhs rupees in his P.F. Account. His wife was living in Banaras and, Mr. S.K. Sharma was living with his servant. He said that S.K. Sharma was to move out after retirement from the Hydel Colony and, therefore, he planned to kidnap S.K. Sharma with Bachha Pandey, his relative, who was living in Vishwas Khand, Gomti Nagar and was working in VLCC.

11. He said that he decided to invite Mr. S.K. Sharma for drinking and debauchery as Mr. Sharma was fond of women and wine. Bachha Pandey agreed to make arrangements. He also said that Guddu Pandey @ Ram Kishore and Pawan Pandey also agreed to help in execution of this plan.

12. For this purpose, he took a Mobile Phone connection No.9838476603 in the name of Alok by forging documents and he used this number in kidnapping of Mr. S.K. Sharma. He said that he made plan with Pawan Tiwari and lured Mr. Sharma for a girl and also to give him money for providing employment to some persons in the electricity Department. Mr. Sharma got ready. According to the plan, he borrowed a car from his friend, Siddhartah Singh and went to the house of Mr. S.K. Sharma along with Baccha Pandey. Baccha Pandey went to the residence and brought Mr. S.K. Sharma from the house and, thereafter, all three went to Vishwas Khand where Guddu Pandey, Lalji, Pawan Tiwari were present. S.K. Sharma was kept on the first floor and, he was provided drinks etc. Demand for Rs.1,00,00,000/- was made from him. However, Mr. S.K. Sharma refused and said that he did not have that much money. He said that he would give Rs.15,00,000/- which was deposited in his Syndicate Bank. In the night Mr. S.K. Sharma received a telephonic call from his servant and, he was asked to tell the servant that he would come in the morning on the next day. On 05.04.2006 again when his servant called, Mr. S.K. Sharma was asked to tell him that he was in Delhi and would come back on the next day.

13. When Mr. S.K. Sharma was asked that without cheque book how the money would be withdrawn, then Mr. Sharma asked him to bring cheque book from almirah and, then he along with Baccha Pandey, went to the house of Mr. S.K. Sharma. At that time he covered his face by a handkerchief and wore a helmet so that the servant did not recognise him. They thought that they would get good amount of money from almirah but no amount was received and cheque book was also not found there. Mr. Sharma used to take some medicines for which they asked for the prescription but the servant could not give the prescription. He further said that he made Ms. Sharma to talk to his father Mr. Devvrat Mishra. His father said that he would help Ms. Sharma to withdraw money from the Bank. However, the Bank informed them that the money could be withdrawn after 3-4 days. From the driver of Mr. Sharma, it was known that Ms. Sharma had informed the police and, then fearing their arrest, the accused gave injection of Sensoran and strangulated Mr. Sharma. Dead body of Mr. S.K. Sharma was brought in a Ford Car at Ramnagar, Barabanki crossing where he met Pawan Tiwari, Baccha Pandey, Rajan Pandey. These persons along with one Guddu Pandey threw the dead body in the river.

14. It appears that after recording the statement of as many as 34 witnesses and collecting the evidence including the call details of the cell phones used by the accused as well as deceased, charge sheet under Sections 364-A, 302, 201, 120-B IPC was filed against the accused including the revisionist herein. The revisionist thereafter filed an application under Section 227 Cr.P.C. for discharge from the case.

15. Learned Sessions judge has rejected the application of the accused revisionist vide impugned order dated 31.01.2007.

16. Heard learned counsel for the revisionist and learned A.G.A. for the State.

17. Learned counsel for the revisionist submits that except for the confessional statement of the co-accused, Rohit Mishra given to the police, there is no other evidence to connect the accused-revisionist with the commission of the offence. He further submits that the confessional statement of the accused given to the police cannot be relied on for framing the charge against the present accused-revisionist. He also submits that statements of co-accused, Baccha Pandey, Pawan Pandey, Rohit Mishra were recorded under Section 161 Cr.P.C. and, they have not made any statement before the learned Magistrate under section 164 Cr.P.C. Further, learned Sessions Court in the impugned order has held that for the first time the accused's name came to the light in the statement of Sub-Inspector, A.K. Sachan on 14.04.2006. In his statement, he said that two mobile numbers i.e. 9838384515 and 9835616862 were used in the commission of the offence. It was further said that the accused was using Mob.No.9839616862 which was in the name of Rohit Mishra. Pawan Pandey and Rohit Mishra were best friends and Pawan Pandey was also absconding.

18. The Trial Court while rejecting the application has held that the deceased, S.K. Shamra was abducted for ransom. An amount of Rs.15,00,000/- was asked to be withdrawn from the Bank by her

wife. After committing the murder of Mr. S. K. Sharma, dead body was thrown in the river and the evidence collected by the investigating officer during the investigation including the statement of the witnesses recorded under Section 161 Cr.P.C. established commission of the offence by the accused and, therefore, he rejected the application of discharge filed by the accused and other co-accused.

19. In support of his submissions that the statement of a co-accused cannot be relied on, learned counsel for the revisionist has cited judgment of the Supreme Court in the case of **State of Tamilnadu versus Jayalalitha : (2000) 5 SCC 440.**

Para 11 of aforesaid report on which reliance has been placed is extracted herein below:-

"11. We may, at the outset, point out that there is no use of the said statement attributed to the third accused Venkataraman on account of two reasons. First is that the said author of the statement has already been arraigned in the case and a charge has been framed against him. Second is that on a reading of the statement we have noticed that it is exculpatory in nature. Hence the said statement can only lie in store and no court can possibly treat it as evidence."

20. However, learned counsel for the revisionist has missed para 34 of aforesaid judgment which throws enough light on what needs to be considered at the time of framing of the charge.

Para 34 of the aforesaid judgment reads as under:-

"34. We would choose to refrain from dealing with the above contention, lest any comment made by us turn out to be detrimental to one or the other side of the case. Nevertheless, it is for the prosecution to explain how certain relevant sheets were found missing and whether the respondent had any knowledge of and also why the respondent should have caused them to be removed. This is not the stage for weighing the pros and cons of all the implications of the materials nor for sifting the materials presented by the prosecution. The exercise at this stage should be confined to considering the police report and the documents to decide whether the allegations against the accused are "groundless" or whether "there is ground for presuming that the accused has committed the offences". Presumption therein is always rebuttable by the accused for which there must be opportunity of participation in the trial."

21. Thus, at the time of framing of charge, it is not required to weigh all the evidence and implication of the material before the court nor it is required to sift the material presented by the prosecution. The court is required to consider the police report and documents to decide whether the allegations against the accused are made out or not. If the Court forms an opinion prima facie that the accused has committed the offence, he cannot be discharged.

22. The second judgment on which learned counsel for the revisionist has placed reliance is **Param Hans Yadav and Sadanand Tripathi versus State of Bihar and others: (1987) 2 SCC 197** to submit that the confessional statement of a co-accused is not a substantive evidence against the other co-accused in the trial.

In support of his contention he has cited paras 9 and 10 which are extracted herein below:-

"9. It is well settled that the confession of a co-accused is not substantive evidence against other co-accused persons in the same trial. As this Court pointed out in *Kashmira Singh v. State of M.P.* [AIR 1952 SC 159 : 1952 SCR 526 : 1952 Cri LJ 839] the confession of a co-accused is not substantive evidence against the other accused persons at the trial but could only be used for lending reassurance if there be any other substantive evidence to be utilised or acted upon.

10. In *Hari Charan Kurmi v. State of Bihar* [AIR 1964 SC 1184 : (1964) 6 SCR 623 : 1964 (2) Cri LJ 344] this Court observed:

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

...that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.""

23. The investigating officer had not only relied on the confessional statement of the co-accused but also had collected other evidence. This is evident from the fact that the mobile number which was in the possession of the revisionist was used in the commission of the offence and that mobile number was in the name of co-accused, Rohit Mishra. It would be seen at the time of trial whether there is substantive evidence to support the case of the prosecution besides confessional statement of the co-accused. At the stage of framing of the charge, the Court is not required to consider all the evidence but it has to find out whether prima facie offence has been committed by the accused or not. Therefore, this judgment is also of no help to the petitioner to say that since there is no other evidence except for the confessional statement, the petitioner should have been discharged.

24. Learned counsel for the revisionist has also placed reliance on one more judgment of the Supreme Court in the case of **Satish Mehra vs Delhi Administration & Anr: (1996) 9 SCC 766** which delineates on the scope of Sections 227, 228, 239 Cr.P.C. etc., Learned counsel for the petitioner submits that considering the ratio of aforesaid judgment since there is no other evidence except for confessional evidence against the revisionist herein, the valuable time of court should not be wasted for holding a trial for formality as the trial should not be an exercise in-futility, therefore, the application ought not to have been rejected inasmuch as there is no scope for the revisionist to be convicted.

Paras 12, 13, 14 and 15 of the aforesaid report are extracted hereinbelow:-

12. An incidental question which emerges in this context is whether the Sessions Judge can look into any material other than those produced by the prosecution. Section 226 of the Code obliges the prosecution to describe the charge brought against the accused and to state by what evidence the guilt of the accused would be proved. The next provision enjoins on the Sessions Judge to decide whether there is sufficient ground to proceed against the accused. In so deciding the Judge has to consider (1) the record of the case and (2) the documents produced therewith. He has then to hear the submissions of the accused as well as the prosecution on the limited question whether there is sufficient ground to proceed. What is the scope of hearing the submissions? Should it be confined to hearing oral arguments alone?

13. Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the Code enjoins on the court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the court at that stage. Here the "ground' may be any valid ground including insufficiency of evidence to prove the charge.

14. The object of providing such an opportunity as is envisaged in Section 227 of the Code is to enable the court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code.

15. But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the Sessions Courts in India are under heavy pressure of workload. If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself.

25. However, from perusal of the order impugned, it is not only confessional statement which is against the accused, there are 34 persons whose statements have been recorded besides other evidence which has been collected. Therefore, the judgment cited by the learned counsel for the revisionist is of not much relevance to say that the revisionist would get acquittal and in no circumstance would be convicted.

26. While considering an application for discharge under Section 227 of the Code, the Court is required to consider the "record of the case" to form an opinion whether there is a ground for presumption and strong suspicion that the accused has committed an offence. After considering the material if the trial Court is of the opinion that there is strong/grave suspicion of involvement of the accused in commission of the offence, the accused cannot be discharged. At the stage of Sections 227/228 (or 239 in warrant case) the Court is only required to see that the material on record and the facts of the case are enough to raise grave suspicion that the accused has committed the offence. If there is no material to arrive at such a satisfaction of suspicion, the accused should be discharged.

27. The scope of Sections 227 and 228 Cr.P.C. has been explained in the judgment of Supreme Court in the case of **State of Bihar v. Ramesh Singh, (1977) 4 SCC 39** in para 4 has held as under:-

"**4.** Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-- ... (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of

criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

28. Once the trial Court forms an opinion on the basis of material available on record about the prima facie case of grave suspicion against the accused, the revisional Court ordinarily should not interfere with such an order inasmuch as the jurisdiction of the Court under Section 397 Cr.P.C. is to be exercised so as to examine the correctness, legality or propriety of order passed by the lower Court.

29. The Supreme Court in its judgment in the case of ***Amit Kapoor v. Ramesh Chander : (2012) 9 SCC 460*** in para 20 has explained the scope of the power under Section 397 Cr.P.C. as under:-

"**20**. The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim *quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest* i.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused."

30. In para 27 of the same judgment principle regarding quashing of the charge either in exercise of jurisdiction under Section 397 Cr.P.C. or under Section 482 Cr.P.C. has been explained as under:-

"27.1. Though there are no limits of the powers of the Court under

Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a "civil wrong" with no "element of criminality" and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his

acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. **27.15.**The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae i.e. to do real and substantial justice for administration of which alone, the courts exist.

[Ref. *State of W.B. v. Swapan Kumar Guha* [(1982) 1 SCC 561 : 1982 SCC (Cri) 283 : AIR 1982 SC 949] ; *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre* [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] ; *Janata Dal v. H.S. Chowdhary* [(1992) 4 SCC 305 : 1993 SCC (Cri) 36 : AIR 1993 SC 892] ; *Rupan Deol Bajaj v. Kanwar Pal Singh Gill* [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] ; *G. Sagar Suri v. State of U.P.* [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] ; *Ajay Mitra v. State of M.P.* [(2003) 3 SCC 11 : 2003 SCC (Cri) 703] ; *Pepsi Foods Ltd. v. Special Judicial Magistrate* [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400 : AIR 1998 SC 128] ; *State of U.P. v. O.P. Sharma* [(1996) 7 SCC 705 : 1996 SCC (Cri) 497] ; *Ganesh Narayan Hegde v. S. Bangarappa* [(1995) 4 SCC 41 : 1995 SCC (Cri) 634] ; *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque* [(2005) 1 SCC 122 : 2005 SCC (Cri) 283] ; *Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.* [(2000) 3 SCC 269 : 2000 SCC (Cri) 615 : AIR 2000 SC 1869] ; *Shakson Belthissor v. State of Kerala* [(2009) 14 SCC 466 : (2010) 1 SCC (Cri) 1412] ; *V.V.S. Rama Sharma v. State of U.P.* [(2009) 7 SCC 234 : (2009) 3 SCC (Cri) 356] ; *Chunduru Siva Ram Krishna v. Peddi Ravindra Babu* [(2009) 11 SCC 203 : (2009) 3 SCC (Cri) 1297] ; *Sheonandan Paswan v. State of Bihar* [(1987) 1 SCC 288 : 1987 SCC (Cri) 82] ; *State of Bihar v. P.P. Sharma* [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : AIR 1991 SC 1260] ; *Lalmuni Devi v. State of Bihar* [(2001) 2 SCC 17 : 2001 SCC (Cri) 275] ; *M. Krishnan v. Vijay Singh* [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] ; *Savita v. State of Rajasthan* [(2005) 12 SCC 338 : (2006) 1 SCC (Cri) 571] and *S.M. Datta v. State of Gujarat* [(2001) 7 SCC 659 : 2001 SCC (Cri) 1361 : 2001 SCC (L&S) 1201] .]

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence."

31. The principles for framing of charge and discharge under Sections 227, 228, 238 and 239 Cr.P.C. have been summarized by the Supreme Court in its judgment, **State v. S. Selvi, (2018) 13 SCC 455.** It has been held that if on the basis of material on record, the Court prima facie forms an opinion that the accused may have committed the offence, it can frame charges. At the time of framing of charge, the Court is required to proceed on presumption that the material produced by the prosecution is true. At that stage, the Court is not expected to go deep into the matter and hold that the material produced does not warrant conviction.

Paras 6 and 7 of the aforesaid report read as under:-

"**6.** It is well settled by this Court in a catena of judgments including *Union of India v. Prafulla Kumar Samal [Union of India v. Prafulla Kumar Samal,* (1979) 3 SCC 4 : 1979 SCC (Cri) 609] , *Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra,* (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , *Sajjan Kumar v. CBI [Sajjan Kumar v. CBI,* (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , *State v. A. Arun Kumar [State v. A. Arun Kumar,* (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , *Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta,* (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , *State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi,* (2003) 2 SCC 711 : 2003 SCC (Cri) 688] , *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya,* (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and *Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja,* (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) 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 material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; 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 within his rights to discharge the accused. 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 statements 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 materials as if he was conducting a trial.

7. In *Sajjan Kumar v. CBI [Sajjan Kumar v. CBI,* (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , this Court on consideration of the various decisions about the scope of Sections 227 and 228 of the Code, laid down the following principles: (SCC pp. 376-77, para 21)

"(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the

evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.""

32. The Supreme Court further in the case of ***Asim Shariff v. NIA*, (2019) 7 SCC 148** has dealt with the scope of Section 227 of the Cr.P.C. for discharge of an accused. In the aforesaid judgment, it has been held that in exercise of the power under Section 227, 228 Cr.P.C. in the Sessions Court (Section 239 Cr.P.C. pertaining to warned cases), the Trial Court has 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. If the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court is justified in framing the charge. It has also been held that if two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspension, the trial Judge would be empowered to discharge the accused. The trial judge is expected to exercise his judicial mind to determine as to whether the case of trial is made out or not.

Para 18 of the said report is extracted hereinbelow:-

"18. Taking note of the exposition of law on the subject laid

down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) 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 material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the court is not supposed to hold a mini trial by marshalling the evidence on record."

33. The Supreme Court again in the case of **Tarun Jit Tejpal versus State of Goa and other: 2019 SCC OnLine SC 1053** has taken note of case law in detail while explaining the powers under Sections 227/228 Cr.P.C. and reiterated the principle as enumerated in State v. S. Selvi (supra) and Sajjan Kumar versus C.B.I.: (2010) 9 SCC 368. In para 32 it has been held as under:-

"32. Applying the law laid down by this Court in the aforesaid decisions and considering the scope of enquiry at the stage of framing of the charge under Section 227/228 if the CrPC, we are of the opinion that the submissions made by the learned Counsel appearing on behalf of the appellant on merits, at this stage, are not required to be considered. Whatever submissions are made by the learned Counsel appearing on behalf of the appellant are on merits are required to be dealt with and considered at an appropriate stage during the course of the trial. Some of the submissions may be considered to be the defence of the accused. Some of the submissions made by the learned Counsel appearing on behalf of the appellant on the conduct of the victim/prosecutrix are required to be dealt with and considered at an appropriate stage during the trial. The same are not required to be considered at this stage of framing of the charge. On considering the material on record, we are of the opinion that there is more than a prima facie case against the accused for which he is required to be tried. There is sufficient ample material against the accused and therefore the learned Trial Court has rightly framed the charge against the accused and the same is rightly confirmed by the High Court. No interference of this Court is called for."

34. Thus, in view of the law as has been explained in several decisions including which have been relied on above and, the fact that the trial Court having considered the record of the case and evidence brought by the prosecution has formed an opinion prima facie of involvement of the revisionist in commission of offence, this revision is ***dismissed***. The Trial Court is directed to frame charge and proceed with the trial and conclude the same expeditiously preferably within a period of one year.

(2019)11ILR A365

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2019

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Revision No. 348 OF 2019

Km. Sandhya & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Sunil Kumar Singh, Sri Abhishek Tripathi

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

A. Criminal Law -Code of Criminal Procedure,1973 - Section 319 - application - an additional accused can be summoned even on the basis of examination-in-chief of a single witness but it depends upon the facts and circumstances of each individual case-the standards of sufficiency of evidence which may justify the summoning of an additional accused under section 319 Cr.P.C. is on higher footing. Such a power must not be exercised in a casual manner-summoning of the accused reflects that neither the ratio nor the obiter of the Constitution Bench of the Apex Court has been followed in the right spirit- in the instant case neither the cross-examination of the witness was allowed to take place nor any further evidence had been allowed to come that would have given more material ot assess the worth and credibility of the allegations that have been brought against the two revisionists-summoning of revisionists is set-aside. (Para 3,4, 6, 7, 8)

Revision allowed (E-6)

List of cases cited:-

1. Hardeep Singh Vs. State of Punjab and Ors, (2014) 3 SCC-92

2. Brijendra Singh and Ors Vs. State of Rajasthan,(2017) LawSuit(SC) 484

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This revision has been filed seeking the quashing of impugned order dated 12.12.2018 passed by Chief Judicial Magistrate, Auraiya, as well as the entire proceedings of Case No.1377 of 2014 (State vs. Radhey Shyam Batham and others), under sections 354, 323, 504 I.P.C., Police Station- Dibiyapur, District-Auraiya.

2. Heard learned counsel for the revisionists.

3. Submission of the counsel is that the implication of the revisionists has been done on the basis of bad blood which existed in between the parties. The background of the case is that a plot was purchased by the mother of the revisionists on 5.9.2013 but as the opposite party was attempting to illegally possess the plot and encroach upon the same, a case in that regard was filed on 25.9.2013 as original suit no.455 of 2013 in the court of Civil Judge Senior Division, Auraiya which is still pending. When the other side came to know about the legal proceedings initiated by the family of the revisionists on 1.10.2013 the opposite party no.2 along with certain other family members became aggressive and made an assault and attacked upon the house of the revisionists as a result of which mother of the revisionists sustained injuries and a report in this regard was lodged as N.C.R. No.97 of 2013 on 1.10.2013 in Police Station Dibiyapur. Reliance in this regard was placed upon

Annexure No.2 of the revision. In this matter a charge-sheet was submitted under sections 323, 324, 452, 504, 506 I.P.C. Again because of the report lodged against the opposite parties the other side felt indignated and out of ire and vengeance entered into confabulations in order to bring an entirely false case against the revisionists and their family members. It was this reason that a number of days after the said occurrence of aggression made by the opposite side they have lodged the present F.I.R. on 5.10.2013. There is hardly any good explanation for this inordinate delay in lodging the F.I.R. and the explanation offered in this regard is quite unpalatable, unconvincing and is incapable of inculcating any belief in the same. After lodging of F.I.R. against the revisionists the investigation took place and it was found that none of the accused persons of the case had any complicity in the crime and as a result of the same the final report was submitted against all the accused persons. Later on, further investigation again took place and though the charge-sheet was submitted against certain other family members of the revisionists but the complicity of the revisionist nos.1 and 2 both remained unsubstantiated on the basis of material collected by the investigation which included the statements of witnesses affirming the absence of both the revisionists at the place of occurrence at the time of the said incident. Subsequently, when the trial took place the examination-in-chief of P.W.1 was recorded and as was expected she repeated the same false allegations made against revisionists. The application under section 319 Cr.P.C. was moved and both the revisionists who are brother and sister, have been summoned by the court without even allowing any cross-examination upon the victim. Submission of the counsel is that though technically speaking, it is permissible under law that an additional accused can be summoned even on the basis of examination-in-chief of a single witness but it all depends upon the facts and circumstances of each individual case which have to be considered before assessing the legitimacy of such exercise. In this particular case where the fact was apparent on the face of record that the implication of both the revisionists was found false by investigation and the evidenciary material collected was highly indicative about their innocence and even their presence at the place of occurrence was not substantiated and the allegations to that effect was found false, and repeatedly the final report was submitted in their favour twice, it would have been a better course and more advisable for the trial Court to have at least allowed the cross-examination of the witness so that the actual worth of the testimony could be better assessed. The Court could also, in a case like this, have proceeded to summon the additional accused after examining more than one witness. According to the counsel the ratio and obiter as has been settled by the Constitution Bench of Apex Court in the case of **Hardeep Singh vs. State of Punjab and others, 2014 (3) SCC-92,** the power to be exercised under section 319 Cr.P.C. is qualitatively different from the power to be exercised under section 204 Cr.P.C. for summoning the accused to face the trial. The standards of sufficiency of evidence which may justify the summoning of an additional accused under section 319 Cr.P.C. is on the higher footing. Such a power must not be exercised either in a casual or caviller manner or in a routine manner. There has to be some very

serious circumspection before exercising such power. It is also true that it is not necessary that the Court should conclude on the basis of evidence produced during the course of trial that evidence is of such nature that must entail the conviction of the accused. That is never the requirement. Such a rigorous assessment is not called for. Nevertheless, the measure of the degree of sufficiency of evidence that should persuade the Court to summon an additional accused must be of a convincing nature which may inspire confidence. Submission is that the order impugned reflects that it is a very casually passed order in which the *ipse dixit* of the victim who in the circumstances was not expected to say anything other than what she said earlier in the F.I.R. or could not have been expected not to reiterate her earlier allegation has been rather credulously brought to serve and become the sole basis to summon the revisionists-accused. Her testimony could have been allowed to be estimated on the anvil of some questions at least in the background of the fact that the false implication of the aforesaid two accused was repeatedly found and affirmed twice in the course of investigations that took place earlier in the case. Submission is that the summoning of the accused reflects that neither the ratio nor the obiter of the Constitution Bench of the Apex Court has been followed in the right spirit and therefore the impugned order is not tenable in the eyes of law.

4. Counsel appearing for the opposite party has submitted that once the witness states about the complicity of a particular accused and there is no ambiguity about the same in her statement then the material collected during the course of investigation is wholly irrelevant and does not deserve to be seen at all. The cross-examination is not a condition precedent to act upon the testimony of a witness for the purpose of exercising the power u/s 319 Cr.P.C. and there is nothing illegal about it if the accused-revisionists have been summoned on the basis of a single examination-in-chief of P.W.1. Therefore there is nothing wrong in the order and trial must go on against the additional accused as such.

5. Heard learned A.G.A. and perused the record.

6. After going through the entire record of the case and considering the Constitution Bench's decision in **Hardeep Singh** (supra) and after considering the Apex Court's decision given in **Brijendra Singh and Ors Vs. State of Rajasthan. 2017 LawSuit(SC) 484,** this Court is of the opinion that the trial Court did not act in the right manner and the least that may be said is that it was an order passed almost in haste. The background of the case which was apparently available to indicate that the complicity of both the accused persons was found unsubstantiated even when the case was investigated twice, was completely ignored by the Court below. Even otherwise, the role assigned to the lady does not appear to be a very probable allegation. But this Court does not propose to enter into that aspect of the case at any great length lest it may cause prejudice to the trial either way. This Court also finds some discrepancies in the details of descriptions and also does not feel very convinced about the nature of allegations that have been made against the revisionist no.2 specially when he has

been found to have been absent on the spot. The revisionist no.2 summoned under section 319 Cr.P.C. is said to be a doctor employed in V.S.R. Memorial Medical Institute, Rasulabad, Kanpur Dehat. It may be clarified that this observation of this Court must not be construed to have any reflection upon the ultimate merits of the case and the trial Court shall be at liberty to proceed in the matter independently remaining completely unprejudiced by the observations of this Court. But as this Court is dealing with the task of assessing the legitimacy or the appropriateness of summoning of the additional accused some sort of reflections are bound to come during the course of discussions.

7. At any rate, this Court is of the considered opinion that the summoning of the revisionists was, to speak the least, at this stage a kind of hasty act resulting into the passing of the impugned order in question which cannot be called a very mature or prudent order. Neither the cross-examination of the witness was allowed to take place nor any further evidence had been allowed to come that would have given more material to assess the worth and credibility of the allegations that have been brought against the two revisionists. The impugned order is certainly not in keeping with the spirit of the Constitution Bench's decision of the Apex Court given in the case of **Hardeep Singh vs. State of Punjab and others, 2014 (3) SCC-92.** The trial court would do well to keep in perspective the sound age old principle that to have power to do something is different from having the judicial ability to know how that power is to be exercised. This Court therefore finds good reason to allow the revision.

8. The impugned order dated 12.12.2018 is hereby set-aside. The revision stands allowed. The summoning of revisionists is also set-aside.

9. It may be observed that if at some future stage more convincing and more sufficient evidence is brought on record which may justify the summoning of the additional accused persons, the trial Court shall be at liberty to proceed further in accordance with law as it may deem fit to do.

(2019)11ILR A368

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABD 10.07.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Revision No. 685 OF 2019

Om Prakash Pandey ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Vimlendu Tripathi

Counsel for the Opposite Parties:
A.G.A., Sri Himanshu Pandey

A. Criminal Law -Code of Criminal Procedure,1973 - Section 133 - the proceedings under section 133 of Cr.P.C. are summary in nature and are meant for the cases of imminent danger to the public tranquillity and peace and the same should not be used or rather misused to scuttle the valuable right of owner of property and that is why, the legislature has in its wisdom used the words "any reliable evidence" in support of such denial, in the event and in case of which he shall stay the proceedings until the matter of the existence of such right has

been decided by a competent Court. (Para 12 to 17)

B. Criminal Law -The procedure prescribed u/s 141 Cr.P.C. in the case where the order u/s 136 of Cr.P.C. is made absolute, is that the removal of unlawful obstruction or nuisance is done by the person against whom the order is made, the Magistrate has to give notice to such person requiring him to perform the act within a time framed fixed in the notice and in the event of disobedience such person is held liable to the penalty u/s 188 IPC and in the case of disobedience the Magistrate may also cause such act to be performed and may also recover the cost of performing it from the properties of such person.in the instant case this procedure has not been adopted for the reason not known to this court and only best known to the third respondent who reflected unjustified and unmindful performance of statutory obligations bestowed upon him. (Para22,23)

Revision allowed (E-6)

List of cases cited:-

1. Raghubar Dutt Vs. Suresh Chandra and Ors, (1987) ACR 566

2. Wali Uddin and Ors Vs. State of U.P. and Ors,1988(12) ACR 1

3. Md. Basar Ali Molla and Ors Vs. State of W.B. and Ors,MANU/WB/0583/2006

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This criminal revision has been preferred against the impugned order dated 11.01.2019 passed by the City Magistrate, Gorakhpur u/s 133(1) of Cr.P.C. in Case No.D201805310000230 of 2017 (Mohd. Salim vs. Om Prakash Pandey), P.S.-Cantt., District-Gorakhpur.

2. Matter was taken up on 15.02.2019 by the preceding bench of this Court and the effect and operation of order dated 11.01.2019 passed by the City Magistrate was stayed until further orders. It was also specifically directed that status-quo with regard to nature of possession of land shall also be maintained. Certain directions were also given to the District Magistrate with regard to immediate measurement of the spot in question. Subsequently on 13.3.2019 Shri Himanshu Pandey, Advocate appeared on behalf of opposite party no.2. Matter was thereafter listed to come up on 3rd April, 2019 with the direction to learned A.G.A. to file counter affidavit. Later on case was again taken up on 31.4.2019 and the compliance report about the directions issued by this Court was filed on behalf of State. Matter was fixed up for final disposal on 17th April, 2019 and last opportunity to file counter affidavit was given to opposite party. Rejoinder affidavit if any, was also directed to be filed in the meantime. It further transpires that a listing application was moved to list the matter earlier as a result of which the matter was fixed up for today. The same has thus come up before this Bench and been taken up today by the Court.

3. Learned counsel appearing on behalf of revisionist at the very outset has submitted that despite the stay orders of this Court, the boundary wall in question has been demolished in complete violation of the Court's direction and not only a gross defiance of the order has been done but the authorities have acted in contempt of the same and a contempt application has already been moved before the appropriate bench of this Court in that regard. The urgency of the matter was placed before the Court.

4. On the query raised by the Court, learned A.G.A. as well as learned counsel appearing for opposite party no.2 have submitted that so far no counter affidavit has been filed. Some further time in that regard has once again been sought. This Court in the circumstances of the case feels that the matter was initially taken up on 15.2.2019 and since then sufficient time has been there to file counter affidavit. Last opportunity has already been given. This Court does not see any good justification to give further time for that purpose in the circumstance of the case. The matter has already been fixed for final disposal by the preceding Bench.

5. While going through the record of the case in hand, this Court has the occasion to go through the orders of this Court passed by the preceding Bench presided by Hon'ble Ajit Kumar, J. whereby not only precise and detailed directions have been given regarding the measurement of the land in question but after receiving the compliance report sent on behalf of the District Magistrate and after going through the same, the Court had proceeded to make pithy observations of significance regarding the lackadaisical manner in which the concerned authorities have acted in this matter. It would not be out of place to quote the order passed by the preceding Bench on 03.4.2019, which reads thus:

"1. This Criminal Revision is directed against the order dated 11th January, 2019 passed by the City Magistrate, Gorakhpur, directing for removal of the boundary wall of the present applicant to the North of the graveyard on account of it being a public passage.

2. The grievance raised in the revision petition is that the revenue records were not examined by the City Magistrate and in exercise of the power which is quasi-judicial in nature. The City Magistrate, therefore, overlooking the records directed for removal of constructions, as if the constructions had resulted in public nuisance causing blockade of a public passage.

3. This Court while entertaining the revision petition, passed a detailed order on 15th February, 2019 directing the District Magistrate/ Collector, Gorakhpur to get the immediate measurement of the spot so as to ascertain whether the land in question is really a public passage or is a part of the land held by the applicant by virtue of sale deed. It was also directed that the revenue official of the concerned Tehsil shall be asked to render help with reference to the relevant revenue records while preparing the report. This Court also stayed the effect and operation of the order dated 11th January, 2019 fixing 13th March, 2019.

4. On 13th March, 2019 Sri Himanshu Pandey, learned Advocate, had put in appearance on behalf of opposite party no. 2 by filing vakalatnama and the Additional Government Advocate was granted further time to submit the report fixing 3rd April, 2019.

5. Today an affidavit of compliance on behalf of the State-respondents, including the opposite party no. 3, has been filed annexing therewith a report of the District Magistrate, Gorakhpur dated 12th March, 2019 in which it has been stated that a team for inspection and preparation of report was constituted headed by Niab-Tehsildar, Sadar. The inspection team reported that as far as plot no. 243/29 area 0.295

hectare is concerned, the same belongs to the graveyard and in the revenue record there is no public passage shown to the east and north of the graveyard, however, there is a 16 feet wide passage in which bricks have been placed with the help of the villagers. The sketch map that has been appended to the report shows that the land in dispute is to the north and east of the graveyard which belongs to the applicant and is adjacent to the graveyard where land/ passage in dispute has been shown.

6. Learned counsel for the applicant has also drawn the attention of the Court to the order dated 30th December, 2011 passed by the then District Magistrate, Gorakhpur permitting construction of boundary wall to the south of the land of the present applicant and there is also order the Sub-divisional Officer dated 3rd July, 2013 in which the direction was issued to the in-charge Inspector, Police Station Cantt. to ensure that nobody could cause obstruction in the construction of the boundary wall of the present applicant.

7. In matter of public nuisance, while the administrative authorities adjudicate under Section 133 Code of Criminal Procedure, it calls for an absolute objective consideration of the allegations and appreciation of revenue records before the authorities come to conclude that a place is a public passage or a public place and that on account of some deliberate activity a public nuisance is caused. The authorities are hide bound in law to look into the records of such land over which public nuisance is complained of.

8. Prima facie, therefore, I find that in the present matter the third respondent has acted quite carelessly and mechanically with least application of mind, and as the records reflect.

9. However, this Court before proceeds to pass final order in the matter and since the position on the spot has been altered, in view of the order impugned here in this revision petition, the counsel for the other side is afforded one last opportunity to file his counter affidavit within ten days from today.

10. Let the matter be placed on board for final disposal on 17th of April, 2019 in the meanwhile after receiving the counter affidavit, the applicant may file rejoinder affidavit.

11. List on 17th April, 2019 showing the name of Sri Himanshu Pandey, as counsel for private respondent. "

6. In the aforesaid backdrop, this Court deems it proper to decide this revision finally.

7. Heard Shri Vimlendu Tripathi, learned counsel for the revisionist, Shri Himanshu Pandey, learned counsel for opposite party no.2 and learned A.G.A. for the State.

8. The crux of factual dispute, as reflects from the record is that the revisionist claims himself to be the owner of land in question, which was purchased by him through registered sale deed dated 01.4.2010 regarding Arazi No.243/28/1/4 and 243/28/1/5 admeasuring 33.75 decimal (1367.56 Sq. Mtr.) and also through registered sale deed dated 07.10.2014 regarding Arazi No.243/28/1/2 and 243/28/1/3 admeasuring 217.5 Air situated in Village-Mahadev Jharkhandi, Tappa and

Pargana-Haveli, Tehsil-Sadar, District-Gorakhpur. The revisionist further claims that in the year 2011 itself, he had moved an application before the District Magistrate, Gorakhpur regarding a dispute of measurement of land in question and the construction of boundary wall thereupon, in respect of which the Revenue Inspector conducted inspection of land in question and also conducted measurement of land and submitted the report which was in his favour, upon which the District Magistrate passed order dated 30.12.2011 and issued instructions to the Tehsildar, Sadar, Gorakhpur to maintain law and order and to ensure that in case the revisionist raises construction of boundary wall only on his own land, no interference be permitted by any third person. According to the revisionist, one another application dated 17.4.2013 was also moved by him for the similar controversy of measurement of land in question and on that occasion also, reports of revenue authorities dated 03.7.2013 and 28.6.2013 were forwarded in favour of revisionist on the basis of which necessary order was passed by the administrative authorities to give protection to the construction raised by the revisionist and to maintain law and order on the site. It was only thereafter that the revisionist had raised construction of boundary wall over his land in the year 2014 and also sold a few plots of the said land. According to the averments made in the affidavit accompanied with the memo of revision, further claim of revisionist is that his land is positioned adjacent to east and north side of one graveyard situated in Khasra No.243 having an area of 0.2950 hectare and the said graveyard is recorded as Clause 6-3/graveyard in the revenue record. The boundary wall constructed by the revisionist is situated on the south and west side of his land and the north side of the land is secured by the boundary wall of engineering college and the east side of his land is open. It has been also claimed by the revisionist that for the purpose of selling plots in his land, he developed a thirty feet Kharanja road on the east side of said graveyard in the horizontal direction (from east to west) up to the boundary of said graveyard. Further claim of revisionist is that few persons namely Sakoor, Abdul Sattar and Abdul Gaffar, being owner of some plot of land of main Gata No.243 and some adjacent land in other gata numbers of village Mahadev Jharkhandi, executed one registered agreement to sale dated 17.8.2016 in favour of one Santosh Sahi for the part of land admeasuring 0.405 decimal, which land is also situated adjacent to the graveyard but on the different side. These persons, according to the claim of revisionist, joined hands with each other and one complaint dated 19.7.2017 was moved before the administrative authorities on the date of Janta Darshan organized on 22.7.2017 and in the said complaint it was alleged that three sides of graveyard are surrounded by a public way and is being used by the villagers since long time for their movements and also for performing Janaza process and the present revisionist purchased land of said public way from a few land owners by using force, in respect of which proceedings are pending in the court and about 20 days before, the revisionist raised the boundary wall on his land by encroaching upon the said public way whereby the village residents are facing serious difficulties and are feeling aggrieved and in case no immediate action is taken, any untoward situation may arise. This application dated 19.7.2017 was treated as complaint u/s

133 of Cr.P.C. and Case No.201805310000230 of 2017 was registered and report was called from the local police, upon which two reports dated 03.8.2017 and 10.10.2017 along with handmade map of the land in question were submitted by the local police before the City Magistrate, Gorakhpur, who has been arrayed in his individual capacity as third respondent in this criminal revision. The erstwhile city Magistrate passed preliminary order dated 06.11.2017 u/s 133 of Cr.P.C. calling response of revisionist for removal of boundary wall or for showing cause as to why the order should not be confirmed. The revisionist submitted his objection dated 02.02.2018 denying existence of public way adjacent to the graveyard and explained that neither revenue record nor municipal record discloses any public passage on the land in question and also disclosed that the land in question was purchased by him through registered sale deeds and also stated that no encroachment has been done by him on any public passage and the entire story of complainant is concocted and false lacking all factual basis. The complainant, who has been arrayed as second respondent in this criminal revision, filed his replica dated 11.4.2018 against objection filed by the revisionist and also moved an application for spot inspection. Thereafter, third respondent got posting as City Magistrate, Gorakhpur and conducted spot inspection on 28.12.2018 in respect of which a hand written site map was prepared and the joint statement of few residents of the vicinity was recorded and was placed on record. Thereafter the third respondents passed final order dated 11.01.2019 u/s 133 of Cr.P.C., against which the present criminal revision has been preferred.

9. Submission of counsel for the revisionist is that the claim of public way or chak road or chak nali is not supported with any government record or revenue record or municipal record and is merely based upon the statement of few persons, who are adversely interested and inimical for vested reasons. Further submission is that the land in question is not a public place or public passage or public way or chak road or chak Nali and in fact it is the private land of the revisionist, upon which the boundary wall in question was constructed in the year 2004 with the strength of orders passed by the District Magistrate and his subordinates after due measurement of land of the revisionist. It has been further submitted that initial complaint dated 19.7.2017 as well as joint statement allegedly recorded during the proceedings u/s 133 of Cr.P.C. has been signed by Sakoor and Abdul Gaffar, who executed agreement to sale in favour of Santosh Sahi and they all are in fact instrumental for issuance of impugned order dated 11.01.2019. Further submission is that there is no justification and reason to hold that the land in question is public way and to hold that there is any encroachment over any public way. Submission is that the third respondent being City Magistrate passed the impugned order in complete ignorance of factual aspects of the case as well as settled position of law in this regard and actually the impugned order is an outcome of bias and prejudice of third respondent, who seemed inclined to favouring the above named Santosh Sahi. Counsel for the revisionist further submits that the unfair bias of opposite party no.3 is apparent on the face of record in view of the subsequent act of demolition of boundary wall at his instance, despite having knowledge of the interim stay

order dated 15.02.2019 passed by this Court, which act amounts to deliberate defiance of the order passed by this Court and even attracts the provisions of Contempt of Court Act. In this respect, reliance has been placed on supplementary affidavit dated 22.02.2019 filed by revisionist.

10. On the other hand, learned A.G.A. supports the order dated 11.01.2019 by submitting that the same is based upon two reports of local police and the inspection of third respondent himself and hence no interference is required.

11. Supporting the submission of learned A.G.A., learned counsel for second respondent i.e. the complainant, has attempted to make a halfhearted faint submission that the public passage was existing at the place since long and was being used by the villagers and due to efflux of time, the land in question being used as public passage cannot be encroached by the revisionist, as his title is disputed and as such, the order dated 11.01.2019 is justified.

12. The law in respect of proceeding u/s 133 of Cr.P.C. is well settled inasmuch as such proceeding is summary in nature and the factual dispute about existence of public passage is required to be adjudicated upon in the light of denial of opposite party about existence of public passage and in case there is some substance or there is any reliable evidence in support of such denial, the Magistrate shall stay the proceedings until the matter of existence of such right is decided by a competent court and if he finds that there is no such evidence, he shall proceed as provided u/s 138 of Cr.P.C. In this regard, relevant provisions of law are being reproduced herein below :

"CHAPTER X - MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B--Public nuisances

133. Conditional order for removal of nuisance -

(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers--

(a) that any unlawful obstruction or nuisance should be removed from ***any public place*** *or from* ***any way,*** *river or channel* ***which is or may be lawfully used by the public;*** *or*

(b)

.....; or,

(c)

.....; or,

(d)

.....; or,

(e)

.....; or,

(f)

.....,

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or ....., within a time to be fixed in the order--

(i) to remove such obstruction or nuisance; or

(ii)

.....; or

(iii)

.....; or

(iv)

.....;

or

(v)

.....;

or

(vi)

.....,

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any civil Court.

Explanation--A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

134. .....

135. .....

136. .....

137. Procedure where existence of public right is denied -

(1) Where an order is made under section 113 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

*(2) If in such inquiry the Magistrate finds that **there is any reliable evidence** in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and if he finds that t**here is no such evidence,** he shall proceed as laid down in section 138.*

*(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce **reliable evidence** in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.*

138. Procedure where he appears to show cause

(1) If the person against whom an order under section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

139. Power of Magistrate to direct local investigation and examination of an expert

The Magistrate may, for the purposes of an inquiry under section 137 or section 138--

(a) direct a local investigation to be made by such person as he thinks fit; or

(b) summon and examine an expert

140. Power of Magistrate to furnish written instructions, etc

(1) Where the Magistrate directs a local investigation by any

person under section 139, the Magistrate may--

(a) furnish such person with such written instruction as may seem necessary for his guidance;

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid

(2) The report of such person may be read as evidence in the case (3) Where the Magistrate summons and examines an expert under section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid

141. Procedure on order being made absolute and consequences of disobedience

(1) When an order has been made absolute under section 136 or section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code (45 of 1860)

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

142. .....

143. ....."

13. The scope of above quoted provisions has been discussed by this Court on many occasions. In the case of **Raghubar Dutt vs. Suresh Chandra and others, 1987 ACR 566,** this Court has discussed the scope of Section-137 of Cr.P.C. and observed as follows :

*"**5.** A bare reading of Section 137 would indicate that the provisions therein are to prevent the Magistrate from arrogating himself the power of civil court. Further the Magistrate need not hold an elaborate enquiry regarding the rights of the parties. The ambit of the enquiry is to find out if there is some prima facie reliable evidence in support of the denial of public right. The Magistrate is not called upon to weigh the evidence in order to determine the rights and title or truth of the denial. But he has just to be satisfied as to whether there is some evidence which could indicate prima facie that it was possible for a competent court to place reliance upon the same. It does not obviously mean that evidence of such a character would definitely establish title of the land. Otherwise in that case the legislature would not have used the words 'just reliable evidence',, rather the words used would have been that the Magistrate would decide on the basis of evidence being led as to whether the person against whom the said order has been passed, has a right in the land to create unlawful obstruction in the public way. The language of Section 137(2) of the Code is couched in such a way that the*

reliable evidence would depend upon the circumstances of each case. To put it differently, it only connotes where the evidence was such that if unrebutted, it would prove the non-existence of public right as alleged by the person against whom conditional order was passed See Lala Bissoomal v. State, 1957 AWR 551, T. N. Sudhakaran v. Dr. L. M. George, 1977 Cri.LJ 542 and Jaswant Singh v. Jagir Singh, MANU/PH/0080/1972 : 1972 CriLJ 792. Further the legislature did not use the word 'evidence' which definitely establishes the right to claim. In other words, reliable evidence can be taken to be a form of evidence which is not the basis of unreliable or forged evidence. The duty of a Magistrate is merely to see whether the evidence in support of denial of public right is reliable.

6. *In the instant case it is better to refer to the evidence led by the opposite parties to prove the denial of public way or the unlawful obstruction created. It was alleged by the opposite parties that plot No. 394 did not contain public way and there was no such entry like public way in plot No. 394 in revenue papers. Similarly in Khatauni for 1387 to 1392F an area of 8 biswa of plot No. 394 was entered as Goth and there was no mention about any public way or Rasta. Similarly extract of Khasra for the years 1374 to 1379 F also mentions the area of 8 biswa of plot No. 3 94A as Goth. There was no mention of any public way or Rasta. It was for the applicant to move an application Under Section 133 to explain as to how this entry of Goth was converted into Rasta. This was the question pertaining to right and title. The aforesaid extracts of Khasra and Khatauni were certainly reliable evidence within the meaning of Section 137(2) of the Code. On the basis of such evidence the Magistrate ought to have stayed the proceedings until the matter of existence of such right of public way was decided by a competent court. The Sessions Judge has correctly allowed the revision by the impugned order."*

14. In **Wali Uddin and others vs. State of U.P. and others, 1988 (12) ACR 1,** this Court has elaborated the language of Section-137(1) of Cr.P.C. and concluded in following terms :

*"**23.** It is also to be noticed that under Section 137(1) the Legislature has used the word "that after the denial of such right by opposite party the Magistrate shall inquire into the matter" and not that the Magistrate shall adjudicate upon or decide the matter or controversy between the parties. The word 'inquire', means eager, to acquire information. The word 'inquire', according to Shorter Oxford English Dictionary means to search into, to seek knowledge, to make inquisition, to make investigation, to seek information by questioning, to seek or to try to find out. The word reliable evidence having been used and the Magistrate having been directed to inquire into the matter and not to decide or adjudicate upon, it is clear that the person denying the public right has to put forward a just and bonafide claim. In case the Magistrate finds that there is some reliable evidence and certainly not a conclusive evidence in support of the denial of any public right to get the matter decided by a competent Court. I am however, of the view that the Section does not make it clear as to who is the person as to whether first party or the second party, who has to approach*

the Civil Court. One thing more may be clarified that in case the Magistrate finds that there is no such reliable evidence in that event he shall proceed in view of the provisions of Section 138 of the Code. In the instant case what has been done is entirely different. Even though the Magistrate confirmed the conditional order but the revision has been disposed of by the learned Additional Sessions Judge in total disregard of the provisions of Section 133 read with Section 137 of the Code. The learned Sessions Judge was exercising the same jurisdiction as was to be exercised by the learned Magistrate. He must have also proceeded to decide the case just with a view to make an enquiry as to whether there was some reliable evidence led by the opposite party No. 2 who denied the existence of such right and in case he found that there was reliable evidence his jurisdiction ceases and it was for the civil Court to decide the same. "

15. The Calcutta High Court in the case of **Md. Basar Ali Molla and others vs. State of West Bengal and others, MANU/WB/0583/2006** has considered the aspect of emergency attached with the dispute regarding public nuisance and has held that it does not apply to private nuisance and private dispute and it is never intended to settle a private dispute. The relevant paragraphs of Md. Basar Ali Molla's case (supra) are being reproduced herein below :

*"**7.** Section 133 Cr. PC relates to passing of order for removal of public nuisance in case of emergency. It does not apply to private nuisance and private dispute and it is never intended to settle a private dispute.*

***8.** It has been laid down in the case reported in MANU/MP/0136/1958 : AIR1958MP350 that Chapter X of the Code of Criminal Procedure deals with "Public Nuisances" and not with private nuisances. The remedy for the latter is the civil suit although what constitutes nuisance may be common to both classes. Section 133 Cr. PC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases the party should be referred to the remedy under the ordinary law.*

***9.** Reference may also be made in the case reported in MANU/KE/0077/1964 : AIR1964Ker252 where it has been held that Section 133 Cr. PC can be used only where there has been an invasion of public rights. The case reported in MANU/BH/0076/1958 : AIR1958Pat210 is also relevant in this case' where it has been held that Section 133 Cr. PC cannot be used as a short cut to achieve what one would like to achieve in a Civil Court. The whole object of Section 133 Cr. PC is that the public should not suffer and that such dangers or obstructions caused by the members of the public should be removed at the earliest possible moment.*

***10.** In that case a decision of Allahabad High Court reported in MANU/UP/0008/1914 was referred. In that case it was held now it is certainly expedient that in all proceedings initiated under Section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute.*

11. *In the case reported in MANU/UP/0013/1942 : AIR1943All19 it has been stated that the proceedings under Section 133 Cr. PC is not intended to settle private dispute between two members of the public.*

12. *Reference can also be made in the case reported in MANU/MH/0210/1991 where it has been held that Chapter XB of Criminal Procedure Code deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest.*

13. *In the instant case there are no dependable materials to hold that the disputed pathway was being used by the public at large but it appears that the same was used by the students and teachers of Sisu Siksha Kendra from 2003 to last week of February, 2005 and the same was not being used from the last week of February, 2005 as existence from the said pathway was destroyed and the same merged with the fishery. So, it does not appear that the public at large is being affected and there was any obstruction of public way or public way has been destroyed and the same requires repair. So, no case of sufferance of public is made out and it does not appear that the Magistrate had to act purely in the interest of the public. There is no invasion of public right. If it assumed that obstruction is caused to the use of the pathway in question by the students, teachers and guardians of students of Sisu Siksha Kendra by the petitioners then it is an obstruction not to the public at large but to a handful of persons and remedy for said obstruction cannot be had by resorting to provision of Section 133 Cr.PC. If there is any nuisance the same is purely a private nuisance for which Civil Court may be approached for appropriate remedy according to law. There is room for contention that Section 133 Cr.PC also does not contemplate any order for repairing of road which has been abolished and also any order in connection with such repair.*

14. *In view of my above discussions I hold that both the impugned orders dated 17.1.2006 and 7.7.2006 cannot stand and the same are liable to be set aside. In the result, the instant applications succeed and the same are allowed. The impugned orders passed by the learned Executive Magistrate are hereby set aside. I make no order as to costs. "*

16. The crux of above quoted statutory law and the precedents is that the authority under section 133 of Cr.P.C. can be exercised by the executive magistrate, when any unlawful obstruction or nuisance is alleged on any public place or on any way, which is or may be lawfully used by the public, as is the controversy in the present case. However, to ascertain the justification of such allegation, the executive magistrate is required to see as to whether the person against whom the show cause has been issued under Section 133(1) of Cr.P.C. has placed "any reliable evidence" in denial of such allegation or not. While doing so, the executive magistrate is not required to ask for any conclusive evidence and he has to consider the evidence brought on record by the person denying existence of unlawful obstruction or nuisance with an understanding as to whether such evidence can be said to be reliable enough. If that is so, the executive magistrate should not proceed further in the matter and should relegate

the parties to the competent civil court for determination of their rights. Even otherwise, the entry in government record regarding the land or passage in question has a direct bearing upon the claim of existence of "any public place" or "any way, which is or may be lawfully used by the public". When the person denying existence of unlawful obstruction or nuisance comes with an explanation that the land or passage in question is actually the land purchased by him through registered sale-deed and such land is not entered in the revenue or municipal record as "public place or public way or government/ municipal land", the executive magistrate should not casually brush aside such counter claim or explanation without giving any convincing reason in that regard and proceed only on the basis of some unsubstantiated statements of a few persons.

17. The proceedings under section 133 of Cr.P.C. are summary in nature and are meant for the cases of imminent danger to the public tranquility and peace and the same should not be used or rather misused to scuttle the valuable right of owner of property and that is why, the legislature has in its wisdom used the words ***"any reliable evidence"*** in support of such denial, in the event and in case of which he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court as provided under Section 137(2) of Cr.P.C., which is certainly having a different import and connotation than the word 'conclusive evidence'. This language used by the legislature has a limiting influence and works as a guideline while exercising authority under section 133 of Cr.P.C.

18. In the light of rival submissions made at the bar, this Court has had the occasion to peruse the entire record of the case, according to which neither the complaint dated 19.7.2017 nor two reports of local police dated 03.8.2017 and 10.10.2017 nor the inspection report of third respondent dated 28.12.2018 discloses any such details of revenue record which may go to demonstrate that the land in dispute was or is entered into any government record as public passage. The perusal of compliance report dated 12th March, 2019 sent on behalf of District Magistrate, Gorakhpur also clearly mentions that the passage shown in the map does not find place in the revenue record, though it has been sought to be shown in the report that at present, one 16 feet wife Kharanja is existing on the side which has been constructed by the village residents collecting common fund. It would be useful to quote the relevant part of inspection report dated 08.3.2019 :

"नायब तहसीलदार, पिपराइच द्वारा जांचोपरांत अपनी जांच आख्या दिनांक27.2.2019 (पताका- ग) प्रस्तुत करते हुए उल्लिखित किया गया है कि आ०नं०243/29 रकबा 0.295 हे० कब्रिस्तान के पूरब उत्तर नजरी नक्शे में प्रदर्शित रास्ते का अंकन राजस्व अभिलेख में नहीं है। मौके पर वर्तमान में16 फीट की चौड़ाई में रास्ता कायम है जिस पर खड़ंजा लगा है। उक्त रास्ता ग्राम निवासियों द्वारा चन्दा लगाकर बनवाया गया है (रास्ते का फोटोग्राफ तथा ग्रामवासियों का चन्दे से रास्ता बनवाए जाने का बयान संलग्न)"

19. The said inspection report dated 08.3.2019 is the enclosure of the report of District Magistrate dated 12.3.2019, which is based thereupon. Both the said reports dated 8.3.2019 and 12.3.2019 mention several other aspects of the land

in question regarding its sale and purchase as well as regarding deficiency of stamp, which aspects are absolutely irrelevant for the purpose of adjudication of the case.

20. In the light of aforesaid factual aspects of the matter, this court has proceeded to consider the legality and veracity of impugned order dated 11.01.2019. The perusal of impugned order reveals observation of the third respondent to the effect that denial of revisionist regarding public passage is not reliable and that is why the removal of encroachment on public passage is justified. The third respondent has also observed that the inspection of site was conducted by him, during which statements of certain persons who were present on the spot were recorded, which disclosed that there was a chak road and chak Nali on the north and east side which has been demolished by the revisionist and road has been constructed. It has also been observed that the said chak road was going towards village via kabristan and the said passage having width about 16 feet near the kabristan has been squeezed by the revisionist and because of wall raised on the public passage, only 8 feet passage is available on the spot and the passage has been encroached. With such observations, the third respondent i.e. the City Magistrate, Gorakhpur has passed order u/s 133 (1) of Cr.P.C., whereby the revisionist has been asked to remove his wall on the passage within a week, so that the passage being used by the villagers may not have any hindrance. There is a recital in the said order about communication thereof to the local police station Cantt. for appropriate action and after due action the file has been ordered to be consigned to record.

21. The above noted observations and findings of third respondent do not disclose any detail about entry of public passage in government record and also do not disclose as to why the denial of the revisionist about existence of public passage was not found reliable.

22. On the anvil of above discussed statutory provisions as well as position of case law in that regard, it is undoubtedly clear that the impugned order is not only cryptic but is also bereft of any good reasoning which may justify the exercise of authority vested under Section-133 of Cr.P.C. Considering the facts of the case, in fact the revisionist appears to have placed sufficiently reliable evidence in the form of details of purchase of land in support of denial of public right in the face of which there appears no occasion for the third respondent to have passed the final order u/s 133 of Cr.P.C. for removal of boundary wall of the revisionist from the land in question. There is one another aspect of the matter that the inspection reports dated 8.3.2019 and 12.3.2019 submitted before this Court on behalf of the District Magistrate, Gorakhpur reveal that at present a 16 feet wide passage is existing having Kharanja thereupon, which has been constructed by the village residents through the collection of money. The procedure prescribed u/s 141 of Cr.P.C. in the case where the order u/s 136 of Cr.P.C. is made absolute, is that the removal of unlawful obstruction or nuisance is done by the person against whom the order is made and in this respect, the Magistrate has to give notice to such person requiring him to perform the act within a time frame fixed in the notice and in the event of disobedience such person against whom the order is made, is held liable to

the penalty provided u/s 188 of the Indian Penal Code and in the case of disobedience the Magistrate may also cause such act to be performed and may also recover the cost of performing it from the properties of such person. In the present matter, this procedure has not been adopted for the reason not known to this Court and only best known to the third respondent. To observe the least, the manner in which the impugned order has been passed by third respondent reflects much about an unjustified and unmindful performance of statutory obligations bestowed upon him and the state of affairs leave much to be desired.

23. So far as the submission made on behalf of revisionist regarding demolition of boundary wall even after attaining knowledge of interim order passed by this Court on 15.02.2019 is concerned, this Court finds that the revisionist has already invoked contempt jurisdiction of this Court in a separate proceeding and as such this Court abstains itself from making any observation, lest it may cause prejudice to the rights of the parties to the contempt proceeding, which is subjudice according to submission made by the counsel for the revisionist.

24. Resultantly the revision succeeds and is allowed and the impugned order dated 11.01.2019 passed by the City Magistrate, Gorakhpur is hereby set aside.

(2019)11ILR A382
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1183 OF 1986

Shamim Ahmad
...Accused/Applicant (In Jail)
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:

Sri K.B. Garg, Sri Mukhtar Alam, Sri S.A. Imam, Sri Saquib Mukhtar, Sri T.B. Islam

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

A. Criminal Law -Prevention of Food Adulteration Act,1954 - Section 7/16 - non-compliance of Section 10(7) & 13(2) - Code of Criminal Procedure, 1973-Section 401 r/w Section 397 - proceeding will not be vitiated for non-availibility of independent witness and section 10(7) will not help the accused at all - for mere absence of corroboration, Food Inspector's evidence cannot be disbelieved. (Para 7to 15)

B. It cannot be doubted that prosecution, when challenged, must satisfy that notice issued under section 13(2) has been served upon the accused but where accused at the stage of revision raise such plea for non-compliance of section 13(2), the court would not allow accused to take such factual plea when the stand taken before courts below shows that service of notice was not disputed. The mere fact that mention of wrong Court was an issue raised before court below is sufficient to prove the fact that notice was actually served upon the revisionist. (Para18 to 22)

Revision dismissed (E-6)

List of cases cited:-

1. Shri Ram Labhaya Vs. Municipal Corporation of Delhi and Another,1974(4) SCC 491

2. K. Harikumar Vs. Food Inspector, Punaloor Muncipality (1995) Supp. (3) SCC 405

3. Pradeep Narayan Madqaonkar & Ors Vs.State of Mah. 1995(4) SCC 255

4. Balbir Singh Vs. State 1996(11) SCC 139

5. Paras Ram Vs. State of Haryana 1992(4) SCC 662

6. Sama Alana Abdulla Vs. State of Gujrat 1996(1) SCC 427

7. Anil alias Sadashiv Nandoskar Vs. State of Mah.,1996(2) SCC 589

8. Subhash Singh Thakurshyam Vs. State(Thru CBI) (1997) 8 SCC 732

9. State of U.P. Vs. Zakaullah 1998 Cri. L.J. 863, para 10

10. Girja Prasad Vs. State of M.P. (2007) 7 SCC 625

11. Vijendra Vs. State of U.P. and Ors(Cri. Ap. 1167 of 2019)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Mukhtar Alam, Advocate, for Revisionist and learned A.G.A. for respondents.

2. This criminal revision under Section 401 read with Section 397 Cr.P.C. has been filed aggrieved by judgment and order dated 15.03.1985 passed by Special Judicial Magistrate, Nagina, Bijnor in Case No. 1335 of 1982 convicting Revisionist under Section 7/16 of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "Act, 1954") and sentencing him to undergo six months' rigorous imprisonment and a fine of Rs. 1000/- Thereagainst Accused-Revisionist preferred Criminal Appeal No. 78 of 1985 which has been dismissed by 2nd Additional Sessions Judge, Bijnor vide judgment and order dated 28.06.1980.

3. The prosecution story, inter alia, is that on 30.04.1982 at about 07.00 AM, Sri Virendra Kumar, Food Inspector found Accused-Revisionist, Shamim Ahmad, carrying about 20 liters of buffalo milk in two canes on his cycle for sale on Nethaur Road in Village Mehmoodpur, District Bijnor. Food Inspector suspected the milk to be adulterated and thereupon after disclosing his identity and serving necessary notice, took a sample of 660 M.Ls. buffalo milk from Accused-Revisionist and paid the cost. Necessary receipt was issued to Revisionist who put thumb mark on it. Sample was divided into three parts and after observing all formalities, one was sent to Public Analyst for examination and rest two were deposited in the Office of Chief Medical Officer, Bijnor. Public Analyst found the milk deficient in fat contents by 17 per cent and non fatty contents by 1 per cent. After obtaining necessary sanction from Chief Medical Officer, Bijnor, complaint was filed by Food Inspector against Accused-Revisionist in the Court.

4. Accused-Revisionist was prosecuted for the offence under Section 7/16 of Act, 1954. In his statement under Section 313 Cr.P.C. he denied to have sold any sample of milk to Food Inspector. According to him, he did not carry on the profession of selling milk but he was a Labourer. He was doing labour in the Hospital, Kotwali, Food Inspector wanted to take work from him to which he did not agree and thereupon Food Inspector got his thumb impression on the alleged notice Ex. Ka-1 and receipt Ex. Ka.-2.

5. Prosecution, in support of its case, examined Sri Virendra Kumar, Food Inspector, as PW-1, Sri Athar Husain, Clerk in office of Chief Medical Officer

as PW-2 and Sri Mool Chand, Vaccinator, as PW-3. Revisionist in defence examined Raees Ahmad as DW-1.

6. After recording oral testimony and perusing material on record, Trial Court convicted and sentenced Accused-Revisionist, as stated above, vide judgment and order dated 15.03.1985 which has been confirmed by Appellate Court by dismissing Revisionist's appeal, vide judgment and order dated 28.06.1980. This revision has been filed challenging both the aforesaid orders.

7. Judgements of Courts below have been challenged on the grounds that; (1) there was non compliance of Section 10(7) of Act, 1954 inasmuch there was no independent witness for sample taken by Food Inspector, (2) before taking sample, milk was not properly shaken which is mandatory requirement, (3) copy of Public Analyst Report was not supplied to Revisionist in time and there was a complete non compliance of Section 13(2) of Act, 1954.

8. So far as first aspect is concerned, it is now well settled that when independent witnesses are not available, Food Inspector can proceed to take sample and mere non-availability of independent witness will not vitiate proceedings. A three Judges Bench of Apex Court in **Shri Ram Labhaya Vs. Municipal Corporation of Delhi and another, 1974(4) SCC 491** has held that if no independent witness was willing to cooperate, Food Inspector cannot compel their presence. Hence, proceedings will not be vitiated for non availability of independent witness and Section 10(7) will not help the accused at all.

9. Now coming to second aspect, it cannot be doubted that milk is a primary product containing fat content and the fat content would also depend on the manner in which sample is taken after stirring. Supreme Court in **K. Harikumar Vs. Food Inspector, Punaloor Municipality 1995 Supp. (3) SCC 405** has held that stirring and churning of milk before taking sample is necessary. Therefore, it was necessary to establish that the sample was taken in a proper manner after stirring which would make the fat and non-fat into homogenous mixture.

10. In the present case, record shows that Food Inspector though stated that he stirred and churned the milk before taking sample, but it is contended that there is no other evidence to corroborate the same. I find that on this aspect, there is no cross-examination. For mere absence of corroboration, Food Inspector's evidence cannot be disbelieved particularly when I do not find any otherwise evidence to doubt the testimony of Food Inspector. It has been repeatedly held that mere fact that if a Police official has given evidence, the same is not to be disbelieved if not corroborated by any other evidence.

11. If the evidence of police officer is found acceptable, it would be an erroneous proposition that Court must reject prosecution version solely on the ground that no independent witness was examined. In **Pradeep Narayan Madqaonkar & others vs. State of Maharashtra 1995 (4) SCC 255,** it was held:

"Indeed, the ***evidence of the official (police) witnesses cannot be discarded merely on the ground that they***

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

12. In **Balbir Singh Vs. State 1996(11) SCC 139,** Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Apex Court vide **Paras Ram vs. State of Haryana 1992 (4) SCC 662, Sama Alana Abdulla vs. State of Gujarat 1996 (1) SCC 427** and **Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra 1996 (2) SCC 589.**

13. In **Subhash Singh Thakurshyam vs State (Through CBI) (1997) 8 SCC 732,** a Two Judge Bench of the Apex Court comprising of Hon'ble M. Mukherjee and Hon'ble K. Thomas JJ, in para 90 observed:

"....We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements."

14. In **State of U.P. v. Zakaullah 1998 Cri. L.J. 863** in para-10, it is said:

"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."

15. Referring to some of the the aforesaid decisions, Court in **Girja Prasad Vs. State of M.P. (2007) 7 SCC 625** held:

"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by

other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence." (para 25)

16. In the present case, it is not the case of Revisionist that when sample was taken, any independent witness was present and that should have been produced to corroborate the testimony of Food Inspector that before taking sample, milk was properly stirred. Moreover, Food Inspector has given a categorical statement on this aspect and since defence has not cross-examined on this aspect, I find no reason to disbelieve the otherwise testimony of Food Inspector on this aspect. Accordingly, even the second contention, noticed above, has no substance and is rejected.

17. Therefore, even the second contention, I find has no force.

18. Now coming to third submission, I find that despatch of Public Analyst Report has been shown as a proper compliance of Section 13 (2) of Act, 1954 but there is nothing to show that the said report was actually acknowledged or received or served upon Revisionist. Complaint was lodged in the Court on 16.08.1982 and notice was sent under Section 13(2) to revisionist on 19.08.1982. The revisionist appeared in the Court on 30.10.1982 and was released on bail. The issue of compliance of Section 13(2) has been decided by Courts below only on the ground that Revisionist did not apply for examination of food material by Central Food Laboratory and, therefore, cannot raise any grievance of non-compliance of Section 13(2) of Act, 1954 but here I find that service of notice upon accused was necessary to be proved by Prosecution so as to prove compliance of Section 13(2) of Act, 1954. This is mandatory. This aspect has been considered by Supreme Court very recently in **Vijendra Vs. State of U.P. and others (Criminal Appeal No. 1167 of 2019) (Arising out of S.L.P. (Criminal) No. 4314 of 2015)** decided on 31.07.2019 and in para 15 of judgment, Court has said as under:

"The very purpose of furnishing such report is to enable the Accused to seek for reference to the Central Food Laboratory for analysis if the Accused is dissatisfied with the report. Such ***safeguard provided to the Accused Under Section 13(2) of the Act is a valuable right.*** *In that view even if the despatch of the report on 07.04.1980 is taken as substantial compliance though it is beyond the period of 10 days from 18.03.1980 i.e., the date on which the prosecution was lodged,* ***in the absence of there being proof of delivery of the report to the Accused; in the instant facts the valuable right available to the Accused/Appellant to seek for reference within the period of 10 days stands defeated.*** *In that circumstance when the Appellant/Accused is made to suffer the penal consequences, it will have to be construed strictly. In the facts and*

circumstances of this case, since as already noticed above the report of the Analyst has not in fact been served on the Appellant and the mere despatch of the report as per the statement of PW-2 was not sufficient." (emphasis added)

19. Learned A.G.A., at this stage, did not dispute that service of notice under Section 13(2) is necessary but pointed out that in the present case, factum that notice was received by Revisionist was not disputed at all for the reason that issue raised before Lower Appellate Court was that notice received by Revisionist has wrong mention of Court which shows that notice was actually received by Revisionist and issue raised before this Court is contrary to what was contended in Courts below.

20. I find substance in what is said by learned A.G.A. Judgment of Lower Appellate Court, in para-9 shows that while arguing that there was non-compliance of Section 13(2) of Act, 1954, Accused-Revisionist argued that name of Court was wrongly mentioned in the notice. This argument was not found correct by Lower Appellate Court as is evident from following findings:

"9. It has next been argued by the learned counsel for the appellant that there has not been any compliance of Rule 13(2) of the Act ***in as much as in the information given to the appellant the name of the Court has been written as Munsif Magistrate Nagina whereas the complaint was filed in the Court of Ist Addl. Munsif Magistrate, Nagina.*** *This contention too is not acceptable as in the present case, complaint was filed in the Court of Ist Addl. Munsif Magistrate on 16.8.82. The* ***information u/s 13(2) of the Act was sent to the appellant on 19.8.82 by registered post which is Ext. Ka.-1. In this information it has been mentioned that the complaint had been filed against him on 16.8.82 in the Court of Munsif Magistrate, Nagina Distt. Bijnor."*** *(emphasis added)*

21. I have gone through the judgment of Courts below carefully and find that there was no complaint made before Court below that notice under Section 13(2) was not received by Accused-Revisionist at all, and, therefore, his right under Section 13(2) was violated. In fact, Revisionist sought to challenge the said notice on different ground which has not been found of any substance by Courts below.

22. Therefore, as a proposition of law, it cannot be doubted that prosecution, when challenged, must satisfy that notice issued under Section 13(2) has been served upon accused but where accused at the stage of Revision raise such plea that notice has not been served upon him and there is non-compliance of Section 13(2), but no such issue was raised in Courts below particularly, Lower Appellate Court, this Court would not allow accused to take such factual plea when as a matter of fact, the stand taken before Courts below shows that service of notice was not disputed, instead notice was challenged on another ground. The mere fact that mention of wrong Court was an issue raised before Court below is sufficient to prove the fact that notice was actually served upon Revisionist. Hence, even third submission has no force.

23. No other point has been argued.

24. The revision lacks merits. Dismissed.

25. The Revisionist, Shamim Ahmad, is on bail. His bail bonds and surety bonds are cancelled. The Chief Judicial Magistrate, Bijnor shall cause him them to be arrested and lodged in jail to serve out sentence passed against him. The compliance shall be reported within two months.

26. Certify this judgment to the Lower Court immediately.

(2019)11ILR A388

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1244 OF 1992

Mohammad Aslam ...Revisionist (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Arpit Agarwal, Sri Akash Gupta

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

A. Criminal Law -Prevention of Food Adulteration Act,1954 - Section 7/16- non-compliance of Section 13(2) - Code of Criminal Procedure, 1973-Section 401 r/w Section 397- -the report of Public Analyst was not served upon revisionist and court below treated compliance only on the ground that report was sent by registered post on the address of accused-in the instant case report of Public Analyst was not actually served upon the accused within time-the very purpose of furnishing such report is to enable the accused to seek for reference to the Central Food Laboratory for analysis if the accused is dissatisfied with the report-Safeguard provided to the accused u/s 13(2) is a valuable right-in the absence of there being proof of delivery of the report to the accused, the valuable right available to the accused to seek reference within the period of 10 days stands defeated. (Para 4,6)

B. It cannot be doubted that prosecution,when challenged, must satisfy that notice issued under Section 13(2) has been served upon accused because it is right of accused and prosecution must prove that not only report of Public Analyst was sent by registered post, but it was actually served upon accused, which has not been done in the instant case. (Para7,8)

Revision allowed (E-6)

List of cases cited:-

1. State thru S.P., New Delhi Vs. Ratan Lal Arora (2004) 4 SCC 590

2. State of Madhya Pradesh Vs. Vikram Das (2019) 4 SCC 125

3. Vijendra Vs. State of U.P. and Ors (Cri,Ap. No. 1167 of 2019)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Arpit Agarwal, learned counsel for revisionist and learned A.G.A. for State.

2. This Criminal Revision under Section 401 read with Section 397 Cr.P.C. has been filed aggrieved by judgment and order dated 09.05.1991 passed by Additional Chief Judicial Magisrate, Nageena, Bijnor in Criminal Case No. 1865 of 1990 convicting and sentencing revisionist under Section 7/16 of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "Act,

1954'). Thereagainst accused-revisionist preferred Criminal Appeal No. 43 of 1992 which has been dismissed by Sessions filed challenging both the aforesaid orders.

3. Counsel for revisionist contended that revisionist is entitled for benefit under Probation of Offenders Act, 1958 (hereinafter referred to as "Act, 1958") but I find that punishment has been awarded under the provisions of Food Adulteration Act, wherein minimum sentence of six months and fine of Rs. 1000/- has been provided and hence in such a case, Act, 1958 will no apply as held by Supreme Court in **State through S.P., New Delhi vs. Ratan Lal Arora (2004) 4 SCC 590,** followed in **State of Madhya Pradesh Vs. Vikram Das (2019) 4 SCC 125.**

4. It is next contended that there is non compliance of Section 13(2) of Act, 1954 inasmuch the report of Public Analyst was not served upon revisionist and Court below treated compliance of Section 13(2) only on the ground that report was sent by registered post on the address of revisionist is sufficient compliance.

5. I find force in the submission.

6. Learned A.G.A. could not dispute that this approach of Courts below is not consistent with the exposition of law laid by Supreme Court very recently in **Vijendra Vs. State of U.P. and others (Criminal Appeal No. 1167 of 2019) (Arising out of S.L.P. (Criminal) No. 4314 of 2015)** decided on 31.07.2019 and in para 15 of judgment, Court has said as under:

"The very purpose of furnishing such report is to enable the Accused to seek for reference to the Central Food Laboratory for analysis if the Accused is dissatisfied with the report. Such ***safeguard provided to the Accused Under Section 13(2) of the Act is a valuable right.*** *In that view even if the despatch of the report on 07.04.1980 is taken as substantial compliance though it is beyond the period of 10 days from 18.03.1980 i.e., the date on which the prosecution was lodged,* ***in the absence of there being proof of delivery of the report to the Accused; in the instant facts the valuable right available to the Accused/Appellant to seek for reference within the period of 10 days stands defeated.*** *In that circumstance when the Appellant/Accused is made to suffer the penal consequences, it will have to be construed strictly. In the facts and circumstances of this case, since as already noticed above the report of the Analyst has not in fact been served on the Appellant and the mere despatch of the report as per the statement of PW-2 was not sufficient." (emphasis added)*

7. Therefore, as a proposition of law, it cannot be doubted that prosecution, when challenged, must satisfy that notice issued under Section 13(2) has been served upon accused because it is right of accused and prosecution must prove that not only report of Public Analyst was sent by registered post, but it was actually served upon accused-Revisionist, which has not been done in the case in hand.

8. In the result, this revision is allowed. Impugned judgements and orders dated 09.05.1991 and 14.08.1992 are hereby set aside.

9. Certify this judgment to the lower Court immediately.

(2019)11ILR A390

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.10.2019

BEFORE
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Revision No. 1385 of 2019

Vikas Singh & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Parmeshwar Dutt Tewari, Sri Kamlesh Kumari, Sri Vijay Kumar Tiwari

Counsel for the Opposite Parties:
Government Advocate

A. Criminal Law -Protection of Children from Sexual Offences Act, 2012 - Section 38 - Indian Penal Code, 1860 - S ection 376D - application-providing the help of interpreter to the seven year old victim for recording the evidence- challenge to - violation of section 38-interpreter can only be provided to a physically or mentally disabled person - disability is quite a distinct thing from inability - providing interpreter to a child who is unable to communicate is not to be treated as disabled person-the word 'unable to communicate' are in consonance with the provision of section 119 Evidence Act.

B. Criminal Law -Code of Criminal Procedure, 1973 - Section 397(2) - application-bar as to admissibility - interlocutory order cannot be amenable in revision u/s 397 as providing the interpreter is not the final order-final order culminates the proceeding as a whole or finally decides the right and liability of the parties.

(Para 2,12,13,17 to 24)

Revision dismissed (E-6)

List of cases cited:-

1. M/s Bhaskar Industries Limited Vs. Bhiwani Denim and Apparels Ltd. And Ors, AIR (2001) SC 3625

2. K.K. Patel and Ors Vs. State of Gujrat, AIR (2000) SC 3346

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present revision is moved on behalf of the accused-applicants involved in Case Crime No. 287 of 2017, under Section 376-D Indian Penal Code, 1860 and Section 7/8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter which shall be referred as 'POCSO' in short), Police Station PGI, District Lucknow. The revision is directed against the order of Addl. Sessions Judge/Special Judge POCSO Act, Lucknow dated 22.07.2019, made Annexure no. 1 to this revision.

2. Heard learned counsel for the revisionists, learned Additional Government Advocate for the State on the point of admission of the revision. Learned A.G.A. termed the order, impugned in this revision, in nature, 'interlocutory order'. He further argued, since revision is moved under Section 397/401 of the Code of Criminal Procedure, 1973, therefore there is a bar as to the admissibility contained under sub Section (2) of Section 397 Cr.P.C.

3. For easy reference Section 397 (2) is quoted below:.

"(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."

4. Learned A.G.A. argued that in view of the aforesaid Clause (2) of Section 397 Cr.P.C., there is a clear bar on the admissibility of the revision, being moved against an interlocutory order, hence must be dismissed at the very stage of admission.

5. Learned counsel for the revisionists, despite the contention of learned A.G.A. as to the bar on admissibility of revision, without addressing the issue, emphasized on the point that the impugned order is passed by the Special Court, in utter violation of the law, misconstruing the provisions of Section 38 of the POCSO Act which occasioned a serious illegality, causing grave injustice to the accused-revisionist, hence the revision lies and impugned order is liable to be interfered exercising power of revision by the Court.

6. In the light of arguments, examined the impugned order alongwith the other materials, placed on record, whether it is passed misconstruing the provisions of Section 38 of the POCSO Act read with the relevant provision of Indian Evidence Act, 1872, applicable to recording of the statement of a victim of sexual offences, during trial.

7. Before discussing the arguments, raised by learned counsel for the revisionists, it would be helpful in judging the legality of the order to look into the facts of the incident, as well as proceeding of the trial before Special court.

8. The First Information Report, briefly stating, discloses that the victim, 5 years' old girl-child, was being sexually abused in the premises of her school "Allen House Public School," Vrindavan Yojna, Lucknow. She, in the age of 4 years, got admission in the said school. On 10.05.2017, the informant lodged First Information Report when she (the mother) noticed that intermittently her daughter suffers sickness with complaint of burning and difficulty while urinating. At the relevant time of lodging the FIR, the child was of 5 years in age. She noticed further that private part of her daughter has some swelling. When she asked the daughter, her reply disclosed that in her school a bhaiya of elder age, who had magic tricks and stories of fairies, on the pretext of entertaining her with magic and stories, used to insert fingers and some other things in her private part. She further told that there were several boys elder in age, students of Class-10, who used to be dressed like her father, also taken her in a room in the school premises where an aunty caught her hold from back and then those elder boys inserted finger and some other things in her private part. Several other like allegations made in the FIR were investigated. The accused-revisionists came into picture as one of the culprits. Naturally, a case alongwith relevant Sections of the Indian Penal Code and Section 3/4 of the 'Prevention of Children from Sexual Offences Act, 2012' were slapped against the accused-revisionist. During trial, by Special Judge, in the course of recording evidence, the victim child who at the relevant time grew old of 7 years, when subjected to question in cross examination as to the incident how happened with her, the court and the parents felt that she is unable to communicate her answer due to lisping tongue as well as to understand the question in their true sense and answer them. Consequent thereupon, on the

application of the parents, learned court exercised it's jurisdiction under Section 38 of the POCSO Act and ordered to provide the victim an 'interpreter' on the cost of the informant.

9. This order, providing the help of interpretor to the aforesaid victim, is challenged in this revision on the ground that 'interpretor' can only be provided to a physically or mentally disabled person and not to a person who is free from such ailments or disability. Submission of learned counsel is that learned Special Judge, going beyond the power given to him under Section 38 of the POCSO Act, has provided the help of interpreter to the victim during cross-examination, which is illegal.

10. The vehemence of the argument is only upon the said fact. Learned counsel has avoided to argue on the point that whether the impugned order, which is passed in the proceeding so as to make furtherance of the proceeding, can be challenged in the revision despite a bar under Section 397(2) of the Cr.P.C.

11. In the wake of insisting argument of learned counsel for the revisionist, the point raised as to the illegality of the order, is taken first to consider, whether the learned court exercised its jurisdiction beyond the power vested in it under the POCSO Act and therefore the said order is illegal.

12. For easy reference and convenience, Section 38 of the POCSO Act is quoted hereunder:

"(1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child."

13. Obviously the aforesaid provision of Section 38 of POCSO Act is having two parts. The vehemence of the argument by learned counsel for the revisionists is upon sub Section (2) of Section 38 of the POCSO Act. Reading over Clause 2 of Section 38 of the Act, learned counsel emphasized that unless the girl suffers from any physical or mental disability, the 'interpreter' could not be given to her. Arguing on the point as to over exercise of the jurisdiction, learned counsel ignored sub Section (1) of Section 38 of the POCSO Act where the opening words used are **"Wherever necessary"**, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child". The said words 'wherever necessary' emanate the Court to exercise it's discretion in appropriate case.

14. Under the POCSO Act, the 'child' is defined as a person below the age of 18 years. The term therefore includes child being newly born or of tender age from months to years below the age of 18 years. A child having the age of adolescence or a child due to lack

of sufficient vocabulary of a particular language or having no acquaintance with the dialect of the language being used by the speaker may be unable to speak, understand or communicate in that particular language. The child may or may not know the words used by other person making conversation with him/her. Even the nature, true meaning/sense of conversation being made to him/her by another person would not be assessable by the child. "To communicate" with any person who is talking with him/her in a particular language, even if known by reason of immaturity of mind would not be understandable to a child. Naturally, he or she would feel 'unable to communicate' with the speaker. These all and other like things make a child 'unable to communicate'.

15. In the present case the girl being a child of tender age (7 years) when subjected to examination in Court for recording her evidence as victim, the questions made to her by some one else (in the present case the defence counsel), to whom she had earlier never heard might have felt herself "unable to understand" the questions. Even if understandable to her, she might have felt 'inability to communicate' properly and correctly, by reason of lack of vocabulary and lisping tongue. The trouble of the child when noticed by the parents and Court, it made them apprehensive of recording of incorrect evidence of the child. In such circumstance, it always would be necessary for the Court to endevour the witness to make him/her expressive of thoughts running in the mind while trying to answer the question in true sense and aspect of the fact.

16. The opening words of Section 38(1) "whenever necessary" signify the discretion of the court to be exercised in any such circumstance while recording the evidence of a child. The court on the application of the parents or on its own observation may gather from the circumstance which necessitate to provide a translator or the interpreter as the case may be.

The difference between 'Unable' and 'Disable'

17. Considering the argument of learned counsel as to the word used in Section 38(2) of the Act to circumspect the necessity for providing help of translator/interpreter to a child while recording the evidence in the case of 'disability' of a child (mental or physical disability), it would not be out of relevance to mention that sub Section (1) of Section 38 does not use the word '**disable**'. There is a lot of difference between the words 'unable' and 'disable'. In the present context, it would be necessary to see that both the words have different meaning. '**Unable**' literally means a person who is not able while '**disable**' means a person incapable of using body part by the action. It clearly means that the 'disability' is quite a distinct thing from 'inability'. One can take example of a child (person) who is dumb/deaf, mentally sick or a person suffering from any other such incapacity to hear, speak or communicate is called severe form of "**disability**". Section 38(2) of the POCSO Act applies to such persons, whereas Section 38(1) of the POCSO Act applies to a child who is not disable but 'unable to communicate'. The words pronounced by a child varies according to her age. In the present case the victim at the relevant time of recording of evidence in Court is 7 years old with lisping tongue, naturally she

would be unable to communicate or any communication made to her by other person, would be much difficult than that made to a well grown child reaching to age of 18 years.

Section 38(1) of POCSO Act in consonance with proviso to amended provision of Section 119 Evidence Act

18. Further, the POCSO Act came into force on 03.02.2013. Section 38 of the Act when came into operation, the provision of Evidence Act, 1872 was also amended. Before the amendment, Section 119 of the Evidence Act was as under:

"[Dumb witnesses- a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."]"

19. Section 119 in The Indian Evidence Act, 1872 as amended vide amending Act no. 13 of 2013 w.e.f. 03.02.2013 runs as under:

*[119. Witness **unable to communicate** verbally-A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence:*

provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.

20. On perusal of the amended and unamended Section of the Evidence Act, 1872, it can clearly be seen that after 03.02.2013 when the amended Act came into force, Section 38(1) of POCSO Act in it's spirit and effect seems to have taken place in the proviso of amended provision of Section 119. It is note worthy that amended Section 119 of the Evidence Act in it's proviso, uses the words 'unable to communicate verbally', the words 'unable to communicate' are in consonance with Section 38 (1) of the POCSO Act.

21. As such, on the basis of above discussion, the argument of learned counsel for the revisionists that the court below while passing the impugned order went beyond the jurisdiction vested in it and wrongly exercised his power to appoint interpreter for victim-child, aged about 7 years, during cross-examination, is incorrect, baseless and suffers from misconception as to the provisions of Evidence Act and the relevant Section 38 of the POCSO Act. In my view courts are made competent under Section 38(1) of POCSO Act read with proviso appended to Section 119 of the Evidence Act (as amended vide Act No. 13 of 2013, w.e.f. 03.02.2013) to provide help of translator or interpreter as the case may be in appropriate cases, to a victim child who is unable to communicate verbally, while recording evidence.

22. Coming on the second point as to the bar of Section 397 (2) of the Cr.P.C., undoubtedly on bare reading of the impugned order providing the interpreter, to the child subjected to cross-examination by a well skilled advocate in defence, is not a final order. Nothing is doing, when this order exists, to culminate the proceeding or finally decide

the right of the accused, adversely affecting his defence. In deciding whether an order challenged is interlocutory or not so far as Section 397(2) Cr.P.C. is concerned, the sole test is not whether such order was passed during the interim stage, if the order, under challenge, culminates the criminal proceeding as a whole or finally decided the right and liability of the parties then the order passed is not interlocutory. This is laid down by Hon'ble Apex Court in the case of **M/s Bhaskar Industries Limited Vs. Bhiwani Denim and Apparels Ltd. and Others** reported in **[AIR 2001 SC 3625] and in the case of K.K. Patel and others Vs. State of Gujrat [AIR 2000 SC 3346].**

23. The impugned order is purely interlocutory which cannot be amenable in revision under Section 397 Cr.P.C. and suffers from the bar under Sub-Section (2) of Section 397 Cr.P.C.

24. On the above two scores, I find that the revision is not admissible and, therefore, the same is dismissed at the very threshold.

(2019)11ILR A395

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATEDALLAHABAD 12.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 1472 of 2014

Valajindra Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Sri Devraj Rajvedi, Sri Amit Kumar Srivastava, Sri Krishna Datta Tiwari, Sri B.K. Srivastava, Ms. Pooja Srivastava, Sri Rahul Chaturvedi

Counsel for the Opposite Parties:

A.G.A, Sri Satyendra Narayan Singh, Sri Subhash Chandra Pandey, Sri Varinder Singh

A. Civil Law- Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 94 - Determination of age of juvenile - Age of juvenile can be determined on the basis of high school certificate/marks-sheet or school record if there is no doubt with regards to genuineness and authenticity thereof - Court has to be sure about the genuineness and authenticity of such certificate/marks-sheet, particularly when there is sufficient material on record to create doubt on such certificate/marks-sheet :- When there arises reasonable doubt in respect thereof, the same cannot be relied blindly and the court is empowered under law to ignore the same - Accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. (Para 13, 14)

Held:- Whatever information was provided with regards to the education of Mandeep Singh was highly suspicious and contradictory. In view of contradictions in school record of Mandeep, the JJ Board, finding no other option determined the age on the basis of the medical evidence - Juvenile Justice Board, declared the age of Mandeep Singh to be 20 years and 4 months on the basis of medical report after deducting one year from the age determined in medical report. (Para 19)

Criminal revision dismissed (E-5)

List of Cases Cited: -

1.Shah Nawaz Vs St. of U.P.(SC) 2011(5) ALJ 580.

2.Raju & anr. Vs St. of Haryana (2010) 3 SCC 235.

3.Hari Ram Vs St. of Raj. & anr (2009) 13 SCC 211.

4.Ravinder Singh Gorkhi Vs St. of U.P. (2006) 5 SCC 584.

5. Ashwani Kumar Saxena Vs St. of M.P. (2012) 9 SCC 750.

6. Jodhbir Singh Vs St. of U.P. 2013(1) SC Cri. R36.

7. Smt. Neha Bee & ors. Vs St. of U.P. 2011 (74) ACC 139.

8. Parashu Ram Singh Vs St. of U.P. 2013 (83) ACC 392.

9. Farzana Vs St. of U.P. Criminal Revision no. 3919 of 2015 decided on 06.05.2016

10. Ashwani Kumar Saxena Vs St. of M.P. 2012 (79) ACC 748.

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

1. Heard Shri B.K. Srivastava, Senior Advocate assisted by Ms. Poooja Srivastava, learned counsel for the revisionist, Shri Subhash Chandra Pandey, learned counsel for the opposite party no. 2, Sri M.P. Singh, learned AGA for the State and perused the record.

2. This revision has been filed against the judgement and order dated 01.04.2014 passed by Additional Sessions Judge, Court No. 2, Rampur in Criminal Appeal No. 66 of 2013 (Smt. Valajindra Kaur Vs. State of U.P and another) dismissing the appeal and affirming the order of Juvenile Justice Board dated 09.10.2013.

3. Aggrieved by the impugned judgement, this revision has been filed challenging the impugned judgement on the ground that the impugned judgement is against the material evidence on record, arbitrary, illegal and suffers from manifest error of law and is based on conjectures and surmises. The court below has not applied its judicial mind. In absence of the matriculation certificate the date of birth recorded in the school first attended has to be taken into consideration, in which the date of birth was recorded to be 01.02.1995 and the same was proved by principal of concerned school. In the family register also the same date of birth was mentioned and the extract of the family register was proved by the Secretary, Gram Panchayat. Instead of relying on these evidence, Juvenile Justice Board relied on medical report with regards to the age of Mandeep Singh which is contrary to law as medical evidence is not binding and the school admission register, transfer certificate and extract of family register was on record and were proved by the witnesses. Therefore, the revisionist has prayed to set aside the impugned judgement as well as the judgement of Principal Judge, Juvenile Justice Board dated 09.10.2013 in Case Crime No. 1563 of 2011 by which prayer to declare Mandeep Singh juvenile has been turned down.

4. The revisionist is the mother of Mandeep Singh who gave an application before the Juvenile Justice Board that the date of birth of Mandeep Singh is 01.02.1995, and at the time of incident he was aged about 16 years 10 months. The learned counsel for the revisionist has submitted that earlier the Juvenile Justice Board by order dated 20.02.2013, declared Mandeep Singh to be juvenile

within the meaning of Juvenile Justice Act on the basis of school record. Against the judgement of the Juvenile Justice Board an appeal was preferred by the complainant side and the same was dismissed on 26.04.2013. Against that order, revision was filed before the High Court and by the order dated 04.07.2013 passed in Criminal Revision No. 1546 of 2013 (Darshan Singh Vs. State of U.P), the High Court set aside the impugned order dated 26.04.2013 and the order dated 20.02.2013 passed by Juvenile Justice Board for taking afresh decision on the juvenility after taking evidence regarding education of Mandeep Singh from class-I to class-V. Opposite party no. 2 was directed to assist the Board in providing information regarding his school first attended. It was further directed that if such information is not provided and information is withheld from the Board, the Board shall be at liberty to take decision on the basis of opinion of Medical Board in accordance with Rule 12(3) of Rules 2007. The present revision pertains to second stage of litigation on that point as after the case was remanded by this court by order dated 04.7.2013, the Juvenile Justice Board, after taking evidence and hearing both the sides, rejected the application of the revisionist declaring the age of Mandeep Singh to be 20 years and 4 months on the basis of medical report after deducting one year from the age determined in medical report. Against this order of the Juvenile Justice Board, an appeal was preferred by the revisionist and the same was dismissed by the impugned judgement dated 01.04.2014.

5. Section 7A of the Juvenile Justice (Care and Protection of Children Act, 2007) provides as follows:-

"7A. Procedure to be followed when claim of juvenility is raised before any court. *(1) Whenever a claim of juvenility is raised before any court or a Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.*

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

Determination of the question of Juvenility

6. Section 2(l3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 which contains almost similar provision to that of the Juvenile Justice (Care and Protection of Children Act, 2007), defines a child in conflict with law *"as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence"*. Section 2(35) defines juvenile as *"a child below the age of eighteen years."*

7. Section 9(2) makes provision for a claim of juvenility to be raised before any court at any stage, even after final disposal of a case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not.

8. The proviso adds that a claim of juvenility may be raised before any court at any stage, even after final disposal of

the case. The claim of such a juvenile shall be considered, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

9. Section 94 of the Act provides the procedure to be followed by the courts or the Boards for the purpose of determination of age in every case concerning a child in conflict with law. It provides that the Court or Board shall determine the age by undertaking the process of age determination by seeking evidence by obtaining as follows:-

(i) the date of birth certificate from the school, 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;

10. It has been further provided that such age determination shall be completed within 15 days from the date of order of the Board and the age so determined shall be deemed to be true age of the person for the purpose of this Act.

11. Earlier Rule 12 (3) of Rules, 2007 provided similar but slightly different provision from section 94 of the new Act of 2015 so for as it has brought all school certificate under one umbrella under sub-section (1) which provides *'the date of birth certificate from the school, matriculation or equivalent certificate from the concerned examination Board if available;'* as the first requirement. Rule 12 (3) reads as follows:

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

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

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

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

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

12. In **Shah Nawaz vs. State of U.P. (SC), 2011(5) ALJ 580**, referring to **Raju and Anr. vs. State of Haryana**

(2010) 3 SCC 235 where the Court had admitted "mark sheet" as one of the proof in determining the age of the accused person, **Hari Ram vs. State of Rajasthan & Anr., (2009) 13 SCC 211, Ravinder Singh Gorkhi vs. State of U.P. (2006) 5 SCC 584** where the issue of School Leaving Certificate was involved and the Court took the view that such certificate in order to become evidence of age, it should be shown that it was issued in the ordinary course of business of the school and the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act. It was held that the entry relating to date of birth entered in the mark sheet is one of the valid proof and evidence for determination of age of an accused person. Therefore, the matriculation marks-sheet and certificate is a conclusive evidence of age and there remains no further need to seek any other proof of age. Again, in **Ashwani Kumar Saxena vs State of MP (2012) 9 SCC 750** and **Jodhbir Singh vs State of UP2013(1) SC Cri. R36,** it has been held that if matriculation certificate/marks-sheet is available, there is no opportunity for the Board to go for other evidence for the determination of the age of juvenile. Even though, new Act has been enforced, the above view still holds the field as there is hardly any difference in respect of determination of age of juvenile.

13. But having said so, the court has to be sure about the genuineness and authenticity of such certificate/marks-sheet, particularly when there is sufficient material on record to create doubt on such certificate/marks-sheet. In **Om Prakesh vs. State of Rajasthan, 2012(77) ACC 654 (SC),** the trial court itself could not arrive at a conclusive finding regarding the age of the accused on the basis of school record and therefore, it was held that the opinion of the medical experts based on X-ray and ossification test will have to be given precedence over the shaky evidence based on school records. The Supreme Court remarked that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like *sexual molestation, rape, gang rape, murder and like offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority.* The benefit of the principle of benevolent legislation attached to Juvenile Justice Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged

accused who is involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.

14. The purpose of the above discussion is that the age of juveni1ity can be determined on the basis of high school certificate/marks-sheet or school record if there is no doubt with regards to genuineness and authenticity thereof. When there arises reasonable doubt in respect thereof, the same cannot be relied blindly and the court is empowered under law to ignore the same.

15. The learned counsel for the revisionist has argued that when the school record first attended by Mandeep Singh was on record there was no occasion for the courts below to go for medical report in order to determine the age of Mandeep Singh. In support of this contention the judgement of this Court in **Smt. Neha Bee and others Vs. State of U.P, 2011 (74) ACC 139, Parashu Ram Singh Vs. State of U.P, 2013 (83) ACC 392** and judgement in Criminal Revision no. 3919 of 2015 (Farzana Vs. State of U.P) decided on 06.05.2016 and the judgement of the Supreme Court in **Ashwani Kumar Saxena Vs. State of M.P, 2012 (79) ACC 748** have been referred. The last case being decided by the Supreme Court, the following observations appears to be material for the purpose of this case:-

"Age determination inquiry", contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the Court to seek evidence and in that process, the Court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the Court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the Court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion form a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the Court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

Once the Court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) of Rule 12 that no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof after referring to the sub-rule(3) of the Rule 12. Further, Section 49 of the Juvenile Justice Act also draws a presumption of the age of the juvenility on its determination."

16. As mentioned above, that aforesaid order dated 04.07.2013 passed in Criminal Revision No. 1546 of 2013, this Court clearly laid down that the Juvenile Justice Board shall determine the

age of Mandeep Singh after taking evidence from his side about his education from class-I to class-V and it was also expected that from the side of Mandeep Singh necessary information shall be provided regarding the school he has attained such education. Failing to provide the above two informations the Juvenile Justice Board was given liberty to take decision on the basis of report of Medical Board. From the side of revisionist the said information were not provided and whatever information was provided with regards to the education of Mandeep Singh was highly suspicious and contradictory. Moreover, information of voting and extract of voting list also shows that the school record of Mandeep was highly suspicious. Therefore, the Juvenile Justice Board proceeded to determine the age on the basis of medical report.

17. This Court in aforesaid revision made following observations:-

"Admittedly, opposite party no.2 has not passed matriculation examination and, therefore, there is no matriculation or equivalent certificate to show his date of birth. In the absence of matriculation certificate, the date of birth recorded in the school first attended has to be taken into consideration. No documentary or oral evidence was led to show the date of birth recorded in the school first attended. It was the case of the complainant that opposite party no. 2 studied in village school. Even from the affidavit, it is apparent that opposite party no. 2 passed class V examination in the year 2003-04. There was no difficulty in filing the documentary evidence regarding date of birth recorded in the school first attended but the same evidence appears to be deliberately withheld by opposite party no. 2. Even if no evidence was led on behalf of opposite party no. 2 to show his date of birth recorded in the school first attended, it was the duty of the Board to summon the relevant documents from the village school or the school where opposite party no. 2 studied from class I to class V and a decision regarding age of opposite party no. 2 could have been taken on that basis but the Board did not consider it proper to summon any such records or witnesses.

A person cannot be permitted to play hide and seek with the court. He cannot be permitted to claim juvenility on the basis of entries of class VI and withholding the records of class I to class V. According to Rule 12 (3), the entry in the school first attended is relevant and the entries in the has not properly conducted enquiry as envisaged under the provisions of Juvenile Justice Act and matter has to be remanded for a fresh decision. The Sessions Court has also not considered this aspect of the matter."

18. From the perusal of both the judgements, it appears that as directed by this Court vide aforesaid judgement dated 04.07.2013 no evidence regarding education of Mandeep Singh from class-I to class-V was filed before the Juvenile Justice Board. Therefore, both the courts below took a view that the revisionist failed to comply with the order of the High Court. Both the courts have also noted that Allahabad High Court has noted in the aforesaid judgement that Mandeep Singh got admission in class-VI on 05.07.2004 in Guru Nanak Inter College, Bilaspur on the basis of the affidavit of his father but there was no evidence given that he passed the examination of class-V in the year 2003-04, which was necessary to show that said

Mandeep Singh got education from class-I to class-V in some school. On the contrary, it was found that leaving certificate which was produced before the Juvenile Justice Board shows that he got admission in U.K.G on 04.07.2001 and he passed class-II on 31.03.2003. Therefore, it was necessary to give educational record of Mandeep Singh showing that he passed the examination of class III, IV, V from some institution, but no such school record was given. The lower courts below found it highly suspicious that when Mandeep Singh passed class-II in year 2003 how he could get admission in class-VI on 05.07.2004 as there is difference of at least three years for getting admission in class-VI. In a natural way, if a person has passed class-II on 31.03.2003 he can get admission in class-VI only after 31.03.2006. On this basis the learned courts below found the date of birth (01.07.1995) shown in the leaving certificate of National Public School, Bilaspur to be highly suspicious particularly when all these points have been elaborately discussed in the aforesaid judgement of the High Court. In the aforesaid order of the High Court, this fact also finds mention that in respect of admission in Guru Nanak Inter College, the affidavit was filed narrating that Mandeep Singh has passed class-V in the year 2003-04 but despite the order of this Court no evidence was led to show in which school Mandeep Singh studied from class-I to class-V nor any such certificate to that effect was filed.

19. In view of the above anomaly and contradictions in school record of Mandeep, the JJ Board, finding no other option and in view of the aforementioned direction of this court, determined the age on the basis of the medical evidence and the order so passed was further affirmed by impugned judgement in appeal. It is pertinent to make a mention that the courts do not reject the claim of juvenility in a routine way unless there exists good cause. I do not find any material irregularity or illegality or jurisdictional error in the impugned order and judgement of the courts below. The revision has got no force and is liable to be dismissed.

20. The revision is therefore **dismissed**. Stay order if any shall stand vacated.

(2019)11ILR A402

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Revision No. 1896 OF 2019

Lokesh & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Vinay Kumar Pandey

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

A. Criminal Law -Code of Criminal Procedure,1973 - Section 319 - Powers under Section 319 Cr.P.C. can be exercised only where strong and cogent evidence are found - much stronger evidence - of such level that if the same was left unrebutted, it would result in conviction of the said person as an accused.

For summoning a person as accused under section 319 Cr.P.C. if the court feels satisfied from the evidence which has come on record that there was much stronger evidence which

showed not merely probability of complicity of the said person of being involved in commission of offence rather the evidence was found of such level that if the same was left unrebutted, it would result in conviction of the said person as an accused then accused shall be summoned – *Held* - Victim has consistently given her statements in support of the prosecution case narrated by her in FIR. The case which she established in FIR was corroborated by her in statements under sections 161 and 164 Cr.P.C. with slight variation and also in her statement given before the trial court, in which she has also been cross-examined at length. (Para 13)

Criminal revision dismissed (E-5)

List of Cases Cited:-

Dev Wati Vs St. of Haryana (2019) 4 SCC 3219

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Vinay Kumar Pandey, learned counsel for the revisionists, Sri Attrey Dut Mishra, learned A.G.A. appearing for the State and perused the record.

2. The instant criminal revision has been filed against the summoning order dated 17.04.2019 passed by Additional Session Judge, Fast Tract, Court No.1, Mathura in Session trial No.244 of 2017 under section 366, 376 IPC (State vs. Satish @ Satto) arising out of Case Crime No.392 of 2016 under section 376D, 363, 366, 379, 323, 504, 506 IPC, Police Station Farah, District Mathura.

3. Before appreciating the arguments of the learned counsel for the revisionists as well as the learned counsel for opposite parties, it would be appropriate to give the facts of this case in brief, which are as follows:

4. The opposite party no. 2 Mamta lodged an FIR on 15.10.2016 at 10.00 A.M. through an application u/s 156 (3) Cr.P.C. stating therein that one Satish @ Satto was her neighbour who was harassing her. On 24.4.2016 at 5.00 P.M. when husband of opposite party no. 2 had gone to Agra, Satish @ Satto, Lokesh, revisionist no. 1, Manoj, revisionist no.2, Vasu Dev @ Vaso revisionist no. 3 forcibly abducted her at the point of country made pistol. All these accused had also stolen Rs.10,000/- and jewellery which were kept in her house. All these accused had given narcotic substance to her and committed gang rape upon her. When she raised alarm then they fled from there giving threat that they would kill her husband. These accused had also taken few indecent photographs of her and have also obtained her signatures on blank papers. They had told her not to disclose about this to anyone and not to take any action, failing which her indecent photographs would be placed on internet. On 26.8.2016 at 4.00 A.M. they came to the village alongwith opposite party no. 2, then opposite party no. 2 disclosed entire facts to her husband. On the same day her husband Naresh went to the house of Satish @ Satto at about 4.00 p.m., then father of Satish @ Satto namely Mansho Ram, accused-revisionist no. 5, father of Manoj namely Keshav, accused revisionist no. 4 and three unknown persons had badly assaulted the opposite party no.2 by kicks and fists and her hairs were cut by scissor by daughter of Mansho Ram namely Chando, accused-revisionist no. 6. They all had threatened her that she would be made to go around the village with her face blackened. This occurrence was witnessed by Nando, Brijesh and Vishnu. The opposite party no. 2 had gone to

lodge report of this occurrence at police station Farah, which was not recorded as the accused revisionist no. 3, Vasu Dev had good relation with the police and thereafter on 7.9.2016 an application was given by her to the S.S.P., Mathura but nothing was done. Thereafter, on this application, subsequent to the order passed by the Court, this FIR was recorded on the above date.

5. After investigation of this case, the police has submitted charge-sheet against the accused Satish @ Satto only under section 376 and 366 IPC while rest of the accused were exonerated.

6. During trial the statement of only one witness i.e. opposite party no. 2 as PW1 has been recorded and thereafter an application 22-Ka was moved by opposite party no. 2 to summon other co-accused under section 319 Cr.P.C. to face trial. The said application has been allowed by the trial court vide impugned order dated 17.04.2019 summoning the accused-revisionist Lokesh, revisionist no.1, Manoj, revisionist no.2, Vasu @ Vasu, revisionist no. 3 to face trial under section 376D, 363, 366 and 379 IPC while other co-accused Keshav revisionist no. 4, Mansho Ram, revisionist no.5 and Km. Chando revisionist no. 6 have been summoned to face trial under sections 323, 504, 506 IPC.

7. The arguments made from the side of the revisionists are that the informant had illicit relationship with co-accused Satish @ Satto with whom she had eloped on 24.4.2016, six days thereafter her husband had lodged an NCR on 01.05.2016 against co-accused Satish @ Satto under section 498 IPC at P.S. Farah, District Mathura wherein he had admitted that the informant of this case had fled with the co-accused Satish @ Satto of her own free will, the said NCR is annexed as Annexure-1. Next it is argued that two months thereafter the informant returned home with Satish @ Satto and was living with her husband, but no complaint was moved by the husband of informant or any of his family members regarding this incident. Thereafter, after four months of the occurrence, informant moved an application under section 156 (3) Cr.P.C before J.M. II, Mathura in respect of this occurrence because her husband and other family members had put pressure upon her to lodge the report against co-accused Satish @ Satto. The informant was medically examined by the doctor but no injuries were seen. The statements of independent witnesses, who are 10 in number, which include the husband of the informant, were recorded. It is stated that no such incident had occurred. It was mentioned that there existed illicit relationship between informant and co-accused Satish @ Satto. These statements are annexed as Annexure-6. Next it is argued that the Investigating Officer after collecting the evidence and examining the statement of informant and her husband as well as independent witnesses, exonerated all the accused persons except the co-accused Satish @ Satto against whom charge-sheet no. 10/17 was filed under section 366 and 376 IPC. The said co-accused has been granted bail vide order dated 29.03.2017. The trial had started and two years thereafter the informant moved the present application on 01.01.2019 for calling the accused-revisionists under section 319 Cr.P.C to face trial which has been erroneously allowed by the trial court. The opposite party no. 2 is a major lady of 40 years of

age having five children aged about 13, 12, 10, 6 and 3 years. It is admitted by her in the statement under section 161 and 164 Cr.P.C. that co-accused Satish @ Satto was doing job of manufacturing carpet (Galicha) for about 10-12 years with her husband. Further, it is mentioned in her statement recorded under section 164 Cr.P.C. that the informant admitted illicit relationship with co-accused Satish @ Satto and has admitted that she had gone with the said accused and spent two months time with each other as husband and wife. Further, it is argued that the revisionist nos. 1 and 2 are cousin brothers. Revisionist nos. 3 and 4 are uncle. The revisionist no. 5 is father and revisionist no. 6 is real sister of co-accused Satish @ Satto, hence they all belong to the family members of co-accused Satish @ Satto. Since the husband of the informant and his family members wanted to settle all criminal cases lodged against them, in order to create pressure upon the revisionists, this false case has been lodged. Further, it is argued that the revisionist no. 6 (sister of co-accused Satish @ Satto) had filed a complaint against the family members of the informant under section 354B, 323, 504, 506, 452 IPC at P.S. Farah District Mathura on 18.9.2016, copy of which is annexed as Annexure-11. Revisionist no. 5(father of the co-accused Satish @ Satto) has filed a complaint against the family members of the informant under sections 147, 148, 149, 354B, 323, 504, 506 and 452 IPC at P.S. Farah, District Mathura, copy of which is annexed as Annexure-12. Further, it is argued that the revisionist no. 5 had already lodged an FIR against the family members of the informant being case crime no. 419 of 2016 under section 307 IPC at P.S. Farah on 17.11.2016, hence the impugned order deserves to be quashed as the same has been passed by the trial court erroneously over looking the fact that the said application was moved by the opposite party no.2 under pressure from her husband and family members in order to put pressure upon the revisionists to compromise the cases which were filed from their side against family members of the opposite party no. 2. Moreover, police has also not found prima-facie case made out against the accused-revisionists and accordingly charge-sheet was not filed against them under abovementioned sections. The independent witnesses including husband of the informant had not supported the prosecution version. These aspects have not been taken into consideration by the trial court while passing the impugned order.

8. No counter affidavit has been filed from the side of the opposite party no. 2 as well as from the side of learned A.G.A. although learned A.G.A. has vehemently opposed the prayer for quashing of the charge-sheet and argued that the impugned order does not suffer from any infirmity as in the statement under section 161 and 164 Cr.P.C. as well as in her statement given before the trial court as PW1, the victim/opposite party no. 2 has supported the prosecution version and discrepancies which appear in the version mentioned in FIR as well as her statements at three stages, cannot be seen in proceedings under section 482 Cr.P.C. hence, this revision deserves to be dismissed.

9. I have gone through the statement of the informant recorded under section 161 Cr.P.C. in which she has stated that her husband does work of manufacturing carpet (Galicha). Her neighbourer Satish

@ Satto also used to work with her husband. On 24.4.2016 when her husband had gone to bring wool from Agra, at about 5.00 p.m. Satish @ Satto, Lokesh, Manoj and Vasu Dev came to her house and forcibly had taken her away in a car and on way some narcotic substance was given to her by which she fainted. Thereafter, she was taken to Jaipur and was kept at various unknown places and all of them had committed rape upon her. They had also stolen away Rs.10,000/- and jewellery from her house and on 26.8.2016 they had brought her back to her village and then she disclosed all this to her husband Naresh and when thereafter she and Naresh went to the house of Satish @ Satto, co-accused, then Vasu Dev, Mansho Ram and Shimbhu, Lokesh, Manoj, Keshav and Chanddo who were present there, had beaten and abused her, her husband and had threatened that in case they make a complaint about this incident at police station, they would not be allowed to live in village. The statement recorded under section 164 Cr.P.C., which is annexed at page 44 of the paper book, contains the same facts, which have been mentioned in her statement under section 161 Cr.P.C. apart from the fact that in this statement it is also stated that when she and her husband went to the house of Satish @ Satto, they had beaten both of them badly and her hair were also cut. She has five children aged between 3 to 12 years. In her statement given in examination-in-chief it is stated that Satish @ Satto was her neighbour, who used to tease her. On 24.4.2016 at 5.00 p.m. when her husband had gone to Agra, accused-revisionist nos. 1 to 3 along with co-accused Satish @ Satto had abducted her on the point of pistol and had also stolen R.10,000/- as well as jewellery from her house and had taken her in a vehicle. She was given narcotic substance and was kept at some unknown place in Jaipur. All the four accused had gang raped her. When she tried to raise alarm, they have threatened that her husband would be killed. Lokesh and Manoj had made few dirty video with co-accused Satish @ Satto of her and her signatures were also obtained on some blank papers and had threatened that in case she discloses about this occurrence, her dirty video would be placed at internet. She continued to be kept at different places during four months period while she was being raped repeatedly by them and on 26.8.20016 they had brought her back in the village at about 4.00 a.m. and then she narrated the entire episode to her husband. When her husband had taken her to the house of Satish @ Satto where father of Satish @ Satto namely Mansho Ram and father of Manoj namely Keshav and three unknown persons had beaten her and her husband by kicks and fists and the daughter of Mansho Ram namely Chando had cut her hair and had threatened her that her face would be blackened and she would be made to move around the village. This occurrence was witnessed by Nando, Brijesh and Vishnu.

10. In cross-examination, she has proved her statement under section 164 Cr.P.C. as paper no. Ka and her application given under section 156(3) Cr.P.C. as exhibit Ka-1.Further she has submitted that she is an illiterate lady. Her marriage was performed 17 years ago and that she used to often visit her parent's house which is located in Agra. In her house the work of manufacturing of carpet is done and her husband had also done the same work. They did not employ any person for the said work. The house

of Satish @ Satto was about 10-12 houses away from her house. She did not know who Satish was. Satish had never worked any work of manufacturing of carpet at her place. She had not mentioned in her complaint that Satish @ Satto used to do the work of manufacturing Galicha in her house. The Investigating Officer had interrogated her to whom she had not stated that Satish @ Satto used to do work of manufacturing of Galicha in her house. The occurrence is of 24.4.2016 and thereafter she had stated on her own that she had gone to lodge report on 26.8.2016 and during this four months, she never made any report nor does she know as to whether her husband had lodged any report or not. Further having read out the paper no. 4A/21, She stated that her husband had not lodged the said report at police station and further pointed out that her husband was sitting at the back on chair. On the date of occurrence, she was alone in her house and in front of her house lives Shiv Ganesh Thakur, who has a "Thela', in his house his mother, daughter-in-law and children reside. On the date of occurrence Shiv Ganesh was not at home. She often visits his house. Co-accused Satish @ Satto used to make frequent visit to her house but her husband would not go to the house of Satish @ Satto nor had he gone in marriage etc. at the house of Satish. On the date of occurrence he did not know Satish @ Satto nor did she know his family members. She was living in the said village Parkham for the last six years, prior to that she was living in Agra. Her daughter aged about 15 years also stated to have studied in class IX at Parkham. She has further stated in cross examination that the Investigating Officer had recorded her statement under threat. The threat was given by Investigating Officer that if she gives any statement against these four accused persons, the same act would be committed with her by him which act was committed by these accused persons with her. She had made complaint orally to the Magistrate about this threat. She does not know the name of the Investigating Officer. First of all the co-accused Satish @ Satto, Manoj, Vasu and Pankaj had taken her to Jaipur in a factory which was deserted where they had kept her for 15 days. There was no house and shop near that factory. All these four accused had lived with her for 2-3 days and thereafter only Satish @ Satto was left behind. There was a Chawkidar in the said factory who was given some money by the accused. The Chawkidar had left the factory on the very first day. In the meantime, no one came in the factory. She had narrated about this fact to the Investigating Officer which has not been recorded by him. About this fact that she was taken to the factory was not mentioned by him in his report but she could not tell its reason. Satish and Manoj are the real brothers. Lokesh is also brother and Vasu is uncle. All these four accused had committed rape upon her. She did not like Satish @ Satto nor any other co-accused. She had suffered internal injury but she was not medically examined for the same. She had told the Investigating Officer about the places where the accused had taken her and fled leaving her behind. She had not told the Investigating Officer that the accused was working in her house for manufacturing the carpet because of which she had developed illicit relationship with him. If the same has been recorded by him, she could not tell its reason. It is wrong to say that Satish had worked in her house for manufacturing of carpet (Galicha). She

had denied that because of enmity, she has lodged this report against the members of the family of the co-accused Satish.

11. After perusal of the statements which have been cited above, I have gone through the impugned order passed by the trial court and find that the trial court has recorded in the impugned judgment that the victim has supported the prosecution version as mentioned in the FIR, in her statement given under section 164 Cr.P.C. and also the same version has been given by her in her statement before the Court against the accused revisionist Lokesh, Manoj, Vasu, therefore, he has summoned them for offence under section 376D, 363, 366 and 379 IPC which are prima-facie made out against them and as regard other co-accused Keshav, Mansho Ram and Km. Chando offence under section 323, 504, 506 IPC are made out. He has also cited principle upon which he has found the prima-facie case made out against the accused-revisionist because he has mentioned that there was no necessity at this stage to make microscopies analysis of the statements of the witnesses and only prima-facie it was to be as to whether the same was made out or not in view of that the court below has exercised its discretion for summoning the accused-revisionists for offence under the abovementioned sections. I see no infirmity in the impugned order. It would be appropriate to mention here the legal principles which have been pronounced by Supreme Court in catena of judgments as to under what circumstances the accused may be summoned under section 319 Cr.P.C.

12. In **Dev Wati vs. State of Haryana, (2019) 4 SCC 3219,** in this case a missing complaint was lodged by the brother of the deceased and after two days the dead body of the deceased was found. Three accused were put to trial under section 302 read with 34 IPC apart from other offence. When evidence was being recorded, PW9 (brother of the deceased) deposed before the sessions court impleading the appellant. Thereafter, the application filed by PW9 under section 319 Cr.P.C. before the Sessions Court was allowed and the appellants were summoned to face trial, which was upheld by the High Court reiterating that word "appear' means "clear to the comprehension' or a phrase near to, if not synonymous with "proved", and imparts a lesser degree of probability then proof. Though only a prima-facie case is to be established from the evidence led before the Court, it requires much stronger evidence than a mere probability of the complicity of the persons against whom the deponent has deposed. The test that has to be applied is of a degree of satisfaction which is more than that a prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that evidence, if goes unrebutted, may lead to conviction of the proposed accused. In the absence of such satisfaction, the court should refrain from exercising the power under section 319 Cr.P.C. On considering deposition of PW9, it was held that no valid ground was found to take a different view from that of High Court and the Sessions Court and it was recorded that no interference with the impugned order was warranted.

13. In view of above proportion of law, it is quite evident that for summoning a person as accused under section 319 Cr.P.C. if the court feels satisfied from the evidence which has come on record that there was much stronger evidence which showed not merely probability of complicity of the said person of being involved in commission of offence rather

the evidence was found of such level that if the same was left unrebutted, it would result in conviction of the said person as an accused then accused shall be summoned. In the present case, if the said interpretation of the provision of section 319 Cr.P.C. is applied, I find that the victim has consistently given her statements in support of the prosecution case narrated by her in FIR. The case which she established in FIR was corroborated by her in statements under sections 161 and 164 Cr.P.C. with slight variation and also in her statement given before the trial court, in which she has also been cross-examined at length. The defence of the accused-revisionists is that since from the side of the revisionists several cases were filed against the family members of the husband of the opposite party no.2 therefore, under influence / pressure from the side of her husband exerted upon opposite party no. 2, she has lodged this false FIR, this is a subject matter of evidence which would be decided by the trial court. Therefore, at this stage, for this Court it would not proper to express any opinion in this regard in proceedings u/s 482 Cr.P.C. No doubt this Court finds that there are several discrepancies and also it is found that allegation of gang rape is leveled against two brothers and uncle of accused Satish @ Satto which seems unusual that real brothers would indulge in this kind of act together, it appears to be subject matter of evidence. No opinion can be expressed in this regard and as regards accused nos. 4 to 6, they are found to have committed offences under section 323, 504, 506 IPC only which are not serious offences, hence this Court deems it proper to grant them relief to the extent that they may approach the trial court within 30 days and seeks bail.

14. The prayer for quashing the proceedings is refused with regard to **revisionist nos. 1 to 3.**

15. However, it is provided that if the **revisionist nos. 4 to 6** appear and surrender before the court below within 30 days from today and apply for bail, then the bail application of the **revisionist nos. 4 to 6** be considered and decided in view of the settled law laid-down by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgment passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.** For a period of 30 days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the **revisionist nos. 4 to 6.** However, in case, the **revisionist nos. 4 to 6** do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

16. With aforesaid direction, this revision is finally disposed of.

(2019)11ILR A409

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 2457 OF 2017

Pramod Kumar Singh & Anr.
...Revisionists
Versus
State of U.P. & Ors.
...Opposite Parties/Complainants

Counsel for the Revisionists:
Sri Shudhanshu Pandey, Sri V.K. Twivedi

Counsel for the Opposite Parties:
A.G.A., Sri Bipin Kumar Tripathi

A. Criminal Law -Domestic Violence Act, 2005 - Section 12 - Object - Provides for speedy disposal of application under section 12 by curtailing unnecessary delay so that the wife might not be deprived of the relief provided under the Act. The Act prescribes a time frame of 60 days for disposal of application. (Para 17)

B. Domestic Violence Act, 2005 - Section 2(q) - A complaint can be filed and relief can be granted under the Act against the female relatives of the husband also. (Para 22)

C. Domestic Violence Act,2005 - Recall of order - when not permissible.

Held:- A very simple order against revisionist passed that he will not commit any domestic violence against the wife. No use in recalling the impugned judgment.

Before the court below, father of the husband-revisionist examined along with uncle and maternal uncle. So closely related persons like father were contesting the case, it cannot be believed that the husband was not having any information. Even though the father of the husband was contesting before the court, the husband did not turn up, untill the ex-parte judgment was passed.

Application under section 12 given by wife in September, 2012 and has been decided in May, 2014, whereas, it should have been decided within 60 days. Therefore, recall thereof, if permitted, will cause great hardship to the wife and son who have been forced to leave the matrimonial house. (Para 15, 16, 17)

Criminal revision dismissed (E-5)

List of Cases Cited: -

1. Indra Sarma Vs V.K. Sarma AIR 2014 SC 309.

2. Sandhya Manoj Wankhade Vs Manoj Bhimrao Wankhade 2011 Cri LJ 1687(SC).

3. Hiralal P. Harsora Vs Kusum Narottamdas Harsora 2017 Cri LJ 509(SC).

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

1. Heard Shri Sudhanshu Pandey, learned counsel for the revisionist, Shri V.K. Twivedi, Advocate holding breif of Shri Bipin Kumar Tripathi, learned counsel for the opposite party no. 2 and Shri M.P. Singh Gaur, learned AGA for the State.

2. This revision has been filed against the impugned judgment and order dated 07.07.2017 passed by the learned Additional District & Sessions Judge, Court no. 1, Gorakhpur in Criminal Appeal No. 226 of 2016 (Pramod Kumar Singh vs. State of U.P.) and order dated 03.11.2016 passed by the Additional Chief Judicial Magistrate-I, Gorakhpur in Misc. Case No. 8829 of 2014 (Pramod Kumar Singh Vs. Pratima Singh), P.S. Kaptanganj, District Gorakhpur by which the learned court below has rejected the application of the husband to set aside the judgment and order dated 31.5.2014 by which application of wife was allowed under section 12 Domestic Violence Act.

3. The impugned orders have been challenged on the ground that the impugned orders are based on misreading of record, non- appreciation of fact/evidence and illegal application of law. Learned Additional Judicial Magistrate, Gorakhpur disposed of the application of opposite party no. 2 under Domestic Violence Act on 31.05.2014 and the order was passed ex-parte against the revisionist. A recall application to

recall the order dated 31.05.2014 was given by the applicant-revisionist and the same was rejected by the Additional Chief Judicial Magistrate-I, Gorakhpur by impugned order dated 03.11.2016 and the Appellate Court has committed grave error in dismissing the appeal filed by the appellant-revisionist. The impugned order is based on surmises and conjecture. Service of notice on revisionists is not in accordance with law and the learned Magistrate has not complied with Rule 12 of the Protection of Women from Domestic Violence Rules, 2006. The revisionist no. 1 was not made party in the application filed under section 12 of the Act and no notice was served upon him, but the learned court below passed order against him, which is totally illegal and even then the recall application has been rejected. From perusal of the order dated 31.05.2014, it is evident that the learned court below proceeded in the matter ex-parte against the revisionists and their family members on the basis of presumption of service of notice which is illegal and the same is vitiated under law, as no opportunity of hearing is provided to the revisionist. Revisionist no. 2 is already regularly paying Rs. 3000/- to the respondent no. 2 under an order dated 01.08.2013 passed by the Principle Judge, Family Court, Gorakhpur in case no. 659 of 2012 filed by respondent nos. 2 and 3, under section 125 Cr.P.C. The impugned orders of the courts below is contrary to record and the same is liable to be set aside.

4. The brief facts of the case is that the opposite party nos. 2 and 3 gave an application before the court of Judicial Magistrate-II, Gorakhpur under section 12 Domestic Violence Act for providing protection order and maintenance stating that she was married with opposite party no. 1 on 20.04.2006 according to Hindu rituals. Some times after marriage the opposite parties started mentally and physically harassing her, demanding Rs. 2 lakhs and a house in the name of opposite party no. 1, situated in Bharwaliya Bujurg. On 31.03.2009 son Arsh Kumar was born and after some time she was sent to her parents house and while going back, the opposite party (husband) repeated his demand of Rs. 2 lakhs. On being refused, he slapped her and twisted her hand due to which her bangles were broken and her hand started bleeding. The wife after some time came back to her matrimonial house and again opposite party started harassing her for dowry. On 20.04.2009, she and her son were forced to leave matrimonial house and her *stri dhan* was also taken by them. In the last week of April, 2012, opposite party (husband) came to her parents house and started talking with her younger sister Nidhi @ Smriti Singh and on 30.04.2012, he enticed her to run away with him and at present he is living with her in a rented room after marrying her in Gorakhpur. Against it, a case was registered as Case Crime no. 22 of 2012, under section 498A, 323, 504, 506, 406, 363, 366, 494 IPC and section 3/4 Dowry Prohibition Act. The wife is living a dejected life and she has no means to maintain herself. Opposite party (husband) is Head Constable, working as Radio Operator in BSF and at present working on deputation in National Security Guard, Maneshar Hariyana and he is getting Rs. 40,000/- as monthly pay. On that basis she claimed Rs. 25,000/- as monthly maintenance for herself and her son.

5. Opposite party Chhail Bihari Singh (father of revisionists) filed his

written objection/written statement in which marriage between revisionist no. 2 and opposite party no.1 and birth of a son has been admitted and remaining pleadings has been denied. Opposite party no. 3 died during the course of proceedings and the case was abated in respect of her. Against the revisionists (husband and his brother), ex-parte proceedings took place, opposite party nos. 2 and 3 filed their written statement. The wife examined herself as PW-1. Opposite party Chhail Bihari examined himself as DW-1 and DW-2 Rama Shankar Singh and DW-3 Durg Vijay Singh have also been examined in support. Thereafter, the learned court below allowed the application by order dated 31.05.2014 awarding protection against domestic violence, order for alternative residence or shared house, monetary relief to the tune of Rs. 5000/- for the wife and Rs. 2000/- for the son.

6. Thereafter the husband and his brother gave an application for recall of the said order, stating that the order was ex-parte. On that application, he was heard and by order dated 03.11.2016 the recall application was rejected. An appeal was filed against this rejection order and the Appellate Court by order dated 07.07.2017 dismissed the appeal.

7. The submission of the learned counsel is that the case was proceeded against him exparte and his simple request was that the ex-parte judgment should be recalled and he should be given an opportunity of hearing. The application for recall is at page 63 and it has been stated in that application that no summon was issued nor was served on him and the whole proceeding was ex-parte. The impugned ex-parte order was obtained secretly and the recall application is well within time and therefore, the same should be recalled. Similarly when the application was rejected an appeal was also filed in which briefly almost the same facts were repeated.

8. In **Indra Sarma Vs V.K. Sarma, AIR 2014 SC 309,** the supreme court said that 'Domestic Violence' is undoubtedly a human rights issue, which was not properly taken care of in our country despite various International Conventions and Declarations acknowleded that domestic violence was undoubtedly a human rights issue and the member countries should take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India. Presently, when a woman is subjected to cruelty by husband or his relatives, it is an offence punishable under Section 498-A, IPC. The Civil Law, it was noticed, did not address this phenomenon in its entirety. Consequently, the Parliament, to provide more effective protection of rights of women guaranteed under the Constitution under Articles 14, 15 and 21, who are victims of violence of any kind occurring in the family, enacted the Domestic Violence Act.

9. The Domestic Violence Act provides various measures for protection of a woman who is facing domestic violence of different forms. It incorporates remedies in terms of residence order (section 19), protection order to stop violence (section 18), monetary relief like maintainence (section 20), custody order (section 21) and compensation order (section 22). Section 12 provides:

"Application to Magistrate.-*(1) An aggrieved person or a Protection*

Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of ***sixty days*** *from the date of its first hearing."*

10. Section 17 of the Act provides for right to reside in a shared household. It reads:

"(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

11. Section 18 speaks of protection orders to be issued by the Magistrate in favour of the aggrieved person and prohibit the respondent from committing any act of domestic violence. Section 19 authorizes the magistrate, on being satisfied that domestic violence has taken place, pass a residence order restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household. Section 20 provides for Monetary reliefs to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence. Section 22 authorizes the Magistrate to pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed against her.

12. Section 23 confers power on magistrate to grant interim and ex parte orders in any proceeding before him under this Act as he deems just and proper. Such power is exercised by the Magistrate on satisfaction that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit of the aggrieved person under section 18, section 19, section 20, section 21 or section 22 of the Act.

13. Section 25 lays down as follows:

"Duration and alteration of orders.-(1) A protection order made under section 18 shall be in force till the aggrieved person applies for discharge.

(2) If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate."

14. For achieving the ends of justice and statutory objective, section 28 gives power to the court to evolve own procedure. Even a mixed process and procedure as provided in civil and criminal law may be adopted simultaneously to meet the ends of justice.

15. From perusal of both the impugned order, it appears that initially the Magistrate took note of the fact that the case was contested by the father of the revisionist and elder father and maternal uncle of the husband. On the point of having knowledge of the case, the learned Magistrate has mentioned that before the court below, father of the husband has been examined along with uncle and maternal uncle, therefore, the court concluded that where so closely related persons like father were contesting the case, it cannot be believed that the husband was not having any information. The leaned Magistrate has also noted that even though the father of the husband was contesting before the court, the husband did not turn up, untill the ex-parte judgment was passed.

16. So far as the revisionist no. 1 is concerned, the learned Magistrate has pointed out that a very simple order against him was passed that he will not commit any Domestic Violence against the wife. Therefore, the learned Magistrate concluded that there is no use in recalling the impugned judgment. From perusal of the order of the Appellate Court, it appears that the learned Appellate Court upheld the order of the learned Magistrate on the basis that the father of the husband was contesting the matter and he had stated in his evidence that he informed about the case to his son, therefore, it was concluded that just to delay the whole case the husband waited till the disposal of the case ex-parte and thereafter, as a second inning, he started giving application for recall etc. On this basis and other grounds also mentioned in the impugned judgment, the Appellate Court affirmed the view taken by the learned Magistrate.

17. Clearly, the view adopted by both the court below appears to be in

consonance with the sublime object of the Domestic Violence Act which provides for speedy disposal of application under section 12 by curtailing unnecessary delay so that the wife might not be deprived of the relief provided under the Act, so necessary for her and her son's survival. The Act prescribes a time frame of 60 days for disposal of application. In this case the application under section 12 has been given by wife in September, 2012 and has been decided in May, 2014, whereas, it should have been decided within 60 days. Therefore, recall thereof, if permitted, it will cause great hardship to the wife and son who have been forced to leave the matrimonial house. It should also be noted that the application of the wife has been allowed for a total amount of Rs. 5000/- for her and Rs. 2000/- for the son, even though she has claimed maintenance of Rs. 25,000/-. Both the court below adopted a logical approach in awarding the said amount.

18. Learned counsel to the revisionist has submitted that he is already paying Rs. 3000/- to the wife according to the order of the Family Court passed in the Case No. 659 of 2012 under section 125 Cr.P.C. and this fact has not been considered by the court below. It is pertinent to mention that the wife along with her son had claimed Rs. 25,000/- and there is no denial of the fact that the husband is getting the salary of Rs. 40,000/- per month, therefore, awarding only Rs. 7,000/- for both wife and son is not excessive any way and even if Rs. 3000/- awarded for maintenance under section 125 Cr.P.C. is added the whole amount will come to Rs. 10,000/- which is much less than what was claimed by the wife and it goes to 1/4th of the pay of the husband.

19. It has been further submitted by the learned counsel to the revisionist that the wife is running a coaching center and is working as lecturer of Zoology in Dr. Ram Manohar Lohiya Girls Inter College and she is earning about Rs. 30,000/- per month. Learned counsel for the opposite party nos. 2 and 3 has mentioned that this fact has never been alleged by the husband neither before the learned Magistrate nor before the Appellate Court, there is no proof at all of this income and therefore, it has been submitted that this cannot be believed. Even if it is believed, section 25 (2) of the Act provides for modification of order in case of change in the circumstances and it provides that *If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.*

20. Therefore, if considered from that angle also, this fact may be brought before the learned court below by the husband by filing a further application showing this fact and claiming for reduction of the amount. This is permissible within the scheme of Domestic Violence Act. But as a note of caution, it is made clear that unless a conclusion is arrived at by the learned Magistrate on this point, he (revisionist) will continue making payment of maintenance awarded to the wife and will not in any way flout the order of Magistrate giving other protections to the wife. If it is not done by the revisionists or his relatives, the learned Magistrate can out rightly reject such application

given under section 25(2) of the Act and proceed further. It is also made clear that the violation of the protection order is crime and if the protection orders are violated, a criminal proceeding may be drawn according to the Domestic Violence act.

21. There is one more argument advanced by the learned counsel to the revisionists that the learned magistrate has allowed the application of the wife against Anita singh who is a woman, whereas, woman has been excluded from the definition of 'Respondent' by section 2(q) of the Act.

Section 2(q) of the Domestic Violence Act is as follows:

" 'respondent' means any adult person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

22. The controversy in this regard has been set at rest by the supreme court in **Sandhya Manoj Wankhade vs Manoj Bhimrao Wankhade, 2011 Cri LJ 1687(SC)** where it has been held that the Act is gender neutral and is not restricted to husband, male partner or their male relatives and a complaint can be validly filed against female relatives also. In **Hiralal P. Harsora vs Kusum Narottamdas Harsora, 2017 Cri LJ 509(SC),** the court went a step further and held that the use of expression 'adult male person' in section 2(q) of the Act is contrary to object of affording protection to women who suffered from domestic violence of any kind and is violative of Article 14 of the Constitution. Therefore, the court struck down the words 'adult male' occurring in section 2(q) of the Act. In view of the aforesaid judgments, I find no force in this argument of the learned counsel and hold that a complaint can be filed and relief can be granted under the Act against the female relatives of the husband also.

23. The Domestic Violence Act is a special legislation which has adopted progressive approach of protecting the wife who is victim and who is suffering or has suffered domestic violence of any kind as defined under the Act, by providing shelter, freedom from fear, economic support, medical relief and legal help to overcome the problem and to survive and live with dignity. The reliefs provided under the Act are urgent in nature and law requires that such applications should be disposed of without delay and efforts should be made by magistrate to dispose the same in 60 days. Domestic violence is a crime against women which is linked to their deprived and disadvantageous position in the society and it refers to violence which takes place in matrimonial home. In order to address this problem, beneficial provisions have been enacted and the magistrate has been conferred authority to adopt stringent procedure by recourse to civil or criminal law or to evolve a procedure to ensure expeditious and meaningful response against a mischievous husband and his relatives. It includes curtailment and situational alteration in procedure applied for disposal of application. The Act is a reminder that the Constitution of our country promises justice, equal

opportunity and status to all women and they cannot be left to bear the burnt of discrimination, disparity and injustice in family as well as public life.

24. On the basis of above discussion, I do not find any material irregularity or illegality or jurisdictional error in the impugned order and the revision has got no force.

25. The revision is **dismissed.**

(2019)11ILR A417

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABD 13.09.2019

BEFORE
THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Revision No. 3369 OF 2019

Priti Devi ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Priyanka Srivastava, Sri Abhishek Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Rahul Saxena

A. Evidence Act,1872 - Section 32 - Multiple Dying Declarations - Dying declaration is relevant evidence - If in a case there are more than one dying declaration and both are contradictory to each other, it is the duty of trial court to carefully examine the dying declarations in the light of materials facts and circumstances as well as evidence placed before the Court. Such cases must be decided on the facts of each case. (Para 12)

B. Code of Criminal Procedure,1973 - Section 319 - Powers under Section 319 Cr.P.C. can be exercised only where strong and cogent evidence are found against a person and not in a casual and cavalier manner. The decree of satisfaction before summoning the offence under Section 319 Cr.P.C. must be more than prima facie, which is warranted at the time of framing of charges against the accused. (Para 14)

Held: – In view of Section 32 of the Evidence Act, dying declaration is a material piece of evidence, which is much more than prima facie and sufficient to summon the person concerned under Section 319 Cr.P.C. as an additional accused – Whether first dying declaration is genuine or second dying declaration is genuine is a subject matter of appreciation of evidence by the trial court at the appropriate stage –Specific allegation as well as motive against the present revisionist is very much on record in the second dying declaration. – Since the specific allegation has been levelled by the deceased in her second dying declaration only against present revisionist, therefore, the said evidence is sufficient to summon the revisionist. (Para 8, 12)

Criminal revision dismissed (E-5)

List of Cases Cited: -

1. Smt. Paniben Vs St. of Guj. 1992 SCC (Cri.) 403.

2. Kundula Bala Subrahmanyam Vs St. of A.P. (1993) SCC (Cri.) 655.

3. Jagbir Singh Vs St. (N.C.T. of Delhi) 2019 SCC Online SC 1148.

4. Hardeep Singh & ors. Vs St. of Punjab & ors 2014(3) SCC 92.

5. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC 706.

6.S Ahmad Ispahni Vs Yogendra Chandak & ors. (2017) 16 SCC 226.

7. Periyasamik & ors. Vs S.Nallasamy 2019 (4) SCC 342

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

1. Sri Rahul Saxena, learned Advocate has filed his Vakalatnama on behalf of opposite party no.2, which is taken on record.

2. Heard Sri Abhishek Srivastava and Priyanka Srivastava, learned counsel for the revisionist, Sri Ramesh Kumar Pandey, learned Additional Government Advocate assisted by Sri Ashish Kumar Tripathi, learned Brief Holder for the State/opposite party no.1, Sri Rahul Saxena, learned counsel for opposite party no.2 and perused the record with the assistance of learned counsel for the parties.

3. This criminal revision under Section 397/401 Cr.P.C. has been filed by the revisionist (Priti Devi) against the order dated 14.08.2019 passed by Additional Sessions Judge, Court No.6, Pilibhit in exercise of powers under Section 319 Cr.P.C. in S.T. No. 222 of 2018 (State Vs. Rajesh Kumar and others), under Sections 498A, 304B Indian Penal Code and 4 Dowry Prohibition Act, Police Station Jahanabad, District Pilibhit, whereby application no. 33 kha dated 8.7.2019 under Section 319 Cr.P.C. of opposite party no.2/informant has been partly allowed and revisionist has been summoned under Sections 498A, 304B I.P.C. and under Section 4 of D.P. Act as an additional accused to face trial in the aforesaid case.

4. Filtering out unnecessary details, the basic facts of the case, in brief, are that the revisionist is sister-in-law as well as *bhabhi* of the deceased (Gaytri) and opposite party no.2/informant is father of the deceased as well as father-in-law of the revisionist. Marriage of the deceased was solemnized with co-accused Rajesh on 17.05.2013. On 28.5.2018, opposite party no.2 lodged FIR under Sections 498A, 304B IPC and Section 3/4 D.P. Act against Rajesh (husband) and Ramotar (father-in-law) of the deceased, registered as case crime no. 0191 of 2018 at Police Station Jahanabad, District Pilibhit alleging therein that his daughter was burnt in her matrimonial house by the accused persons on account of non-fulfillment of demand of dowry. She was admitted in district hospital, Pilibhit, and thereafter, she was admitted in Ram Kishore hospital, Bareilly. Subsequently, she was taken to Guru Tej Bahadur Hospital, where she died during her treatment. In this case there are two dying declarations of the deceased.

The First dying declaration of the deceased was recorded on 7.5.2018 by Naib Tehsildar, Pilibhit, Sadar when she was admitted in district hospital, Pilibhit which is reproduced herein-below:-

"Patient Gayatri Devi is fully conscious and oriented and is able to give statement in her full sense.

मैं गायत्री देवी W/o राजेश कुमार उम्र लगभग 22 वर्ष नि० ग्रा०- ढ़डिया बदल थाना- जहानाबाद पीलीभीत अपने पूरे होशो हवास में बयान करती हूँ कि आज दिनांक 07.05.18 को दोपहर लगभग 2:PM पर गैस चूल्हे पर खाना बना रही थी तभी अचानक आग मेरे कपड़ो में लग गयी जिससे मैं जल गयी। उक्त घटना में अन्य कोई उत्तरदायी नहीं है।

ह०अप०

शेर बहादुर सिंह

नायब तहसीलदार

पीलीभीत सदर

समय 7.05PM

Patient Gayatri Devi was fully conscious and oriented and gave statement in her full sense"

The second dying declaration of the deceased was recorded on 18.5.2018 by Naib Tehsildar Bareilly when she was shifted and admitted in Sri Ram Kishore Memorial Hospital, Bareilly, which is reproduced herein-below:-

" मरीज बयान देने की स्थिति में है

मृत्यु पूर्व बयान-

मैं गायत्री पत्नी राजेश कुमार आयु लगभग 22 साल बयान करती हूँ कि मेरी शादी को 6 वर्ष हो चुका है। मेरे एक बेटा है। मेरे पती गांव में मजदूरी का कार्य करते हैं। दिनांक 07.05.18 को मैं गैस पर चाय बना रही थी उस समय दोपहर को लगभग 12 बज रहे थे। मेरे ननद प्रीती से मेरा झगड़ा हो गया। जब मैं चाय बना रही थी उसी समय उन्होंने मिट्टी के तेल से भरे बोतल खींचकर मुझे मारी जो गैस पर आ गिरी और फूट गयी। जिससे तेल फैल गया और आग लग गयी। आग भभकने से मेरे कपड़ों में लग गयी और मैं जल गयी। मेरी सास ने पहले पीलीभीत में भर्ती कराया उसके बाद बरेली लाये। बयान पढ़कर सुनकर तस्दीक किया। L.F.T.I गायत्री बयान देने के दौरान और उसके बाद मरीज होश में रहा

ह०अप०
18/5/18
1.10 PM"

5. The Investigating Officer after investigation submitted charge-sheet only against Rajesh Kumar (husband) and Ramotar (father-in-law of the deceased), under Sections 498A, 304B IPC and Section 3/4 D.P. Act. Before the trial court, statement of PW-1 Omkar (father of the deceased), PW-2 Jaswant Singh (brother of the deceased and husband of revisionist) and PW-3 Km. Kanchan were recorded. Thereafter, on 8.7.2019, opposite party no.2 (father of the deceased) moved an application under Section 319 Cr.P.C. for summoning Preeti Devi (revisionist), Nannhi (mother-in-law) and Vikash (brother-in-law) of the deceased as an additional accused to face trial. The said application of opposite party no.2 has been partly allowed by impugned order dated 14.08.2019, whereby only present revisionist Preeti Devi has been summoned to face trial. The said order dated 14.08.2019 is under challenge in the instant revision.

6. Learned counsel for the revisionist assailing the impugned order dated 14.08.2019 submitted that:-

(i) Revisionist Preeti Devi is sister of deceased's husband Rajesh as well as wife of Jaswant Singh (brother of the deceased), as such opposite party no.2/informant of this case is father of the deceased and father-in-law also of the revisionist. Since, the revisionist was harassed and tortured in her matrimonial home, therefore, father of the revisionist had lodged FIR on 17.09.2014 against her husband and other family members of the deceased (parents, brother and sister of the deceased), in which charge-sheet was submitted against Omkar/opposite party no.2, Jaswant Singh, Ramkali and Km. Kanchan.

(ii) Revisionist also filed a case under Section 125 Cr.P.C. against her husband Jaswant Singh (who is brother of the deceased and PW-2 in the present case), which has been allowed by ex-parte order dated 26.06.2019 directing PW-2 Jaswant Singh to pay an amount of Rs. 2,500/- as maintenance to the revisionist.

(iii) Being annoyed against the action of revisionist, family members of

the deceased Gaytri Devi in collusion with each other moved an application under Section 319 Cr.P.C. against the revisionist on 8.7.2019 with mala fide intention.

(iv) There are contradiction in both dying declarations dated 7.5.2018 as well as 18.5.2018, therefore, there was no occasion to allow the application under Section 319 Cr.P.C. of the prosecution.

(v) The trial court without properly evaluating the material available before him and without considering the statements recorded under Section 161 Cr.P.C. and first dying declaration of the deceased dated 7.5.2018 allowed the application under Section 319 Cr.P.C. of opposite party no.2 and summoned the revisionist to face trial, which is illegal and not sustainable in the eye of law.

(vi) Cause of death of deceased as per post mortem report is contradictory to the prosecution case.

(vii) Lastly, it is submitted that the revisionist has been falsely implicated in this case and no offence is made out against the revisionist. Hence, impugned order dated 14.08.2019 against the revisionist is liable to be quashed by this Court.

7. Per contra, learned Additional Government Advocate and learned brief holder for the State as well as learned counsel appearing on behalf of opposite party no.2 refuting the submissions advanced on behalf of the revisionist submitted that PW-1 Omkar, PW-2 Jaswant Singh and PW-3 Km. Kanchan in their statements have made allegation against the present revisionist Priti as well as mother-in-law and brother-in-law of the deceased. It is also submitted that revisionist has not filed post mortem report of deceased. In second dying declaration dated 18.05.2018 of the deceased specific allegation has been levelled against the revisionist Priti Devi. It is submitted that as per the second dying declaration dated 18.05.2018, the deceased received burn injury by the deliberate act of revisionist Priti Devi, who on account of skirmish took place between them, thrown kerosene bottle on the gas stove when deceased was cooking tea and thereafter Gaytri died in hospital during her treatment, therefore, the revisionist was rightly summoned by the order dated 14.08.2019 to face trial and the present revision is liable to be dismissed.

8. After having heard the submissions of the learned counsel for the parties and perusing the entire record, I find that it is true that the revisionist is neither named in the First Information Report nor in the statement under Section 161 Cr.P.C. of the informant, but it is also admitted facts on record that in this case there are two dying declarations of the deceased. First dying declaration was recorded on 7.5.2018 by Sher Bahadur Singh, Naib Tehsildar, Sadar, Pilibhit when deceased was admitted in district hospital, Pilibhit, while second dying declaration was recorded on 18.5.2018 by Ravindra Pratap Singh, Naib Tehsildar, Bareilly when deceased was shifted and admitted in Sri Ram Kishore Memorial Hospital, Bareilly. Though, both the dying declarations are contradictory to each other, but both dying declarations have been recorded by the Government Official competent to record the same. In both the dying declarations, it is mentioned that patient Gayatri Devi is fully conscious and is able to give statement in her full sense, therefore, genuineness or otherwise of both the

aforesaid dying declaration can be taken into consideration by the trial court at the appropriate stage in the light of facts, circumstances and material evidence on the record of the case. At this stage, it cannot be said by this Court that which dying declaration is correct and which dying declaration will prevail over other dying declaration. This Court is of the view that whether first dying declaration is genuine or second dying declaration is genuine is a subject matter of appreciation of evidence by the trial court at the appropriate stage. Specific allegation as well as motive against the present revisionist is very much on record in the second dying declaration dated 18.05.2018.

9. A dying declaration is relevant evidence as declared by Section 32 of the Indian Evidence Act, 1872. The Apex Court in case of **Paniben (Smt) Vs. State of Gujarat 1992 SCC (Cri.) 403** has discussed certain circumstances with regard to dying declaration. The relevant paragraph nos. 18 and 19 of the said judgment are as follows:-

"18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. 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 either 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. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Munnu Raja Vs. State of M.P. (1976) 3 SCC 104.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of U. P. Vs. Ram Sagar Yadav, (1985) 1 SCC 552; Ramavati Devi Vs. State of Bihar (1983) 1 SCC 211.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. K. Rama Chandra Reddy Vs. Public Prosecutor (1976) 3 SCC 618

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. Rasheed Beg Vs. Sate of Madhya Pradesh (1974) 4 SCC 264

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh Vs. State of M. P. 1981 supp SCC 25

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. Ram Manorath Vs. State of U.P. (1981) 2 SCC 654

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra Vs. Krishnamurthi Laxmipati Naidu 1980 Supp SCC 455

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza Vs. State of Bihar 1980 Supp SCC 769

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram Vs. State of M.P 1988 Supp SCC 152

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P. Vs. Madan Mohan (1989) 3 SCC 390.

19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declaration made by the deceased Bai Kanta. This Court in Mohan Lal Gangaram Gehani Vs. State of Maharashtra (1989) 1 SCC 700 held:

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

Of course, if the plurality of dying declarations could be held to be trust worthy and reliable, they have to be accepted."

10. Issue of multiple dying declaration has also been considered by the Apex Court in case of **Kundula Bala Subrahmanyam Vs. State of Andhra Pradesh (1993) SCC (Cri.) 655.** Relevant observations made by the Apex Court in para 18 of the said judgment are as follows:-

"18. Section 32 (1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not credit-worthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the

statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations, then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same."

11. Recently, the Apex Court in its judgment dated 4th September, 2019 in case of **Jagbir Singh Vs. State (N.C.T. of Delhi) 2019 SCC Online SC 1148** has laid down parameter for considering the multiple dying declaration in a case. Relevant paragraph no. 30 of the said judgment is as follows:-

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

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

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

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

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

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

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

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

h. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying

declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

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

12. In the light of dictum of the Apex Court in above mentioned judgments, it is well settled that if in a case there are more than one dying declaration and both are contradictory to each other, it is the duty of trial court to carefully examine the dying declarations in the light of materials facts and circumstances as well as evidence placed before the Court. Where there are more than one dying declaration, no straight jaket formula can be laid down. In the circumstances, case must be decided on the facts of each case. In the present case, the trial court has partly allowed the application no. 33 kha under Section 319 Cr.P.C. of the prosecution with finding that since the specific allegation has been levelled by the deceased in her second dying declaration only against present revisionist, therefore, the said evidence is sufficient to summon the revisionist. Since there were no corroborative material against Nannhi Devi (mother-in-law) and Vikash (brother-in-law) except the statements of PW-1, PW-2 and PW-3, therefore, prayer for summoning them has been refused by the trial court. So far as submission of learned counsel for the revisionist regarding false implication of the revisionist on account of FIR dated 17.09.2014 lodged by father of the revisionist against opposite party no.2 and his family members as well as proceedings of maintenance case no. 214 of 2018 filed by the present revisionist Preeti Devi are concerned, the same has been taken into consideration by the trial court, while passing the impugned order dated 14.08.2019.

13. Issues relating to scope and object of summoning the accused under Section 319 Cr.P.C. has been well considered and settled by Constitutional Bench consisting of five Judges of Apex Court in case of **Hardeep Singh and others vs. State of Punjab and others 2014(3) SCC 92.** Relevant paragraph nos. 105 and 106 of the said judgment are reproduced herein-below:-

"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 aforesaid principles laid down by the Apex Court in the case of Hardeep Singh (supra) has been reiterated further in case of **Brijendra Singh and others vs. State of Rajasthan; 2017(7) SCC 706** as well as in the case **S Ahmad Ispahni vs. Yogendra Chandak and others; 2017 (16) SCC 226** observing that powers under Section 319 Cr.P.C. can be exercised only where strong and cogent evidence are found against a person and not in a casual and cavalier manner. The decree of satisfaction before summoning the offence under Section 319 Cr.P.C. must be more than prima facie, which is warranted at the time of framing of charges against the accused.

15. The Apex Court in case of **Periyasamik and others vs. S.Nallasamy 2019 (4) SCC 342** has also held that the additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

16. The grounds taken in the criminal revision reveal that many of them are disputed question of facts. This Court is of the view that in view of Section 32 of the Evidence Act, dying declaration is a material piece of evidence, which is much more than prima facie and sufficient to summon the person concerned under Section 319 Cr.P.C. as an additional accused. It is also well settled that the appreciation of evidence is a function of the trial court. This Court in exercise of power under Section 397/401 Cr.P.C. cannot assume such jurisdiction and put to an end to the process of trial provided under the law. The disputed question of facts and defence of the accused cannot be taken into consideration at this pre-trial stage. Factual submissions and defence as raised in the criminal revision can be more appropriately gone into by the trial court at the appropriate stage.

17. Under the facts and circumstances of the case, I do not find any material illegality or perversity in the order dated 14.08.2019 of the trial court, therefore, the same is not liable to be interfered with, as the same is impeccable.

18. As a fallout and consequence of above discussions, the revision lacks merit, and is, accordingly, **dismissed**.

(2019)11ILR A426

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 3450 OF 2019

Manidhar Mishra & Anr.
...Applicants/Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Rajiv Lochan Shukla, Sri Ravikant Shukla

Counsel for the Opposite Party:
A.G.A., Sri Pawan Kumar Mishra, Sri I.K. Chaturvedi

A. Criminal Law -Code of Criminal Procedure,1973 - Section 319 - Degree of satisfaction - Standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused - What is, necessary for the Court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, *if unrebutted*, may lead to the conviction of a person sought to be added as the accused in the case.

B. Criminal Law -Code of Criminal Procedure,1973 - Section 319 - 'Evidence' - Examination in-chief of prosecution witnesses is to be considered and there is no need to wait for cross-examination. (Para 14)

Held: - In the testimony of PW-2, specific role attributed to two accused persons Ankur Mishra and Manidhar Mishra - Trial court discussed the statement of PW-2 and PW-3 and found sufficient evidence showing involvement of and for proceeding against the revisionists Ankur Mishra and Manidhar Mishra –Two eyewitnesses supported the prosecution version and stated the involvement revisionists in commission of the offence and if the same remains unrebutted, the prosecution will certainly succeed.

(Para 17, 19)

Criminal revision dismissed (E-5)

List of Cases Cited: -

1. Sunil Kumar Gupta & ors. Vs St. of U.P. & ors 2019 (108) ACC 29.

2. Hardeep Singh Vs St. of Punjab (2014) 3 SCC 92.

3.Sarabjit Singh & anr. Vs St. of Punjab & anr. (2009) 16 SCC 46.

4. Babubhai Bhimabhai Bokhiria Vs St. of Guj. (2014) 5 SCC 568.

5. Brijendra Singh Vs St. of Raj. AIR 2017 SC 2839.

6. Labhuji Amaratji Thakor Vs St. of Guj. AIR 2019 SC 734.

7. Rakesh Vs St. of Haryana AIR 2019 SC 2168

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

1. Heard Sri Rajiv Lochan Shukla, learned Senior counsel assisted by Sri Ravi Kant Shukla, appearing for the revisionists, Sri I.K. Chaturvedi, learned Senior counsel assisted by Sri Pawan Kumar Mishra, appearing for the opposite party no.2, the learned A.G.A. for the State and also perused the record.

2. This revision has been filed by the revisionist, Manidhar Mishra and Gangadhar Mishra @ Ankur Mishra against the judgement and order dated 05.09.2019 passed by learned Sessions

Judge, Basti on the application (Paper No.77Kha) moved by opposite party no.2 Pradeep Kumar Tiwari in S.T. No. 211 of 2016 (State Vs. Roop Narayan Giri) in Case Crime No. 0568 of 2016 under section 302 I.P.C., Police Station Captainganj, District Basti.

3. Submission of the learned counsel for the revisionist is that initially an application was moved from the side of prosecution under section 319 Cr.P.C. and the learned Sessions Judge, Basti passed an order dated 28.10.2017 by which he rejected the application.

4. Against that order, a revision being Revision No. 236 of 2018 was filed before this Court and vide order dated 08.07.2019, that revision was partly allowed in respect of two accused persons Ankur Mishra and Manidhar Mishra remanding the file with the direction that in respect of both of them, learned trial court shall reconsider and re-visit as to whether Ankur Mishra and Manidhar Mishra may be summoned in exercise of power under section 319 Criminal Procedure Code in the light of the guidelines provided in the case of **Hardeep Singh Vs. State of Punjab (2014) 3 SCC 92** and shall pass fresh order in respect of summoning of these two accused persons. For remaining revisionists, revision was rejected finding no illegality and infirmity in the order of the learned trial court in respect of them. Therefore, matter remained pending in respect of Ankur Mishra and Manidhar Mishra and the learned Sessions Judge, Basti was expected to pass fresh order. Subsequently, learned Sessions Judge, Basti, after hearing both the sides, passed the impugned order by which he summoned the accused, Ankur Mishra and Manidhar Mishra for the offence under Section 302 /34 I.P.C. under Section 319 Cr.P.C.

5. Aggrieved by this order, the present revision has been filed by the revisionists, Ankur Mishra and Manidhar Mishra challenging the impugned order on the basis that the learned trial court, after the case was remanded back to him, did not consider the directions given in the order of this Court and without considering the guidelines of the aforesaid judgements, impugned order was passed. It was not considered that Investigation Officer did not submit charge-sheet against them. Impugned order is based on the testimony of P.W.2, Ashutosh Tiwari. During trial the statement of P.W.1Pradeep Kumar Tiwari, the applicant/ complainant was also recorded but the same has not been considered while passing the said order. The testimony of P.W.1 and P.W.2 were inconsistent and as such was not reliable at all. It appears that they are not even eye witnesses of the case and the complainant has implicated all the family members of accused persons. Post-mortem report also did not support the prosecution version and only three injuries were found on the body of the deceased, hence, order is not sustainable in the eye of law and deserves to be quashed. It has been further submitted that the revisionist no.1 is employed as Government Servant whereas revisionist no.2 is in search of job.

6. it has been further submitted that in the judgement passed by this Court in the aforesaid Revision, an observation was made by this Court that *'so far as the complicity of Ankur Mishra, Manidhar Mishra are concerned appears to be*

specific role has been attributed to them in the testimony of PW-2'. For remaining persons, this Court absolutely did not find any case and to that effect observation has been incorporated in the judgement of this Court. The learned trial court passed the impugned order on the basis of aforesaid observation which is not justified in view of the judgement of this Court in the earlier Revision.

7. Submission of the learned counsel for the revisionists is of two folds; firstly, that the guidelines which were required to be considered by the learned trial court in view of the order of this Court was not at all considered while summoning the revisionists and secondly, learned trial court did not consider the statement of witnesses in detail as directed by this Court.

8. It is pertinent to mention that initially the F.I.R. was lodged naming 8 accused persons. After investigation, charge-sheet was filed only against one Roop Narayan Giri and other 7 accused persons were given clean chit in the matter.

9. Since copy of the CD in which Investigation Officer has recorded the statements of witnesses is not on record, therefore, it is not possible to take some assistance in order to test as to on what ground, Investigation Officer did not submit charge-sheet against the revisionists/ accused persons. Therefore, I have to confine to the statement which was recorded during trial. Before the learned trial court, P.W.2 has been examined. It is admitted fact from both the sides that P.W.1 is not an eye witness and he made statement on the basis of information given to him on mobile and on receiving information, he came to lodge F.I.R. P.W. 2 has been examined as eye witness before the trial court and he has given his statement before the trial court in which involvement of the accused persons/revisionists has been clearly stated. From the statement of P.W.2, it appears that he has specifically stated that at the time of the incident, accused Roop Narain Giri was carrying sabbal and accused Ankur Mishra was also carrying sabbal whereas accused Manidhar Mishra was armed with knife and lathi. The witness has stated that when they started beating his grand-father, he saw the said incident himself and with him, his grand-mother also saw the incident. The learned trial court has further referred to the statement of PW-3 Smt Ketaki Tiwari who has stated that she saw her husband surrounded by the accused persons on his cot. On noise, her grand son told her that her husband was being beaten. She saw her husband was being beaten by accused Roopnarain Giri and Ankur Misra hitting her husband by sabbal and others were carrying lathi and have surrounded him. Seeing that all the accused persons surrounded her husband and beating him, she cried and fainted. Thus, the learned trial court found that both PW-2 and PW-3 are eyewitnesses and have stated that accused Roop Narayan Giri and Ankur Mishra were carrying sabbal and other accused Manidhar Misra with lathi were striking the deceased. Thus, the learned trial court found enough evidence against the accused persons showing their involvement in the commission of offence.

10. Learned counsel for the revisionists has referred to the judgement rendered in the Case of **Sunil Kumar**

Gupta and others Vs. State of U.P. and others, [2019 (108) ACC 29), in which Supreme Court visited the law on the point of Section 319 Cr.P.C., that refers to the judgement of **Hardeep Singh Vs. State of Punjab,** (2014) 3 SCC 92 and **Sarabjit Singh and another Vs. State of Punjab and another,** (2009) 16 SCC 46 and has concluded that for summoning the accused under section 319 Cr.P.C. much stronger evidence than mere probability of complicity of such persons is required and it should appear that if such evidence remains un-rebutted, the trial would result in conviction. It is also to be seen as to whether impugned order which has been passed in consonance with the said guidelines and the law laid down.

11. Section 319 Cr.P.C. reads as under :-

"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 a fresh, 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. In **Hardeep Singh (supra),** the Constitution Bench has settled the law in respect of Section 319, Criminal Procedure Code. that the standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused. The Supreme Court observed for the purpose of Section 319 as under:

".....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 the conviction of a person sought to be added as the accused in the case."

Regarding the degree of satisfaction necessary for framing a charge, the Court observed:

"However, there is a series of cases wherein this court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 of the 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".

The Court concluded as below:

"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....."

13. In **Babubhai Bhimabhai Bokhiria vs. State of Gujarat,** 2014 (5) SCC 568, the aforesaid view of Hardeep Singh (supra) has been further quoted with approval and the Supreme Court has held as under :-

"Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

14. In **Brijendra Singh vs State of Rajasthan,** AIR 2017 SC 2839, the supreme court discussed the meaning of 'evidence' in section 319, Criminal Procedure Code and expressed the view that the examination-in-chief of prosecution witnesses is to be considered and there is no need to wait for cross-examination. The prima facie opinion and satisfaction with regards to complicity of the person in commission of the offence is not mere probability of involvement. It requires stronger and cogent evidence. In this case, the IO investigated the offence and did not submit charge-sheet for the reason that at the time of incident the appellant was at a distance of 175 km from the place of occurrence. The supreme court set aside the summoning order and observed that no doubt, the trial court can summon the person on the basis of the statement of witnesses given during trial. However, where plethora of evidence was collected by the IO including documentary evidence indicating his plea of alibi to be correct, the trial court is duty bound to consider the evidence so collected by IO while forming opinion and recording satisfaction regarding prima facie case for the purpose of section 319 of the Criminal Procedure Code.

15. The view expressed in **Hardeep Singh (supra)** has been further reiterated in **Labhuji Amaratji Thakor vs State of Gujarat,** AIR 2019 SC 734 and has laid

down 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. The Supreme Court set aside the order of the High Court and up held the order of Court below rejecting the application under section 319.

16. In **Rakesh vs State of Haryana,** AIR 2019 SC 2168, It appears that the facts of the case was quite similar in the case before the Supreme Court as in that case also the name of the persons was not mentioned in the FIR and when the statement under section 161 Cr.P.C. was recorded by the Investigating Officer, the name of these persons did not find mention. The supreme court again considered the ambit of section 319 and laid down as follows:

"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 charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction."

17. What is important is that the learned trial court discussed the statement of PW-2 and PW-3 and found sufficient evidence showing involvement of and for proceeding against the revisionists Ankur Mishra and Manidhar Mishra for the offence under Section 302/34 IPC. After reaching this conclusion, the learned trial court took support in favour of the conclusion by referring to the observation of this court in the judgement of earlier Revision in which this court has observed to the effect that in the testimony of PW-2, specific role has been attributed to two accused persons Ankur Mishra and Manidhar Mishra. I do not find anything wrong in it and it cannot be said that the learned trial court has summoned the revisionists only on the basis of the aforesaid observation of this Court.

18. So far as submission of the learned counsel for the revisionists with regard to non mentioning of judgement of the Supreme Court is concerned which has been pointed out in the earlier judgement of this Court in the said revision, of course, it appears to be missing, but, this revision is not to be decided on this basis or on the basis why the learned trial court did not mention or discuss those references.

19. In the situation like this, where two eyewitnesses supported the prosecution version and have stated the involvement of these two accused persons in commission of the offence and if the same remains unrebutted, the prosecution will certainly succeed, and also considering the fact that these two accused persons/revisionists were named in the F.I.R., I find that there remains no reason as to why and how otherwise conclusion could be reached by the learned trial court with regard to these two accused person.

20. In view of the above, I am of the view that there is no substance in the arguments of the learned counsel to the revisionists and the impugned order does not suffer from any illegality, infirmity or

jurisdictional error. Revision has no force and is liable to be dismissed.

21. The revision is accordingly, **dismissed**.

(2019)11ILR A432

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 3546 of 2019

Smt. Sanjeeda @ Moti & Ors.
...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Atul Kumar

Counsel for the Opposite Parties:
A.G.A., Sri Sushil Kumar Pandey

A. Criminal Law -Code of Criminal Procedure,1973 - Section 319 - Degree of satisfaction - Standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused.

B. Criminal Law- Code of Criminal Procedure,1973 - Section 319 - 'Evidence' - Examination in-chief of prosecution witnesses is to be considered and there is no need to wait for cross-examination

Revisionist name occurred in the statements of P.W. - 1 Murtaza, who lodged F.I.R. and of P.W.-2 - Mustafa who was the eyewitness and has seen the occurrence also stated the same thing in his statement. After completing examination-in-chief of P.W.-2 ,accused persons /revisionists were summoned under section 319 Cr.P.C. *Held* - Requirement of section 319 Cr.P.C. was established by statement of two witnesses. Further All these accused persons are named accused persons in the FIR (Para 19, 20)

Criminal Revision dismissed (E-5)

List of Cases Cited: -

1. Hardeep Singh Vs St. of Punjab (2014) 3 SCC 92.

2. Babubhai Bhimabhai Bokhiria Vs St. of Guj. (2014) 5 SCC 568.

3. Brijendra Singh Vs St. of Raj. AIR 2017 SC 2839.

4.Labhuji Amaratji Thakor Vs St. of Guj. AIR 2019 SC 734

5. Rakesh Vs St. of Haryana AIR 2019 SC 2168

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

1. Vakalatnama filed by Shri Sushil Kumar Pandey, Advocate on behalf of the informant is taken on record.

2. Heard Shri Atul Kumar, learned counsel for the revisionist, Shri Sushil Kumar Pandey, learned counsel for the informant, learned A.G.A. for the State and perused the record. .

3. This revision has been filed against the order dated 21.08.2019 passed by the Additional District Judge, Court no. 9, Muzaffar Nagar in S.T. No. 1291 of 2016 (State Vs. Mohsin), arising out of Case Crime No. 480 of 2016, under sections 147, 148, 302 read with section 149, 506 I.P.C., P.S. Charthawal, District Muzaffar Nagar by which the revisionist Smt. Sanjeeda @ Moti, Gulfaraj,

Shahnawaz, Mehtab, Hafij and Jishan have been summoned under section 319 Cr.P.C.

4. The F.I.R. was in respect of the criminal incident took place on 02.08.2016 for which on the same day the F.I.R. was lodged by one Murtaza stating that his brother Riyazul Hussain was sleeping in the upper portion of the house in veranda and it was mid night at 1:30 a.m. Sanjeeda @ Moti, Gulfaraj, Shahnawaz, Mehtab, Hafij and Jishan and three other persons came and caused gun shot injuries to Riyazul Hussain and because of that he died and thereafter, the accused persons firing on the family members and the informant, threaten with dire consequences, escaped away from the place. His brother Mustafa, Sahid @ Bhuru, the wife of Mustafa Julekha and the wife of informant Kuresha saw the accused persons running away after committing the offence. On the basis of this, the offence was registered under section 147, 148, 149, 302, 506 IPC against 7 named persons and three unknown persons.

5. The Investigation took place and the Investigating Officer submitted charge-sheet against single accused Mohsin for the offence under sections 147, 148, 149, 302, 506 IPC. The trial started and it has been submitted by the learned counsel to the revisionist that charges were framed against the accused persons for the offence under section 147, 148, 302 read with section 149 and 506 IPC. Thereafter the statement of one witness namely P.W.-1 Murtaza was recorded and an application has been given by the prosecution for summoning all the accused persons against whom the charge-sheet was not filed but their name occurred in the statement of P.W.-1. After hearing the prosecution the accused persons were summoned by order date 08.02.2019 against that order these revisionists filed a revision which was decided by this Court as Criminal Revision No. 927 of 2019 by order dated 12.03.2019 and the summoning order of the accused persons under section 319 Cr.P.C. was set aside and the matter was remanded to dispose of the application a fresh as only one witness was examined at that time and this court expected some more evidence to come for the just disposal of the application.

6. Thereafter, the trial proceeded and Mustafa was examined as P.W.-2 and after completing examination-in-chief of P.W.-2 the application was decided a fresh by the impugned order dated 21.08.2019 and the accused persons /revisionists were summoned under section 319 Cr.P.C.

7. Aggrieved by this order, this revision has been filed challenging the impugned order on the basis that in passing the said order the evidence was not properly weighed and the same is illegal, without consideration of the facts and evidence on record. This was not considered by the learned court below that there was no allegation in the FIR against the revisionists and no specific role was assigned to them in commission of the offence. The deceased sustained only one fire arm injury and none other have sustained any injury, therefore, the impugned order is illegal and against the provisions of law and is liable to be set aside.

8. It has been admitted by both the sides is pertinent that in revision only

three aspects are considered- material irregularity, illegality and jurisdictional error in passing the impugned order. The Revisional Court is not required to enter into the factual matrix in such cases and needless to say that the jurisdiction of the Revisional Court is enough restricted, so far as the factual matrix is concerned.

9. From the perusal of the F.I.R. it appears that the accused persons who are summoned under section 319 Cr.P.C. were all named in the F.I.R., therefore, it was necessary to look into the reasons, why and how, I.O. submitted charge-sheet only against single accused. It is strange to see that in the charge-sheet there is specific mention of section such as 147, 148 IPC and it requires that the particular offence must have been committed by a group of persons who must have constituted an unlawful assembly with the common object of committing the offence. Therefore, there appears to be apparent absurdity that the I.O. submitted charge-sheet only against a single accused and incorporated in the charge-sheet that the offence under section 147 and 148 IPC was also constituted. It is also very significant to mention that the learned trail court has also framed charge including these two sections alongwith section 149 IPC, therefore, while submitting the charge-sheet it was in the mind of the I.O. that the offence has been committed by an unlawful assembly with the common object to commit that offence and the same must have been present while framing charge.

10. Now, there are two witnesses who have been examined as yet, PW-1 Murtaza who was already earlier examined and who has lodged F.I.R. and the second is PW-2 Mustafa who is eyewitness.

11. It is also pertinent to mention that the cross-examination of PW-1 has been completed from the side of the accused and thereafter, PW-2 has been examined. Admittedly the offence was committed in the mid night and for committing the offence the place of occurrence has been shown to be the house of deceased and the place around his house. The learned counsel to the revisionist has laid emphasis on the fact that when the fire took place, the informant was in his room, therefore, he could not be said to be an eyewitness of the incident. May be so, it is one angle of viewing the situation but in his statement it has clearly come that when he and his wife came out side the house they saw the accused persons 9 or 10 in numbers, armed with pistols in their hands, after committing the offence, were indulged in firing targeting other family members and creating alarm and threatening to all of them escaped from the place.

12. Now, saying that this witness is not an eyewitness has to be looked into by the learned trial court. A finding on this aspect is not expected in revision, but this much is clear that they saw the accused persons come out from the house and running away from the place firing towards the family members.

13. Section 319 Cr.P.C. reads as under :-

"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 a fresh, 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."

14. In **Hardeep Singh (supra),** the Constitution Bench has settled the law in respect of Section 319, Criminal Procedure Code. that the standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused. The Supreme Court observed for the purpose of Section 319 as under:

".....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 the conviction of a person sought to be added as the accused in the case."

Regarding the degree of satisfaction necessary for framing a charge, the Court observed:

"However, there is a series of cases wherein this court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 of the 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".

The Court concluded as below:

"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....."

15. In **Babubhai Bhimabhai Bokhiria vs. State of Gujarat, 2014 (5) SCC 568**, the aforesaid view of **Hardeep Singh (supra)** has been further quoted

with approval and the Supreme Court has held as under :-

"Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

16. In **Brijendra Singh vs State of Rajasthan, AIR 2017 SC 2839**, the supreme court discussed the meaning of 'evidence' in section 319, Criminal Procedure Code and expressed the view that the examination-in-chief of prosecution witnesses is to be considered and there is no need to wait for cross-examination. The prima facie opinion and satisfaction with regards to complicity of the person in commission of the offence is not mere probability of involvement. It requires stronger and cogent evidence. In this case, the IO investigated the offence and did not submit charge-sheet for the reason that at the time of incident the appellant was at a distance of 175 km from the place of occurrence. The supreme court set aside the summoning order and observed that no doubt, the trial court can summon the person on the basis of the statement of witnesses given during trial. However, where plethora of evidence was collected by the IO including documentary evidence indicating his plea of alibi to be correct, the trial court is duty bound to consider the evidence so collected by IO while forming opinion and recording satisfaction regarding prima facie case for the purpose of section 319 of the Criminal Procedure Code.

17. The view expressed in **Hardeep Singh (supra)** has been further reiterated in **Labhuji Amaratji Thakor vs State of Gujarat, AIR 2019 SC 734** and has laid down 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. The Supreme Court set aside the order of the High Court and up held the order of Court below rejecting the application under section 319.

18. In Rakesh vs State of Haryana, AIR 2019 SC 2168, It appears that the facts of the case was quite similar in the case before the Supreme Court as in that case also the name of the persons was not mentioned in the FIR and when the statement under section 161 Cr.P.C. was recorded by the Investigating Officer, the name of these persons did not find mention. The supreme court again considered the ambit of section 319 and laid down as follows:

"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 charge, but short of satisfaction to an

extent that the evidence, if goes unrebutted, would lead to conviction."

19. in this case P.W.-2 is the eyewitness who has seen the occurrence and he has also stated the same thing in his statement. He has stated that on the said time, date and place, the accused persons came in the mid night. He saw them who were 9 or 10 in numbers carrying pistol in their hands. He recognized them in the electric light and they all were the resident of same village and were very much acquainted with him. He has further stated that they all had caught hold of deceased on his cot and on the exhortation of Smt. Sanjeeda @ Moti accused Mohsin shot him on his chest. On hearing noise his brother Mustafa and his wife Smt. Julekha, a neighbor Sahid @ Bhuru reached there and they challenged the accused persons, thereupon, while stepping done from the staircase, they all fired on them with intention to cause death. Thereafter, threatening of dire consequences they went away from the place. This is the evidence on record for the purpose of disposal of application under section 319 Cr.P.C.

20. The learned trial court has considered the evidence on record and has found sufficient evidence on record for establishing involvement of these accused persons in the commission of the offence. At the cost of the repetition it must be remembered that the Investigating Officer while submitting the charge-sheet when mentioned section 147 and 148 IPC, the natural inference is that by concluding investigation he has found that the offence was committed by unlawful assembly. The statement of witnesses certainly goes to show that these accused persons constituted an unlawful assembly and at the the time of incident they were the members of unlawful assembly. The requirement for the application of section 319 Cr.P.C. appears to have been established by statement of two witnesses. All these accused persons are named accused persons in the FIR and the FIR has not been delayed to support the idea that in the written report the name of so many persons was deliberately included while lodging the F.I.R. in a situation, where the crime has been committed in mid night and that too in the house of deceased, it appears natural and more probable that a single accused will not alone go and commit such crime in other's house and place unless accompanied by other accused persons, otherwise, the possibility may be always there that the single person may be overpowered by other side. Therefore, the conclusion reached by the learned trial court is logical and justified.

21. In view of the above discussions, I find that there is no material irregularity or illegality in the impugned order nor there is any jurisdictional error and therefore, the revision has got no force and is liable to be dismissed.

22. The revision is dismissed accordingly.

(2019)11ILR A437

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.11.2019

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

Criminal Appeal No. 635 of 2005
with
Criminal Appeal No. 644 of 2005

Siya Ram & Anr. ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
Sri S.H. Ibrahim, Sri Neeraj Sahu, Sri Sunil Kumar Singh

Counsel for the Respondents:
Additional Govt. Advocate

A. Evidence Law-Indian Evidence Act,1872 - Relationship with deceased is not a factor that affects credibility of a witness, - direct evidence of the witnesses - no material inconsistency or major contradictions in evidence- incident had occurred without premeditation -no common intention of appellants to commit murder -amongst the injuries sustained by the deceased only one injury has been found fatal- the appellants were certainly having sufficient common intention/knowledge that their act is likely to result in the death of deceased- not acted in a cruel or brutal manner and also have not taken undue advantage of the situation- committed the offence punishable under Section 304 part (II) of the IPC instead of Section 302 - conviction under Section 302 read with Section 34 of the IPC is altered from Sections 302/34 to Section 304 Part II read with Section 34 of the IPC. (Para 2,19,20,22,23,24,26,29,31,)

Both Appeals partly allowed (E-7)

Chronological list of cases cited:-

1. Mani Vs St. of Ker. & ors. (2019) 2 SCC Crl.

2. Ranbir Vs St. (NCT) of Delhi. (2019) 2 SCC Crl. 746.

3. Laxmi Chand & anr. Vs St. of U.P. (2019) 1 SCC Crl. 368.

4. Tula Ram Vs St. of M.P. (2018)3 SCC Crl. 358.

5. Ram Pratap & ors Vs. St. of Raj. (2018) 3 SCC Crl. 214.

6. Manoj Kumar Vs St. of H. P. (2018) 3 SCC Crl. 33.

7. Lavghan Bhai Devji Bhai Vasavas Vs St. of Guj. (2018) 2 SCC Crl. 461.

8. Atul Thakur Vs St. of H .P. (2018) 1 SCC Crl. 743.

9. Mahendra Mulji Kerai Patel Vs St. of Guj. (2008) 14 SCC 690.

10. Darshan Singh Vs St. of Pun. & Ors., MANU/SC/0044/2010

11. Babulal Bhagwan Khandare and ors. Vs St. of Mah. MANU/SC/1026/2004

12. Ananta Deb Singha Mahapatra & ors. Vs St. of W.B. reported in MANU/SC/2610/2007

13. Laxman Singh Vs Poonam Singh ,MANU/SC/0692/2003

14. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

15. Sucha Singh & ors. Vs St. of Pun. MANU/SC/0527/2003

16. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

17. St. of Raj. v. Smt. Kalki & anr. MANU/SC/0254/1981 : AIR 1981 SC 1390,

18. Sachchey Lal Tiwari Vs St. of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039,

19. Bhagaloo Lodh & ors. Vs St. of U.P. reported in MANU/SC/0700/2011

20. Molu & ors. Vs St. of Har. AIR (1976) SUPREME COURT 2499

21. Praful Sudhakar Parab Vs St. of Mah. AIR (2016) SUPREME COURT 3107

22. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. as reported in AIR (1983), 753, MANU/SC/0090/1983

23. Krishna Mochi & ors. Vs St. of Bihar, MANU/SC/0327/2002

24. Shajahan & ors. Vs St. of Ker. & ors.,MANU/SC/1094/2007

25. Behari Prasad & ors. Vs St. of Bihar, MANU/SC/0752/1996

26. Bahadur Naik Vs St. of Bihar (11.05.2000 - SC) : MANU/SC/0405/2000

27. Rakesh Kumar Vs St. (Delhi Admn.), MANU/SC/1242/ 1994,

28. Ram Gulam Chaudhury & ors. vs. St. of Bihar, MANU/SC/0582/ 2001

29. St. of Kar. Vs Bhaskar Kushali Kotharkar & ors., MANU/SC/0702/2004

30. Arjun & ors. Vs St. of Chhattisgarh ,MANU/SC/0153/2017

31. Arumugam Vs St. Represented by Inspector of Police, Tamil Nadu MANU/SC/8108/2008 : (2008) 15 SCC 590

32. Surinder Kumar Vs U.T.of Chandigarh MANU/SC/0589/1989 (1989) 2 SCC 217

33. Ghapoo Yadav & ors. Vs St. of M.P. (2003) 3 SCC 528, MANU/SC/0124/2003,

34. Sukbhir Singh Vs St. of Har. (2002) MANU / SC/016/2002 3 SCC 327

35. Alister Anthony Pareira Vs St. of Mah. (2012) 2 SCC 648, MANU/SC/0015/2012

36. Basdev Vs The St. of PEPSU AIR (1956) SC 488

37. Pulicherla Nagaraju @ Nagaraja Reddy Vs St.of A.P. (2006) 11 SCC 444, MANU/SC/8419/2006

38. Surain Singh Vs St. of Pun. reported in MANU/SC/0399/2017 (2017) 5 SCC 796

39. Saravanan & ors. Vs St. of Pondicherry, MANU/SC/0952/2004

40. Bhaba Nanda Sarma & ors. Vs St. of Assam ,MANU/SC/0078/1977.

41. Afrahim Sheikh & ors. Vs. St. of W.B. , MANU/SC/0055/1964

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

1. Heard Sri Sunil Kumar Singh Learned counsel for the appellants, learned AGA for the State and perused the record.

2. Aforesaid criminal appeals No. 635 of 2005 and 644 of 2005 have been filed by the appellants Siya ram, Data Ram, Ram Ratan and Ram Sewak respectively, against the judgment and order dated 11.4.2005, passed by Additional District and Sessions Judge, Court No.3, Hardoi, in S.T. No. 288 of 1995, arising out of Crime No. 36 of 1994, relating to Police Station Manjhila, District Hardoi, whereby the appellants have been convicted and sentenced, under Section 302/34 IPC for life imprisonment and fine of Rs. 10,000/- each, in default of payment of fine two years R.I., under Section 325/34 IPC for five years R.I. and fine of Rs. 5000/- each, in default of payment of fine for one year R.I. and under Section 323/34 IPC for six months R.I.

For the sake of convenience and to avoid repetition of facts and evidence, both appeals are being decided together by common judgment.

3. The prosecution story as emerges from the record of the subordinate court is, that a written application was presented on 28.3.1994 at 9.15 A.M. to S.H.O., Police Station Manjhila, District Hardoi by Raja Ram s/o Dwarika Prasad, R/o Lokpur, Majra Kusuma, Police Station Manjhila, District Hardoi, stating therein that on 27.3.1994 at about 8.00 P.M., when he was going to extend Holi greetings, Siya Ram son of Kuber Kachi, Data Ram, Ram Ratan and Ram Sewak both sons of Bihari, who are residents of the same village, for the reason of old enmity pertaining to the passage of tractor

trolley of Raja Ram, assaulted him with sticks. On an alarm raised by him, Ram Ratan son of Dwarika R/o Lokpur, Police Station Manjhila, District Hardoi, Dinesh Kumar son of Raja Ram, Ram Swaroop son of Bulaki, Hari Shankar and Majnu arrived at the spot to save him, however, they were also assaulted by the above accused persons with *lathis* (sticks). Hue and cry made by all of them attracted Babu Ram son of Dwarika, Ram Lal son of Immer and many other villagers, who challenged the accused persons and saved him and others from accused persons. It is further stated that the accused persons after extending threats and hurling abuses to them, fled away from the scene of occurrence.

4. On the basis of above, written application a First Information Report (Ex. Ka-1) was registered at Police Station Manjhila on 28.3.1994 at 9.15 A.M. against the above accused persons at Case Crime No. 36 of 1994, under Sections 323, 504, 506 IPC and Investigation of the same was entrusted to Sub Inspector Shri Krishna Murari Mishra.

5. The medical examination of the injuries of the injured persons was done by P.W.9- Dr. A.K. Jain on 28.3.1994 from 12.30 onwards who reported as under:-

Injured Majanu was examined by Dr. A.K. Jain on 28.3.1994 at about 12.30 P.M. at P.H.C. Shahabad, who was identified by Constable 316 Ram Singh of Police Station Manjhila and following injuries were found on his person:-

(I) Injury No.1- lacerated wound 1.5 cm. X 1 cm. X scalp deep on the (Rt) side of head 4.5 cm. above root of nose clotts present.

(II) Contusion 4.5 cm. X 2 cm. To outer aspect and lower part of (Rt) forearm 1 cm. Above (Rt) wrist joint.

All injuries were found simple in nature caused by blunt object and duration was about one day.

On the same day at about 12.40 P.M. injured Nanhi was examined and a contusion of 5 cm. x 4 cm. on her lower eyelid red was found and injury was found simple caused by blunt object. Duration was about one day.

On the same day at about 12.50 P.M. injured Hari Shankar was examined and following injuries were found on his person:-

(1) Lacerated wound 2 cm. X 0.5 cm. X scalp deep (Rt) top of head 11.5 cm. above rear of nose clotts present.

(2) Lacerated wound "X' Ist leg 3.5 cm. X 0.5 cm. X bone deep IInd leg 3.4 cm. X 0.4 cm. X bone deep on the (Rt) side of head 15.5. cm. above (Rt) of ear, clotts present.

(3) Contusion 6 cm. X 2 cm. on the back and outer aspect of left forearm 9.5 cm. above left elbow joint.

(4) Contusion 4 cm. X 2cm. on the back of left thumb.

(5) Abraded contusions 3 cm. X 2 cm. on the back of (Rt) forearm 7 cm. above (Rt) forearm.

All injuries were caused by blunt object, were simple in nature and duration was about one day.

On the same day at about 1.00 P.M. injured Vinod Kumar was examined and following injuries were found on his person:-

(1) Abraded contusion 4 cm. X 2 cm. on the back of (Rt) middle finger 2 cm. above top of nail.

(2) Contused swelling 6 cm. X 5 cm. on the posterior aspect of (Rt) hand & back of thigh just above of right thigh. Kept under observation. Advise X-ray.

(3) Contused swelling 11 cm. X 9 cm. on the back of left hand 3 cm. below from left wrist joint. Injury kept under observation. Advise X-ray.

All injuries were caused by blunt object and were simple in nature, except injury no. (2) and (3) which are kept under observation and X-ray was advised. Duration was found to be of one day.

On the same day at about 1.10 P.M. injured Ram Swaroop was examined and following injuries were found on his person:-

(1) Contusion 5 cm. X 4 cm. On the left head 5.5. cm. above from upper border of left ear pinna.

(2) Lacerated wound 1.4 cm. X 0.4 cm. X muscle deep on the left face 1 cm. away from outer angle of left arm. Clotts present.

(3) Contusions 11 cm. X 3 cm. on the back of left side of scapular region upper part red.

(4) Contusion 5 cm. X 2 cm. at the outer aspect of middle of Rt. Upper arm. Red.

(5) Abraded contusion 7 cm. X 3 cm. on the right elbow. Red.

(6) Abraded contusion 1.5 cm. x 1.5 cm. at the outer aspect of Rt. Knee .

All injuries were simple in nature and were caused by blunt object. Duration was found to be of about one day.

On the same day at about 1.20 P.M. injured Dinesh Kumar was examined and following injuries were found on his person:-

(1) Contusion 15.5 cm. X 3 cm. on the outer aspect & back of (Rt) forearm, upper part red.

(2) Abraded contusion 3.5 cm. X 2 cm. on outer aspect of left upper arm, upper part red.

(3) Contusion 9 cm. X 2 cm. On back of Right chest. Lower part red.

All injuries were simple in nature caused by blunt object. Duration ws found to be of about one day.

On the same day at about 1.30 P.M. injured Ram Ratan was examined and following injuries were found on his person:-

(1) Lacerated wound 3 cm. X 0.5 x scalp deep on the (Rt) side top of head 7.5 cm. mid point (Rt) eye brow. Clotts present.

(2) Contusion 10 cm. X 3 cm. on the outer aspect of the back of (Rt) elbow, 2.5 cm. above (Rt) forearm. Red.

(3) Contused swelling 8 cm. X 8 cm. on the back of left hand kept under observation advise X-ray. Red.

(4) Abraded Contusion 6 cm. X 3 cm. on the left face just below outer corner left eyebrow. Red.

(5) Abraded contusion 12cm. X 3 cm. on the back of (Rt) scapular region .

(6) Contusion 12 cm. X 3 cm. on the back of chest (Rt) chest 18.5. cm. below from 7th vertebra.

(7) Contusion 6 cm. X 3 cm. on the outer aspect of left shoulder.

(8) Contusion 8 cm. X 2 cm. on the front and upper part of left thigh. Red.

All injuries were simple except injury no. (3) which was kept under observation X-ray.

All injuries were caused by blunt object. Duration was found to be of about one day.

Deceased Raja Ram who at that point to time was alive, was also

examined by Dr. A.K. Jain on the same day at about 1.45 P.M. and following injuries were found on his person:

1. Lacerated wound 3 cm. X 1 cm. X bone deep left head 11 cm. Left trager of ear kept under observation X-ray, advised.

2. Lacerated wound 1.5 cm. X 1 cm. X 0.5 cm. scalp deep on the left side of fore head 6 cm. Above root of nose kept under observation X-ray, advised.

3. Contusion 4 cm. X 2 cm. on the left upper eye lid.

4. Contusion 11 cm. X 3 cm. on the back of left forearm 8 cm. above left wrist joint. Red. Kept under observation X-ray, advised.

5. Contusion 8 cm. X 3 cm. on the back of (Rt) forearm 5 cm. Behind (Rt) oblique forward of (Rt) elbow joint.

All injuries were caused by blunt object, simple in nature except injury no. (1), (2) & (4) which were kept under observation and X-ray was advised. Duration was found to be of one day.

6. Injured/ informant Raja Ram was admitted in District Hospital, Hardoi, however during the course of treatment he died on 29.3.1994 at at about 12.00 P.M. Inquest of his dead body was performed by Sub Inspector Mewa Singh- P.W.6 at mortuary of District Hospital, Hardoi on 29.3.1994 at about 1.00 P.M. and a report Ex. Ka-1A was prepared by him. He also prepared other necessary papers for the purpose of postmortem i.e. Ex. Ka-2 to Ka-7 i.e. Challan lash, photo lash, chitthi R.I.,Chitthi CMO and after sealing, the dead body was given in the custody of Constable Sukhlal and Constable Shri Ram for the purpose of postmortem.

7. On 29.3.1994 at about 5.00P.M., Postmortem on the body of the deceased-Raja Ram was conducted by PW-8 Dr. C.N. Shukla, the then Senior Eye Surgeon, District Hospital, Hardoi, who received the dead body at 4.30 P.M. on the same day and found that the deceased was of about 50 years of age and a person of average built. Eyes and mouth of the deceased were closed. Rigor mortis was present on the whole body. Following injuries were found on the body of the deceased:

1. Contusion 6 cm. X 2.5 cms. over posterior lateral aspect of (Rt) forearm 7 cm. above wrist.

2. Contusion 8 cm. X 5 cm. over back of (Rt) elbow.

3. Contusion 8 cm. X 6 cm. over (Rt) shoulder.

4. Contusion with Abrasion over (left) side head frontal region, just above forehead.

5. Stitched wound (3 stitches present) 3 cm. X linear over left side head frontal region 3 cms. above injury no. (4).

6. Contusion present in an area of 12 cm. X 8 cm. of head including, temporal adjoining parietal, and frontal region left side with ceehy moses in both lids of left eye parietal and temporal bones were fractured.

On internal examination the membranes and brain were found lacerated with hematoma, four ounces of fluid was found in the stomach, while in the small intestine liquid faecal and gases and in large intestine faecal matter and gases were found. Liver was found weighing about 1000 gm. and gallbladder was found half full. Urinary bladder was empty, no abnormal defect was found in spleen and kidneys.

In the opinion of the doctor death of the deceased occurred due to shock and coma as a result of ante-

mortem injuries. P.W.9- Dr. C.N. Shukla has stated to have prepared the postmortem report in his hand writing and signatures as Ex. Ka-8.

8. Due to the death of injured Raja Ram on 29.3.1994 at about 12.00 P.M. at District Hosptial, Hardoi, investigation of the case was altered under Section 304 IPC vide G.D. entry no.12 dated 31.3.1994.

9. The investigating officer after completion of the investigation submitted charge sheet against all appellants under Sections 304, 323, 325 and 504 IPC.

10. On the case being committed to the court of sessions the charges under Sections 302/34, 325/34, 323/34, 506 IPC were framed against all appellants, who denied the charges and claimed trial.

11. Prosecution in order to prove its case relied on following documentary evidence.:-

(I) Ex. Ka-1 (Application/ FIR)

(II)Ex. Ka-1 A (Inquest report)

(III) Ex. Ka-2 (Form No.13)

(IV) Ex. Ka-3 (Photo lash)

(V) Ex. Ka-4 (Chitthi R.I.)

(VI)Ex. Ka-5 (Chitthi CMO)

(VII)Ex. Ka-6 (Memo of cloth of deceased)

(VIII)Ex. Ka-7 (Sample of seal)

(IX)Ex. Ka-8 (Postmortem report of deceased Raja Ram)

(X)Ex. Ka-9 (Medical Report of Majanu)

(XI)Ex. Ka-10 (Medical report of Smt. Nanhi Devi)

(XII)Ex. Ka-11 (Medical report of Hari Shankar)

(XIII) Ex. Ka-12 (Medical report of Vinod Kuamr)

(XIV) Ex. Ka-13 (Medical report of Ram Swaroop)

(XV) Ex. Ka-14 (Medical report of Dinesh Kumar)

(XVI) Ex. Ka-15 (Medical report of Ram Ratan)

(XVII) Ex. Ka-16 (Medical report of Raja Ram)

In addition to the above documentary evidence, the prosecution also testified following witnesses in its favour:-

(I) P.W.1 -Dinesh Kumar (Eye witness/ son of informant-

Raja Ram)

(II) P.W.2- Ram Ratan (Injured eye witness)

(III) P.W.3- Smt. Nanhi (Injured eye witness)

(IV) P.W.4- Ram Swaroop (Injured eye witness)

(V) P.W.5- Chhabi Nath (Witness Panchayat Nama)

(VI) P.W.6- S.I. Mewa Singh (Prepared inquest report and

necessary papers for postmortem)

(VII) P.W.7- Tula Ram (Scribe of the FIR)

(VIII) P.W.8- Dr. C.N. Shukla (Conducted the postmortem)

(IX) P.W.9- Dr. A.K. Jain (Examined injured persons)

12. We have noticed the statement of prosecution witnesses as under:-

P.W.1- Dinesh Kumar, who is the son of the deceased Raja Ram, has stated about the existence of enmity in between his father and appellants pertaining to use of the passage which falls in front of the houses of appellants by deceased Raja Ram for his tractor-trolley. This witness has further stated that on the fateful night at about 8.00 P.M. when his father was going to extend Holi Greetings and reached in front of the house of Kaptan Singh all appellants started assaulting him with sticks. He further stated that on alarm raised by his father, he along with his uncle Ram Ratan, aunt Smt. Nanhi Devi, brother Vinod Kumar, Ram Swaroop, Hari Shankar and Majanu arrived at the spot and attempted to save his father, on which he and other persons of his side were assaulted by appellants by sticks. On a noise made by them, Babu Ram, Ram Lal and other villagers came at the spot and saved them. Appellants after hurling abuses and intimidating them fled away from the scene of occurrence. He further stated that on the next morning all injured persons and his father Raja Ram went to Police Station Manjhila and lodged the report scribed by Tula Ram. He identified the signatures of his father on the First Information Report and also acknowledged that Tula Ram has only written what was stated by his father-Raja Ram. He also stated that due to deteriorated condition of his father he was admitted in District Hospital, Hardoi. However, due to the injures sustained by him, he died in the hospital during the course of treatment.

P.W.2- Ram Ratan, who is the brother of the deceased- Raja Ram has corroborated the story of prosecution as stated in the First Information Report and has stated that on the fateful night when he and his brother Raja- Ram were going to extend Holi Greetings all appellants, who were carrying sticks with them, assaulted them in front of the house of Kamta @ Kaptan Singh. According to him, on an alarm raised by them, Vinod, Ram Swaroop, Dinesh Kumar, Smt. Nanhi Devi, Hari shankar and Majanu came at the spot who were also beaten by the appellants. Thereafter other villagers and his brother Babu Ram came and appellants after abusing and intimidating them fled away from the scene. He further stated that appellants were having enmity with his brother- Raja Ram on the basis of dispute pertaining to the passage of the tractor-trolley from the *'Galiyara'* situated in front of the house of Data Ram. He stated that the injuries of the injured persons were treated at Government Hospital, Shahabad from where he and his brother Raja Ram was referred to District Hospital, Hardoi. He acknowledged that the Investigating Officer recorded his statement.

P.W.3- Smt. Nanhi Devi, who is the wife of P.W.2- Ram Ratan has stated about the enmity of the appellants with the brother of her husband Ram Ratan (Raja Ram)for the reason that the tractor trolley owned by Raja Ram from used the passage situated in front of the houses of the appellants. She further stated that on the fateful day and time

when her *'Jeth'* (Raja Ram) arrived in front of the house of Kamta Nai, appellants started beating him with *lathis* and on an alarm made by Raja Ram, she and other family members of her house rushed to the scene of occurrence and they were also assaulted by the appellants. She claimed that on alarm being raised by them, her Jeth- Babu Ram and many other villagers came at the scene. She along with other injured persons went to Police Station Manjhila and got their injuries examined at Government Hospital, Shahabad. Her husband and Jeth Raja- Ram were referred to District Hospital, Hardoi, where Raja Ram died. She also acknowledged that her statement was recorded by the Investigating Officer.

P.W.4- Ram Swaroop has been declared hostile, who in his statement has stated that on the fateful night at about 8.00 P.M. when he was in his house, he heard an alarm being raised by Raja Ram and Ram Ratan and when he arrived at the scene of the occurrence, near the house of Kaptan Singh, he was also assaulted by some one by striking a blow of *lathi* on his head, whereby he became unconscious and could not see appellants assaulting Ram Ratan and Ram Sewak. On being cross examined by the public prosecutor he admitted that he went to the Police Station Majhila and Government Hospital Shahabad on the next day, where his injuries were treated and Ram Ratan, Raja Ram and Vinod Kumar who were severely injured, were referred to District Hospital, Hardoi.

P.W.5- Chhabi Nath is a witness of Inquest (Panchayat Nama) who acknowledged his signatures on the inquest report.

P.W.6- S.I. Mewa Singh has stated that he performed the inquest of the body of deceased Raja Ram and also prepared necessary papers for the purpose of postmortem and has proved those papers as Ex. Ka-1 to Ex. Ka-7.

P.W.7- Tula Ram is the scribe of FIR, who stated that he wrote the FIR Ex. Ka-1, which and the report was signed by Raja Ram and thereafter it was given to the clerk of the Police Station.

P.W.8- Dr.C.N. Shukla has stated that he performed postmortem on the body of deceased Raja Ram. He stated to have prepared the postmortem report in his signatures and hand writing and also stated about the injuries and other examination made by him which has been elaborately discussed in paragraph 7 of this judgment.

P.W.9- Dr. A.K. Jain has also stated to have examined the injuries of injured persons from the informant side. He has proved the injury reports of the injured persons Smt. Nanhi Devi, Majanu, Hari Shankar, Vinod Kumar, Ram Swaroop, Dinesh Kumar, Ram Ratan and Raja Ram under his signatures and hand writing as Ex. Ka-9 to Ka-16. Detailed description of the injuries found by him on the body of injured persons has been elaborately stated in paragraph 5 of this judgment.

13. After closure of evidence of prosecution statement of all appellants were recorded under Section 313 of the Cr.P.C., wherein they have denied to have caused injuries to the informant or other injured persons and claimed that in fact appellants- Ram Sewak and Data Ram were assaulted by Ram Ratan and others and a cross FIR pertaining to that incident was lodged by appellant Data Ram and he was also medically examined. However, appellants choose not to adduce any witness in their favour.

14. The appellants after recording their statements under Section 313 Cr.P.C. have filed four documents in their defence by list 61B, along with application 60 B, which were taken on record vide order of trial Court dated 24.2.2005. The detail of these documents is as under ;

The first document 61B/2, filed by appellants in their defence is a certified copy of the FIR, Chick no. 44/94 lodged by appellant- Data Ram on 28.3.1994 at 10.45 A.M. against Raja Ram, Ram Ratan, Hari Shankar and Shiv Raj under Sections 323, 504 IPC which was registered as NCR and was modified as Case Crime No. 78/95 on 17.6.1995 under Sections 325, 323, 504 IPC on the basis of X-ray report, with the allegations that on 27.3.1994 at 8.00 P.M. when Data Ram was extending greetings of Holi, in front of his house the above accused persons assaulted him, his brother- Ram Sewak and son of Data Ram. It is further alleged that witnesses named therein and other villagers saved them.

Next document 61B/4, is a certified copy of the Final Report (Closure Report) submitted by the Investigation Officer, pertaining to the above case stating that the investigation of the case is closed as the allegations of the FIR were found false.

Third document 61B/6 is a certified copy of Site Plan of the alleged occurrence of the above mentioned case lodged by appellant Data Ram.

Fourth document i.e. 61B/8, is a certified copy of the complaint of complaint case no. 2971 of 2003 filed by appellant Data Ram on 18.9.2003 against Ram Ratan and Hari Shankar under Sections 323, 325, 504 and 506 iPC.

Apart from above documents one report dated 18.4.1994 submitted by Medical Officer, District Jail Hardoi to J.M. Hardoi, is also on record which stated that under orders of the Court dated 12.4.1994, Xray of Data Ram and Ram Sewak was performed, in District Hospital Hardoi, wherein a finger of Ram Sewak was found fractured. However, no fracture has been found on the person of Data Ram.

15. Learned trial Court after appreciating the evidence available on record came to the conclusion that the prosecution has been able to prove its case beyond reasonable doubt and therefore convicted all the appellants for committing the offences under Sections 302/34, 325/34 and 323/34 IPC and sentenced all the appellants in the manner stated herein before, in paragraph two of this judgment.

16. Aggrieved by the judgment and order of the trial court the appellants have challenged the same by filing instant appeals.

17. Learned counsel for the appellants, while referring to the judgment of the trial court submits that the trial court in order to convict the appellants has relied on inadmissible evidence, completely ignoring the fact that it is a case where the appellants had claimed that it was actually the informant's side who had assaulted the appellants and by such assault appellants sustained injuries on their persons, which were not explained by the prosecution. Therefore, he submits that the trial court has committed an illegality by not appreciating the evidence available on

record in the light of the cross case and cross version of the incident.

He further submits that the prosecution has not explained the injuries sustained by the appellant- Data Ram and others while it was the incumbent duty of the prosecution to explain as to how the injuries have been sustained by the appellants.

It is further submitted that independent witnesses have not been produced by the prosecution and the witnesses of the fact who have been produced by the prosecution i.e. P.W.1- Dinesh, P.W.2- Ram Ratan and PW-.3- Smt. Nanhi, are all blood relatives, therefore he submits that the prosecution purposely withheld the independent witnesses and have produced only those witnesses, who are relatives of the deceased.

He further submits that the evidence of the prosecution witnesses is not reliable and they are not truthful, therefore, the trial court has erred in convicting the appellants.

He further submits that even if the story of the prosecution is taken on its face value the alleged act of appellants could not travel beyond 325 IPC, as there was no intention of the appellants to cause death of deceased- Raja Ram and this fact has been completely ignored by the trial court.

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

(1) ***Mani Vs. State of Kerala and others*** (2019) 2 SCC Crl. Page 1.

(2) ***Ranbir Vs. State (NCT) of Delhi*** (2019) 2 SCC Crl. 746.

(3) ***Laxmi Chand and another Vs. State of U.P.*** (2019) 1 SCC Crl. 368.

(4) ***Tula Ram Vs. State of Madhya Pradesh*** (2018)3 SCC Crl. 358.

(5) ***Ram Pratap and others Vs. State of Rajashthan*** (2018) 3 SCC Crl. 214.

(6) ***Manoj Kumar Vs. State of Himachal Pradesh*** (2018) 3 SCC Crl. 33.

(7) ***Lavghan Bhai Devji Bhai Vasavas Vs. State of Gujrat*** (2018) 2 SCC Crl. 461.

(8) ***Atul Thakur Vs. State of Himachal Pradesh*** (2018) 1 SCC Crl. 743.

(9) ***Mahendra Mulji Kerai Patel Vs. State of Gujrat*** (2008) 14 SCC 690.

18. Learned AGA while supporting the judgment of the trial court submits that requisite standard of proof beyond reasonable doubts has been achieved by the prosecution before the trial court and all prosecution eye witnesses who were produced before the court below are injured witnesses and therefore their testimony could not be easily brushed aside, therefore no error has been committed by the trial court in accepting the reliable testimony of injured eye witnesses.

He further submits that the appellants have not specifically taken the plea of self defence and they have never said that they in exercise of any right of private defence had assaulted the deceased and other injured persons, therefore the trial Court was not obliged to consider their reluctant plea of private defence, however the trial Court has elaborately considered this issue and recorded a finding that no right of private defence was available to the appellants and therefore there appears no illegality or error in the judgment of the trial court.

He further submits that prosecution is not obliged to explain the

superficial injuries found on the person of appellant, unless it is proved that the injuries were sustained in the same incident.

He further submits that testimony of all eye witnesses is reliable and truthful and the medical evidence also corroborates the same. The enmity in between the parties is an admitted fact, as they were having *'ranjish'* with regard the passage of tractor-trolley of Raja Ram through *''Galiyara'* situated in front of house of appellant- Data Ram and it has also come in the evidence that two days prior to the incident a wall of the house of Data Ram was demolished by the trolley of deceased- Raja Ram. Otherwise also in a case based on direct evidence, the motive looses its significance.

He further submits that the court below has not committed any illegality or irregularity either in appreciation of evidence or application of law and therefore, no interference in the judgment of the trial court is warranted as from the conduct of the appellants it was apparent that they were having a common intention to cause death of deceased- Raja Ram and to inflict injuries to the injured persons. Therefore the trial Court has committed no error in convicting the appellants.

19. Having heard the submissions of Ld. Counsel for the parties we deal with the first argument of Learned counsel for the appellants that the informant's side actually assaulted the appellants whereby the appellants- Data Ram and others sustained injuries and a cross report pertaining to this incident was lodged by appellant- Data Ram but the court below has ignored this material fact.

The law relating to the right of private defence of person and property is found under Section 96 to 106 of the Indian penal code. The provisions contained in these sections give authority to a man to use necessary force against an assailant or wrong-doer for the purpose of protecting ones body and property when immediate aid from the state machinery is not readily available and in doing so he is not answerable in law for his deeds.

Honble Supreme Court in a landmark decision **Darshan Singh Vs. State of Punjab and Ors.** reported in **MANU/SC/0044/2010** after analyzing many judgments of the Hon'ble Supreme Court as well as of High Courts formulated following principles :-

"58. .....

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co- terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

Honble Supreme Court in **Babulal Bhagwan Khandare and Ors. Vs. State of Maharashtra** reported in **MANU/SC/1026/2004** , opined as under :-

"26.....Only other question which needs to be considered, is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from

the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.....

27. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. 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. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit- worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar MANU/SC/0136/1976 : 1976CriL J1736]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting....."

Honble Supreme Court in **Ananta Deb Singha Mahapatra and Ors. Vs. State of West Bengal** reported in **MANU/SC/2610/2007,** while discussing the scheme of right of private defence held as under :-

*"**9.** Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances.* ***It is not necessary for the accused to plead in so many words that he acted in self- defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting***

necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. *The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities is favour of that plea on the basis of the material on record." (Emphasis Ours)*

In **Laxman Singh Vs. Poonam Singh ,MANU/SC/0692/2003,** Hon'ble Supreme Court resolved as under :-

*"**8.** The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilis the version of the right of private defence. 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.*

But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

It is apparent from the above decisions that existence of any right to defend the person or property either of self or of any other person is not necessarily required to be proved by accused persons by tendering direct evidence and the same may also be proved by referring to the evidence of prosecution and from the contradictions occurred therein and also by referring to other proved facts and circumstances available on record.

Keeping in view the above settled legal position pertaining to the proof of right of private defence and the extent of its exercise, we proceed to examine whether the appellants were having any right to defend their person and whether the same has been exercised within the limitations enumerated and highlighted in the above mentioned case laws and scheme as provided in Section 96 to 105 of Indian Penal Code.

Appellant- Ram Swaroop in his statement recorded under Section 313 of the Cr.P.C. has stated that Ram Sewak and Data Ram were assaulted by Ram Ratan and others and a first information report with regard to this incident was lodged by Data Ram and he was also medically examined. Similar was the answer of appellants- Ram Ratan, Data Ram and Siya Ram.

From the above statements of the appellants recorded under Section 313 of Cr.P.C. it is apparent that a specific plea of exercise of right of private defence has not been taken by the appellants, as they have not stated to have assaulted or used force in exercise of such right but only stated that in fact they were beaten by the informant's side.

Perusal of record further reveals that P.W.-9 Dr. A.K. Jain on 28.3.1994 from 12.30 p.m. onwards has examined the injuries of 8 injured persons from informant side, namely, Raja Ram, Ram Ratan, Hari Shankar, Majnu, Smt. Nanhi Devi, Vinod Kumar , Ram Swaroop and Dinesh Kumar. The appellants in their defence has produced four documents which are certified copies of (i)Cross FIR (ii) Final Report submitted by police (iii) Site Plan of cross case and (iv) Complaint filed by appellant Data Ram. Therefore no copy of any injury report has been filed by the appellants on record nor any Doctor was examined by them which may suggest that some injuries were sustained by the appellant Data Ram or Ram Sewak in the incident. However During the course of pendency of matter at the stage of commital two illegible Photostat copies of injury reports of Data Ram and Ram Sewak were produced, perusal of which shows that appellant Data Ram has sustained two injuries on his head and some injuries on various parts of his body and appellant Ram Sewak has also sustained some injuries. All these injuries were simple and these were about one day old. Though these Photostat copies of the injury reports are not admissible in evidence, without proof in accordance with the provisions contained in the Indian Evidence act, but keeping in view the fact that the appellants may prove the existence of any right of private defence in their favor by the standard of preponderance of probabilities, we take these documents in consideration only for the limited purpose of evaluating the existence of any right of private defence in favor of appellants.

Perusal of the documents filed by the appellants before the Court below in their defence further reveals that it was alleged by the appellant that they were assaulted by informant's side in front of the house of appellant Data Ram and an FIR in the matter was also lodged by appellant Data Ram. However after investigation Final report was submitted by the police and thereafter a complaint case was filed by the appellant Data Ram. It has further been stated by learned counsel for the appellants, during the course of argument before this Court, that the complaint case filed by the appellants was dismissed and persons arrayed as accused persons therein were not summoned to face trial.

However, the copy of the FIR, Final Report, Site Plan and complaint case submitted by the appellants reveal that the appellants have taken a defence that informant's side actually assaulted them and on an alarm raised by them some villagers came there and in order to save the appellants, they used force by lathis (sticks), whereby Raja Ram and Ram Sewak sustained injuries and Raja Ram ultimately died and one finger of appellant- Ram Sewak also sustained fracture. Significantly the date and time of the incident mentioned in the cross FIR and complaint filed by appellant is the same which has been stated by the prosecution in the instant case i.e. 22.3.1994 at 8.00 P.M. So far as the place of occurrence is concerned informant stated that the incident occurred in front of the house of Kaptan, while appellants

stated that it occurred in front of the house of appellant Data Ram. However there is not such distance in between these places. It is also pertinent to mention here that during cross examination suggestion has also been given by the appellants to P.W.1- Dinesh Kumar that Raja Ram and others went to the house of Data Ram to assault him and ladies of the appellant's house, in order to save them, assaulted Raja Ram whereby the informant's side received injuries. In the same manner a suggestion was also given to P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi by the appellants that informant's side assaulted them and on an alarm raised by them, their neighbours and other villagers used force to save the appellants, whereby the injured persons from informant's side received injuries.

In this view, from perusal of the evidence and material made available by the appellants on record it transpires that the appellants have taken a defence that informant and other persons of their side assaulted them on 27.3.1994 at 8.00 p.m. in front of the house of appellant Data Ram and when they raised an alarm, other villagers came at the scene and in order to save them, used sticks whereby Ram Sewak and Raja Ram got injuries and Raja Ram died subsequently.

There cannot be any doubt in the proposition that the accused persons of a crime, during trial, may put forth their defence in many ways. They may put their defence by way of suggestions given to the prosecution witnesses or through their statement recorded under Section 313 Cr.P.C. as well as by tendering oral or documentary evidence.

In the instant case two fold defence has been put forth by the appellants, at first they had taken a defence that they had been beaten by informant's side and in order to save them, ladies of their house used force by lathis and secondly that when they were being beaten by the informant side, neighbours and other villagers responded and assaulted informant's side, whereby the informant's side sustained injuries.

Having perused the evidence available on record, we are of the considered opinion that the appellants have miserably failed to prove the existence of any right of private defence in their favour. No witness has been examined by the appellants in support of their defence. The cross FIR lodged by the appellant Data Ram culminated into Closure Report(Final Report) and thereafter a complaint case was filed by appellant Data Ram. No document has been filed by the appellants which may show as to what has happened to the complaint case filed by Data Ram and only a statement has been made by Ld. counsel for the appellant before this Court that the complaint case filed by them has been dismissed. Therefore, the documents filed by appellants in their defence, at the most, may only suggest that there was a cross version of the incident which was not found true by the Investigating Officer and a final report was submitted and thereafter a complaint case was filed, which was also dismissed. Therefore, the evidence and material submitted by the appellants is not sufficient, even on the parameter of preponderence of probability, to establish any right of private defence in favour of appellants.

Now, when no witness has been produced by the appellants to establish any right of private defence and the documentary evidence produced by the appellants has also been found not sufficient to prove existence of any such right, we look into the evidence led by

prosecution, in order to satisfy ourself, as to whether any right of private defence could be inferred in favour of appellants, which may justify use of force by them to the extent of killing one of the injured persons of the informant's side namely Raja Ram.

We have carefully perused the statements of P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi and have found that there is nothing in their evidence which may even remotely suggest that either the appellants or their ladies, neighbours or other villagers were having any right of private defence, in exercise of which, inflicting of injuries by them, on informant side, may be justified. It is also apparent from record that injuries of appellants - Data Ram and Ram Sewak have not been duly proved by appellants. Moreover the injuries found on the person of appellants- Data Ram and Ram Sewak are of such nature which might have been sustained by them during the course of scuffle or even by the co-appellants under the duress of their assault. All injuries sustained by these two appellants have been found simple in nature and only one injury sustained by Data Ram on his forehead appears to be of some substance, but in absence of any reliable evidence in support of the defence, this injury alone is not enough to reject the otherwise truthful and reliable evidence of prosecution witnesses, specially in the background that eight persons from the side of informant have sustained injuries in the occurrence and in order to save himself any of the injured person may ignorantly cause such injuries to these two appellants. No reliable evidence has been tendered by the appellants either before the trial court or before this Court, which may suggest that apart from minor injuries to Data Ram and Ram Sewak any other appellant have sustained any injury and photo copy of the injury reports of Data Ram and Ram Sewak, filed along with the bail application before the trial court, could not be read in evidence unless duly proved in accordance with law. Even otherwise all injuries claimed by these two appellants have been found simple and it is after many days of the occurrence that a report has been submitted by the medical officer of District Jail Hardoi pertaining to the fracture found in the finger of Ram Sewak.

Having gone through the reliable evidence of the prosecution injured eye witnesses, namely, P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi, we are of the considered opinion that the occurrence has taken place in front of the house of Kaptan @ Kamta and there is nothing on record which may suggest that the informant's side went to the house of appellant- Data Ram and assaulted them. The names of the ladies of the house of appellants or the name of any villager or even any neighbour, who allegedly exercised the right of private defence on behalf of the appellants, has not been stated by the appellants either during the trial or before this Court. Therefore the plea of existence of a right of private defence in favour of the appellants has not been found proved and the only corollary of this is that appellants have miserably failed to prove any right of private defence available to them or to any other person to defend their person . It is also established by the truthful evidence of injured eye witnesses presented by prosecution that on 27.3.1994 at 8.00 P.M., it was the informant's side, which was assaulted by

appellants by sticks, resulting into injuries to eight persons of the informant's side, out of which, Raja Ram died during the course of treatment in the District Hospital, Hardoi. The appellants by referring to the injuries allegedly sustained by appellants- Data Ram and Ram Sewak have been successful only in establishing that the appellant- Data Ram and Ram Sewak, along with other appellants were present at the scene of occurrence and at the most it may be a case of free fight, but certainly no right of private defence was available either to the appellants or to any other person, against informant and other injured persons as they have not been found aggressor. We accordingly do not find any substance in this submission of Ld. Counsel for appellants.

20. The next submission by Ld. Counsel for the appellants is that independent witnesses have not been produced by the prosecution and the witnesses of the fact who have been testified by the prosecution i.e. P.W.1- Dinesh, P.W.2- Ram Ratan and PW-.3- Smt. Nanhi, are all blood relatives, therefore he submits that the prosecution purposely withheld the independent witnesses and have produced only those witnesses, who are relatives to the deceased and the trial Court has committed an illegality in accepting the testimony of these interested witnesses.

In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** Hon'ble Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

In **Sucha Singh and Ors. vs. State of Punjab, MANU/SC/0527/2003** Hon'ble Supreme Court has observed as follows :-

"15. In Dalip Singh and Ors. v. The State of Punjab MANU/SC/0031/1953 : [1954]1SCR145 it has been laid down as under:-

"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 a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

Hon'ble Supreme Court in ***Gangabhavani vs. Rayapati Venkat Reddy and Ors. , MANU/SC/0897/2013*** held as under :-

"11. 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.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

12. In ***State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390****, this Court held:*

"5A. 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."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In ***Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039,*** *while dealing with the case this Court held:*

"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."

14. 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."

In ***Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011,*** It was held as under :-

"14. 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."

It is therefore settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with deceased is not a factor that affects credibility of a witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence of such witness to find out, whether he is a natural witness and whether in the facts and circumstances of the case his evidence is cogent and credible. Keeping in view the above factual and legal matrix, we do not find any substance in the submissions of Ld. Counsel for appellants that the testimony of the PW-1 Sri Dinesh, PW-2 Ram Ratan and PW-3 Smt. Nanhee be discarded only on the basis of their relation with the deceased. However, in the facts and circumstances of the case, the same has to be appreciated with care and caution with due regard to the fact that these witnesses are also injured witnesses.

21. The next argument which has been advanced by learned counsel for the appellants is that the prosecution has not been able to prove motive of the crime and therefore the story of the prosecution is not believable.

Per contra learned AGA submits that it is a case of direct evidence and the motive is not of much significance in the instant case.

A three Judges Bench Of Hon'ble Supreme Court in **Molu and others v. State of Haryana AIR 1976 SUPREME COURT 2499** opined as under :-

"11. Finally it was argued by the appellants, following the reasons given by the Sessions Judge, that there was no adequate motive for the accused to commit murder of two persons and to cause injuries to others. It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes. however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye-witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. For these reasons, therefore,

we agree with the High Court that the prosecution has been able to prove the case against the appellants beyond reasonable doubt."

In **Praful Sudhakar Parab v. State of Maharashtra, AIR 2016 SUPREME COURT 3107** Hon'ble Supreme Court stated as under :-

"16. One of the submissions which has been raised by the learned amicus curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash laying in the office but no evidence was led by the prosecution to prove that how much cash were there in the pay office. Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in Ravinder Kumar and another v. State of Punjab, 2001 (7) SCC 690 : (AIR 2001 SC 3570), has laid down following in paragraph 18:

"18.....It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in State of Himachal Pradesh v. Jeet Singh {1999 (4) SCC 370 : (AIR 1999 SC 1293)}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Keeping in view the above stated law we are of the considered opinion that the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused persons, as to what made them to commit the crime. Therefore, the cases which are based on direct evidence of the witnesses should be decided on the basis of the quality and probative value of the evidence of such eye witnesses.

Having gone through the prosecution evidence available on record, it is apparent that it is a case of direct evidence as the occurrence has been witnessed by P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi, who are themselves injured persons. Therefore when the case of the prosecution is based on the testimony of those witnesses who have seen the occurrence and have also received injuries in the incident, the same should be decided on the quality of their evidence keeping in view the golden rule of proof beyond reasonable doubt. Record further reveals and it has been stated in the evidence by the prosecution eye

witnesses that the parties were inimical towards each other on account of the use of passage by Raja Ram for the purpose of his Tractor- Trolley. This fact has also found place in the FIR as well as in the statement of eye witnesses. P.W.1- Dinesh Kumar, in his evidence in cross examination has also admitted that a wall of the house of Data Ram was demolished by tractor-trolley of Raja Ram about two days before the incident and Data Ram, though did not lodge any FIR, had hurled filthy abuses on them. Therefore it transpires that just two days before the incident a wall of the house of Data Ram-appellant was demolished by tractor trolley of deceased- Raja Ram and there was sufficient motive available to the appellant to commit the crime. Moreover the appellants have also admitted the occurrence, though with a different version, that they have been beaten by informant side. Therefore when the occurrence, with a cross version has been admitted to the appellants and it is otherwise apparent on the face of record that the parties were inimical towards each other from before the incident, we do not find any force in this submission of learned counsel for the appellants.

21. Learned counsel also submits that the place of occurrence has also not been established and in fact the appellants have been assaulted by the informant side in front of the house of Data Ram, therefore, the case of the prosecution is not acceptable on this score also.

Perusal of record shows that in the FIR no place of occurrence has been mentioned and only the incident has been narrated. P.W.1- Dinesh Kumar who is the son of the deceased, Raja Ram has stated that his father and Ram Ratan were assaulted in front of the house of Kaptan Singh @ Kamta. In cross examination he stated that the house of Kaptan Singh is situated towards north of passage (Galiyara). He further stated that his brother Virendra Kumar took Daroga Ji to the place of occurrence and he did not accompany them. P.W.2 - Ram Ratan in his evidence has also fixed the place of occurrence as in front of the main door of Kaptan Singh's house. He has narrated topography of the passage and surrounding in detail. However, in his cross examination he stated that "marpeet' happened near the tree of *'Pakar'* which is situated near the southern wall of Kaptan Singh's house. P.W.3- Smt. Nanhi Devi also corroborated the evidence of above witnesses when she stated that "marpeet' happened near the house of Kaptan Singh. Even hostile witness P.W.4- Ram Swaroop in his statement has stated the place of occurrence as near the house of Kaptan Singh. In lengthy cross examination of these witnesses much emphasis has not been given on the scene of crime and appellants in cross FIR filed by them have stated the scene of occurrence as the front of appellant- Data Ram's house and also that Marpeet has been done by the informant side wherein appellants- Data Ram and Ram Sewak were injured. The site plans prepared in both the cases are also available on record. A perusal of these site plans reveals that there is slight difference in the version of appellants and informant, so far as the places of occurrence is concerned. The informant side stated the place of occurrence as in front of Kaptan Singh's house while the appellants stated the same to be in front of appellant- Data Ram's house. The distance between the houses of Kaptan Singh and Data Ram is only less than hundred meters and assault

on them has also been admitted to have happened in-front of Data Ram's house. Therefore keeping in view the fact that appellants' version of the incident was not found truthful and Final Report was submitted by the Investigating Officer and Complaint case filed by them was also dismissed and no reliable evidence has been submitted by them in this case, it is proved that incident had occurred near the house of Kaptan Singh.

22. Learned counsel for the appellants forcefully submits that the testimony of the prosecution witness is full of material contradictions and there are inherent lacuna in the story of the prosecution and therefore the prosecution witnesses are not reliable, moreover the injuries sustained by the appellants- Data Ram and Ram Sewak have not been explained by the prosecution and therefore the appellants are liable to be acquitted.

Learned AGA has, however submitted that the prosecution is not obliged to explain superficial injuries of the appellants in the back ground of the fact that eight persons from the side of prosecution were injured in the incident. Moreover, it has not been proved on record that any injury has been sustained by appellants- Ram Sewak and Data Ram, as neither any injury report has been proved nor any doctor or witness has been examined, which may prove the contention of appellants.

Having regard to the argument of Ld. Counsel for the appellants pertaining to the appreciation of the evidence of witnesses, the law is well settled that in a criminal trial it is the duty of the Court, while appreciating the evidence on record, to exercise due diligence. The Court must bear in mind the facts and circumstances where the crime has been committed, the quality of evidence, nature of the witnesses, their level of understanding and power of perception and reproduction. All efforts must be to find the truth from the evidence available on record. It must also remain in the mind that there cannot be a prosecution case without any fault and therefore obligation lies on the court to analyze the evidence on record and to make sincere judicial scrutiny on the yard stick of settled principles pertaining to appreciation of evidence. The contradictions, infirmities of the evidence must be assessed on the yardstick of probability and unless infirmities and contradictions are of such a magnitude, so as to go to the core of the prosecution case, over emphasis should not be attached to such minor contradictions or infirmities. Experience reminds us that even most honest and truthful witnesses may differ in some details under the duress of cross examination, which may not affect the core of the prosecution case and their evidence therefore must be appreciated keeping in consideration their social status, their power of observation and reproduction as well as the human conduct and due regard must also be given to the fact that memory also fades by the passage of time.

Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** laid down the following principles :-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a

video tape is replayed an the mental screen.

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

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

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

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

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

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

In **Krishna Mochi and Ors. vs. State of Bihar, MANU/SC/0327/2002** held as under :-

"As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : 1981CriLJ1012 , normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against accused-appellants in the case at hand."

In **Shajahan and Ors. Vs. State of Kerala and Ors.,MANU/SC/1094/2007,** Hon'ble Supreme Court Of India held as under :-

"9. In another important case Lakshmi Singh and Ors. v. State of Bihar MANU/SC/0136/1976 : 1976CriLJ1736 , after referring to the ratio laid down in Mohar Rai's case (supra), this Court observed:

Where the prosecution fails to explain the injuries on the accused, two results follow:

(1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants.

It was further observed that:

In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the 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 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.

But non-explanation of the injuries sustained by the accused may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijayee Singh and Ors. v. State of U.P. MANU/SC/0284/1990 : 1990CriLJ1510 .

10. Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. *As observed by this Court in Ramlagan Singh v. State of Bihar MANU/SC/0216/1972 : 1973CriLJ44* ***prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused.*** *In Hare Krishna Singh and Ors. v. State of Bihar MANU/SC/0181/1988 : 1988CriLJ925 ,* ***it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the***

prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifling and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of the prosecution case. *(See Surendra Paswan v. State of Jharkhand MANU/SC/0978/2003 : (2003)12SCC360 and Anil Kumar v. State of U.P. MANU/SC/0762/2004 : 2004(7)SCALE684 ."*
(Emphasis Ours)

We have perused the record in the back ground of submissions made by learned counsel for rival parties and have found that P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi have given reliable account of the incident. All these three injured eye witnesses have established the place of occurrence as in front of or near the main door of house of Kaptan Singh. They have stated that all the appellants participated in the assault with sticks. P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi have stated to have reached at the spot after hearing the alarm raised by deceased Raja Ram and injured Ram Ratan along with other injured persons Dinesh Kumar, Hari Shankar, Majnu, Vinod and Ram Swaroop and as per their reliable evidence they were also assaulted with "*lathis*' by all appellants. Deceased Raja Ram, P.W.1- Dinesh Kumar, P.W.2- Ram Ratan, P.W.3- Smt. Nanhi Devi, Hari Shankar, Majnau, Vinod Kumar and Ram Swaroop, all have sustained injuries in the incident. Their injuries have been medically examined under the police protection and P.W.9- Dr. A.K. Jain, who examined all injured persons on 28.3.1994 from 12.30 P.M. onwards, has clearly deposed that all injuries found on the person of the injured were one day old and were caused by hard and blunt object. He further opined that these injuries might have been sustained on 27.3.1994 at 8.00 P.M. Similarly P.W.8- Dr. C.N. Shukla who performed postmortem on the body of the deceased- Raja Ram has also opined that the injuries found on the person of the deceased were possible to have been caused by *'lathi- dandas'*. Therefore, the medical evidence fully corroborates the reliable ocular evidence of P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi.

Though there appears minor contradictions in the testimony of these three injured/ eye witnesses with regard to the fact as to whether Raja Ram was coming back or going to extend Holi greetings at the time of incident and with regard to the fact whether Ram Ratan was actually accompanying him, but all these contradictions are minor ones which do not have any bearing on the core of the prosecution case. It is also to be taken into consideration that P.W.1- Dinesh Kumar was examined on 4.10.2002 while P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi were examined as witnesses before the trial Court on 28.10.2003, therefore all these witnesses of fact have been examined before the trial court after 8 long years of the incident and even after minute analysis and appraisal of their evidence, we do not find any material inconsistency or major contradictions in their evidence. Therefore, in our considered opinion, the evidence of these eye witnesses is reliable, truthful and acceptable. All these witnesses have sustained injuries in the incident and their presence on the spot is proved. Hence in view of above we do not find any

illegality in the finding of the court below that the evidence of all three prosecution witnesses is reliable, trustworthy and can be acted upon. The fact that some injuries allegedly found on the person of the appellants- Data Ram and Ram Sewak have not been explained by the prosecution is of no consequence, as firstly no injury reports of either Ram Sewak or Data Ram was produced on record by appellants in their defence, while they filed some documents in their defence. Secondly there is only photo copy of the injuries reports of Data Ram and Ram Sewak, which are illegible and were filed along with the bail application of appellants. We are surprised that no attempt has been made by the appellants to get these medical reports proved by the doctor who had allegedly examined them. It is also apparent that the appellants after closure of evidence of prosecution and after recording their statements under Section 313 Cr.P.C. have filed some documents in their defence i.e. Chick FIR, final report, Site Plan pertaining to cross case and also copy of Complaint case, whereby it is alleged that it was informant's side which assaulted the appellants and some villagers used force to save appellants, due to which Raja Ram sustained injuries and died subsequently. Why certified copies of these injury reports pertaining to these two appellants were not brought on record and as to why their injuries were not proved by summoning the doctor, who examined them and also why any witness(s) has not been produced, who may establish their version of the incident, are questions which have not been answered by the appellants, neither before the trial court nor before this Court. This court can only take into consideration that evidence which is admissible in the facts and circumstances of the case and has also been duly proved in accordance with the provisions contained in the Indian Evidence Act. Therefore in absence of any proof of injury reports of appellants- Data Ram and Ram Sewak, It could not be presumed that they actually received injuries in the same occurrence happened on 27.3.1994.

Even if it is admitted for a moment that Ram Sewak and Data Ram got some injuries, out of which, one injury sustained by Ram Sewak, resulted in the fracture of his finger, the same would not discredit the reliable and truthful testimony of three injured eye witnesses and it is possible that while assaulting the informant side, the appellant- Ram Sewak got himself injured or any injured person from the side of informant while defending himself/ herself, unknowingly inflicted any injury on him. But keeping in view the fact that from the side of prosecution as many as eight persons had received injuries, out of which one, namely, Raja Ram died, no adverse inference could be drawn by simple injuries sustained by appellants- Ram Sewak and Data Ram, which has also not been found duly proved in the facts and circumstances of the case.

23. Therefore, firstly, no injury has been proved to have been sustained by the appellants - Ram Sewak and Data Ram and even if the photo copies of injury reports filed with bail application and one report of Medical Officer of District Jail, Hardoi are taken into consideration, injuries allegedly sustained by Ram Sewak and Data Ram are not such that non explanation of which may adversely affect the case of the prosecution and at the most these injuries may suggest that the incident may be a case of free fight.

24. In our considered opinion the evidence of all three injured eye witnesses, namely, P.W.1- Dinesh Kumar, P.W.2- Ram Ratan and P.W.3- Smt. Nanhi Devi, is reliable, trustworthy. All these witnesses are injured witnesses and keeping in view the totality of facts there is a ring of truth around the testimony of these witnesses. Therefore the prosecution has been able to prove its case against the appellants beyond any reasonable doubt that appellants assaulted Raja Ram and other injured persons in front of the house of Kaptan Singh, whereby injured persons received injuries, as a result of which Raja Ram died. It is also established that no right of private defence was available to appellants or to any other person to cause harm to the informant's party.

25. We as a Court of first appeal are conscious of our duty to ensure that to convict appellants the evidence of prosecution must be of such strength that the standard of proof beyond reasonable doubt is achieved. In our opinion, it is the paramount duty of this Court to deliberate even those issues which have not been highlighted by the appellants and which may have some bearing on the merits of the case. After carefully examining the record of the case for this purpose we find that Investigation Officer of this case has not been examined. We have perused the record of the case to find out as to why the Investigating Officer was not produced by the prosecution during trial and why the trial Court did not think it better to summon the Investigating Officer under section 311 of the Code Of Criminal Procedure. Perusal of record for this purpose reveals that when almost all the measures required for the attendance of the Investigating Officer were exhausted and his presence could not be procured, the trial Court closed the evidence of prosecution. Strangely the trial Court did not bother to summon the secondary evidence for the purpose. It shows that the trial Court was not conscious of its role in the criminal trial. The role of the presiding Judge of a criminal Court is not of a referee or umpire, he is required to get himself involved actively in the process of adjudication to know the truth. Unfortunately in this case the trial Judge was ignorant about the importance of its role in a criminal trial. The fact thus remains that the Investigating Officer of this case has not been examined. The law with regard to the consequences which may flow from non examination of the Investigating Officer in a criminal trial are no more res integra.

In **Behari Prasad and Ors. vs. State of Bihar, MANU/SC/0752/1996,** where Investigating Officer has not been examined, Hon'ble Supreme Court held as under :-

"23..... It, however, appears to us that the entire case diary should not have been allowed to be exhibited by the learned Additional Sessions Judge. In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eye witnesses. Such evidences are in conformity with the case made out in F.I.R. and also with the medical evidence. Hence, for non examination of investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were

deprived of the opportunity to effectively cross examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non examination of investigating Officer per se vitiates a criminal trial. These appeals, therefore, fail and are dismissed. The appellants who have been released on bail should be taken into custody to serve out the sentence."

In similar situation Hon'ble Supreme Court **Bahadur Naik vs. State of Bihar (11.05.2000 - SC) : MANU/SC/0405/2000,** held as under :-

"2. The appellant has not been able to shake the credibility of the eye-witnesses. No material construction in the case of the prosecution has been shown to us. Under these facts and circumstances, the non-examination of the Investigating Officer as a witnesses is of no consequences. It has not been shown what prejudice has been caused to the appellant by such non-examination."

In **Rakesh Kumar vs. State (Delhi Admn.), MANU/SC/1242/ 1994,** Hon'ble Supreme Court observed as under :-

"7. The learned Counsel appearing for the appellant first contended that non-examination of S.I. Sube Singh who investigated into the case, raised a great suspicion about the truth and bone fides of the prosecution story. We do not find any substance in this contention. It appears that in spite of best efforts the prosecution could not produce him and therefore no adverse presumption can be drawn against the prosecution for his non-examination. That apart, nothing was elicited in cross examination of any of the prosecution witnesses wherefrom it could be said that the Investigating Officer's production was essentially required to give an opportunity to the defence to cross examine him with reference to statements recorded by him under section 161 Cr. P.C. or any steps taken by him during investigation. His non-examination, therefore, did not in any way affect the prosecution case nor prejudice the appellant in his defence."

In **Ram Gulam Chaudhury and Ors. vs. State of Bihar, MANU/SC/0582/ 2001,** Hon'ble Supreme Court observed as under:-

"27. In the case of Ram Dev v. State of U.P. reported in, this Court has held that it is always desirable for the prosecution of examine the Investigating Officer. However, non examination of the Investigating Officer not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses.

29. In the case of Ambika Prasad v. State (Delhi Admn.) reported in MANU/SC/0036/2000 : 2000CriLJ810, it was held that the criminal trial is meant for doing justice not just to the accused but also to the victim and the society so that law and order is maintained. It was held that a Judge does not preside over criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that guilty man does not escape. It was held that both are public duties which the judges has to perform. It was held that it was unfortunate that the Investigating Officer had not stepped into the witness box without any justifiable ground. It was held that this conduct of

the Investigating Officer and other hostile witnesses could not be a ground for discarding evidence of P.Ws,5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that non-examination of the Investigating Officer could not be a ground for disbelieving eye witnesses."

30. In the case of Bahadur Naik v. State of Bihar reported in MANU/SC/0405/2000 : 2000CriLJ2466, it was held that non-examination of an Investigating Officer was of no consequences when it could not be shown as to what prejudice had been caused to the appellant by such non-examination.

31. In our view, in this case also non-examination of the Investigating Officer has caused no prejudice at all. All the Mr. Mishra could submit was that the examination of the Investigating Officer would have shown that the occurrence had taken place not in the courtyard but outside on the road. The Investigating Officer was not an eye witness. The body had already been removed by the Appellant. The Investigating Officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have gave creditable and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the Investigating Officer was not examined. The non-examination of the Investigating Officer has not lead to any prejudice to the Appellants. We, therefore, see no substance in this submission.

In **State of Karnataka vs. Bhaskar Kushali Kotharkar and Ors., MANU/SC/0702/2004,** after considering the ratio propounded in Bahadur Naik and Bihari (Supra), held as under :-

"10. There is very strong and convincing evidence to prove that these respondents along with others had attacked deceased Prakash, PW-1 and PW-2. The Sessions Judge had given valid reasons for finding these respondents guilty. The Single Judge was not justified in reversing the conviction and sentence solely on the ground that investigating officer was not examined by the prosecution. As the respondents were not prejudiced by the non-examination of the investigating officer and also the constable who recorded the FI statement. The finding of the learned Single Judge is erroneous, therefore, we set aside the same."

26. Keeping in view the aforesaid legal position if we look into the facts and evidence of prosecution led in the instant case, we find that the appellants have admitted the occurrence with a cross version and have claimed that informant's side had actually assaulted them in-front of the house of appellant Data Ram. Appellants, in their defence, amongst other documents, have also filed a certified copy of the site plan prepared by the investigating officer of the case lodged by them, wherein the incident has been shown to have occurred in-front of the house of appellant Data Ram . Therefore the happening of the incident on 27.03.1994 at about 08.00 p.m. is also admitted to the appellants. The House of Dataram is situated at a short distance from the house of Kaptan singh, as is evident by the site plans prepared in both cases and the prosecution claimed that the incident in the instant matter occurred in-front of the house of Kaptan. We have gone through the evidence of all the prosecution eye witnesses and have found no infirmity either with regard to the

consistency or reliability of these witnesses. All eye witnesses PW-1 Dinesh Singh, PW-2 Ratan Singh and PW-3 Smt. Nanhi are injured witnesses and have given truthful account of the incident. There are no material contradictions in their statements . The spot where incident occurred has been established by these witnesses. No material improvements or contradictions are evident in their testimony. We do not find any thing in the statement of these witnesses which may suggest that the appellant in any manner have been prejudiced by non presentation of investigating Officer and perhaps for this reason this issue was not raised either at thae stage of trial or even before this Court. Therefore in the facts and circumstances of the case non examination of Investigating Officer is not fatal to the prosecution and it is not a ground to disbelieve the otherwise reliable and trustworthy prosecution witnesses. As mentioned above, evidence, facts and circumstances of this case do not reflect that any prejudice has been caused to the appellants on account of non examination of the Investigating Officer. The evidence of the ocular witnesses further shows that no material contradictions were put to them regarding the facts stated by the eye witnesses, from their statements recorded under Section 161 of Cr. P.C. or about the place of occurrence. There was also no effective cross examination regarding the place of occurrence stated by the witnesses to infer any prejudice and as such the appellants were not put to any prejudice by non examination of Investigating Officer and therefore, we find that non examination of Investigating Officer in this case has not resulted in any kind of prejudice to the appellants.

27. Now we come to the next question, as to what offence has been committed by the appellants. The trial Court, vide impugned judgment and order has convicted the appellants for committing the offences under Sections 302/34, 325/34, 323/34 IPC. The proved facts in brief are that on 27.3.1994 at 8.00 P.M. appellants on the basis of previous enmity pertaining to the passage, whereby deceased- Raja Ram used to bring his tractor- trolley, at first assaulted Raja Ram and Ram Ratan and when they raised an alarm, rest of the injured persons who went to save them were also assaulted. The injury reports of all injured persons and injury report and postmortem report of deceased Raja Ram clearly reveal that the injuries sustained by the deceased and injured persons have been caused by the use of sticks. It is also proved that all appellants have participated in the assault and also that they were acting in furtherance of their common intention. The law on this point is well settled that common intention to commit any offence may be formed instantly at the spur of the moment at the spot or even during the course of fight.

28. Hon'ble Supreme Court Of India in ***Arjun and Ors. Vs State of Chhattisgarh*** *reported in* ***MANU/SC/0153/2017,*** wherein the appellants assaulted the deceased with katta, gandasa and stone and deceased fell down and sustained injuries on his head and his brain matter came out and he died on the way to the hospital has held as under :-*"20. To invoke this exception (4), the requirements that are to be fulfilled have been laid down by this Court in Surinder Kumar v. Union Territory of Chandigarh MANU/SC/0589/1989 :*

(1989) 2 SCC 217, it has been explained as under:

7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.....

21. Further in the case of ***Arumugam v. State, Represented by Inspector of Police, Tamil Nadu MANU/SC/8108/2008 :*** *(2008) 15 SCC 590, in support of the proposition of law that under what circumstances exception (4) to Section 300 Indian Penal Code can be invoked if death is caused, it has been explained as under:*

18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 Indian Penal Code is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general Rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

23. When and if there is intent and knowledge, then the same would be a case of Section 304 Part I Indian Penal Code and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II Indian Penal Code. Injuries/incised wound caused on the head i.e. right parietal region and right temporal region and also occipital region, the injuries indicate that the Appellants had intention and knowledge to cause the injuries and thus it would be a case falling Under Section 304 Part I Indian Penal Code. The conviction of the Appellants Under Section 302 read with Section 34 Indian Penal Code is modified Under Section 304 Part I Indian Penal Code. As per the Jail Custody Certificates on record, the Appellants have served 9 years 3 months and 13 days as on 2nd

March, 2016, which means as on date the Appellants have served 9 years 11 months. Taking into account the facts and circumstances in which the offence has been committed, for the modified conviction Under Section 304 Part I Indian Penal Code, the sentence is modified to that of the period already undergone."

In **Surinder Kumar v. Union Territory, Chandigarh MANU/SC/0589/1989 (1989) 2 SCC 217,** Hon'ble Supreme Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of Exception of section 300 IPC provided he has not acted cruelly. It was held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

"..... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."

In ***Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528, MANU/SC/0124/2003,*** it is held as under :-

"...The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight: (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300. IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4 It is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

In **Sukbhir Singh v. State of Haryana (2002) MANU / SC/016/2002 3 SCC 327,** the appellant caused two Bhala blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. Hon'ble Supreme Court has held that the appellant had acted in a cruel and unusual manner in following words :-

"...All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with Bhala caused injuries at random and thus did not act in a cruel or unusual manner."

For considering the question whether the act of the appellant will fall under Section 304 Part I or Part II of the IPC, we notice the distinction between these two parts of that provision as drawn by Hon'ble Supreme Court in ***Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648, MANU/SC/0015/2012*** which is in the following words:

"..... For punishment under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death...."

*In **Basdev v. The State of PEPSU AIR 1956 SC 488,** Hon'ble Supreme Court drew distinction between motive, intention and knowledge in the following words:*

"....Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things..."

Hon'ble Supreme Court in ***Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444, MANU/SC/8419/2006*** enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused relevant portion of which is extracted herein below:

"...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre- meditation. In fact, there may not even be criminality. At the other

end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention..."

In the case of **Surain Singh Vs. State of Punjab reported in MANU/SC/0399/2017 (2017) 5 SCC 796,** Hon'ble Supreme Court has reiterated the settled legal position about the purport of Exception 4 to Section 300 of IPC. In this case, the accused had repeatedly assaulted the deceased with a Kirpan and caused injuries resulting into death. After restating the legal position, the Court converted the offence to one under Section 304 Part-II instead of Section 302 IPC and observed as under:-

"15. The weapon used in the fight between the parties is 'Kirpan' which is used by 'Amritdhari Sikhs' as a spiritual tool. In the present case, the Kirpan used by the Appellant-accused was a small Kirpan. In order to find out whether the instrument or manner of retaliation was cruel and dangerous in its nature, it is clear from the deposition of the Doctor who conducted autopsy on the body of the deceased that stab wounds were present on the right side of the chest and of the back of abdomen which implies that in the spur of the moment, the Appellant-accused inflicted injuries using Kirpan though not on the vital organs of the body of the deceased but he stabbed the deceased which proved fatal. The injury intended by the Accused and actually inflicted by him is sufficient in the ordinary course of nature to cause death or not, must be determined in each case on the basis of the facts and circumstances. In the instant case, the injuries caused were the result of blow with a small Kirpan and it cannot be presumed that the Accused had intended to cause the inflicted injuries. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. It is clear from the

materials on record that the incident was in a sudden fight and we are of the opinion that the Appellant-accused had not taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly.

16. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall Under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it cannot be said that the Appellant-accused had any intention of causing the death of the deceased when he committed the act in question. The incident took place out of grave and sudden provocation and hence the Accused is entitled to the benefit of Section 300 Exception 4 of the Indian Penal Code."

Therefore the role of appellants, in commission of crime, is to be analyzed and appreciated in the background of above mentioned legal position.

29. Careful perusal of evidence available on record reveals that the occurrence on the fateful day has been proved to have happened in two parts. At first, Raja Ram and Ram Ratan were assaulted by the appellants with sticks and when other injured persons came to their rescue, they were also assaulted. The appellants have failed to prove that they were having any right of private defence and they also failed to prove the photo copies of injury reports filed with the application of bail with regard to appellants- Data Ram and Ram Sewak, but a report sent by Medical Officer, District Jail, Hardoi to Judicial Magistrate, Hardoi on 18.4.1994 is also available on record, whereby it was informed that Ram Sewak got a fracture in his finger. However, this report could not prove the existence of any right of private defence in favour of appellants but these photo copies of injury reports coupled with the above mentioned report of Medical Officer, District Jail, Hardoi may suggest that both the appellants i.e. Data Ram and Ram Sewak might have sustained some simple injuries in the occurrence, therefore, it appears that some resistance was also offerred by the informant side, though, the same may be without any intention to cause harm to any one and might be only to defend themselves. The *'marpit'* in the incident is also proved to have occurred in front to the house of Kaptan Singh and this place falls at equal distance from the house of Data Ram and informant/ deceased Raja Ram. Therefore, it is not a case where ;the appellants had come to the house of Raja Ram for the purpose of assaulting him. Per contra the incident had happened when Raja Ram and Ram Ratan were going to extend Holi greetings to the villagers and the appellants were not having any prior information about their arrival. It is also apparent that incident had occurred without premeditation, in the spur of moment and keeping in view the weapon of assault i.e. *Lathi* and number of injuries caused to the deceased Raja Ram and also the fact that from amongst the injuries sustained by the deceased only one injury has been found fatal, there appears no common intention of appellants to commit murder of Raja Ram. It is also apparent that appellants had not acted in a cruel manner and did

not take undue advantage of the situation. It is also worth consideration that the First information report of the case was initially registered under Sections 323, 504, 506 IPC and deceased Raja Ram, even after sustaining injuries, remained in his house for the whole night and approached the Police Station, the next day. Therefore it is not established beyond reasonable doubt on record that appellants were having any intention to commit murder of Raja Ram, but keeping in view the fact that it was only one blow of *lathi*, inflicted on the head of the deceased- Raja Ram which resulted in the laceration of his brain and membranes and that hematoma was also found beneath this injury and also the fact that some injuries sustained by other injured persons were also found simple in nature, what is found proved is that the appellants were certainly having sufficient common intention/knowledge that their act is likely to result in the death of deceased- Raja Ram or of any other injured person and that they have not acted in a cruel or brutal manner and also have not taken undue advantage of the situation. Thus, in the facts and circumstances of the case they are found to have committed the offence punishable under Section 304 part (II) of the IPC instead of Section 302.

30. In **Afrahim Sheikh and Ors. vs. State of West Bengal** reported in **MANU/SC/0055/1964** Hon'ble Supreme Court while considering the issue as to whether the accused persons could be convicted under Section 304 part II of the IPC with the aid of section 34 of the IPC, opined as under :-

"15. The question is whether the second part of s. 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating, the requirements of s. 304, Part II are not satisfied in the case of each of them ? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why s. 304, Part II cannot be read with s. 34. The common intention is with regard to the criminal act, i.e., the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e., beating, there is no reason why s. 34 or s. 35 should not be read with the second part of s. 304 to make each liable individually."

Above principle was approved by Hon'ble Supreme Court in **Bhaba Nanda Sarma and Ors. vs. State of Assam ,MANU/SC/0078/1977.**

In **Saravanan and Ors. vs. State of Pondicherry, MANU/SC/0952/2004** relying on Afrahim Sheikh (Supra),Hon'ble Supreme Court held as under :-

"10. In the leading case of Barendra Kumar Ghosh v. Emperor (AIR 1925 PC 1, the appellant was charged under Section 302 read with Section 34 IPC for murder of a Post Master. The evidence disclosed that while the Post Master was in the office counting money, three persons of whom appellant was one, fired pistols at him asking him to hand over cash. The trial Judge directed the

Jury that if they were satisfied that the Post Master was killed in furtherance of the common intention of all the three, the appellant could be held guilty of murder whether or not he had fired the fatal shot. The appellant was accordingly convicted. Being aggrieved by such conviction, the appellant approached the Privy Council. It was contended on behalf of the prisoner that he was outside the room. He was in the courtyard and was frightened. He did not participate in the crime and hence, he could not have been convicted for an offence punishable under Section 302 IPC by invoking Section 34 IPC. The contention was, however, negatived. It was held that once it is established that an act was committed in furtherance of the common intention of all, Section 34 could be attracted and all could be held liable irrespective of their individual act.

11. The Judicial Committee observed that the distinction between two types of offenders (i) principals in the first degree, that is, who actually commit the crime; and (ii) principals in the second degree, that is, who aid in commission of the crime, as found in English law has not been strictly adhered to in India. In the circumstances, according to their Lordships, Section 34 would be attracted provided that it is proved that the criminal act was done by several persons in furtherance of the common intention of all.

12. Dealing with the argument on behalf of the appellant that he had not fired any shot, the Judicial Committee observed that if two men tie a rope round the neck of third man and pull opposite ends of the rope till he is dead, each can be held liable for the ultimate act, i.e. death of the victim. If the contention on behalf of the appellant would be upheld that each should be held liable for his act only, each can successfully contend that the prosecution had not discharged the onus inasmuch as nothing more was proved against each of them, than an attempt to kill which might or might not have succeeded. "Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man." Referring to Sections 33, 34, 37 and 38 IPC, it was held that even if the appellant did nothing as he stood outside the door, he could be held liable. It is to be remembered that in crimes as in other things "they also serve who only stand and wait."

31. Therefore, in view of aforesaid discussion all appellants are required to be convicted under Section 304 part (II) read with Section 34 of the IPC, instead of Section 302 read with Section 34 IPC. In view of above, both the appeals filed by the appellants are **partly allowed** and their conviction under Section 302 read with Section 34 of the IPC is altered from Sections 302/34 to Section 304 Part II read with Section 34 of the IPC and **all appellants are now convicted for committing the offence under Section 304 part (II) read with Section 34 of the IPC.**

Keeping in view the fact that the incident is of the year 1994 and only one injury on the head of the deceased Raja Ram has been found to be fatal and it is not clear as to who is the author of this fatal injury and the appellants are being convicted, as they were sharing common intention/knowledge that their acts are likely to result in the death of Raja Ram, in our considered opinion, imprisonment for 9 years for committing the offence under Section 304 (II) IPC,

will meet the ends of justice. **Therefore, the appellants no. (1) Siya Ram (2) Data Ram (3) Ram Ratan and (4) Ram Sewak are convicted under Section 304(II) read with section 34 of IPC and sentenced to undergo rigorous imprisonment for 9 years and fine of Rs. 10,000/- each and in default of payment of fine they will further undergo simple imprisonment for six months.**

So far as conviction and sentence of appellants as ordered by the trial court with regard to Sections 325 and 323 read with Section 34 IPC is concerned we do not find any infirmity in the same and therefore the same is **maintained.** All punishment will run concurrently and appellants will also get the benefit of Section 428 of Crpc. The judgment and order of the trial court is modified accordingly.

The appellants are reported to be on bail, their bail bonds are canceled and they are directed to surrender before the trial court within 20 days from today. They shall be lodged in jail to serve out the sentence as modified by this Court.

Copy of this judgment be immediately sent, along with the record, to the court below for information and compliance.

(2019)11ILR A476

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Reference No. 06 of 2011
with
Crl. Capital Appeal (Capital Cases) No. 2330 of 2011
and
Capital Cases No. 4173 of 2011

Santosh @ Tidke ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri S.P. Sharma

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

A. Criminal Law -Indian Penal Code,1860 - Sections 376, 302 and 201 IPC – Death Penalty – Court would consider cumulative effect of both aggravating and mitigating circumstances and has to strike a balance between the two and see towards which side the scale/balance of justice, tilts - The true import of proposition of law is that awarding of life imprisonment for offence under Section 302 IPC is the rule and death sentence is an exception. To award death sentence, Courts should specify the aggravating and mitigating circumstances of the case.

B. Criminal Law -Indian Penal Code, 1860 - Death penalty – Mitigating & Aggravating circumstances - What are - would depend upon the facts of each case - Trial Court has to compare mitigating and aggravating circumstances to come to the inference as to the punishment to be awarded.

No material has been placed by prosecution to suggest, that accused will be a threat to society and there is no probability of his reformation and rehabilitation. - here is a case where there are certain mitigating circumstances but no aggravating circumstance – held - punishment of death for the offence under Section 302 I.P.C. cannot be justified – Death punishment is highly excessive and deserves to be remitted to life imprisonment. - Reference is hereby rejected - Capital Cases (Appeals) are partly allowed and judgment of Trial Court stands modified only in respect of punishment awarded for

offence under Section 302 I.P.C. and substituted by life imprisonment - The punishment imposed for the offences under Sections 376 and 201 I.P.C. are maintained. (Para-3, 100,115,118,120,121,131)

C. Indian Evidence Act, 1860 - Circumstantial Evidence of 'last seen' - It is not necessary that in a criminal trial only when an eye witness is present, conviction can be held and not otherwise - Where circumstantial evidence is such which leads to the inference that it was the accused only who committed the crime and none else, the accused can be convicted and sentenced appropriately - the circumstances from which the conclusion of guilt is to be drawn "must" or "should be" and not merely "may be" fully established. Chain of circumstance must be complete leaving no doubt that it was the appellant alone and none else who had committed the crime for which he has been charged.

Present case is not founded on ocular version proving directly that crime has been committed by accused-appellant - It is founded on the circumstantial evidence of last seen as also recovery of various objects including dead body and pathological and Forensic Reports - (Para-73 ,74, 83)

D. Indian Evidence Act, 1860 - Sections 25 and 26, Section 27 - Section 27, exists by way of a proviso to Sections 25 and 26. A statement made by way of confession in police custody that distinctly relates to the fact discovered is admissible in evidence against the accused. (Para - 86 ,87, 88)

Appeal partly allowed (E-7)

List of Cases Cited: -

1. St. Represented by Inspector of Police Vs Saravanan & anr. AIR (2009) SC 152

2. Arumugam Vs St. AIR (2009) SC 331

3. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

4. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Mah. JT 2010 (12) SC 287

5. Sampath Kumar Vs Inspector of Police, Krishnagiri, (2012) 4 SCC 124

6. Sachin Kumar Singhraha Vs St. of M.P. Cri. Appeal Nos. 473-474 of 2019

7. Smt. Shamim Vs St. of (GNCT of Delhi), (2018) 10 SCC 509

8. Hanumant Govind Nargundkar & anr. Vs St. of M.P., AIR (1952) SC 343

9. Hukam Singh Vs St. of Raj. AIR (1977) SC 1063

10. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SC 1622

11. Ashok Kumar Chatterjee Vs St. of M. P. AIR (1989) SC 1890

12. C. Chenga Reddy & ors. Vs St. of A. P. (1996) 10 SCC 193

13. Bodh Raj @ Bodha & ors. Vs St. of J&K. (2002) 8 SCC 45

14. Shivu & anr. Vs R.G. High Court of Kar. & anr. (2007) 4 SCC 713

15. Tomaso Bruno Vs St. of U.P., (2015) 7 SCC 178.

16. Delhi Administration Vs Bal Krishan & ors. (1972) 4 SCC 659

17. Mohmed Inayatullah Vs The St. of Mah. (1976) 1 SCC 828

18. Raju Manjhi Vs St. of Bihar AIR (2018) SC 3592

19. Ravinder Kumar & anr. Vs St. of Pun. (2001) 7SCC 690

20. Amar Singh Vs Balwinder Singh & ors. (2003) 2 SCC 518

21. Tara Singh Vs St. of Pun. AIR (1991) SC 63

22. Sahebrao & anr. Vs St. of Mah. (2006) 9 SCC 794

23. Palani Vs St. of T.N. Cri. Appeal No. 1100 of 2009, decided on 27.11.2018

24. Bachan Singh Vs St. of Pun. (1980) 2 SCC 684

25. Furman Vs Georgia (1972) SCC OnLine US SC 171

26. Machhi Singh Vs St. of Pun. (1983) 3 SCC 470

27. Haresh Mohandas Rajput Vs St. of Mah. (2011) 12 SCC 56

28. Dhananjoy Chatterjee Vs St. of W. B. (1994) 2 SCC 220

29. Ramnaresh and others Vs St. of Chhattisgarh (2012) 4 SCC 257

30. Swamy Shraddananda Vs St. of Kar. (2008) 13 SCC 767

31. Mukesh & anr. Vs St. (NCT of Delhi) & ors. (2017) 6 SCC 1

32. Ahmed Hussein Vali Mohammed Saiyed & anr. Vs St. of Guj. (2009) 7 SCC 254

33. Jameel Vs St. of U.P. (2010) 12 SCC 532

34. Guru Basavaraj @ Benne Settapa Vs St. of Kar. (2012) 8 SCC 734

35. Gopal Singh Vs St. of Uttarakhand, (2013) 3 JT 444

36. Hazara Singh Vs Raj Kumar & anr. 2013 9 SCC 516

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Present Reference under Section 366 Cr.P.C. and Capital Case under Section 374(2) Cr.P.C. have arisen from judgment and order dated 14.03.2011 passed by Sri Vigyan Ram Mishra, Additional Sessions Judge, Court No. 1, Jhansi.

2. Capital Case Appeal No.4173 of 2011 has been filed by accused-appellant Santosh @ Tidkey through Sri S.P. Sharma, Advocate and Capital Case Appeal No.2330 of 2011 has been filed by same accused-appellant through Senior Superintendent, District Jail, Jhansi.

3. By the impugned judgment and order, accused-appellant has been convicted in Session Trial No.144 of 2009, (Case Crime No.665 of 2009), under Sections 376, 302 and 201 IPC, Police Station Chirgaon, District Jhansi. Considering the case to be rarest of rare, he has been sentenced under Section 376 IPC for life imprisonment; under Section 302 IPC, he has been sentenced to death. He has been directed to be hanged till he dies. Under Section 201 IPC, he has been sentenced to two years Rigorous Imprisonment (hereinafter referred to "R.I.").

4. For confirmation of death sentence, Reference No.06 of 2011 has been made to this Court by Trial Court vide letter dated 14.03.2011.

5. Factual matrix of the case arising from the written report Ex.Ka-1, as well as evidence brought on record is as follows:-

6. On 05.05.2009, a written report was presented before Police Station Chirgaon, District Jhansi by Informant, PW-1, Mehtab Singh, alleging that on previous evening of 04.05.2009 at about 05:00 PM, Informant's wife Usha was present in the house and their daughter Jyoti was playing in front of door. In the meantime, accused-appellant Santosh @

Tidkey, aged about eighteen years, came over there and told the child Jyoti to go with him to get mehadi applied on her hand, whereupon Jyoti went with him. When she did not return till night, Informant made search for her but could not trace. Buddh Singh, son of Hemraj, and Lakhan son of Gokal Rajpoot of the village told that they had seen Santosh getting Jyoti drunk water at the hand-pump in front of house of Amar Singh Rajpoot. They had seen him taking away the girl. When Informant and others made search for Santosh @ Tidkey, he could not be traced. Santosh is a mischievous boy and they are sure that he has murdered her and caused dead body of Jyoti disappeared has absconded.

7. On the basis of written report Ex.Ka-1, First Information Report (hereinafter referred to as "FIR") was lodged by PW-3, Constable, Brijesh Mohan Rawat, as Case Crime no.665 of 2009, under Sections 302 and 201 IPC on 05.05.2009 at 02:00 PM at Police Station Chirgaon, District Jhansi. He prepared Chick FIR Ex.Ka-6 and made relevant corresponding entry in General Diary (hereinafter referred to as "GD"), a copy whereof is Ex.Ka-7 on record.

8. After registration of case, investigation was entrusted to PW-5, Sub Inspector (hereinafter referred to as "SI") Sri Girwar Giri. He obtained a copy of FIR and after recording statement of Head Moharrier as well as Informant, PW-1, proceeded to the place of occurrence along with S.I. Sri Ram and other Police personnel. He searched for accused and recorded statement of mother of the deceased (Jyoti). He prepared site plan Ex.Ka-9 of the place where-from accused-appellant had taken prosecutrix / deceased. In the meantime, on getting information about location of accused, Police went to Temple of Kuchwadiya and arrested accused-appellant, who admitted that he had taken Jyoti on the pretext of applying Mehndi and got her drunk water and then took her to Bera, where he inserted finger in her vagina as a result whereof blood stained oozing; then she cried. Accused put her frock and suppressed her mouth and committed rape upon her on a stone slab (Patiya). Thereafter he covered her with the stone slab and fled away. On the pointing of accused-appellant, dead body of Jyoti was recovered by Police. A recovery memo, Paper no. 11, was prepared by Investigating Officer (hereinafter referred to as "IO"). He also prepared inquest Ex.Ka-10 before the Panches. He prepared necessary documents along with inquest, Ex.Ka-11 to 15, and thereafter sent dead body along with Constable, Mustaque Ahmad, and Head Constable, Prati Pal Singh, to District Hospital for postmortem. He took in possession simple as well as blood stained pieces of stone slab (patiya). IO also took in possession a blank wrapper, a tube of mehndi cone and necklace made of red and white beads from the spot and prepared recovery memo Ex.Ka-4. He also took in possession undergarments of deceased which contained blood stains and prepared recovery memo Ex.Ka-6.

9. Autopsy on the dead body of deceased was conducted by PW-4, Dr. A.K. Tripathi. According to him, deceased girl was aged about 3½ years. On external examination, Doctor found that deceased was of average body built; rigor mortis passed off from neck and upper extremities and present on both lower extremities, no sign of

decomposition was seen; face was congested; both eyes were closed; fresh blood was coming out from both nostrils; bleeding from vagina was present; dried blood was present over perineal region and both thighs; hymen was ruptured and lacerated; bleeding from vagina was present. He found following ante mortem injuries:-

1. Contusion abraded 1.5cm x 1.5cm on right side of neck just behind mastoid process.

2. Abraded contusion two in number, one below other on left side of neck, 1 cm below and behind left mastoid process on side of neck, underlying tissue and muscle of neck are contused.

10. On internal examination, Doctor found both the pleura, larynx, trachea and both the lungs congested; about 50 gm of pasty semi digested food in stomach; large intestine contained faecal matter and gases; liver was congested; gall bladder was half full, weighed 450 gm; spleen and both kidneys were congested; urinary bladder was empty and blood clots present on the vagina. According to doctor, duration of death was about one day at the time of postmortem. In the opinion of PW-4, Dr.A.K. Tripathi, girl died due to asphyxia as a result of ante mortem throttling.

11. Doctor prepared slides of vaginal smear and vaginal swab and preserved for pathological examination which were sealed and handed over to Constables along-with clothes of the deceased.

12. PW-6, Dr. Mohini Saxena, the then Senior Consultant Pathologist in Women Hospital, Jhansi had examined three slides of vaginal smear and swab sent by PW-4 Dr. A.K. Tripathi. She found that slides did not contain spermatozoa but RCBS was found in them. She prepared report Ex.Ka-22.

13. On 06.05.2009. I.O. got accused-appellant medically examined. He sent recovered articles relating to incident for Forensic Science Laboratory (hereinafter referred to as "FSL"), Agra.

14. After conclusion of investigation, IO, PW-5, Girwar Giri, submitted charge sheet Ex.Ka.-16 in Court under Sections 376, 302 and 201 IPC against accused-appellant.

15. Cognizance of the offences was taken by Chief Judicial Magistrate (hereinafter referred to as "CJM"), Jhansi on 20.05.2009. Since the case was exclusively triable by Court of Sessions, CJM committed the case to Sessions Court on 09.07.2009, where it was registered as Session Trial No.144 of 2009, under Sections 376, 302 and 201 IPC, Case Crime No.665 of 2009, Police Station Chirgaon, District Jhansi. Learned Sessions Judge transferred the case to the Court of Additional Sessions Judge, Court No.1, Jhansi who framed charges against the accused-appellant under Sections 302, 376 and 201 IPC. The charge read as under:-

"मैं विज्ञानराम मिश्रा, अपर सत्र न्यायाधीश, कक्ष सं0–1, झाँसी आप सन्तोष उर्फ तिड़के पर निम्न लिखित आरोप विरचित करता हूँ–

प्रथम यह कि दिनांक 4.5.09 को ***स्थान–पेश दरवाजा वादी ग्राम बरल थाना चिरगॉव जिला झाँसी में*** *अपने वादी मेहताबसिंह की पुत्री कु0 ज्योति आयु साढ़े तीन वर्ष की हत्या कर दी। इस प्रकार आपने ऐसा अपराध किया जो भा0द0सं0 की धारा–302 के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

द्वितीय यह कि दिनांक उक्त दिनांक, समय व स्थान पर आपने वादी की पुत्री कु0 ज्योति उम्र साढ़े तीन साल के साथ ग्राम बरल थाना चिरगॉव जिला झॉसी में ***स्थित बुद्वसिंह के मकान के खण्डहर में बलात्कार किया*** *और इस प्रकार आपने ऐसा अपराध किया, जो भा0द0सं0 की धारा–376 के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

तृतीय यह कि दिनांक 5.5.09 को आपने ग्राम–बरल वहद थाना चिरगॉव जिला झॉसी स्थित ***बुद्वसिंह के मकान खण्डहर में कमरे के उत्तरी पश्चिमी कोने से पत्थर के पटिया के नीचे से*** *मृतका कु0 ज्योति की लाश को बरामद कराया जिसे आपने अपराध की साक्ष्य विलोपन हेतु छिपाया था और इस प्रकार आपने ऐसा अपराध किया, जो भा0द0सं0 की धारा–201 के अन्तर्गत दण्डनीय है और ऐसा इस न्यायालय केय प्रसंज्ञान में है।*

और एतद् द्वारा निर्देश देता हूँ कि आपका परीक्षण उपरोक्त धाराओं के अन्तर्गत इस न्यायालय द्वारा किया जायेगा।"

"I Vigyan Ram Mishra, Additional Sessions Judge, Court No.1, Jhansi charge you Santosh @ Tidkey as under:-

Firstly that on 04.05.2009 ***at the door of informant in Village Baral, Police Station Chirgaon, District Jhansi*** *you committed murder of Km. Jyoti daughter of Mehtab Singh aged about 3½ years. Thereby you have committed offence which is punishable under Section 302 IPC and is within the cognizance of this Court.*

Secondly that on the aforesaid date, place and time you committed rape on Km. Jyoti aged about 3½ years ***in the ruins of the house of Budh Singh*** *within Village Baral, Police Station Chirgaon, District Jhansi and thereby you have committed an offence punishable under Section 376 IPC and within cognizance of this Court.*

Thirdly that on 05.05.2009 you got recovered the dead body of deceased Km. Jyoti from ***beneath the stone slab kept in the south west corner of the ruins in the runes of house of Budh Singh*** *situated within Village Baral under Police Station Chirgaon, District Jhansi where you had concealed the dead body with the intention of disappearing the evidence and thereby you committed offence which is punishable under Section 201 IPC and within cognizance of this Court.*

I hereby direct that you be tried by this Court for the aforesaid judgement."
(English Translation by Court)

16. Accused-appellant pleaded not guilty and asked for trial.

17. In support of its case, prosecution examined, in all, six witnesses, out of whom **PW-1** Mehtab Singh is father of victim (deceased Km. Jyoti), **PW-2** Budh Singh is witness who had last seen the deceased Jyoti with accused-appellant while he was getting her drink water. He is also a witness of arrest of accused-appellant as well as recovery of blood stained under-wear of accused-appellant.

18. PWs 1 and 2 both are witnesses of fact and rest are formal witnesses of Police and Health Department.

19. **PW-3** Constable Moharrir Brij Mohan Rawat had registered FIR at case crime no.665 of 2009, under Sections 302 and 201 IPC and has proved Chick report Ex.Ka-6 and a copy of GD Ex.Ka-7. **PW-4** Dr. A.K. Tripathi had conducted autopsy on the dead body of Km. Jyoti and has proved injury report Ex.Ka-8 referred above. **PW-5** Girwar Giri is the IO and has proved site plan Ex.Ka-9, inquest Ex.Ka-10, documents relating to sending of dead body of victim / deceased to the District Hospital Ex.Ka-11 to 15, recovery memo Ex.Ka-3 in respect of

blood stained pieces of stone slab, recovery memo Ex.Ka-4 in respect of Mehndi Cone and necklace of beads, recovery memo Ex. Ka-6 pertaining to blood stained underwear of the appellant; charge sheet Ex.Ka-16 and site plan Ex.Ka-17 in respect of place of occurrence where-from dead body of Jyoti was recovered. IO has also proved FSL report Ex.Ka-19, 20 and 21. **PW-6** Dr. Smt. Mohini Saxena has proved pathological report, Ex.Ka-22, in respect of examination of three slides of vaginal smear and swab.

20. Three reports of FSL of Agra were received; **first report,** dated 26.10.2009 received from Joint Director, FSL, Agra is Ex.Ka-21, according to which spermatozoa were found on the frock of the deceased. However, no spermatozoa was found on underwear of Kalawa.

21. **Second report,** of the Joint Director of FSL, Agra is dated 29.10.2009, Ex.Ka-20, and findings are as under:-

(i) Blood stains were found on the pieces of stones, underwear of accused-appellant Santosh, frock of deceased and Kalawa (bracelet) in large area.

(ii) Largest blood stains on stone measured about 5 cm.

(iii) For examination of blood spectrum test was applied.

(iv) On **pieces of stones, underwear of accused-appellant and frock of Jyoti, human blood was found.**

(v) On Kalawa (bracelet) blood stains were found disintegrated, therefore, determination could not be made. No definite conclusion could be drawn from the classification of blood stains on pieces of stone and underwear of accused Santosh.

(vi) Blood stains on the frock of Km. Jyoti were not fit for classification.

22. **Third FSL report** Ex.Ka-19 dated 16.01.2010 is with respect to sample of blood stained and simple pieces of stones slab. On physical microscopic inspection both the pieces of blood stained stone and pieces of simple stone (material EX-1) appeared to be similar in terms of colour, nature and density.

23. Accused-appellant was examined under Section 313 Cr.P.C. on 24.02.2011, he stated that prosecution story is false; he had not taken Jyoti with him from house of Informant; allegation that he had made Km. Jyoti drunk water is false and concocted; witness Budh Singh in connivance with Lakhan Singh had got FIR registered to implicate him falsely; he did not commit rape or murder and has falsely been implicated; all the documents are false and incorrect; he pleaded ignorance about the postmortem on deceased; site plan had been prepared at the instigation of Informant in order to implicate him; police had arrested him from the chabutra situated out side his house; he did not make any statement to Police and Police has recorded false statement; he did not get any dead body recovered; he pleaded ignorance about blood stains on stone slab; he denied of any underwear belong to him taken by Police; he was not aware as to whose underwear had been recovered; on the instigation of Informant and witnesses, he has been implicated under Section 376 IPC; he also pleaded ignorance about

sending articles to FSL for examination; Informant and witnesses are relatives and friends and want to usurp his property after throwing him out of village.

24. On 03.03.2011, accused-appellant was again examined by Court under Section 313 Cr.P.C. wherein he was confronted with the reports regarding sample of smear in three slides. He said that the same are wrong and he has no knowledge about those reports.

25. On appreciation of evidence available on record and after hearing both the parties, Trial Judge recorded capital punishment against the accused-appellant under Section 302 IPC; life imprisonment under Section 376 IPC and two years' RI under Section 201 IPC as stated above.

26. Trial Court has given verdict of conviction, broadly, recording its finding on the following aspects :-

(i) Dead body of victim (Km. Jyoti) was discovered on the pointing by accused on 05.05.2009.

(ii) Accused has taken victim with him and Informant PW-1 was an eye witness to this fact and also proved the pretext on which accused allured victim to accompany him.

(iii) PW-2 Budh Singh verified the fact that he has seen accused along with victim while he was helping victim to drink water at the hand-pump in front of the house of Bhanwar Singh.

(iv) Possibility of rape could not be ruled out by PW-4 Dr. A.K. Tripathi due to ruptured hymen.

(v) Cause of death of victim due to asphyxia as a result of throttling was proved by PW-4 who proved post mortem report.

(vi) Blood stains were found on the underwear of accused as per forensic report dated 29.10.2009 (Ex.Ka-20) and remained unexplained by accused.

(vii) There was no delay in lodging F.I.R. inasmuch as victim had gone with accused at around 5:00 PM in the evening in front of PW-1 and when she did not return up to 7:00 PM, PW-1 and other family members searched for her. PW-2 Budh Singh during search met Informant and told that he has seen accused along with victim getting her to drink water at the hand-pump in front of the house of Bhanwar Singh and thereafter went together and on this information further search continued and when none could be traced out thereafter report was lodged at 2:00 AM in the Police Station.

(vii) Accused was arrested at 5:00 AM on 05.05.2009 and on his pointing out dead body of the victim was recovered.

(viii) Post mortem was conducted on 05.05.2009 at 3:30 PM and as per statement of PW4 death might have been occurred about 24 hours earlier and / or in the night of 4/5.05.2009.

(ix) Victim was last seen with accused and thereafter her dead body was recovered. The time lapse between the last seen and recovery of dead body is closer ruling out any possibility of the victim having gone with anybody else in the meantime.

(x) Accused pleaded enmity with Informant stating that he wanted to grab his property but neither any evidence was adduced to prove this nor any such suggestion was made to PW-1 and PW-2 in cross-examination.

(xi) Though defence was taken that PW-1 and PW-2 are relatives but this fact could not be proved adducing any evidence.

(xii) No evidence was brought to show that there was previous enmity with the witnesses of fact and more particularly, the Informant and accused. Accused also did not adduce any evidence to show that he had any personal property in the village.

(xiii) Site plan Ex.Ka-9 was proved by I.O., PW-5, S.I. Girwar Giri, showing that the houses of accused and Informant i.e. father of victim are opposite to each other.

(xiv) The place where accused stated to have committed rape upon victim as also the place where her dead body was concealed were clearly mentioned in site plan and I.O. also proved G.D. (Ex.Ka-18) wherein the fact of taking statement of accused explaining the manner in which he committed crime, is mentioned.

(xv) The stone slab on which rape was committed measured 2' 10" by 1' 8" and had blood stains in large amount.

(xvi) The stone slab, underwear of accused and deceased frock were found to have human blood of same nature.

(xvii) Though underwear of accused and underwear and frock of deceased, as per the report (Ex.Ka-2) of PW-6, did not contain spermatozoa but as per forensic report, spermatozoa was found on deceased's frock.

(xviii) In the panchayatnama, swelling in vagina was mentioned and as per post mortem report also hymen was found ruptured which supports that rape was committed upon the victim.

(xix) The defence that accused was juvenile was not found correct and as per record, it was found that accused was 19-1/2 years at the time of incident.

27. Trial Court, therefore, found accused guilty of committing offences under Sections 376, 302 and 201 I.P.C. and has convicted and sentenced him in the manner as stated above.

28. Against conviction and sentence Capital Case Appeal No.4173 of 2011 has been filed by accused-appellant Santosh @ Tidkey through Sri S.P. Sharma, Advocate, Capital Case Appeal No.2330 of 2011 has been filed by same accused-appellant through Senior Superintendent District Jail, Jhansi and Reference No. 06 of 2011 has been made by Trial Court for confirmation of Capital punishment.

29. We have heard Sri S.P. Sharma, learned Counsel for the appellant and Sri M.C. Joshi, learned AGA for State at length and have gone through record carefully with the valuable assistance of learned Counsel for parties.

30. Learned counsel for the accused-appellant contended that there is no eye witness of the incident; there was no motive for accused to commit the crime for which he has been charged; chain of

events is not complete so as to draw a conclusion that it is only the accused appellant who could have committed crime and none else; the dead body of the victim was found by Police on its own and accused has been implicated falsely; as per vaginal smear test, no spermatozoa was found and the charge of rape is not proved; prosecution has failed to prove its case beyond reasonable doubt; and, lastly that since evidence adduced by prosecution is not sufficient to point out with due reasonableness that it is only the appellant who has committed crime for which he has been charge, accused is entitled to benefit of doubt. On the question of sentence, it is contended that accused at the time of committing crime was a young man of 19-1/2 years with no criminal history and there was no aggravating factors so as to justify death sentence hence Court below in awarding capital punishment has committed manifest error.

31. Per contra Sri M.C. Joshi, learned AGA for the State contended that admittedly, it is not a case of ocular evidence but there are two reliable and unimpeachable witnesses who have proved the fact that the accused had taken the girl with him and she was last seen with him where-after her dead body was recovered and that too, on pointing out by accused-appellant, hence, chain of circumstances was complete; the short time within which incident had taken place and other relevant factors of presence of blood stains on the underwear, stone slab and frock of deceased of same nature support the inference that it is only the accused who had committed crime and none else; and accused has not offered any explanation as to how blood stains were found on his underwear. So far as the sentence is concerned, it is contended that a minor girl aged about 3 and 1/2 years has been dishonoured and murdered in a very cruel manner and accused-appellant, not only committed rape and murder, but even hide her dead body and showed no repentance, hence, Trial Court has rightly treated it as case of rarest of rare nature and awarded capital punishment which warrants no interference and Reference made by Trial Court deserves to be confirmed.

32. Before coming to the merits of the matter we find it appropriate to place on record that during pendency of appeals, accused-appellant moved an application under Section 7-A of Juvenile Justice Board (Care and Protection) Act, 2000 (hereinafter referred to as the Act, 2000) with prayer that accused-appellant be declared juvenile and the matter should be decided in accordance with provisions of Act, 2000. This plea was raised by accused before Trial Court also. The matter was examined and thereafter Trial Court passed order dated 07.07.2010 rejecting application of accused for declaring him juvenile offender in Trial relating to Case Crime No. 66 of 2009 under Sections 302 and 201 I.P.C., P.S.Chirgaon. The matter was taken in Criminal Revision No. 4154 of 2010 by accused-appellant Santosh @ Tidkey wherein order dated 07.07.2010 passed by Additional Sessions Judge, Court No. 1, Jhansi was challenged. This Court confirmed findings of Trial Court after considering material on record and dismissed revision vide judgement dated 18.1.2017. It is not in dispute that aforesaid judgement of Revisional Court has attained finality therefore, counsel of appellant did not press issue of juvenility

before this Court at the time of final hearing of these appeals and Reference and has addressed this Court on merits.

33. Now we proceed to consider the merits of the matter.

34. In the light of rival submissions, two questions have arisen requiring adjudication by this Court :-

(i) Whether prosecution has adduced enough evidence to prove beyond reasonable doubt that accused appellant has committed crime for which he was charged.

(ii) Whether facts of this case bring it within the parameters of 'rarest of rare', so as to justify Capital punishment, i.e. death sentence.

35. Before examining above questions, we find it appropriate to have re-look of entire evidence on record which was brought by prosecution before Court below and thereafter we shall proceed to examine "whether evidence is sufficient to bring home the findings of guilt / conviction against the accused appellant".

36. Documentary evidence placed by prosecution includes written report dated 05.05.2009 (Ex.Ka-1); F.I.R. dated 05.05.2009 (Ex.Ka-6); recovery memo of blood stained stone dated 05.05.2009 (Ex.Ka-3); and recovery memo of wrapper Chka-Chak; and red-yellow Mala, dated 05.05.2009 (Ex.Ka-4); recovery memo of dead body of Km. Jyoti dated 05.05.2009 (Ex.Ka-5); recovery memo of blood stained Chaddhi (underwear) dated 05.05.2009 (Ex.Ka-6); vaginal semen report dated 08.05.2009 (Ex.Ka-22); post mortem report dated 05.05.2009 (Ex.Ka-8); and Forensic Laboratory Reports dated 16.01.2010 (Ex.Ka-19), dated 29.10.2010 (Ex.Ka-20) and dated 26.10.2010 (Ex.Ka-21).

37. Oral evidence examined by prosecution comprised of six witnesses whereof Mehtab Singh PW-1 is the Informant and father of victim / deceased; PW-1 and Budh Singh PW-2 are the witnesses of fact having seen victim along with accused-appellant in the evening of 04.05.2009; Constable, Brijmohan, prepared Chick No. 77 of 2009 (Ex.Ka-6) and G.D. No. 3 at 2:00 AM dated 05.05.2009 (Ex.Ka-7) and these documents were proved by him; Doctor A.K. Tripathi, Senior Consultant, District Hospital, Jhansi, PW-4, had conducted post mortem and proved post mortem report (Ex.Ka-8); Investigating Officer, S.I., Girwar Giri, PW-5 proved site plan (Ex.Ka-9) and also the fact of arrest of accused and discovery of dead body of Km. Jyoti on the pointing out of accused-appellant; recovery memo of dead body and Panchayatnma; collection of blood sample of stone; recovery of underwear of accused-appellant and forensic reports received as (Ex.Ka-19, Ka-20 and Ka-21) and lastly, Dr. Smt. Mohini Saxena, PW-6 who examined three slides of vaginal smear received from Dr. A.K. Tripathi and proved the report (Ex.Ka-22).

38. The Informant PW-1 and Budh Singh PW-2 are witnesses of fact and rest are formal witnesses.

39. PW-1, Mehtab Singh, father of deceased in examination in chief stated that he is well acquainted with accused Santosh @ Tidkey who was residing in front of his house; his daughter Km. Jyoti aged about 3 and 1/2 years at around 5:00

PM on 05.05.2009 was playing in front of door of the house and PW-1 and his wife were present in the house; Accused-appellant on the pretext of getting Mehadi applie on the hand of Km. Jyoti, took her with him in front of Informant and his wife and thereafter Km. Jyoti did not return; they tried to find out but failed. Lakhan Lal and Budh Singh, two persons residing in the village, during search, met Informant and told that they had seen accused Santosh @ Tidkey in front of the house of Bhanwar Singh where he was getting Km. Jyoti to drink water and had seen both of them going together; Santosh @ Tidkey is a mischievous person which led Informant to believe that he (accused) had murdered Km. Jyoti and hide her dead body somewhere; thereafter he lodged report in Police Station i.e. Ex.Ka-1. On 05.05.2009, Police arrested Santosh @ Tidkey at the temple of Kuchbadiya Baba where he was hiding; Santosh @ Tidkey in front of all told that he had killed Km. Jyoti and hide her dead body in the ruins of the house of Hemraj and also that he can get her dead body discovered; thereafter, he got body discovered from the ruin of the house of Hemraj. I.O. prepared panchayatnama of dead body of Km. Jyoti on the spot in front of villagers as well as Informant and PW-2. PW-1 Informant and other villagers signed panchayatnama; at the time of preparing panchayatnama, private part of deceased Km. Jyoti had blood stains and it appeared that after committing rape upon her she was murdered; PW-1 proved his signature on panchayatnama which is marked as Ex.Ka-2. I.O. also collected stone slab having blood stains, it was cut with an Axe and blood stained stone piece was taken in custody and Fard (memo) was prepared which was also signed by Informant and another witness Sudama and it was marked as Ex.Ka-3; from the spot, one Mala, a blank wrapper of 'Chka chak' and Mehadi was recovered for which also Fard (memo) was prepared and signed by Informant as well as Sudama which was marked as Ex.Ka-4. Dead body of girl was sent for post mortem; Four stone pieces kept in a sealed bundle were opened in Court and during examination in chief, Informant saw those pieces and verified that the same were those which were collected by I.O. from the place where dead body was found and where, as per information given by accused, he committed rape and murder of Km. Jyoti and these articles were marked as material Exhibits-1 to 4; out of four stone pieces, one was without any blood stain. In cross examination PW-1 said that they are three brothers, Parvat Singh, Mehtab Singh and Ram Prakash; Parvat Singh is residing outside; Hemraj Singh belongs to his family and in relation is grandfather (Baba) aged about 72 to 75 years; Hemraj has three sons, Budh Singh, Mithlesh and Bahadur Singh; Lakhan Lal belongs to the same caste as that of Informant and his father's name is Gokul; House of Lakhan Lal is at a quite distance from the house of Informant. Lakhan Lal has two houses in the village; one house is after about 8-9 houses from the house of Informant; house of accused was in front of Informant's house and in between there is a five feet passage; there is no Chabutara in front of house of Informant and Informant's house has four rooms; accused Santosh @ Tidkey are two brothers and since childhood he has been residing in the same house; accused is not undergoing education and PW-1 is not aware as upto which class accused has studied; he is not aware as to whether

accused was facing any other criminal case; accused is unemployed and just wanders hither and thither; accused was born in front of Informant and there were some complaints of theft committed by accused, made by villagers, but they were all settled; he was not aware as to whose goods were stolen by accused; Informant had four daughters and Km. Jyoti was playing in front of door of his house where he was sitting, Santosh came out from his house and in the presence of Informant took her with him; Informant did not raise objection when accused was taking Km. Jyoti though he asked as to why he was taking her, whereupon he said that he is taking Km. Jyoti for putting Mehadi on her hand; this happened at around 5:00 PM; at that time other neighbours were not present; he did not stop Santosh @ Tidkey from taking Km. Jyoti as he was not aware that Santosh @ Tidkey would murder her; when she did not return up to 7:00 PM, search was made but she could not be found and then Informant was let to believe that Santosh had taken her and might have murdered her, hence he lodged F.I.R.; during search when the girl was not found, two village people Budh Singh and Lakhn Singh told Informant that they had seen Km. Jyoti accompanying Santosh @ Tidkey and she was drinking water from the hand pump in front of the house of Bhanwar Singh Rajpoot and those two persons had seen Km Jyoti going with Santosh @ Tidkey; these persons met Informant arount 7.15 PM, where-after, search continued up to 11:30 PM and then report was lodged at 2:00 AM on 05.05.2009; first of all search was made at the house of Santosh @ Tidkey where his mother was present but Santosh @ Tidkey and Km. Jyoti was not present; both were searched in the entire area; nobody except Budh Singh and Lakhan Singh told that Santosh and Km. Jyoti were going together; Informant came back to his house around 3:00 AM after lodging report and by that time, accused Santosh @ Tidkey could not be found; Informant and others were sitting in the house in the night; body of Km. Jyoti was found in the ruins of house of Hemraj, who was not brother of Informant but belongs to the family; Informant has no relation with Hemraj and was not aware with the name of his father; about 15 houses away is the house of Hemraj; dead body of Km. Jyoti was recovered by Police; Informant had reached the site and Hemraj had also come; dead body was discovered in front of Hemraj, Informant and Ram Prakash; Hemraj and Ram Prakash did not sign documents i.e. recovery memo; Police arrested Santosh @ Tidkey at around 5:00 AM or 5:30 AM in the morning when a lot of people had gathered; after arrest of Santosh @ Tidkey, Informant did not visit Police Station; Informant's statement was recorded by I.O. and Informant told him about the place where-from Santosh @ Tidkey had taken Km. Jyoti; the place where dead body was discovered is around 70 to 80 paces from the house of Informant; he did not visit the entire village with I.O. and Police did not arrest any member of family of Santosh @ Tidkey and only Santosh @ Tidkey was arrested; Informant had no dispute regarding property or house with Santosh @ Tidkey.

40. PW-1 therefore, is not a witness of crime as such, but he has proved that Santosh @ Tidkey had taken Informant's minor daughter, aged about 3-1/2 years, in the evening of 04.05.2009 and when she did not come back by 7:00 PM, search started and during that process.

Informant met Budh Singh also told that Santosh @ Tidkey and Km. Jyoti were going together. PW-1 is also a witness of recovery of dead body of victim in the ruins of house of Hemraj and condition of dead body is mentioned in panchayatnama. He is witness to panchayatnama and recovery memo on which he has put his signature.

41. In cross examination, we do not find anything otherwise extracted by defence to discredit the above facts stated by Informant in his evidence. To this extent evidence of Informant is clear, consistent and in our view, trustworthy. It is not expected that a father will make a wrong statement and shield real culprit when his own daughter and that too a minor girl of 3-1/2 years is subjected to heinous crime committed upon her causing her death.

42. Evidence of PW-1, Informant proved the fact that Santosh @ Tidkey resides in a house, in front of Informant and, therefore, was well know to Informant since his birth. Informant did not give any instance on account whereof there could be any occasion of enmity or bad blood between Informant and accused. Whatever has transpired or he had seen, he stated. He said that Santosh @ Tidkey, on the pretext of putting Mehadi on the hand of victim, took her with him and there being no otherwise reason of suspicion, Informant did not prevent accused from taking her with him for the aforesaid purpose i.e. putting Mehadi on her hand.

43. There is no scope of any identity dispute nor any scope of malice. The statement of Informant to the extent that it is the accused who had taken the girl with him, stating that he would get Mehadi put on her hand and the accused was well known to the Informant is proved by PW-1. These facts remain uncontroverted and nothing otherwise could be extracted in his cross-examination.

44. PW-2, Budh Singh is also a witness of last seen and has stated in his oral deposition that on 04.05.2009 he along with Lakhan Singh was coming from *'Bada'* on 04.05.2009 at around 5:00 PM; when they reached near the house of Bhanwar Singh, saw Santosh @ Tidkey getting water drunk to Km. Jyoti from the hand-pump and thereafter both went towards *'Bada'*. He told this fact to Ghanaram and Mehtab Singh who is father of Km. Jyoti; she did not return till night and when their family members searched for her, she could not be found where-after her family members reported the matter to Police; it came on 05.05.2009 and recovered dead body of Km. Jyoti from *'Bada'* on the pointing out of Santosh @ Tidkey; Police prepared recovery memo of dead body and it was signed by PW-2 also; the said recovery memo, Paper No. 11-A was shown to PW-2 and he verified his signature as also of one Suresh Kumar and it was exhibited as Ex.Ka-5.

45. Police got underwear of Santosh @ Tidkey in its possession which was having blood stains and it was a blue coloured underwear. Recovery memo of underwear was also prepared and it was also signed by PW-2 and Suresh and on proving, document was exhibited as Ex.Ka-6.

46. PW-2 stated that dead body of Km. Jyoti was discovered on the pointing out by Santosh @ Tidkey from the ruins

of house of Hemraj. He also identified Santosh @ Tidkey, present in Court, stating that he belongs to the village of PW-2 and has seen him going with Km. Jyoti. Budh Singh son of Hemraj is a farmer. If he had work, he used to go in the morning but when he had no work, normally stays at his residence. Whenever he has work, goes to the field and there is no time of his return. He had normal relation with the family of accused Santosh @ Tidkey. His father Hemraj was alive who had also normal relations with the family of accused Santosh @ Tidkey. The incident is of 04.05.2009 and he reiterated this fact in his examination in chef and in cross-examination as well. In the cross-examination, he said to have seen both of them i.e. Santosh and Jyoti from a distance of only five paces from hand-pump, where she was drinking water and Santosh @ Tidkey was getting her drunk water with his hands. Santosh @ Tidkey was wearing white shirt and pant while Jyoti was wearing frock and underwear. Hand-pump was installed out side the house of Bhanwar Singh and it belongs to Bhanwar Singh. There was no boundary wall around hand-pump. When Santosh @ Tidkey was getting Jyoti drunk water, doors of house of Bhanwar Singh were open and mother of Bhanwar Singh was outside the house. After drinking water, both went towards *'Bada'*. *'Bada'* is not bound / fenced from all four sides and has no gate. He did not ask from Santosh @ Tidkey and Jyoti as to where they were going. He new Mehtab Singh, father of Km. Jyoti with whom he met in the evening, at around 7:00 PM, when he (Mehtap Singh) told that he was searching his daughter, Km. Jyoti. PW-2 told that he had seen Km. Jyoti with Santosh @ Tidkey outside the house of Bhanwar Singh where Km. Jyoti was drinking water with the help of Santosh @ Tidkey from the hand pump. The condition of Km. Jyoti was normal at the time of drinking water. Santosh @ Tidkey was never prosecuted earlier nor arrested by Police in past. When he was getting Km. Jyoti drunk water, it was not night but there was sun light. No body resides in the *'Bada'* of PW-2 i.e. the ruins of the house of Hemraj where the incident had taken place. PW-2 said that Informant went to lodge report around 8:00-9:00 PM and PW-2 had not accompanied him. Informant came back at around 12:00 PM after lodging report and at that time PW-2 was sitting in the locality. When Mehtab Singh had come, he was searching Jyoti. Between 7:00 to 12:00 PM in the night, they also went at the house of Santosh @ Tidkey and inquired about him. PW-2 had Suresh and Lakhan Singh of the village with him, besides 3 to 4 other persons, at that time, but Santosh @ Tidkey was not found at his residence. His brother was found. Santosh was searched in the entire village but could not be found. In the morning, around 5:00 AM, Police came and arrested Santosh @ Tidkey from temple of Kuchbadiya Baba. There was no permanent priest in the said temple and it is open from all the sides. The aforesaid temple was about 1 Km. away from the village. PW-2 had not seen Police while arresting Santosh @ Tidkey but when he was brought in the village, PW-2 saw him. Police made inquiry from Santosh @ Tidkey but did not beat him. Interrogation was made in the present of villagers as well as PW-2. On the pointing of Santosh @ Tidkey dead body of Km. Jyoti was discovered by Police. At that time, PW-2 was also there. In fact entire village was there. The Informant Mehtab Singh was also present.

47. Blue coloured underwear from a sealed cover envelop was opened when witness PW-2 was recalled for examination on the application of prosecution and he proved it. The blue

coloured underwear, stating it was the same underwear which accused appellant was wearing at the time of incident and it was taken in custody by Police from the accused-appellant. The aforesaid underwear was marked as Ex.Ka-5. In cross-examination, he reiterated that underwear was seized by Police before him from accused who was wearing the said underwear under the pant. Police got stripped off pant and underwear of accused and took underwear in its custody. The underwear was stained with blood. Police also seized a stone. On the recovery memo of underwear PW-2 and Suresh put their signature.

48. The aforesaid witness PW-2, therefore, has proved three facts :-

(i) He saw accused-appellant Santosh @ Tidkey along with Jyoti in front of house of Bhanwar Singh at the hand-pump where Santosh @ Tidkey with his hands was helping Km. Jyoti to drink water and after drinking water both Jyoti and Santosh @ Tidkey went towards *'Bada'* i.e. ruins of the house of PW-2 and Hemraj, whose ruins have been stated by PW-1 is the father of PW-2 Budh Singh.

(ii) Secondly, he has verified and proved the fact that underwear seized by Police belongs to accused-appellant and when he was arrested, Police taken out from the accused the said underwear and seized it. Before seizure the underwear was inspected and it was found containing blood stains and recovery memo was signed by PW-2.

(iii) Discovery of dead body of Km. Jyoti was on the pointing out by accused and at that time not only PW-2 but PW-1 and other villagers were also present.

49. In the cross-examination, we do not find anything adverse which could have been extracted by defence. So far as the above facts stated by PW-2 are concerned, to this extent PW-2 is clear categorical and uncontroverted hence to this extent his evidence, we find wholly trustworthy.

50. Counsel for the accused appellant stated that with respect to the time of lodging of F.I.R., PW-2 has stated that Informant had gone to lodge a report around 8:00 to 9:00 PM and returned back around 12:00 PM in the night while report itself was lodged at 2:00 AM on 05.05.2009 i.e. early morning and there is clear contradiction on this aspect in the statement of PW-2 but we find that this inconsistency in statement of PW-2 is not material vis vis the fact which he has stated in his examination-in-chief and more so, his own statement that he did not accompany Informant for lodging report, therefore, he was not a witness to prove the time of lodging the report was lodged.

51. Minor contradiction regarding time of lodging a report has also arrest of accused, we find that in villages and the incident like above are happening when cannot accept that persons will record the incident keeping a complete time record watching completely wrist watches. Times are mentioned approximately and unless we find some serious contradictions so as to render entire evidence and untrustworthy. There is no reason to discard the evidence which is otherwise truth and trustworthy.

52. In this case, all the above stated factors are minor inconsistencies and same do not affect the substance of testimony of witnesses. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due

to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].** We therefore, find no force in this submission also.

53. Moreover, incident had taken place on 04.05.2009. The aforesaid examination of PW-2 was conducted on 24.1.2011 i.e. after 1 and ½ years. The time lapse can always cause minor aberrations in the statement of a witness who cannot be expected to depict the entire scene like a scripted story as and when required to tell. Any person who is a witness to an incident react in his own way and it differs from person to person. Mostly such aspects which a person thinks to be of most importance or of highest importance are noticed and reflected in his mind but details aspects do not get registered in mind and memory and there may be some variations on such minor aspects. Every contradiction or variation in statement of witnesses is not material and will not render statement of a witness untrustworthy.

54. We have gone through the entire evidence very carefully, as have also discussed above, and find no material contradiction, so as to disbelieve the prosecution case or the individual witness. Minor contradictions are bound to occur but the same will not be fatal to prosecution who has otherwise produced trustworthy witness to prove the guilt of accused.

55. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

56. In **Sachin Kumar Singhraha v. State of Madhya Pradesh in Criminal Appeal Nos. 473-474 of 2019** decided on

12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

57. Lest we forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in **Smt. Shamim v. State of (GNCT of Delhi), 2018(10) SCC 509.**

58. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy. Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

59. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be

discredited. [Vide: **State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].**

60. Thus after analysing entire evidence with the settled principle of law as discussed above, we are of the view that contradiction pointed out are not fatal to prosecution case and do not affect the veracity of prosecution witnesses therefore, above arguments also have no substance.

61. In the present case, the fact of last seen, and recovery of dead body as well as underwear of victim and accused and their identification are the facts proved by witnesses. We find, on these aspects, nothing otherwise material has been extracted to contradict or disbelieve statement of PW-2. Hence, we find no reason to discard his evidence for minor contradictions. Trial Court has also rightly believed his statement.

62. PW-3 Constable Brijmohan has proved date, time and the person who lodged report and is consistent with regard to time when the F.I.R. as well as statement of PW-1 was recorded. Nothing adverse could be extracted in his cross-examination.

63. PW-4 Dr. A.K. Tripathi is a witness to prove post mortem report since he had conducted post mortem and submitted report. Besides others, he proved the fact that blood was coming out from vagina and blood clots were also present. He prepared slides and sent for pathological examination and proved, on the basis of post mortem report, possibility of rape and killing of girl by throttling. He also proved that death could have occurred in the night of 04/05.05.2009.

64. In cross-examination, PW-4 reiterated that the injuries on neck show that some body has throttled the neck. He denied suggestion that rape was not committed upon the girl. He also said in cross-examination that rupture of hymen can be caused due to rape or on account of injuries by any other object.

65. PW-5, I.O., Girwar Giri has stated that he was assigned investigation where upon he made inquiry from the Informant and recorded his statement. Then he searched village and tried to find out Km. Jyoti and accused Santosh @ Tidkey, accompanied by Informant and other witnesses. He also recorded statement of Usha, wife of Informant and this is mentioned in C.D. On the same day, on the pointing out of Informant, he prepared site plan where-from accused had taken Km. Jyoti along with him and it was marked as Ex.Ka-9. He recorded statement of Prem Narayan and Mithlesh. When received information that accused was hiding in temple of Kuchbadiya Baba, accompanied by police officials and villagers, PW-5 went to the temple of Kuchbadiya Baba and searched in the rooms where he found accused Santosh @ Tidkey, who was identified by the villagers also and taken in custody at around 6:00 AM. The documents of his arrest were prepared and the same were Paper no. 12-A/1 to 12-A/5 in record of Trial Court. After taking accused in custody, he was interrogated whereupon

he admitted his guilt and said that on the pretext of getting Menhdi put on the hands of Jyoti, he took her from her house. In the way Jyoti drank water and thereafter she was taken in the ruins of house of Budh Singh i.e. son of Hemraj, where he inserted his finger in the vagina which resulted in bleeding whereupon she cried. Accused immediately put her frock on her mouth and throttled her neck and thereafter committed rape upon her, on the stone piece. Later he kept stone piece on her dead body and after concealing the same, ran away. He stated to get dead body of Jyoti discovered on the pointing out by accused from the ruins of house of Budh Singh after removing stone piece. In respect of recovery memo, Paper No. 11-A was prepared. On the spot panthayatnama was also prepared which was duly signed by Panchas and marked as Ex.Ka-10.

66. I.O., PW-5 collected blood stained stone pieces which had blood stains at several places and the same were taken after breaking the stone slab. Sample of three pieces of blood stained stone and one simple was taken in possession and memo was prepared which was exhibited as 3. On the spot he found a blank wrapper mentioning in English *'Chaka Chak'*, a Cone of *'Prem Dulhan Mehadi'* and Mala of red and white beads. I.O. also prepared Fard as Ex.Ka-4. During investigation accused stated that he was wearing same underwear which he had worn while committing rape upon Km. Jyoti. Police immediately got him stripped off the accused and took out underwear with blood stains thereon. It was taken in custody and Fard / memo was prepared and marked as Exhibit-6. On the basis of statement of accused given to the Police and injuries found on the dead body of Km. Jyoti, Section 376 I.P.C. was added and this fact was mentioned in C.D. Medical examination of accused was conducted and copy of report is a part of C.D. and fact of preparation of panchayatnama is also mentioned therein.

67. I.O. sent related material for examination to FSL at Agra. Vaginal smear slide report from pathology was received by him and on the basis thereof, charge sheet against accused under Sections 302, 376 and 201 I.P.C. was submitted. The site plan of the place where dead body was recovered, was also proved and marked as Ex.Ka-17.

68. The FSL report was also proved by PW-5 and marked as Ex.Ka-19, Ka-20 and Ka-21. The sealed bundle containing blank wrapper of *'Chaka Chak'*, Tube of *'Prem Dulhan Mehadi'*, red and white beads Mala were taken out and identified by PW-5 and these were marked as material exhibits-6, 7 and 8. From the sealed envelop red colour underwear was taken out, which was identified as of Km. Jyoti and blue colour underwear was identified to be of accused Santosh @ Tidkey. PW-5 also identified the frock which Km. Jyoti was wearing and seized from her dead body and it was marked as material Ex.-9. This witness has been subjected to a lengthy cross-examination. With regard to underwear of accused, in cross examination, he has explained the manner in which it was seized from accused and said :-

"मौके पर मुल्जिम की चढडी उतराकर कब्जा मे ली गई थी। तथा उसे दूसरी चढडी पहनाई गई थी । मौके पर दूसरी चढडी मुल्जिम के घर वालो से मंगाई गई थी । अभियुक्त की चढडी विधि विज्ञान प्रयोग शाला भेजी गई थी । विधि

विज्ञान प्रयोग शाला की रिपोर्ट आने से पहले मैने धारा 376 आई0पी0सी0 की बड़ोत्तरी की थी ।''

Underwear of accused was got put of from him and taken in possession on the spot and he was made to put at another underwear, was brought at the spot from the villagers of the accused. Underwear of accused was sent to F.S.L. I had made addition of Section 376 I.P.C. prior to receipt of report of FSL." (English Translation by Court)

69. He also verified and proved that accused told about the death of Km. Jyoti. When he was interrogated by Police, he said that he has murdered her and also committed rape upon her. These facts were stated by accused on spot and mentioned in C.D.

70. We do not find anything contradictory extracted by defence in lengthy cross-examination of PW-5 and the witness has withstood the facts stated in his examination in chief.

71. The last formal witness is Dr. Smt. Mohini Saxena who was posted as Senior Consultant in Pathology in woman Hospital, Jhansi and has tested three slides of vaginal smear sent for pathological test. She said that spermatozoa was not found in all three slides but in the the same report she found R.B.C.S. Testing report was proved by her and marked as Ex.Ka-22. She explained meaning of R.B.C.S. as the blood elements. In cross examination, she withstood her statement. When questioned said that it was not possible to tell as to blood was that of Km. Jyoti or the accused Santosh @ Tidkey since it would have been possible only after D.N.A. test.

72. The statement under Section 313 Cr.P.C. of accused's is of complete denial. While answering question no. 24, he said that he will tender defence evidence when given opportunity, but as a matter of fact, has not given any evidence at all. Answering question no. 21, he said that witnesses and Informant are relatives and friends and with the intent to get the accused appellant exiled from village they are deposing so as to acquire his (accused's property) but give no evidence to prove it. While answering question nos. 19 and 20 with respect to FSL report Ex.Ka-19, Ka-20 and Ka-21 and material Ex.-1 to 9, he said that he has no information about that.

73. The examination of the aforesaid evidence in detail shows that present case is not founded on ocular version proving directly that crime has been committed by accused-appellant. It is founded on the circumstantial evidence of last seen as also recovery of various objects including dead body and pathological and Forensic Reports. It is not necessary that in a criminal trial only when an eye witness is present, conviction can be held and not otherwise. Where circumstantial evidence is such which may lead to an inference that it is the accused only who has committed crime and none else, the accused can be convicted and sentenced appropriately.

74. In the case in hand, prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is

to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

75. In **Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343,** on appreciation of evidence, when a case depends only on circumstantial evidence, where Court said:

"... 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.....*** *it must be such as to show that* ***within all human probability the act must have been done by the accused."***

76. In ***Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,*** Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

77. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,** Court, while dealing with a case based on circumstantial evidence, held that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The ***circumstances concerned 'must or should' and not 'may be' established.***

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be ***a chain of evidence so complete as not to leave any reasonable ground*** *for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (emphasis added)*

78. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

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

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

(3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and none else; and,

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

(emphasis added)

79. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

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

(emphasis added)

80. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court said :

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,** upon any other reasonable hypothesis than that of his guilt*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."** (emphasis added)*

81. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.**

82. When we collect the relevant circumstances and chain thereof in the light of evidence discussed above, the following facts proved by the witnesses emerge before us :-

(i) On 04.05.2009 around 5:00 PM, accused residing in front of the house of Informant as well as deceased, came and told the deceased that he would get Mehadi put on her hand and on that pretext took her with him.

(ii) Identity of accused is not doubted since he was well known to both the witnesses of fact i.e. PW-1 and PW-2.

(iii) On the way, accused helped deceased in drinking water from hand-pump installed in front of the house of Bhanwar Singh and at that very time, both

were seen by Budh Singh, PW-2, who was coming along with one Lakhan Singh from the side of ruins of his house.

(iv) After drinking water by deceased, both i.e. accused and deceased went towards the ruins of the house of Hemraj i.e. father of Budh Singh, PW-2, and till this stage both were seen by PW-2 Budh Singh.

(v) Both the accused and victim did not return in night.

(vi) After making all efforts to search out them in village, information was lodged to police at around 2:00 AM on 05.05.2009.

(vii) Around 5:00 or 6:00 AM in the morning of 05.05.2009, Police arrested accused from the temple of Kuchbadiya Baba, in front of PWs-1, 2 and other villagers.

(viii) On the pointing out of accused, dead body of Km. Jyoti was discovered by Police from the ruins of the house of Hemraj i.e. father of Budh Singh PW-2 which was concealed under a stone slab.

(ix) The dead body and various injuries found therein show that she was raped and murdered by throttling.

(x) In front of PW-1 and PW-2, Police collected underwear worn by accused at the time of arrest which contained blood stains and on examination, it was found that blood stains are that of human blood which could not be explained by accused.

(xi) Blood stains and Spermatozoa were found on the frock of the deceased.

(xii) Except PW-1 and Budh Singh PW-2, who saw accused and deceased going together, none other has seen the deceased going with anybody else, since the time she left her house with accused till recovery of her dead body by the Police.

(xi) From the post mortem report and the statement of PW-4 i.e. Doctor who conducted autopsy, rape and murder by throttling the girl is proved.

83. These facts clearly point out to the guilt of accused-appellant and, in our view, chain of circumstances is complete leaving no doubt that it is the appellant alone and none else who had committed the crime for which he has been charged.

84. At this stage, we may also point out that in charge-1 the mention of place is door of the house of Informant but that is a place where from the accused had taken the girl with him and actual crime was committed in ruins of house of Hemraj i.e. father of Budh Singh PW-2 and to this extent place mentioned in Charge-1 is not consistent with Charge-2 but neither on this aspect any issue has been raised before court below nor before us and, in fact, it is not in dispute that dead body was discovered from the ruins of the house of Hemraj, i.e. father of Budh Singh PW-2 and as per the prosecution story, crime of rape, murder and concealment of evidence were committed thereat. Hence, nothing turned out from this error so as to help the accused-appellant.

85. Learned counsel for the appellant contended that statement of accused appellant claimed to have been made to I.O. is not admissible in evidence, therefore, same cannot be treated to be an admission. We have no objection in accepting the said contention. In fact while consideration evidence, we have not taken into account this statement and neither it has been treated as evidence

of admission nor admissible in evidence, but under Section 27 such part of statement which results in recovery of certain material on the pointing out by accused while in custody of Police, is admissible in evidence and to that extent, statement of appellant which has been treated to be his information on the basis whereof dead body of Km. Jyoti was discovered by Police is admissible under Section 27 and we have taken this fact as an evidence and part of the chain of evidence to reach the conclusion of guilt against the appellant.

86. Section 27 of Act, 1872 provides for how much of information received from accused who is in custody of police may be proved. It reads as under:

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

87. Aforesaid provision is by way of proviso to Sections 25 and 26 of Act, 1872. An statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused.

88. In **Delhi Administration vs. Bal Krishan and Ors., 1972(4) SCC 659** Court said that Section 27 permits proof of so much of information which is given by persons accused of an offence when in custody of a Police Officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Sections 25 and 26 of Act, 1872 provides that no confession made to a Police Officer whether in custody or not can be proved as against the accused. Section 27, therefore, is proviso to above Sections and statement even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against accused in the circumstances stated in Section 27.

89. In **Mohmed Inayatullah vs. The State of Maharashtra, 1976(1) SCC 828** Court observed that though interpretation and scope of Section 27 has been subject of consideration in several authoritative pronouncement but its application to concrete cases is not always free from difficulty. In order to make its application swift and convenient Court considered the provision again and said:

"12. The expression "Provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section in to operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition

is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."

90. Idea behind Section 27 has been explained by Court in para 20 of judgment in **Bodh Raj @ Bodha and Ors. vs. State of Jammu and Kashmir (supra)** as under:

"20. If all that is required to lift the ban be the inclusion in the confession information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, ***the information must come from any accused in custody of the police.*** *The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer.* ***The statement which is admissible under Section 27 is the one which is the information leading to discovery.*** *Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words,* ***the exact information given by the accused while in custody which led to recovery of the articles has to be proved.*** *It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded,* ***the exact information must be adduced through evidence.*** *The* ***basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events.*** *The doctrine is founded on the principle that if any fact is discovered as*

a search made on the strength of any information obtained from a prisoner, ***such a discovery is a guarantee that the information supplied by the prisoner is true.*** *The information might be confessional or non-exculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the* ***"fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.*** *(see State of Maharashtra v. Danu Gopinath Shirde and Ors. 2000 CriLJ 2301). No doubt, the information permitted to be admitted in evidence* ***is confined to that portion of the information which "distinctly relates to the fact thereby discovered".*** *But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."*

(emphasis added)

91. Similar issue has been considered recently in **Raju Manjhi vs. State of Bihar, AIR 2018 SC 3592.** Therein Court held that Act, 1872 provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. Court held that recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt and such confessional statement stands and satisfies the test of Section 27 of Act, 1872.

92. With regard to delay of F.I.R., we find no substance for the reason that the daughter of Informant was taken by accused around 5:00 PM and after making all efforts to search of them, the report was lodged at about 2:00 AM on 05.05.2009. The distance of Police Station is about 4 Km. from the village of Informant and looking to the entire facts it cannot be said that F.I.R. is belated to the extent that it justifies an inference in lodging of F.I.R. without due deliberation and improvements. Even otherwise mere delay in F.I.R. is not a ground to reject prosecution version.

93. It is also well settled, if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. In **"Ravinder Kumar & Anr. Vs. State of Punjab", (2001) 7SCC 690,** Court has held;

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal

cases. *It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police.* ***It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal.*** *Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the* ***delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.*** *When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. " (emphasis added)*

94. In **Amar Singh Vs. Balwinder Singh & Ors. (2003) 2 SCC 518,** Court held :

"There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. *It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration.* ***There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."***

(emphasis added)

95. In this connection it will also be useful to take note of the following observation made in **Tara Singh V. State of Punjab AIR (1991) SC 63.**

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. ... unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. *These are all matters for appreciation and much depends on the facts and circumstance of each case." (emphasis added)*

96. In **Sahebrao and another Vs. State of Maharashtra (2006) 9 SCC 794,** Court held:

"The settled principle of law of this Court is that delay in filing FIR by itself cannot be a ground to doubt the prosecution case and discard it. *The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory." (emphasis added)*

97. From the above discussed exposition of law, it is manifest that prosecution version cannot be rejected solely on the ground of delay in lodging FIR. Court has to examine the

explanation furnished by prosecution for explaining delay. There may be various circumstances particularly number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If prosecution explains the delay, Court should not reject prosecution story solely on this ground. Therefore, the entire incident, as narrated by witnesses, has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of prosecution. Even if there is some unexplained delay, Court has to take into consideration whether it can be termed as abnormal.

98. Recently in **Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009, decided on 27.11.2018,** it has been observed by Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused.

99. Considering the entire discussions made above, we are clearly of the view that accused-appellant has committed crime to which has been charged by the Court below and court below has rightly held him guilty of those charges. The prosecution has well succeeded in proving offences committed by appellant, i.e., murder under Section 302 I.P.C., rape under Section 376 I.P.C. and hiding of dead body with an objective to screen himself from punishment, under Section 201 I.P.C. The judgement of conviction passed by the Court, therefore is confirmed.

100. Now we come to the question of penalty. Appellant has been awarded death sentence for committing offence under Section 302 I.P.C., life imprisonment for offence under Section 376 I.P.C. and two years rigorous imprisonment for the offence under Section 201 I.P.C. First of all, we propose to examine whether award of punishment of death penalty for committing offence under Section 302 I.P.C. is justified in the present case.

101. Before looking to the facts of present case on the question of sentence of death penalty, it would be appropriate to advert to judicial authorities on the matter throwing light and laying down principles for imposing penalty, in a case, particularly death penalty.

102. One of the earliest case, in the matter is **Bachan Singh v. State of Punjab, (1980) 2 SCC 684.** In para 164, Court said that normal rule is that for the offence of murder, accused shall be punished with the sentence of life imprisonment. Court can depart from that rule and impose sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing death sentence. While considering question of sentence to be imposed for the offence of murder under Section 302 IPC, Court must have regard to every relevant circumstance relating to crime as well as criminal. If Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, Court may impose death sentence.

103. Relying on the authority in **Furman v. Georgia, (1972) SCC OnLine US SC 171** Court noted the suggestion given by learned counsel about aggravating and mitigating circumstances in para 202 of the judgement in **Bachan Singh (supra)** which read as under :-

"202. ... 'Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed--

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

104. Thereafter in para 203, Court said that broadly there can be no objection to the acceptance of these indicators noted above but Court would not fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other. Thereafter in para 206 of judgment in **Bachan Singh (supra),** Court also suggested certain mitigating circumstances as under :-

"206. ... 'Mitigating circumstances.--In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The ***age of the accused. If the accused is young or old, he shall not be sentenced to death.***

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The ***probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions (3) and (4) above.***

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

*(7) That the condition of the accused showed that he was mentally defective and tha*t the said defect impaired his capacity to appreciate the criminality of his conduct."

105. Again in para 207 in **Bachan Singh** (supra), Court further said that mitigating circumstances referred in para 206 are relevant and must be given great

weight in determination of sentence. Thereafter referring to the words caution and care, in **Bachan Singh** (Supra) Court observed that it is imperative to voice the concern that Courts, aided by the broad illustrative guidelines, will discharge onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

106. Then in **Machhi Singh v. State of Punjab, (1983) 3 SCC 470** stress was laid on certain aspects namely, manner of commission of murder, motive thereof, antisocial or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder. Court culled out certain propositions emerging from **Bachan Singh** (supra), in para 38 and said as under :-

*"The following propositions emerge from **Bachan Singh** case:*

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the ''offender' also require to be taken into consideration along with the circumstances of the ''crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

107. The three-Judges Bench in **Machhi Singh** (supra) further said that following questions must be answered in order to apply the guidelines :-

*"(a) **Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate** and calls for a death sentence"*

*(b) Are the **circumstances of the crime such** that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?" (Emphasis added)*

108. In **Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56,** after referring to **Bachan Singh** (supra) and **Machhi Singh** (supra), Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in **Bachan Singh** (supra) to cases where the "collective conscience" of community is

so shocked that it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. Court, however, underlined that full weightage must be accorded to the mitigating circumstances of the case and a just balance had to be struck between the aggravating and the mitigating circumstances.

109. In para 20 of the judgment in **Haresh Mohandas Rajput** (supra), Court observed that the rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur of the momentary provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society, death sentence should be awarded.

110. In **Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220,** Court opined that imposition of appropriate punishment is the manner in which Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that Courts reflect public abhorrence of the crime. Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

111. After referring to earlier authorities including **Bachan Singh** (supra) and **Machhi Singh** (supra), Supreme Court in **Ramnaresh and others v. State of Chhattisgarh, (2012) 4 SCC 257** tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances and in para 76 said as under :-

"Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear

psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there ***is a cold-blooded murder without provocation.***

(11) The ***crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.***

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The ***age of the accused is a relevant consideration but not a determinative factor by itself.***

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

(Emphasis added)

112. The principles laid down in **Bachan Singh** (supra) and **Machhi Singh**

(supra) were sought to be followed and applied subsequently for deciding as to what sentence should be awarded but later on it was felt that the principles laid down in the above authorities are not being correctly applied and have led to inconsistency in sentencing process in India. It was also observed that the list of categories of murder crafted in **Machhi Singh** (supra) in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario.

113. A three-Judge Bench in **Swamy Shraddananda v. State of Karnataka, (2008) 13 SCC 767,** in para 43 of the judgment, said :-

"43. In Machhi Singh the Court crafted the categories of murder in which `the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and `whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that ***even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable.*** *Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."*
(Emphasis added)

114. In a recent judgment in **Mukesh and another v. State (NCT of Delhi) and others, (2017) 6 SCC 1,** a three-Judges Bench has confirmed death sentence in two concurring judgments rendered by Hon'ble Dipak Misra,J. (for himself and Hon'ble Ashok Bhusan,J.) and by Hon'ble R. Banumathi,J.

115. After referring to catena of decisions, earlier rendered on the question of sentence, it is observed that Court would consider cumulative effect of both factors i.e. aggravating and mitigating circumstances and has to strike a balance between the two and see towards which side the scale/balance of justice, tilts.

116. Hon'ble R. Banumathi,J. observed that factors like poverty, young age, dependants, absence of criminal

antecedents, post crime remedies and good conduct in imprisonment cannot be taken as mitigating circumstances to take out the case in the category of rarest of rare case. In para 516 of concurring judgment, Hon'ble R. Banumathi,J. Court said :-

"Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. ***When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system.*** *As held in Om Prakash v. State of Haryana, (1999) 3 SCC 19, the* ***Court must respond to the cry of the society*** *and to settle what would be a deterrent punishment for what was an apparently abominable crime."*

(Emphasis added)

117. In para 497 of the judgment in **Mukesh and another v. State (NCT of Delhi) and others** (supra), in concurring judgment by Hon'ble R.Banumathi,J. it is observed :-

" ... Courts have further held that ***where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolical manner,*** *the accused should be* ***shown no remorse and death penalty should be awarded."***
(Emphasis added)

118. The true import of aforesaid settled propositions of law is that awarding of life imprisonment for offence under Section 302 IPC is the rule and death sentence is an exception. Death sentence should only be awarded in cases which come under the purview of "rarest of rare case". Supreme Court, time and again has ruled that for awarding death sentence, Courts should specify the aggravating and mitigating circumstances of the case. What are the aggravating and mitigating circumstances would depends upon the facts of each case.

119. Mitigating circumstances are categorized as the manner and circumstances in and under which offence was committed; the age of the accused; the chances of the accused in not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated; if the condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct and the circumstances which, in normal course of life would render such a behaviour possible and could have the effect of giving rise to mental imbalance. Mitigating circumstances may also be that if upon appreciation of evidence Court is of the view that crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime. Court has to see, if it is 'rarest of rare' case for awarding death sentence and in the opinion of Court any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice then only extreme punishment would be awarded. Moreover, aggravating circumstances are in relation to crime and victim while mitigating circumstances are broadly in relation to criminal. Balance between the two has to

be ascertained by Court while determining "Rarest of rare" case. Circumstances discussed in aforesaid decisions are example but not exhaustive. No fixed formula has been set to formulate aggravating and mitigating circumstances and the discretion is left with Court which has to evaluate, depending on the facts and circumstances of each case.

120. Applying the exposition of law as discussed above to the facts of the present case, we find that Trial Court has discussed the question of sentence and got itself impressed with the facts that the minor girl of 3-1/2 years has been murdered by accused-appellant after committing rape upon her which is a heinous crime, that too against women and thereafter she has been murdered therefore, the crime committed by accused-appellant comes within the category of rarest of rear case to justify capital punishment of death sentence. Unfortunately, we find that Trial Court has not compared mitigating and aggravating circumstances to come to the inference as to what should be punishment in the case in hand. It cannot be doubted that offence committed by accused-appellant comes within the category of 'heinous crime' but for this reason alone indictment of punishment of death sentence has not been appreciated by Courts in various authorities, as discussed above.

121. In the present case, one of the mitigating circumstance is, age of accused. In para 206 (2) of judgment in **Bachan Singh** (supra) it has been held that if the accused is young or old, he shall not be sentenced to death. In the present case, as per finding recorded by Court below, accused was about 19 years of age at the time when crime was committed. He was obviously a very young boy having just attained majority. Another mitigating factor is probability that accused can be reformed and rehabilitated. In para 206 (4) in **Bachan Singh** (supra) Court has said that this should be shown by prosecution that accused does not satisfy conditions (3) and (4), i.e., probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society and that there is no probability of reformation and rehabilitation of accused. No such material has been placed by prosecution in the case in hand and there is nothing on this aspect which has been substantiated or addressed before Court, even to suggest, that accused will be a threat to society and there is no probability of his reformation and rehabilitation. The various aggravating circumstances as detailed in para 76 of judgment in **Ramnaresh and others v. State of Chhattisgarh** (supra), we find absent in the case in hand. Therefore, here is a case where there are certain mitigating circumstances but no aggravating circumstance. Hence, punishment of death, in our view, for the offence under Section 302 I.P.C. cannot be held to be justified; this is highly excessive and deserves to be remitted to life imprisonment. We, therefore, modify sentence awarded to accused-appellant for offence under Section 302 I.P.C. and sentence him for life imprisonment.

122. Then comes, punishment awarded for the offences committed under Sections 376 and 201 I.P.C. Here, adequacy and sufficiency of punishment has to be considered on the principle that

when an offence has been committed, law also imposes obligation upon Court to award proper sentence.

123. In the matter of awarding punishment multiple factors have to be considered by this Court. The law regulates social interests, arbitrates conflicting claims and demands. Security of individuals as well as property of individuals is one of the essential functions of the State. The administration of criminal law justice is a mode to achieve this goal. The inherent cardinal principle of criminal administration of justice is that the punishment imposed on an offender should be adequate so as to serve the purpose of deterrence as well as reformation. It should reflect the crime, the offender has committed and should be proportionate to the gravity of the offence. Sentencing process should be sterned so as to give a message to the offender as well as the person like him roaming free in the society not to indulge in criminal activities but also to give a message to society that an offence if committed, would not go unpunished. The offender should be suitably punished so that society also get a message that if something wrong has been done, one will have to pay for it in proper manner irrespective of time lag.

124. Further sentencing process should be sterned but tampered with mercy where-ever it is so warranted. How and in what manner element of leniency shall prevail, will depend upon multifarious reasons including the facts and circumstances of individual case, nature of crime, the matter in which it was committed, whether preplanned or otherwise, the motive, conduct, nature of weapon used etc. But one cannot be lost sight of the fact that undue sympathy to impose inadequate sentence would do more harm to justice system as it is bound to undermine public confidence in the efficacy of law. The society cannot long endure such serious threats. It is duty of the court to give adequate, proper and suitable sentence having regard to various aspects, some of which, are noticed above.

125. In **Ahmed Hussein Vali Mohammed Saiyed and another Vs. State of Gujrat, 2009 (7) SCC 254,** Court confirmed that:

"any liberal attitude by imposing meager sentences or taking too sympathetic view ***merely on account of lapse of time in respect of such offences*** *will be result-wise* ***counter productive in the long run and against the interest of society*** *which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system." (Emphasis added)*

126. In **Jameel Vs. State of Uttar Pradesh, 2010 (12) SCC 532,** Court held:

"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."

127. In **Guru Basavaraj @ Benne Settapa Vs. State of Karnataka, 2012 (8) SCC 734,** Court said:

"The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

128. In **Gopal Singh Vs. State of Uttarakhand, 2013 (3) JT 444,** court said that:

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence"

129. In **Hazara Singh Vs. Raj Kumar and another, 2013 (9) SCC 516,** Court observed:

"We also reiterate that ***undue sympathy to impose inadequate sentence would do more harm to the justice system*** *to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The* ***Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."***

(Emphasis added)

130. A feeble attempt was made by learned counsel for appellant to suggest that punishment awarded under Sections 376 and 201 I.P.C. may also be reduced but neither he could give any valid justification for the same nor we find any such reason to dilute sentence awarded to appellant by Court below under Sections 376 and 201 I.P.C. Therefore, judgment of Court below in respect to sentence awarded for offences under Sections 376 and 201 I.P.C. is hereby confirmed.

131. In view of above discussions, Reference No. 6 of 2011 is hereby rejected. Capital Cases (Appeals) No. 2330 of 2011 and 4173 of 2011 are partly allowed and judgment of Trial Court stands modified only in respect of punishment awarded for offence under Section 302 I.P.C. and substituted by life imprisonment. The punishment imposed for the offences under Sections 376 and 201 I.P.C. are maintained.

132. Let a copy of this judgment along with the Trial Court record be sent to the Court concerned for compliance. Copy of the judgment be also sent to accused-appellant through Jail Superintendent concerned for intimation. Compliance report be also submitted to this Court.

(2019)11ILR A513

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 2710 of 2012

Lal Chand Gupta ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri I.P. Singh (A.C.)

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

A. Evidence Law-Indian Evidence Act,1872 – Ocular evidence - direct evidence - Incident took place in day light - presence of injured witnesses cannot be easily ignored - testimony of

an injured witness is accorded a special status in law - Non-availability of blood at the door of deceased does not falsify prosecution case - where direct evidence is trustworthy, it can be believed. Then motive does not carry much weight. Merely because witnesses are close relatives of the deceased, their testimonies cannot be discarded - Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible evidence - medical evidence is totally compatible with ocular version - discrepancies, variation and contradiction in the prosecution case do not go to the root of case - accused-appellant committed murder of deceased and caused injuries to PW-1 and 2 at the time, date and place as stated by prosecution - PW-1 and PW-2 are natural witnesses - prosecution is not obliged to produce an independent witness - prosecution has been able to prove its case beyond reasonable doubt - punishment should be proportionate to gravity of offence - Trial Court has rightly convicted and sentenced him.(Para 19,28,31,34,35,38,43, 45, 51, 53,54)

Jail appeal dismissed (E-7)

List of cases cited:-

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

2. St. of U.P. Vs Kishan Chand (2004) 7 SCC 629

3. Lokesh Shivakumar Vs St. of Kar. (2012) 3 SCC 196

4. Dilip Singh Vs St. of Pun. AIR (1953), SC 364.

5. Dharnidhar Vs St. of U.P. (2010) 7 SCC 759
6. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

7. Sampath Kumar Vs Inspector of Police, Krishna giri, (2012) 4 SCC 124

8. Sachin Kumar Singhraha Vs St. of M.P.

9. Smt. Shamim Vs St. of (NCT of Delhi)

10. State Represented by Inspector of Police Vs Saravanan & anr., AIR (2009) SC 152;

11. Arumugam Vs St. AIR (2009) SC 331;

12. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334; and

13. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Mah. JT (2010) 12 SC 287

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

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

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

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

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellant-Lal Chand Gupta faced trial in Sessions Trial No. 110 of 2009 (State v. Lal Chand Gupta, Case Crime No. 1343 of 2008) under Sections 302, 307, 504 and 506 IPC, Police Station Gagha, District Gorakhpur, which came to be heard and decided by Additional Sessions Judge (Ex-cadre-2), Court No.14, Gorakhpur, vide judgment dated 17.03.2012, Trial Court convict accused-appellant under Sections 302, 324 and 504 IPC and sentenced him to undergo life imprisonment with a fine of Rs. 5000/- under Section 302 IPC, 3 years under Section 324 IPC with a fine of Rs.2000/- and one year under Section 504 IPC but acquitted of charge under Section 506 IPC. All the sentences shall run concurrently. Accused-appellant has sought interference of this Court in the present Jail Appeal filed from Jail through Jail Superintendent concerned.

2. Factual matrix of the case as borne out from First Information Report

(hereinafter referred to as "FIR") as well as material placed on record, in brief, is that PW-1, Shatrughan Vishwakarma, presented a written report Ex.Ka-1 in Police Station Gagha, District Gorakhpur stating that a goat of accused-appellant was grazing in his field. His brother, victim Govind Vishwakarma, brought the goat and tied it at the door. He (PW-1), victim Govind Vishwakarma, and Ganesh Sharma (PW-2) of same village went to the house of accused-appellant for complaint. Accused was beating his wife, when they reached the house of accused. They enquired, why he was beating his wife. His goat was grazing in his field, which was apprehended and taken away, whereupon, accused started abusing and extending threat to take life. When he objected to abusing, accused-Lal Chand Gupta took out knife and with intention to kill, stabbed in chest of victim. When PW-1 and PW-2 tried to capture him, he attacked them also with intention to kill. Victim rushed to house and fell down. PW-1 and PW-2 also received injuries in the said incident. While making arrangement to hospital, victim-Govind Vishwakarma succumbed to injuries. Incident took place at about 5:00 p.m. Dead body was lying on the spot. Incident was witnessed by Lok Nath and many persons of village.

3. On the basis of a written report Ex.Ka-1, a chick F.I.R. Ex.Ka-2 was registered by PW-3, HC Ramkesh, as Case Crime No.1343 of 2008 under Sections 302, 307, 504 and 506 IPC against accused. Entry of case was made in General Diary, copy whereof is Ex.Ka-3.

4. Under the direction of PW-8, R.K. Ravi held inquest over dead body of deceased-Govind Vishwakarma, prepared panch-nama Ex.Ka-5 and other papers relating thereto. Body was duly sealed and sent to District Hospital Gorakhpur for postmortem.

5. PW-7, Dr. Gyan Chandra, conducted autopsy over dead body of deceased-Govind Vishwakarma and prepared postmortem report Ex.Ka-7 under his signature, expressing his opinion that death of deceased was possible on 27.11.2008 at about 5:00 p.m. due to shock and hemorrhage as a result of ante-mortem injuries found on the person of deceased which might have been caused by some sharp cutting weapon like knife. Doctor found ante-mortem injuries on the body of deceased as under :-

(I) Incised wound 4 cm x 2 cm x bone deep over left side chest, 14 cm below the left clavicle.

6. PW-6, Dr. D.P. Singh, conducted medical examination of PW-1 Shatrughan Vishwakarma and prepared medico-legal report Ex.Ka-6. Doctor found a linear abrasion of 3 cm, incised, obliquely situated over left side of chest, and opined that it might have been caused by some sharp weapon on 27.11.2008 at about 5:00 p.m. and was simple in nature.

7. PW-10, Doctor Chadra Prakash conducted medical examination of Ganesh Sharma, PW-2 and prepared injury report Ex.Ka-12. Doctor found one penetrating wound 3.5cm x 0.5cm x 3.5cm present over left side back about 8.0 cm below left scapula.

8. PW-8, Ravinder Kumar Ravi, commenced investigation, recorded

statement of PW-1, Shatrughan Vishwakarma, and other witnesses, visited spot, prepared site plan Ex.Ka.-9, collected blood stained and simple earth from spot, prepared memo thereof Ex.Ka-8. On 04.12.2008, he arrested accused and on his pointing, recovered blood stained knife, allegedly used in commission of offence, from bushes of Bamboo near his house, prepared memo thereof Ex.Ka-4. Investigating Officer recorded statement of other witnesses and after completion of necessary formalities, submitted charg-sheet, Ex.Ka-11, against accused under Sections 302, 307, 504 and 506 IPC before Chief Judicial Magistrate, concerned.

9. Case, being exclusively triable by Court of Sessions, was committed by Chief Judicial Magistrate to Sessions Court wherefrom, it was transferred to Additional Sessions Judge (FTC), Court No.3, Gorakhpur for disposal in accordance with law.

10. Trial Court, after considering the entire material on record, framed charges against accused-appellant under Section 302 IPC on 28.05.2009 and under Sections 307, 504 and 506 IPC on 04.08.2009, which read as under:

" आरोप

मैं, अजय कुमार श्रीवास्तव अपर सत्र न्यायाधीश /एफ०टी०सी० को०नं०3, गोरखपुर आप श्री लालचन्द गुप्ता को निम्न आरोप से आरोपित किया गया।

प्रथमः- यह कि दिनांक 27.11.2008 को समय करीब 5.00 बजे शाम बहदग्राम-कोहड़ा, थाना- गगहा, जिला- गोरखपुर में बकरी चरने के विवाद को ले करके वादी मुकदमा शत्रुध्न के भाई गोविन्द विश्वकर्मा को जान से मारने की नियत से चाकू से उसके सीने में मारना और उसको पकड़ने के लिये वादी मुकदमा व गणेश शर्मा गये तो उनको भी चाकू से मार कर गम्भीर चोटे पहुचाये। उक्त चोटे से वादी मुकदमा के भाई गोविन्द विश्वकर्मा को प्राण घातक चोटे आने के कारण उसकी मृत्यु हो गयी। इस प्रकार आप ने धारा-302 भा०दं०सं० के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायाय के प्रसंज्ञान में है।

एतद् द्वारा मै आप को निर्देशित करता हूँ कि उपरोक्त आरोप का परीक्षण इसी न्यायालय द्वारा किया जायेगा।"

"I, Ajay Kumar Srivastava, Additional Sessions Judge / FTC No. 3, Gorakhpur do hereby charge you Shri Lal Chand Gupta with the following offence:

First: That on 27.11.2008 at around 5 pm within the limits of Village Kohda, PS Gagha, District Gorakhpur; you, on account of a dispute regarding grazing the goat, stabbed a knife into the chest of complainant Shatrughan's brother Govind Vishwakarma with the intent to kill him; and when the complainant and Ganesh Sharma went to catch hold of you, you also caused grave injuries by attacking them with the knife. As a result of the critical injuries so caused, the complainant's brother Govind Vishwakarma died. In this way, you have committed an offence punishable u/s 302 of IPC, which is within the cognizance of this court.

It is hereby directed that you be tried by this court for the aforesaid offence."

(English Translation by Court)

"मै, अजय कुमार श्रीवास्तव, अपर सत्र न्यायाधीश /एफ०टी०सी० को०नं०3 गोरखपुर आप श्री लालचन्द गुप्ता को निम्न आरोप से आरोपित करता हूँ।

प्रथमः- *यह कि दिनांकः 27.11.2008 को समय करीब 5.00 बजे बहद ग्राम-कोहड़ा, थाना- गगहा, जिला- गोरखपुर में बकरी चरने के विवाद को लेकर के वादी मुकदमा शत्रुध्न के भाई गोविन्द शर्मा को जान से मारने की नियत से चाकू से उसके सीने में मारा और जब पकड़ने के लिये वादी मुकदमा शत्रुध्न एवं गणेश शर्मा गये तो उनको भी चाकू से जान मारने की नियत से मारे पीटे,जिससे उनको प्राण घातक चोटे आई। इस प्रकार आप ने धारा-307 भा०द० सं० के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

द्वितीयः- *यह कि उपरोक्त दिनांक, समय व स्थान पर आप लोगो ने वादी मुकदमा व उसके भाई तथा उसके परिवार के लोगो को अपमानित करने के आशय से गाली गुप्ता दिये, जिससे उसकी सामाजिक प्रतिष्ठा गिरी, इस प्रकार आपने धारा- 504 भा०द०सं० के अन्तर्गत दण्डनीय अपराध किया, जो इस न्यायालय के प्रसंज्ञान में है।*

तृतीयः- *यह कि उपरोक्त दिनांक, समय व स्थान पर आपने वादी मुकदमा व उसके भाई तथा उनके पूरे परिवार के लोगो को भविष्य में भयभीत रहने के आशय से जान माल की धमकी दिये जिससे वे लोग हमेशा आतंकित रहते है। इस प्रकार आप ने धारा 506 भा०दं०सं० का अपराध किया है।*

एतद् द्वारा मै आप लोगो को निर्देशित करता हूँ कि उपरोक्त आरोप का परीक्षण इसी न्यायालय द्वारा किया जायेगा।"

"I, Ajay Kumar Srivastava, Additional Sessions Judge / FTC No. 3, Gorakhpur do hereby charge you Shri Lal Chand Gupta with the following offences:

First*: That on 27.11.2008 at around 5 pm within the limits of Village Kohda, PS Gagha, District Gorakhpur; you, on account of a dispute regarding grazing the goat, stabbed a knife into the chest of complainant Shatrughan's brother Govind Vishwakarma with the intent to kill him; and when the complainant Shatrughan and Ganesh Sharma went to catch hold of you, you also attacked him with knife with the intent to kill him; as a result of which he sustained critical injuries. In this way, you have committed an offence punishable u/s 307 of IPC, which is within the cognizance of this court.*

Second*: That on the aforesaid date, time and place, you used filthy language in order to insult the complainant, his brother and his family; thus bringing their social status down. In this way, you have committed an offence punishable u/s 504 IPC, which is within the cognizance of this court.*

Third*: That on the aforesaid date, time and place, you, with an intent to put the complainant, his brother and all his family members to intimidation even in the future, threatened to kill them and to destroy their property; as a result of which they are always under fear. In this way, you have committed an offence punishable u/s 506 IPC, which is within the cognizance of this court.*

It is hereby directed that you be tried by this court for the aforesaid offence."

(English Translation by Court)

11. Accused denied charges levelled against him and claimed trial.

12. In order to substantiate its case, prosecution examined as many as ten witnesses in the following manner :

Sr. No.	Name of PW	Nature of witness	Paper proved
1	Shatrughan	Fact	Ex.Ka-1

	Vishwakarma		& Ex. Ka-2
2	Ganesh Sharma	Fact	Ex.Ka-11
3	HC Ramkesh	Formal	Ex.Ka-2 & Ex. Ka-3
4	Dwarika Nath Vishwakarma	Formal	Ex.Ka-4 (recovery memo)
5	Jitendra Vishwakarma	Formal	Ex.Ka-5 (inquest)
6	Dr. DP Singh	Formal	Ex.Ka-6
7	Dr. Gyan Chandra	Formal	Ex.Ka-7
8	Ravindra Kumar Ravi (IO)	Formal	Ex.Ka-4, Ex.Ka-8 and Ex.Ka-11
9	Vijay Kumar (constable)	Formal	Ex. Ka-10
10	Dr. Chandra Prakash	Formal	Ex.Ka-12 (Injury report)

13. Subsequent to closure of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded by Court explaining all incriminating circumstances and other evidence. Accused denied prosecution story in toto and all formalities of investigation were said to be wrong. He claimed false implication on account of enmity and statement of witnesses were said to be wrong. In response of question 6, accused answered that informant and his brother (deceased) had come with knife and Danda to his house, assaulted him, due to which he sustained injury on his head and they wanted to take his life by cutting his neck. Complainant side must have suffered injuries while making defence. Accused examined DW-1, Jai Kirshna Mishra, in defence.

14. After hearing counsel for parties and analyzing entire evidence led by prosecution on record, Trial Court has found accused-appellant guilty and convicted him, as stated above. Feeling aggrieved and dissatisfied with impugned judgment and order of conviction and sentence, present appeal has been filed through Jail.

15. We have heard Sri I.P. Singh, Amicus Curiae for accused-appellant and Sri Nikhil Chaturvedi, learned A.G.A for State-respondents, at length, and have gone through record carefully with valuable assistance of learned counsel for parties.

16. Learned Amicus Curiae appearing for accused-appellant took us through record and challenged conviction and sentence of accused-appellant, advancing his submissions, in the following manners :-

i. There is no independent witness of the incident. PW-1 is a relative witness. No independent witness came forward to support prosecution case. PW-1 and deceased themselves had come to the house of accused-appellant to take his life.

ii. There is no motive to accused-appellant to commit murder of Govind Vishwakarma and cause injuries to PW-1.

iii. There are several contradictions rendering prosecution doubtful.

iv. Prosecution story inspires no confidence.

v. Witnesses are not natural. Prosecution has failed to prove its case beyond reasonable doubt. Accused-

appellant is entitled to benefit of doubt and deserves acquittal.

vi. Trial Court did not appreciate prosecution evidence with full care and cautious.

vii. Medical evidence also does not go with prosecution version.

17. Per contra learned AGA supported impugned judgment and submitted that it is a day light murder and a case of direct evidence, in which, victim sustained knife injuries and succumbed to death. PW-1 and 2 also received injuries in the same incident, that is why, their presence on the spot cannot be doubted. Even otherwise, accused-appellant himself admitted to be present on the spot on the date of incident. Thus, Trial Court has rightly convicted and sentenced him.

18. Although time, date, place of incident and murder of victim, could not be disputed from the side of defence but according to learned counsel for accused-appellant, he is not responsible for committing murder of Govind Vishwakarma and causing injuries to PW-1 and 2. From statements of PW-1, 2, 6 and 7 and defence witness also time, date, place of incident and presence of deceased on the spot stand proved.

19. Admittedly, this is a case of direct evidence, in which, Govind Vishwakarma was murdered and PW-1 and 2 were injured. Incident took place in day light. Accused-appellant and complainant, being resident of same village, are known to each other. Accused-appellant has himself admitted his presence on the date of incident in his statement under Section 313 Cr.P.C.

20. Thus, two questions are up for consideration of this Court i.e. "Whether accused-appellant is responsible for committing murder of victim-Govind Vishwakarma and causing serious injuries to PW-1 and PW-2" and "Whether Trial Court has rightly convicted accused-appellant or not?"

21. We now proceed to consider briefly, evidence of prosecution and some relevant judgments.

22. PW-1 deposed that on 27.11.2008, at about 5:00 pm, a goat of accused-appellant was grazing in his field. His brother, Govind Vishwakarma (victim), caught and tied it in his house. When PW-1, Govind Vishwakarma (victim) and Ganesh Sharma (PW-2) went to the house of accused-appellant to make a complaint, they saw that accused-appellant was beating his wife whereupon they objected and asked why he was beating his wife and told him that his goat was grazing in his field and they tied it at the door. Accused-appellant started abusing and threatening them of taking their life. When they objected him for abusing, accused-appellant, with intention to kill, took out knife, and stabbed in chest of victim. He and Ganesh Sharma tried to apprehend accused-appellant but accused attacked them with knife, resultantly, PW-1 himself, and Ganesh Sharma (PW-2) received knife injuries. Victim rushed to his house, fell down in Varandah and succumbed. Many persons of village have seen the incident. It is further deposed that he got scribed Tehrir, Ex. Ka-1, by one Sadhu Saran Sharma (not examined), put his signature and presented to Police Station concerned. Witness got injured while saving his brother in incident.

23. PW-2, Ganesh Sharma, deposed that on 27.11.2008, a goat of accused-appellant was grazing in the field of victim whereupon he caught and tied it on the door of his house. Thereafter, at 5:00 pm, he (witness), victim Govind Vishwakarma, Satrughan Vishwakarma, PW-1, went to the house of accused-appellant for making complaint and witnessed that he was beating his wife. They asked him why he was beating his wife that they took his goat who was grazing in the field. Accused-appellant started abusing in filthy language and threatened them. When victim objected him for abusing, accused stabbed knife in chest of victim. He and Shatrughan, PW-1, rushed to save him, accused-appellant attacked them with knife. He received injury on his back. Accused-appellant ran away towards Banswari. Victim, Govind Vishwakarma, succumbed to death in his house. He was also medically examined in Sadar Hospital. Incident was witnessed by Lok Nath Sharma and many persons also.

24. Both PW-1 and PW-2 withstood lengthy cross examination but nothing material could be brought so as to disbelieve their testimony. Evidently, PW-1 and PW-2 got injured in the same incident, hence their presence cannot be doubted.

25. PW-6, Dr. D.P. Singh, deposed that on 28.11.2008, he was posted, as Medical Officer; medically examined Shatrughan Vishwakarma; and found a linear abrasion of 3 cm incised obliquely situated over the left side of chest and opined that it might have been caused by some sharp weapon on 27.11.2008 at about 5:00 p.m. and was simple in nature.

26. PW-10, Dr. Chand Prakash, deposed that on 27.11.2008, while posting in District Hospital Gorakhpur, he medically examined Ganesh Sharma and found one penetrating wound 3.5 x 0.5 cm x 3.5 cm present over left side back about 8.0 cm below left scapula.

27. Evidently, PW-1 and 2 sustained injuries in the same incident. PW-1, Shatrughan Vishwakarma, sustained one injury caused by sharp object and PW-2, Ganesh Sharma, sustained penetrating wound caused by sharp pointed object. All the injuries are simple in nature and fresh. Injury report Ex.Ka-6 and 12 respectively corroborate this fact which also find support from the evidence of Dr D.P. Singh, PW-16, and Dr. Chandra Prakash, PW-10.

28. It is settled that presence of injured witnesses cannot be easily ignored. Normally an injured witness would enjoy greater credibility because he has suffered himself,thus, there will no occasion for such a person to state an incorrect version of occurrence or to involve anybody falsely and in the bargain, protect real culprit. We need not discuss more elaborately the weightage that should be attached by this Court to the testimony of injured persons since this aspect of criminal jurisprudence is no more res-inegra.

29. In ***Abdul Sayeed Vs. State of Madhya Pradesh, (2010) 10 SCC 259,*** Court held as under :-

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court.

Where a witness to the occurrence has himself been injured in

the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime *and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."* ***[Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkay vs. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. And Balraje v. State of Maharashtra.]***

29. While deciding this issue, a similar view was taken in ***Jarnail Singh v. State of Punjab,*** *where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29) "28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell.* ***In Shivalingappa Kallayanappa v. State of Karnataka*** *this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.*

(Emphasis added)

30. In **State of U.P. v. Kishan Chand (2004) 7 SCC 629,** referring the judgement of **Krishna vs State Of Haryana on 12 July, 1994,** a similar view has been reiterated by Court, observing that testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing is elicited to discard his testimony, it should be relied upon.

31. The law on the point can be summarised to the effect that testimony of an injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of crime. Such witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

32. According to learned counsel for accused-appellant, evidently, dead body was found at the door of Informant, while blood was not found at the door of deceased, therefore, dead body was shifted from anywhere to the door of deceased and it was not the prosecution case.

33. Admittedly, dead body was found at the door of deceased and inquest report was prepared there. It has also come in evidence of PW-8 that blood was

not found at the door of deceased but PW-1 and PW-2 categorically stated in his statement that accused-appellant stabbed knife in front of his house; victim ran to his house; fell down and succumbed to injuries at his door. PW-8 stated that blood stained was seen on the way leading to informant' house from accused-appellant's house.

34. Non-availability of blood at the door of deceased does not falsify prosecution case for the reasons that incident took place in front of accused-appellant's house, which was proved by PW-1, PW-2 and PW-8 and victim rushed to his house, where he fell down and died. Therefore, submission of learned counsel for accused-appellant is not acceptable and we reject the same.

35. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellant.

36. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

37. Next argument of learned counsel for accused-appellant is that PW-1 is real brother of victim and he is not an independent witness. We are not impressed upon with the same for the reasons that testimony of related witness cannot be discarded only on the ground of relationship with victim or accused.

38. It is settled law that merely because witnesses are closely relative to deceased, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible evidence.

39. Testimony of eye witness merely because he happens to be a relative of the deceased cannot be discarded as a 'close relative' would be last one to screen out the real culprit and implicate innocent person as held in **Dilip Singh v. State of Punjab, AIR,1953, SC 364.** Court has held:-

"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. 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 generalisation. 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."

40. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed:-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of Jayabalan v. U.T. of Pondicherry [(2010)1 SCC 199], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"

41. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court said :-

"11. 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.

(Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308****)."*

42. So far as the genesis of prosecution story and medical evidence is concerned, PW-1 and PW-2 categorically deposed that on the date of incident, goat of accused was grazing in field of victim who brought it and tied at the door of his house and went to house of accused for making complaint where above incident took place.

43. PW-1 and PW-2 supported prosecution case. PW-6, Investigating Officer, found blood in Varandah of accused. In this way, genesis of prosecution stands established. PW-6, Dr. DP Singh, PW-7 Dr. Gyan Chandra, and PW-8, Dr. Chand Prakash, proved medical reports. All three doctors opined that injury found on the person of deceased injured might be caused by sharp weapon, like knife, at the relevant time and date as stated by prosecution, therefore, medical evidence is totally compatible with ocular version.

44. PW-1 and PW-2 are natural witnesses who have supported prosecution. House of Informant is at the distance of 50-60 mtr. away from accused-appellant. Since goat of accused was grazing in the field of deceased,

therefore, coming of deceased and witnesses to the house of accused-appellant for making complaint and their presence on spot cannot be easily doubted. It is often seen that no villagers come forward to give evidence in support of prosecution against accused-appellant in heinous offence, like murder, due to fear of evil and it is settled principle of law that prosecution is not obliged to produce an independent witness.

45. So far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and find that the same do not go to the root of case.

46. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

47. In **Sachin Kumar Singhraha v. State of Madhya Pradesh** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

48. Lest we not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of the Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

49. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

50. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal

errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].** We therefore, find no force in this submission also.

51. Considering entire facts and circumstances of the case, statement of PWs as well documentary evidence produced by prosecution and legal proposition discussed herein before, we have no hesitation to come to conclusion that accused-appellant committed murder of Govind Vishwakarma and caused injuries to PW-1 and 2 at the time, date and place as stated by prosecution and prosecution has been able to prove its case beyond reasonable doubt. Trial Court has rightly convicted and sentenced him. Appeal lacks merit and is liable to be dismissed.

52. So far as sentence is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

53. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalized. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The court will

be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide : **(Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

54. In view of above propositions of law, the paramount principle that should be the guiding laser beam is that punishment should be proportionate to gravity of offence.

55. Hence, applying the principles laid down by Apex Court in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment imposed upon accused appellant by the Trial Court in the impugned judgment and order is not excessive or exorbitant and no occasion arises to interfere in the matter on the point of punishment imposed upon the accused-appellant.

56. Consequently, **Appeal** lacks merit and is hereby **dismissed**.

57. Lower Court record alongwith a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

58. Before parting, we provide that Sri I.P. Singh, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A526

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJBEER SINGH, J.

Criminal Appeal No. 2834 of 1988

Mushtkim @ Pappu ...Appellant(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri M.F. Ansari, Sri Ajay Kumar Pandey, Sri Keshav Sahai, Sri M. Islam

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

A. Evidence Law-Indian Evidence Act, 1872 – Criminal Procedure Code, 1973, section 161 – Statement / Dying declaration - deceased made oral dying declaration before her mother (PW-4) as to the manner in which she was burnt - PW-5, is the Executive Magistrate, who recorded the dying declaration of the deceased - obtained medical certificate

of the deceased from the Doctor - the investigating officer recorded two statements of the deceased which have been duly proved by the investigating officer - apparent from the contents of the dying declaration that it is the appellant who burnt the deceased after pouring kerosene oil on her - It is a settled proposition of law that after the death of the deceased, her statement recorded under Section 161 Cr.P.C. can be treated as her dying declaration - the dying declarations of the deceased have been duly proved by the witnesses - enough evidence on record to suggest that deceased was in a position to speak and at least she was in a fit state of mind to make her statement - the complicity of the appellant in committing the murder of the deceased, has been duly proved - The trial court was fully justified in convicting the appellant.

(Para 14, 15, 26, 28,29,)

Appeal dismissed (E-7)

List of cases cited:-

1. St. of Guj. Vs. Jayrajbhai Punjabhai Varu (2016) 14 SCC 151

2. Gaffar Badshaha Pathan Vs. St. of Mah. (2004) 10 SCC 589

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

4. Lakhan Vs St. of MP, (2010) 8 SCC 514

5. Shudhakar Vs St. of M.P. (2012) 7 SCC 569

6. Ramakant Mishra Vs St. of U.P. (2015) 8 SCC 299

7. Rafique @ Rauf & ors. Vs St. of U.P. (2013) 12 SCC 121

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned order and judgment dated 09.12.1988 passed by VIIth Additional Sessions Judge, Meerut in Sessions Trial No. 96 of 1988 convicting the appellant under Section 302 and 498A of IPC and sentencing him to undergo rigorous life imprisonment under Section 302 and one year rigorous imprisonment under Section 498A, with a direction that both the sentences shall run concurrently.

2. In the present case, name of the deceased is Khalida Begum wife of the accused-appellant. Their marriage was solomnised on 01.04.1985 and she died in her matrimonial house on 09.11.1987 after suffering 95% burn injuries. On 31.10.1987 itself, on the basis of written report Ex.Ka-1 lodged by PW-1, Nisar Ahmad, father of the deceased, FIR Ex.Ka-4 was registered against the accused-appellant and two acquitted accused under Sections 307 and 498A of IPC. On 31.10.1987 itself, dying declaration of the deceased Ex.Ka-3 was recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate wherein she has categorically stated that she was burnt by the appellant. On 01.11.1987, case diary statement Ex.Ka-14 of the deceased was recorded in which also she named the appellant to be the accused. Likewise, on 02.11.1987, in another diary statement of the deceased Ex.Ka-15, she has stated that she was burnt by the appellant. Deceased also made oral dying declaration before PW-4, Shajda Begum implicating the appellant as the main accused.

3. After the death of the deceased, inquest on her dead body was conducted on 9.11.1987 vide Ex.Ka-16 and the body was sent for post-mortem which was conducted on 10.11.1987 by PW-3, Dr. S.C. Gupta vide Ex.Ka-2.

4. As per Autopsy Surgeon, following ante-mortem injuries were found on the body of deceased:

(I) superficial to deep burn present on whole body except lower part

of abdomen, genatal region and a small portion of back i.e. inter scapula region of left side into supra scapula region of left side.

(II) cut open mark present on right leg inner and lower one third.

The cause of death of the deceased was due to shock as a result of extensive burn.

5. While framing charge, the trial judge has framed charge against accused-appellant under Sections 302, 304B and 498A of IPC whereas against two acquitted accused namely Mohd. Mohsin and Smt. Amna, charges were framed under Sections 304B/34 and 498A/34 of IPC.

6. So as to hold accused persons guilty, prosecution has examined nine witnesses, whereas three defence witnesses have also been examined. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they pleaded their innocence and false implication.

7. By the impugned judgment, the trial judge has acquitted co-accused Mohsin and Smt. Amna of all the offences, whereas appellant has been convicted under Section 302 and 498A of IPC. Hence this appeal.

8. Learned counsel for the appellant submits:-

(I) that on the same set of evidence, once co-accused has been acquitted, the trial court was not justified in convicting the appellant.

(II) that dying declaration of the deceased Ex.Ka-3 recorded by the Executive Magistrate is not reliable as at the time of making the said statement, the deceased was not in a fit state of mind. Learned counsel submits that endorsement made by the Doctor in dying declaration has been obtained after it was recorded and, therefore, it has no legal sanctity.

(III) that diary statements Ex.Ka-14 and Ex.Ka-15 of the deceased are nothing but concocted piece of evidence.

(IV) that deceased died an accidental death but unfortunately appellant has been made escape goat just because he happens to be the husband of the deceased.

(V) that it is the appellant, who hospitalized the deceased and, therefore, even assuming that any such incident had taken place, case of the appellant would not fall under Section 302 of IPC.

9. On the other hand, supporting the impugned judgment, it has been argued by the State Counsel:

(I) that conviction of the appellant is in accordance with law and there is no infirmity in the same.

(II) that there is no reason for this Court to disbelieve the dying declaration Ex.Ka-3 of the deceased recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate. He submits that 161 Cr.P.C. statements of the deceased Ex.Ka-14 and Ex.Ka-15 are to be treated as her dying declaration after her death.

(III) that the oral dying declaration was also made by the deceased before PW-4, Shajda Begum and that also supports the prosecution case.

(IV) that the mere fact that the appellant hospitalized the deceased, will

not give him any leniency because after the incident, the appellant may have felt fear in his mind of being punished by the police and that is why, he hospitalized the deceased. In any case, the heinous act of the appellant cannot be diluted just because he hospitalized the deceased.

10. We have heard learned counsel for the parties and perused the record.

11. PW-1, Nisar Ahmad is a father of the deceased and the informant, has stated that marriage of the deceased was solemnized with the appellant on 01.04.1985 and in the marriage, sufficient dowry was given by him. Since beginning, accused persons used to harass the deceased for demand of various articles like fridge and motorcycle. On 31.12.1987, he came to know about the incident and then he lodged the report.

12. PW-2, Bharat Singh, Constable, took the body for postmortem.

13. PW-3, Dr. S.C. Gupta, conducted postmortem on the body of the deceased and noticed 90% to 95% burn injuries on the body of the deceased.

14. PW-4, Shajda Begum, is the mother of the deceased, states that since the date of marriage, the deceased was subjected to cruelty for demand of dowry and various articles were given to her. She further states that the deceased made oral dying declaration before her as to the manner in which she was burnt. In cross-examination, this witness was subjected to various questions including tricky ones but she remained firm and has reiterated as to the manner in which the deceased discloses her about the incident and the ill-treatment meted to her.

15. PW-5, Mukesh Kumar Gupta, is the Executive Magistrate, who recorded the dying declaration of the deceased. He has stated that before recording the dying declaration of the deceased, he obtained medical certificate of the deceased from the Doctor and only after due certification, he recorded the statement in which the deceased had disclosed that she was burnt by the accused-appellant. He has duly proved the dying declaration Ex. Ka-3.

16. PW-6, Bhagat Singh Visth, has recorded the FIR.

17. PW-7, Ahsan Ilahi, is a maternal uncle of the deceased, has stated that he saw accused-appellant burning the deceased and that after the incident deceased was crying and shouting by saying that she was burnt by other two accused persons.

18. PW-8, G.S. Verma, is an Investigating Officer. He also recorded the diary statement of the deceased Ex.Ka-14 and Ex.Ka-15, wherein deceased has stated as to the manner in which she was burnt by the appellant.

19. PW-9, Dr. V.P. Goel, medically examined the deceased when she was first admitted in Chaurasiya Nursing Home and he has also proved the injury report of the deceased Ex.Ka-25. This witness has also proved the fitness certificate of the deceased given by him at the time of recording the dying declaration by the Executive Magistrate.

20. DW-1, Hafizuddin, has stated that in the marriage of appellant and the deceased, no dowry was settled and that the couple was living happily.

21. DW-2, Matin has stated that it is the appellant, who extinguish the fire.

22. DW-3, Dr. S.K. Singh, has stated that after injecting pathedrin and calmpose, patient would be semi-conscious. He, however, has stated that even in the case of 100% burn injury, at times, patient can speak and can also keep quiet.

23. Before we appreciate the evidence adduced by the prosecution, we feel it appropriate to refer certain judgments of the Apex Court governing the law of the dying declaration.

24. In **State of Gujarat v. Jayrajbhai Punjabhai Varu**, the Supreme Court held 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.

16. In the case on hand, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent herein in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of PW-1.

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.

18. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind

that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

19. On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in- laws in the alleged statement given to her father. 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."

25. In **Gaffar Badshaha Pathan v. State of Maharashtra,**it was held as under:

"5. Dr. A.U. Masurkar was the Chief Medical Officer of the hospital at the relevant time. The High Court has held that the recording of the dying declaration and story stated therein apparently appears to be false and concocted for the various reasons noticed in the impugned judgment. It has to be borne in mind that the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. The fact that the statement of the deceased was recorded at about 9.00 p.m. by the Head Constable cannot be doubted though an attempt to the contrary seems to have been made by the prosecution. The statements of the prosecution witnesses (PW 5 and PW 11)

also show that the statement was recorded by the Head Constable. According to PW 5, it was only a show made by the Head Constable of recording statement, since according to the said witness, the deceased was not in a position to speak at that time. Even PW 11, a doctor in the hospital, has deposed about the recording of the statement by the Head Constable though he has not formally proved the dying declaration but has certified the correctness of the endorsement of Dr. A.U. Masurkar on the dying declaration. PW 11 was shown the dying declaration. He has deposed that the certificate recorded on the dying declaration is in the handwriting of Dr. Masurkar, Chief Medical Officer of the hospital. He has further deposed that Dr. Masurkar is in the hospital since the last 12 to 15 years and that he had degree in MS and was estimated to be an honest and expert surgeon of the area. One of the reasons which had strongly weighed with the High Court in rejecting the dying declaration is that the endorsement of the doctor is only about the deceased lady being conscious and not that she was in a fit condition to make the statement. The High Court went into distinction between consciousness and fitness to make statement. On the facts of the present case, we are unable to sustain the approach adopted by the High Court. It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. Under these circumstances, the dying declaration could not have been rejected on the ground that it does not contain the endorsement of the doctor of the fitness of the lady to make the statement as the certificate of the doctor only shows that she was in a conscious state. The endorsement of the doctor aforequoted is not only about the conscious state of the lady but is that she made the statement in a conscious state."

26. In **P. Mani v State of Tamilnadu,** while considering the suspicious dying declaration, it has been held by the Apex Court that the conviction can be based solely on the basis of dying declaration alone, but the same must be wholly reliable and trustworthy. Para 14 of the said judgment reads thus:

"14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard 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 records 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 records 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 Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In 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."

27. In **Lakhan v. State of MP,** the Supreme Court after discussing number of judgments on the point of dying declarations summarized the law in this regard, as under:

"20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

28. In **Shudhakar v. State of MP,** the Supreme Court held as under:

"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."

29. In **Ramakant Mishra v. State of UP,** the Supreme Court observed as under:

"9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:

"Dying Declarations - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. U.S., Kan., 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196.

Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be

his impending death is not excluded by the hearsay rule. Fed. Evid.R. 804 (b) (2).

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration."

24. In the present case, the dying declaration of the deceased Ex.Ka-3 recorded by PW-5, Executive Magistrate reads as under:-

" थानाध्यक्ष कोतवाली की सूचना पर मैं मुकेश कुमार गुप्ता सिटी मजिस्ट्रेट मेरठ चौरसिया नर्सिगं होम पर रोगी श्रीमती खालिदा का बयान लेने पहुॅचा। मौके पर उपस्थित डा0 की राय पर कि रोगी बयान देने में मानसिक व शारीरिक रूप से स्वस्थ है रोगी का बयान लेना प्रारम्भ किया। रोगी से प्रश्न पूछे गये जिसके उत्तर निम्न हैं।

प्रश्न 1– मैं मजिस्ट्रेट बयान लेने आया हूॅ क्या आप समझ रही हैं।

उत्तर– हॉ

प्रश्न – आपके साथ क्या घटना घटित हुई ?

उत्तर– आज करीब 1 1/2 –2 बजे जब मेरे घर पर मेरे आदमी के अलावा कोई नहीं था, मेरे पति ने मेरे उपर मिट्टी का तेल छिड़क दिया तथा आग लगा दी। आग लगाने के बाद मैनें शोर मचाया, मौहल्ले वाले लोग आ गये। उसके उपरान्त मेरे पति ही मुझे इस नर्सिंग होम में लाये।

प्रश्न – आप अपना बयान सोच समझकर दे रही हो?

उत्तर– मैं बयान सोच समझकर दे रही हूॅ। मेरे पति ने ही मुझे जलाया है।

प्रश्न– पति ने तुम्हें क्यों जलाया ?

उत्तर– मैं खर्चे के लिए पैसे मांगती थी। इसी कारण से मेरे पति ने मुझे जला दिया। 7:15

ह0 अपठनीय

31-10-87

City Magistrate

Meerut "

25. The above dying declaration has been recorded by the PW-5, Mukesh Kumar Gupta, Executive Magistrate and has been duly endorsed by PW-9, Dr. V.P. Goel. In the Court, PW-5, Executive Magistrate has categorically stated that it is he, who recorded the dying declaration after obtaining the certificate from the Doctor and likewise PW-9, V.P. Goel, who gave the certificate, has also affirmed this fact that after his certificate, dying declaration was recorded by the Executive Magistrate. Considering the evidence available on record, we have absolutely no doubt about the authenticity of the dying declaration recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate.

26. From the contents of the dying declaration, it is apparent that it is the appellant who burnt the deceased after pouring kerosene oil on her. Apart from the above dying declaration, the investigating officer recorded two diary statements of the deceased on 1.11.1987 and 2.11.1987 vide Ex. Ka-14 and Ex.Ka-15. These two documents have been duly proved by the investigating officer. It is a settled proposition of law that after the death of the deceased, her statement recorded under Section 161 Cr.P.C. can be treated as her dying declaration.

In the present case, diary statements of the deceased were recorded on 01.11.1987 and 2.11.1987 and she died on 09.11.1987. After the death of the deceased, these two statements made by the deceased becomes her dying declaration. Law in this respect is well settled.

30. In **Rafique alias Rauf and Ors. Vs. State of Uttar Pradesh,** the Apex Court held as under:

"16. The important question for consideration, therefore, is whether the said statement made by the deceased can be taken as a dying declaration and reliance can be placed upon the same.

17. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of P.W.6, Investigating Officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the Investigating Officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of P.W.5 the postmortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.

18. The High Court, therefore, reached a conclusion that the deceased Zahiruddin, was in a position to speak and that the statement under Ext.Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the Investigating Officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial Court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.

19. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed upon the dying declaration and also the implication of Section 162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in Khushal Rao vs. State of Bombay - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and ''Phipson on Evidence' - 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

20. The Full Bench of the Madras High Court in Guruswami Tevar - AIR 1940 Mad 196 in its unanimous opinion stated that no hard-and-fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in

the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patnant decision of this Court reported in Sri Bhagwan v. State of U.P. - (2013) 12 SCC 137, to which one of us was a party, the Court dealt with more or less an identical situation and held as under in paras 21 and 22: and Nagpur also expressed the same view in the decisions reported in Mohd. Arif v. Emperor - AIR 1941 Pat. 409 and Gulabrao Krishnajee v. Emperor - AIR 1945 Nag. 153.

26. In a recent decision of this Court reported in Sri Bhagwan v. State of U.P. - (2013) 12 SCC 137, to which one of us was a party, the Court dealt with more or less an identical situation and held as under in paras 21 and 22:

"21. As far as the implication of 162(2) CrPC is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned Senior Counsel for the respondent, once the said statement though recorded under Section 161 CrPC assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32(1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 CrPC. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162(2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the

appellant also stands rejected."....

27. Apart from the above three dying declarations, the deceased also made oral dying declaration before PW-4 and the said witness has also proved the oral dying declaration.

28. Taking the cumulative effect of the evidence, we have no reason to disbelieve the dying declarations of the deceased which have been duly proved by the witnesses. The mere fact that certain medicines were given to treat the deceased does not mean that she was not in a fit state of mind to make the dying declaration. There is enough evidence on record to suggest that from 31.10.1987 to 09.11.1987, deceased was in a position to speak and at least she was in a fit state of mind on 31.10.1987, 01.11.1987 and 02.11.1987 to make her statement.

29. Considering all these aspects of the case, the complicity of the appellant in committing the murder of the deceased, has been duly proved.

30. We find no substance in the argument of the defence that as the appellant hospitalized the deceased, some leniency be shown to him. The appellant might have hospitalized the deceased because of fear in his mind but that does not entitle him for any leniency. The trial court was fully justified in convicting the appellant.

31. The appeal has no substance and the same is, accordingly, dismissed.

32. Accused-appellant is reported to be on bail. His bail bond stands cancelled and he be taken into custody immediately for serving the remaining sentence.

33. We appreciate the assistance rendered by Sri Ajay, Amicus and we direct the State Government to pay Rs. 5,000/- towards his remuneration.

(2019)11ILR A538

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No: 2854 of 2017

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

Counsel for the Appellant:
Sri P.K. Singh

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

A. Criminal Law -Protection of Children From Sexual Offences Act, 2012, sections 3 / 4; Indian Penal Code, 1860 - Sections 376, 506 & Code of Criminal Procedure - Section 374(2) of Cr.P.C. - Quantum of punishment - in case of conviction under Section 376 I.P.C as well as for penetrative sexual assault, punishable under Section 4 of POCSO Act, the sentencing is to be made under Section 4 of the POCSO Act. , because it is for graver degree sentence.

B. Sentencing - Modification of sentence - The convict-appellant has no criminal antecedent - There is likelihood of him being brought in the main stream of society after repent and reformation - sentence of seven years with fine of Rs.15,000/- and in default six months' additional imprisonment under Section 4 of POCSO Act was adequate and proper sentence - Imposed sentence under Section 376 I.P.C. was not permissible as per section 42 of POCSO Act. Appeal partly

allowed regarding quantum of sentence for imprisonment, awarded under Section 376 I.P.C. - dismissed for rest of sentence awarded under Section 506 I.P.C. and Section 3/4 of POCSO Act, - The sentence awarded by trial judge substituted - Convict-appellant sentenced for offence punishable under Section 506 I.P.C. with one year simple imprisonment - further sentenced with seven years' rigorous imprisonment and fine of Rs.15,000/- and in default six months' additional imprisonment for offence punishable under Section 3/4 of POCSO Act. (Para 3,4,7, 8)

Appeal partly allowed. (E-7)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed by convict-appellant Shyam Sunder against judgment of conviction and sentence made therein in Special Sessions Trial No. 579 of 2013 (State Vs. Shyam Sunder), arising out of Case Crime No. 351 of 2013, under Sections 376, 506 I.P.C. read with Section 3/4 POCSO Act, Police Station Kalyanpur, District Kanpur Nagar, passed by Court of Special Judge (POCSO Act) / Additional Session Judge, Court No. 14, Kanpur Nagar.

2. Memo of appeal contends that trial court failed to appreciate facts and evidence placed on record. There was inordinate delay in lodging the F.I.R. and it was without any explanation. There was inconsistency in medical report and oral testimony, resulting improvement and exaggeration in prosecution case. Owing to dispute of tenancy, this false implication was made. Hence, this appeal with a prayer for setting aside impugned judgment of conviction and sentence made therein.

3. At the very outset, it is mentioned by Sri P.K. Singh, learned counsel for appellant that he is not challenging the judgment of conviction, wherein convict-appellant has been convicted for offence punishable under Sections 376, 506 I.P.C. read with Section 3/4 of POCSO Act. Rather, quantum of punishment has been challenged because trial court has convicted and sentenced the convict-appellant with ten years' rigorous imprisonment and fine of Rs.10,000/- and in case of default six months' additional rigorous imprisonment under Section 376 I.P.C. with further sentence for one year's simple imprisonment under Section 506 I.P.C. with additional imprisonment of seven years' imprisonment with fine of Rs.15,000/- and in case of default six months' additional rigorous imprisonment under Section 3/4 of POCSO Act. There had been a direction for concurrent running of sentences and adjustment of previous imprisonment in this very case, towards above sentence awarded. Whereas, as per Section 42 of the Protection of Children From Sexual Offences Act, 2012 (Act No. 32 of 2012) *"**Alternate Punishment**-Where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."* i.e. punishment may not be made in both

the provisions of Indian Penal Code as well as of POCSO Act. Rather, the punishment, which is higher in degree, for one and same offence, as provided under POCSO Act as well as I.P.C. is to be chosen and that is to be awarded. The awarded sentence by trial court under Section 376 I.P.C. was ten years' rigorous imprisonment with fine of Rs.10,000/- and in default, six months' additional rigorous imprisonment. Again for same offence of penetrative sexual assault i.e. rape, defined under Section 375 I.P.C. as well as Section 3 of POCSO Act, punishable under Section 376 I.P.C. and Section 4 of POCSO Act, trial court has awarded sentence of seven years imprisonment with fine of Rs.15,000/- and in default six months' additional imprisonment. Hence, it was apparently erroneous.

4. For determination of this point regarding higher degree of sentence, Section 376 I.P.C. provides whoever except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life or for a term which may extend to ten years and shall also be liable to fine, unless the woman raped is his own wife and is not under 12 years of age, in which case he shall be punished with either description for a term which may extend to two years or fine or with both. Meaning thereby, punishment under this section is of two categories. First is not less than seven years, which may extend to life. The second one is for a term, which may extend to ten years and shall also be liable to fine. The trial Judge in present case has invoked jurisdiction for this second part because fine has been imposed along with ten years rigorous imprisonment, which is not provided in first part. Whereas under POCSO Act under Section 4 the punishment for penetrative sexual assault is "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 i.e. imprisonment not less than seven years extending up to life imprisonment, along with fine has been provided in this Section 4. Hence, it is a graver punishment in degree. Because under Section 376 I.P.C., the punishment of life imprisonment was with no fine and a punishment which was with fine was up to ten years only. Whereas under Section 4 of POCSO Act punishment provided is up to life imprisonment, but not less than seven years coupled with fine. Hence, it is a graver punishment. Hence, as per Section 42 of POCSO Act, in case of conviction under Section 376 I.P.C as well as for penetrative sexual assault, punishable under Section 4 of POCSO Act, the sentencing is to be made under Section 4 of the POCSO Act. Because it is of graver degree sentence. The trial Judge, in impugned judgment, has awarded ten years' rigorous imprisonment with fine for offence punishable under Section 376 I.P.C. and he has further sentenced rigorous imprisonment of seven years with fine and in default additional imprisonment, under Section 4 of POCSO Act. Hence, prayer for setting aside sentence provided under Section 376 I.P.C. has been made.

5. Sri K.K. Rajbhar, learned A.G.A. has vehemently opposed this contention by mentioning that sentence awarded in

I.P.C. was in view of the provisions given under the Code, whereas under Section 4 of POCSO Act, it was within provision of the above Act. The Court had taken care for a direction for concurrent running of sentences and it cannot be said that twice sentencing is there. Hence, this appeal, against quantum of punishment, be dismissed.

6. From the very perusal of legal provision of Section 376 I.P.C., which provides for punishment of rape and Section 4 of POCSO Act, which provides punishment for penetrative sexual assault, it is apparently clear that sentence to be provided under Section 4 of POCSO Act is greater in degree then of I.P.C.. Because under POCSO Act the minimum sentence is seven years, which may extend to life imprisonment and it is to be coupled with fine. Whereas under Section 376 I.P.C. minimum sentence as the Code was in effect on that date is seven years imprisonment, which may extend up to life imprisonment, but there is not provision for fine and if fine is to be imposed then it is for second category where the maximum sentence is up to 10 years coupled with fine. Hence, the learned trial Judge was to sentence under Section 4 of POCSO Act because of Section 42 of POCSO Act and under Section 4 of POCSO Act, sentence awarded is of seven years' imprisonment with fine and in default additional imprisonment of six months, which was in accordance with the provision of Section 4. The punishment awarded for offence punishable under Section 376 I.P.C. i.e. ten years' rigorous imprisonment with fine of Rs.10,000/- was not to be awarded as per Section 42 of POCSO Act. Hence, this part of quantum of sentence is to be set aside. There is no State appeal for enhancement of punishment awarded under Section 4 of POCSO Act.

7. The factual aspect of this case is that prosecutrix was held to be of 15 years in medical age determination, though she was said to be of 11 years in F.I.R. (Ext.Ka-1) and other statement recorded. But from the perusal of first information report, it is apparent that this report was got lodged for above offence of rape after repeated rape being said to be made by convict-appellant. In between, neither prosecutrix disclosed the occurrence nor ever protest was raised. The last occurrence of rape was said to be of Chaitra Navratra of year 2013 i.e. a delayed report. The convict-appellant is of no criminal antecedent. There is likelihood of him being brought in the main stream of society after repent and reformation. Hence, sentence of seven years with fine of Rs.15,000/- and in default six months' additional imprisonment under Section 4 of POCSO Act was adequate and proper sentence.

8. Under above facts and circumstances, imposed sentence under Section 376 I.P.C. was not permissible as per section 42 of POCSO Act. Hence, appeal is liable to be partly allowed regarding quantum of sentence for imprisonment, awarded under Section 376 I.P.C.. But for rest of sentence awarded under Section 506 I.P.C. and Section 3/4 of POCSO Act, the same is to be dismissed. Accordingly, it is being partly allowed. The sentence awarded by trial judge is being substituted as below.

Order

Convict-appellant Shyam Sunder is being sentenced for offence punishable

under Section 506 I.P.C. with one year simple imprisonment. He is further sentenced with seven years' rigorous imprisonment and fine of Rs.15,000/- and in default six months' additional imprisonment for offence punishable under Section 3/4 of POCSO Act. Both the sentences shall run concurrently and adjustment of previous imprisonment in this case crime number shall be made against above awarded sentence.

9. Copy of the judgment along with lower Court record be transmitted to trial Court for amendment of warrant of conviction and sentence as per above conviction and sentence and for follow up action.

(2019)11ILR A542

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR-IX, J.

Criminal Appeal No. 2963 of 2009

Hasam & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Sushil Kumar Pandey, Sri Abhinav Singh, Sri Anil Raghav, Sri Brijesh Sahai, Sri Nazrul Islam Jafri, Sri Veer Singh, Sri S.I. Jafri

Counsel for the Opposite Party:
A.G.A., Sri Bakhtyar Yusuf

A. Evidence Law-Indian Evidence Act,1872 - Medical evidence (postmortem report) fully corroborates the prosecution version as well as testimony of prosecution witnesses - ocular evidence has been fully supported by medical evidence - The presence of witnesses is proved to be natural and their statements are nothing but disclosure of actual facts relating to the occurrence - There is nothing on record to show that PW-2 had any animous against the accused appellants - The testimony of prosecution witnesses of fact are cogent credible and trustworthy - both the witnesses of fact have proved the prosecution version and their testimonies is fully supported by medical evidence therefore motive loses its significance - there are some minor contradictions in the depositions of the prosecution witnesses of facts that too in regard to the subsequent events and not to the actual incident - minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission - findings of conviction for the offence punishable under Section 302 I.P.C. recorded by the trial court are well substantiated by the evidence on record - the conviction recorded against the accused appellants under Section 302 I.P.C. is hereby maintained and affirmed. (Para 6 ,58,59,64,69,71)

B. Indian Evidence Act,1872 - Section 25, Section 26 , Section 27 - Section 27 of the Indian Evidence Act is in the nature of an exception to the general rules contained in the two preceding sections i.e. under section 25 and 26 - Being an exception to the general rule it has to be strictly construed - The section does not permit the admission in evidence of the whole of the confession, but of such portion only of it as can be said to relate distinctly to the fact

discovered - The accused appellants were arrested by the police personnel and two pistols and cartridges were recovered from their possession - In view of this the portion of the alleged joint statement by the accused appellants wherein they admitted that they had committed the murder with the pistols recovered from their possession, this fact would be admissible in evidence. (Para 70)

Appeal dismissed (E-7)

List of cases cited:-

1. Mritunjoy Biswas Vs Pranab @ Kuti Biswas & anr. (2013) 12 SCC 796

2. St. of U.P. Vs Krishna Master & anrs. (2012) 12 Supreme Court Cases 324

3. Amit Vs St. of U.P. (2012) 4 SCC 107

4. Hukum Singh Vs St. of Raj. (2000) 7SCC 490

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

6. Vijay Shankar Vs St. of Haryana (2015) 12 SCC 644

7. Abdul Waheed Vs St. of U.P. (2016) 1 SCC 583,

8. Gopal Vs St. of U.P. (1999) 39 ACC 98

(Delivered by Hon'ble Anil Kumar-IX, J.)

1. This appeal has been filed against the judgment and order dated 23.04.2009 passed by Additional Sessions Judge Court No. 9, Muzaffarnagar in Sessions Trial No. 405 of 2005 (State of Uttar Pradesh Vs. Hasam and another) arising out of Case Crime No. 06 of 2005 under Section 302 Indian Penal Code (here-in-after referred to as "I.P.C."), Police Station- Chhapar, District- Muzaffarnagar whereby both the appellants Hasam and Nazam have been convicted and sentenced to imprisonment for life with a fine of Rs. 10,000/- under Section 302 I.P.C. with default stipulation.

2. The prosecution case in brief is that the informant Mohabbat Ali has lodged F.I.R. on 16.01.2005 at 05:15 p.m. at police station- Chhapar, District- Muzaffarnagar alleging therein that on 16.01.2005 he along with Haneef, Aladeen and his brother Ajaz (deceased) were taking off peels of the sugarcane in the field of Ajaz. At about 4:30 p.m. both the accused Hasam and Nazam came there with Tamancha (country made pistol) in their hands and said that Ajaz was the pairokar of civil case pending in the court, he must not be spared alive. Both the assailants fired with their respective weapons on Ajaz (brother of the informant) who received fire arm injuries on right side back and left eye and died on the spot. The entry was made in G.D. of police station as Report No. 24 at 17:15 hrs. on 16.01.2005 and investigation was taken up by PW-4 Virendra Singh the then posted as Station Officer at police station Chhapar.

3. After the registration of the F.I.R. at police station, Investigating Officer proceeded to the spot with necessary relevant papers and started investigation of the case. He directed Sub-Inspector Prem Prakash Giri (PW-5) to conduct the inquest of the deceased on spot. The inquest proceeding commenced at 6:30 p.m. and completed at 8:30 p.m. on 16.01.2005. Inquest report is exhibit Ka-6. In the inquest report opinion was expressed unanimously that deadbody be sent for postmortem examination so that cause of death could be ascertained

properly. In the process certain relevant papers were prepared by PW-5 and he has prepared inquest report, photo nash exhibit Ka-7. Letter to R.I. exhibit Ka-8, letter to C.M.O. exhibit Ka-9. After conducting inquest and observing necessary formalities, the deadbody was entrusted to two constables Udai Veer Singh and Harpal Singh for postmortem examination.

4. Thereafter postmortem examination of the deadbody of Ajaz was conducted by Dr. Rajesh Singh PW-3 at 2:40 p.m. on 17.01.2005 at district hospital Muzaffarnagar. Postmortem report is exhibit Ka-2. According to the postmortem report doctor has found following ante-mortem injuries on the deadbody of the deceased:-

(i) Firearm entry wound size 1.5 cm X ½ cm on left eye-brow margins are inverted an area of blackening 07cm X 5.5 cm on left front forehead.

(ii) Exit wound- Size 2.5 cm X 1.5 cm on just below the left mandible 2.5 cm from left ear. Margins are everted and irregular edges. Injury no. 1 is corresponding to injury no. 2 i.e. wound of exit. The path is communicating from injury no. 1 to no. 2 maxillary bone upper side fracture present.

(iii) Firearm injury size 4.5 cm X 3 cm on Rt. Side of back of chest, 5 cm below from scapula & 16 cm from midline (vertebral column) wound margins are inverted and lacerated the wound is extended inner right & left lung and to accending aorta 7th & 8th right ribs are fractured. Pellets recovered from both lungs.

Doctor opined that the duration of death was approximately one day old and cause of death is due to ante-mortem firearm injuries on the vital organs.

5. At the time of occurrence PW-4 Virendra Singh was posted as Station Officer of police station Chhapar, Muzaffarnagar. In his presence, F.I.R. of the Case Crime No. 06/2005 under Section 302 I.P.C. was registered on the basis of the written report of the complainant Mohabbat Ali, brother of deceased. Investigation of the case was taken up by PW-4 Virendra Singh. He directed to Sub-Inspector Prem Prakash Giri PW-5 to conduct and prepare the inquest report in dragon light and petromax. He has recorded statement under Section 161 Cr.P.C. of the complainant Mohabbat Ali and eye witness Haneef. On 17.01.2005, he has recorded statement of the witnesses of the inquest and eye witness Aladeen. He inspected the spot on the pointing of complainant and prepared site plan which is exhibit as Ka-3. On 22.01.2005 at 8:40 a.m. he arrested both the accused Hasam and Nazam near the Kabristan on Basera Madak Road. He recovered one Tamancha 315 bore and one live cartridge from the possession of accused Hasam and one Tamancha 12 bore, two live cartridges from the possession of Nazam. Against Hasam and Nazam cases were registered under the Arms Act as Case Crime No. 16 of 2005 & Case Crime No. 17 of 2005 under section 25/27 Arms Act respectively. He sent the recovered firearms to Forensic Science Laboratory, Agra for examination. He recorded the statement of Sub-Inspector Prem Prakash Giri, Constable Harpal Singh and Udaiveer Singh. After investigation he has submitted charge-sheet against both the appellants Hasam and Nazam in aforesaid crime no. ;6 of 2005 under

aforesaid section 302 I.P.C. Charge-sheet is marked as exhibit Ka- 5.

6. In the process, case of both the accused was committed to court of sessions where the Case Crime No. 6 of 2005 under section 302 IPC was numbered as Sessions Trial No. 405 of 2005. It will be proper to mention here that separate sessions trial under Section 25 Arms Act were registered as Sessions Trial No. 672 of 2005 and Sessions Trial No. 673 of 2005 against each of the accused person for the recovery of firearms from them. The trial was entrusted to the court of Additional Sessions Judge, Court No. 9 Muzaffarnagar. The trial of cases under Section 25/27 Arms Act were also proceeded and decided with the trial of this case resulting into acquittal of the accused appellants from the charfges of section 25 Arms Act.

7. The trial court after hearing the prosecution as well as defence and perusing the material available on record framed the charges against the accused-appellants under section 302 IPC. The charges framed against them were read over and explained to them. The accused appellants abjured the guilt and claimed to be tried. Thus prosecution was directed to produce all its testimonies by which it proposes to prove guilt of the accused person. The prosecution has examined as many as seven witnesses, the brief sketch of these witnesses is as here-under:-

8. The prosecution had examined informant Mohabbat Ali (P.W.1), Aladeen (P.W.2) as eye witness, Dr. Rajesh Singh (P.W.3), S.H.O.Virendra Singh (P.W.4), Sub-inspector Prem Prakash Giri (P.W.5) , constable Virendra Kumar P.W 6 , Sub-inspector and Harpal Singh (P.W.7) as formal witnesses.

9. After conclusion of the prosecution evidence, the accused appellants namely Hasam and Nazam were examined under Section 313 Cr.P.C.In their statement they denied all the charges attributed against them and pleaded for innocence. They stated that they have been falsely implicated in the present case due to animosity. They demanded opportunity to produce evidence in defence. They produced Rishipal Singh Radio Station Officer as D.W.1.

10. The prosecution in order to corroborate its stand examined Mohabbat Ali (P.W.1) on 1.2.2006. who is the brother of deceased and the complainant eye witnesses of the incident . He deposed that he is well acquainted with the accused appellants Hasam and Nazam. The accused appellants are belonging to his village and are his neighbours. He is also knowing to deceased Ajaz who was his real younger brother. The occurrence had taken place on 16.1.2005 at about 4 to 4.30 p.m. He in association with Haneef, Aladeen (PW-2) and his brother Ajaz (now deceased) were peeling sugarcane in the field. At that place, the accused persons namely Hasam and Nazam came at around 4 to 4-30 p.m. and on reaching at that place they exposed that Ajaz was doing the pairvi of cases in the civil court hence today they shall not spare him. Both the accused persons namely Hasam and Nazam were equipped with country made pistol. They fired at Ajaz, the brother of the complainant. The first fire hit at the right side chest and the second fire hit on his left eye as a result of which he succumbed to injuries on the spot.

Thereafter accused persons fled from the spot unleashing reign of terror by extending threats and hurling abusive and vituperative words. P.W.1 Mohabbat Ali immediately rushed at the police chawki. It was informed by the personnel posted at the police chowki to get the first information report registered at the police station. The first informant got the report written sitting at the house by his nephew Hakim Ali. The report was written verbatum by Hakim Ali at the dictate of the complainant. The report was heard by him on the recital of Hakim Ali. Thereafter the written report was handed over at the police station concerned. P.W.1 Mohabbat Ali had identified the writing and signature of Hakim Ali. He had seen him reading and writing. The paper no.5 was read to P.W.1 Mohabbat Ali. He proved that it was the same report which was got written by Hakim Ali and was handed over at the police station concerned. The said written report was marked as Ext.Ka.1.

11. P.W.1 Mohabbat Ali divulged that his house and the house of accused persons are situated in the same vicinity. Prior to 5 to 6 months of the incident, there was rift between the complainant and the accused persons on the issue of exit of water. The said issue was pacified on the intervention of some dignified persons of the locality. He had acquiesced proposal put forth by the persons of the locality and was satisfied but the accused persons were nurturing animus and grudge against him. On account of former animosity, the accused persons namely Hasam and Nazam had done to death his brother Ajaz by firing upon him.

12. In cross examination he unravelled that Hakim Ali is practicing in civil court at Muzaffrar Nagar who is standing behind him. The sun had set on after one hour of the incident. The police personnel had come at the spot after enshrouding of sun. He could not ascertain as to whether the police personnel who came on the spot were hailing to Basere or Chhapar. When the P.W.1 Mohabbat Ali reached at the police station concerned, the Station Officer were present there. He informed to the Station Officer concerned that such an occurrence had taken place in which his brother was done to death with firing. He stayed at the police station concerned about 15-20 minutes. His nephew Hakim Ali was also associated with him. P.W.1 Mohabbat Ali proceeded from the police station firstly and the police personnel departed from the police station concerned later on. He reached at the place of occurrence with police personnel. When the complainant and other persons reached at the place of occurrence, the sky was darkened but it was not night. The person standing at a distance of 20 yards was visible. No higher officer of the police had reached at the place of occurrence in his presence. At the place of occurrence there were three police officer and the rest were police personnel. He could not ascertain who was the Station Officer, who was the Circle Officer and who was the Senior Superintendent of Police. It is wrong to say that he was not present on the spot and had not seen the incident. He has also stated position of Ajaz (deceased) and the witnesses on spot at the time of incident. He could not divulge the duration of stay of police personnel whether they stayed two hours, or four hours or six hours. He proved his presence at the place of occurrence.

13. The P.W. 1 Mohabbat Ali was further cross examined on 23.3.2006. He

deposed that the corpse of Ajaz had reached at Muzaffar Nagar mortuary on 16.1.2005 at about 11.00 P.M. The complainant in association with Hakim Ali (Advocate), Haneef Aladeen and other persons reached at the mortuary with the corpse of Ajaz. Two to four persons remained present with the dead body of Ajaz. Rest of the persons returned to village. The persons staying at the mortuary with corpse were Shaukeen and Kayyum. The persons associated with the corpse of Ajaz from the place of occurrence to morturary were Mohd. Azad s/o Fazal, Nawab s/o Idreesh, Firoz uddin s/o Shamiuddin, Tanamjeem s/o Aswar Ali and Shaukat s/o Ghaseeta. The corpse of deceased Ajaz was brought at the mortuary in Tempo. Ambassador car was also used by other persons in coming at the mortuary. The dead body of Ajaz was escorted by two police personnel. The station officer concerned directed them to reach at the mortuary on the assurance that he will reach very soon. The Station Officer concerned had reached at the mortuary within 30 to 45 minutes. The Station Officer concerned was at Chhapar police station. One constable had come with the station officer concerned. The P.W.1 Mohabbat Ali did not recollect how long the Station Officer concerned stayed at the mortuary because he was coming back to his village leaving the corpse of Ajaz. Hakim Ali (Advocate) stayed at the village. There was no light at the mortuary. He had also not gone inside the room. It was not within his knowledge as to whether there was electric or not. The person standing there had opened the lock. Next day, he had reached at the mortuary at about 7 'o' clock. When the P.W.1 Mohabbat Ali reached at the mortuary, the police personnel from Chhapar had come there. The station officer concerned in association with two or three police personnel came there at about 9 'O' clock. The police personnel stayed there approximately three or four hours. Two police personnel who had gone with him (P.W.1 Mohabbat Ali) remained there three or four hours. He was not aware about any interrogation made by the Station Officer concerned at the mortuary. The Station Officer concerned was making confabulation with the persons standing there. The station officer present at the mortuary was seen at the place of occurrence. He had seen the station officer concerned making discourse with Mohd. Ajad, Nawab, Firoz Uddin , Tanjeem , Shaukat Ali. These five persons had reached at the mortuary with him in the morning. The station officer concerned had seen the corpse of Ajaz at the mortuary. The signature on the Panchayatnama was obtained at the mortuary. The signature of witnesses namely Mohd. Azad s/o Fazla, Nawab s/o Idrish, Firozuddin s/o Shamimuddin, Tanjeem s/o Akhtar Ali ,Shaukat Ali s/o Ghasita was obtained at the house situate at Basera. The dead body of Ajaz was lying in the house at the moment of Panchayatnama. His house was existing on the road running from Varla to Basera towards north side. His house was adjoining to the road. Ajaz (deceased) was living in that house. The house of accused Hasam and Nazam was situated at a distance of 500 metres from his house. It was also divulged by him that there was demarcative wall in between these houses. It is wrong to say that his house as well as the house of Hasam and Nazam would not have been existing side by side.

14. The field where the occurrence took place is situated towards north side

on the road running from Barla Basera . The field which is the place of occurrence is existing at a distance of ½ kilometre on the road running from Khai Kheri. The chak road was carved out towards west from the path running from Khai Kheri. His chak was existing in front of the chak of Faiyaz running from the Chak road. Running from the path of Khai Khera at a distance of 90 metres towards west , his chak was existing. To reach at the chak, he had to proceed towards south from the chak road. The field of occurrence would have been about seven bighas. The crops of sugar cane was existing in that field. There were crops of sugar cane around the field of occurrence. The height of the sugar cane was more than the height of the men. The harvesting of the sugar cane was not continuing in the adjacent field. In the adjoining of his field, there was field of Nawab s/o Gafoor towards west, field of Faiyaz s/o Raham Ilahi towards east, field of Lal Fakeer Chand no member of their family were present there at the moment of occurrence. The complainant (P.W.1) was peeling off sugar cane at his field at about 10.00 a.m. and Ajaz as well as both the witnesses were also peeling off sugar cane. The complainant was having the peeling equipment i.e. Palkati and Daranti. Bogi (cart) was standing in the field. They were peeling off sugar cane from 10.00 a.m. to 4.00 p.m. In the intervening period, they used to suck juice from the sugar cane. The complainant and three others had peeled off till the crucial moment of occurrence about 7 to 8 bundles. The peelings of the sugar cane were scattered. The trunks of peeled cane were being loaded on the Bogi (cart). The complainant had not met with the accused Hasam and Nazam in the morning while going to his sugar cane field. The accused appellants had no field adjacent to the spot of occurrence. The witnesses namely Haneef and Aladeen had also no field in the adjacent to the field of occurrence. They used to go near the place of occurrence for peeling off the sugar cane. The deceased (Ajaz) had worn shirt, pant, sweater. Socks etc. at the moment of occurrence. The cloth put on his head was removed. At the moment of occurrence, the complainant was handing over peeled trunk of sugar cane to Ajaz. The Bogi was leashed with bullock. Ajaz (deceased) was standing on the Bogi (cart) at the moment of occurrence. Ten to twenty bundles of peeled sugar cane were loaded on the cart. Ajaz (deceased) was adjusting to those bundles. The mouth of the bullock was towards west. Ajaz at the moment of occurrence was towards east at the back of cart.. The miscreants did not search to Ajaz rather he was visible from the front side on the Bogi (cart). The miscreants had appeared from the sugar cane field of Nawab towards the western side. No quarrel had taken place prior to this incident. Both the malfactors remained down to the Bogi (cart). The complainant was standing towards east of the Bogi (cart). Ajaz (deceased) was standing at the height of 3 or 4 feet from the ground. Ajaz (deceased) was sitting at the moment of occurrence and his face was towards east. The malfactors fired upon him from the direction of south. Ajaz (deceased) could not get time to flee from the place of occurrence. The accused persons were standing in contiguous of the Bogi (cart). The malfactors had fired without stretching their elbow. There was altitude of about one foot between the accused persons and the deceased (Ajaz) meaning thereby deceased (Ajaz) was standing at the height of about one foot from the accused

persons. The complainant had raised shrieks and shrill at the moment of occurrence but nobody had come. The malfactors did not fire upon any other person except Ajaz. The accused persons had opened only two round of firing at the place of occurrence. The weapon by which the miscreants were equipped, one of them was 315 bore . He had not seen that weapon earlier. On being interrogated by the people, it was divulged by him that one weapon was of thin barrel and the another was of thick barrel. During the course of confabulation, people informed him that it is called Katta (country made pistol. On being wounded, Ajaz had fallen down from the cart. The peeled trunks of sugar cane were also saturated with blood. Blood was also fallen down. The deceased (Ajaz) had fallen towards north from the Bogi (cart). After executing the incident, the accused persons had run away from the place of occurrence. The complainant had observed the condition of Ajaz by touching his body. The condition of deceased (Ajaz) was highly precarious even he was neither inhaling nor exhaling. There was no stain of blood on the cloth of compl;ainant nor Haneef and Aladeen. The place where Ajaz had fallen down, was saturated with profuse blood. After receiving firearm injury, he observed Ajaz where he had sustained injuries. Skull bone was not fractured. The left eye of the deceased (Ajaz) had come out on account of injuries. The next injury was caused in the right side of abdomen. The complainant did not pay heed on the size of wounds. He had seen only two injuries on the person of the deceased. When the police personnel came on the spot, they did not allow anybody to touch the body of the deceased. When the police personnel touched the body of the deceased (Ajaz), the complainant was present on the spot. When the police personnel touched the body of the deceased (Ajaz), at that moment there were only two injuries on his person. The complainant did not take notice as to whether the blood was exuding from the body of the deceased (Ajaz) or not. One eye had come out and the other eye was partially opened. The deceased (Ajaz) was not lying flat. The police personnel after examining the condition of the deceased (Ajaz) took the corpse into possession. At that moment, there was gathering of about hundred persons hailing to that village. The village personnel did not resist when the police personnel were taking the corpse of deceased Ajaz. The Geep of police personnel was standing in the nearby place at the chakroad. The police personnels were having torches. There was no arrangement of light. The police personnel told at the police chawki that they shall raid at the house of the assailants namely Hasam and Nazam and will arrest them. Since the complainant was unconscious, he could not give correct information whether the police personnel had taken any assistance of his men in raiding at the house of assailants. He regained consciousness on the next day and the next day, he had gone with the deceased (Ajaz). The complainant was highly flustered and nonplussed. Hakim Ali, Advocate had reached at the place of incident after the occurrence. It was further averred that Hakim Ali reached at the place of occurrence after lodging of the first information report. The complainant had seen Hakim Ali (Advocate) at the place of occurrence at about 5 to 5.45 p.m. There was no Advocate hailing to Muzaffar Nagar with him. He had gone at the police station concerned with Hakim Ali Advocate. The

Station Officer concerned had reached at the place of occurrence just behind him. The police personnel had reached at the place of occurrence prior to that. No person belonging to the family of accused Hasam and Nazam was present at the place of occurrence.

15. After the incident, the station officer concerned had interrogated him at the place of occurrence. He could not recollect as to whether the statement recorded by the Station Officer concerned was noted down or not. The complainant got the spot inspection done by the station officer concerned next day at about 11.00 a.m. On the same day, he showed the Bogi standing at the place of occurrence and the blood saturated trunks of sugar cane. Those trunks of Sugar Cane were lying at the beneath of Bogi (cart) . He could not ascertain as to whether the Station Officer concerned had taken away the same with him or not. The blood saturated soil and plain soil were collected on the next day. The place of occurrence was pointed to the Station Officer concerned from where the accused persons had fired upon Ajaz. The particular place was pointed to the Station Officer concerned from where the deceased (Ajaz) was sitting at the crucial moment of firing. He had shown the bundles of sugar cane lying on the spot. It was pointed out by him that he was peeling off sugar cane towards east of Bogi (cart). He has pointed to the Station Officer concerned with regard to holding of trunks of sugar cane. In case this has not been recorded by the Station Officer concerned, he had no reason. It was divulged by him that the accused persons fled from the place of occurrence hurling abusive and vituperative words. In case it has not been recorded by him,he could not put forth any reason. It was also brought in the notice of the Station Officer concerned that he had gone at the police station concerned that he had gone at the police chowki. The police personnel posted at the Chowki directed to him to go at the police station concerned to get the FIR registered. This fact was divulged by him to the Station Officer concerned. In case this fact was not recorded in the report or investigation, he could not put forth any reason for it. This fact was also unfolded by him that his house was situated in the contiguous of the assailants and the querrel ensued between them on the issue of exit of water prior to six months of the incident. This quarrelsome issue was settled by the intervention of some dignified persons of the locality but the assailants had been nurturing animus and grudge against the deceased (Ajaz) and his family members and in consequence of retaliation, the accused appellants had executed the said offence liquidating the deceased (Ajaz). In case this fact has not been incorporated in the first information report, I have no reason to say anything.

16. Further it was divulged by the P.W.1 (Mohabbat Ali) in his cross examination recorded on 31.3.2006 that he had no idea on how many papers were got signed from him. He had also no idea that ten papers were got signed from him or it was twelve in numbers. At the moment,the station officer concerned got his signature on the papers, Hakim Ali was also present there. The report which was got registered by him was duly signed by him at the police station concerned. The papers on which his signatures were obtained , he does not have any knowledge what were those papers. It was neither asked by him what

were those papers.The station officer concerned did not make any confabulation at the police station with Hakim Ali before him. When he was at the police station concerned, he had unfolded entire incident to the Station Officer concerned.

17. The police station was not existing on the Highway of Delhi-Dehradun. It was existing towards western side from the road at the distance of one and one and half furlong. When he reached at the police station concerned, the sun was rising. When he returned from the police station concerned, the day was nearly over. The police station concerned was situated at the distance of 10 to 12 kilometre from his village. It was not situated at the distance of twenty kilometres.

18. He had shown the incriminating articles i.e. Palkati and Darati lying at the spot to the Station Officer concerned. His witnesses namely Haneef and Aladeen were tightening bundles on the spot. Someone were tightening trunks of sugar cane. Ajaz was sitting on the spot lowering his neck below therefore, Ajaz (deceased) could not flee from the spot. Fire was done from the countrymade pistol. The pistol was only one barrel and not have two barrels. The country made pistol was not further loaded. The complainant did not make attempt to apprehend the accused persons after firing. The incriminating articles i.e. Palkati or Daranti were not lifted by him. The complainant was highly terrified and frightened. After harvesting the sugar cane, only roots (Khobey) were left. Khobey means the root of the sugar cane. The deceased Ajaz might have fallen in the mid of the roots. A Kolhoo was installed near the place of incident. for crushing the sugar cane. The Kolhoo was lying unused. There were two brick kilns between the road and the place of occurrence but at the moment of the incident, there was no person preparing the rough bricks. The brick kiln was also closed. From the place of occurrence towards east, the brick kiln was adjoining with the field of Faiyaz but no body was present there. After execution of the incident, the complainant remained there about 2 to 3 minutes thereafter the complainant and the witnesses rushed towards the village. On arriving at the road, he divulged that Ajaz had been hit with shot. He did not make any arrangement of vehicle for reaching at the road. He did not come across to any person in the interregnum period. There were about fifty shops at the stall. On reaching at the stall and divulging about the murder of Ajaz, a number of persons gathered. The complainant had not gone at the place of occurrence again. He did not have knowledge who were present at the place of occurrence after his departure. This fact was unfolded by the complainant on reaching at his house that his brother Ajaz had been hit with shot. Haneef and Aladeen also unravelled that he was hit with shot. The civil suit which was pending prior to the incident was concerning with Bhondoo s/o Varoo. In that suit, Bhondoo was not doing pairvi but Ajaz (deceased) was doing pairvi. The house of Bhondoo was situated towards east from the house of Hamid and Majid. The complainant was not aware against whom Bhondoo had instituted the suit. The suit was instituted in the civil court prior to 5 to 6 months . The said suit is still pending. The complainant was not doing any pairvi with regard to the suit pending in civil court. Some quarrel and

ruckus had taken place between the assailants and the deceased (Ajaz) with respect to the suit pending in the civil court. The uprorious scene developed between the assailants and the deceased (Ajaz) and others were informed to the police station concerned. The matter was pacified on the intervention of the police.

19. He deposed that earlier dispute had taken place from the side of the complainant and the assailants. The police personnel had intervened to alleviate. At the crucial time of incident, the deceased (Ajaz) was running the shop of fertilizers at the stall. The deceased (Ajaz) was not doing the transanction of money lending. The deceased (Ajaz) did not have any cart or taxi for plying on rent. It was divulged that he was possessing Ambassador car for his own pleasant.

20. It was disowned by the complainant that the deceased (Ajaz) used to have cart and taxi both and those were used to ply on rent. It is wrong to say that the driver of the cart was done to death and the pairvi was being done by Ajaz (deceased) in that case. His brother Ajaz was constantly being threatened by the assailants. It is wrong to say that his brother was done to death by some strangers. It is also wrong to say that on account of pendency of civil suit, the first information report has been lodged against the accused appellants after much deliberation and consultation after undue delay. It is wrong to say that Hakim Ali Advocate was called from Muzaffar Nagar so as to get the first information report registered. At the moment of execution of the incident, Hakim Ali Advocate used to live at the back of District Hospital. He confirmed that his brother Ajaz was done to death before him. He disowned that he was giving his testimony against the accused appellants on account of animosity.

21. The prosecution has examined Aladeen as P.W.2 on 29.5.2006. He affirmed on oath that he is knowing well to Hasam and Nazam who are belonging to his village. The incident has taken place on 16th January 2005 at about 4 to 4.30 p.m. Mohabbat Ali (complainant P.W.1), Haneef and Ajaz peeling sugar cane with him in the field of Ajaz. The accused persons namely Hasam and

22. Nazam came who were equipped with pistols. Nazam told to another accused that Ajaz is doing pairvi against him in the civil suit. He will not be spared alive today. Nazam fired from his pistol pointing towards Ajaz which hit at the right side under the arm of Ajaz. Second fire was made by Hasam pointing towards Ajaz which hit at his right eye. The victim (Ajaz) succumbed to injuries on the spot as a result of shot sustained by him.

23. There was a civil suit pending between the perpetrators of the crime and Ajaz on the issue of drain on account of which assailants were rearing and nurturing animus and grudge. Ajaz has been decimated on account of these bitterness.

24. The P.W.2 Aladeen was cross examined. He divulged that when both the assailants had fired to the victim Ajaz then the malfactors were standing on the ground and the victim Ajaz was standing on the cart. It was divulged by him that shots were made from short distance. He remained present on the spot after the time of incident till the arrival of the

police. He had seen to Hakim Ali Advocate at 4.30 p.m-5.00 p.m. Hakim Ali Advocate had done the work of writing at the home. He was not aware as to whether the police personnel who came at the spot was hailing to Chhapar or Basera. The police personnel had arrived on the spot just after the incident at about 4.30 p.m. to 5.00 p.m. He proved his presence on the spot at the time of occurrence.

25. The cross examination of P.W.2 Aladeen was resumed on 7.7.2006. He deposed that he had no field adjacent to the place of occurrence. He had gone for peeling of sugar cane on the day of the occurrence. It had come to his notice that the work of peeling was going on in the field of deceased (Ajaz). The field of occurrence was situated from the main path of Basera Varla towards north side about one kilometre away . It is correct to say that the altitude of the field was about one or one and half feet from the height of men. No work of peeling was going on in any field except in the field of Ajaz (deceased). The field in which the working of peeling was going on was measuring to about seven bighas. The work of peeling was going on in that field prior to one or two days of the incident . On the fateful day of incident, about 5 to 4 biswa sugar cane was peeled off. Prior to it, more than 1'1/2 bigha sugar cane was peeled off. The peeling of the sugar cane in that field was not done in entire north -south side but in some portion of north-south direction. The peeling work was done from the western side. The sugar cane of Haji was situated towards western side. In the north side, the field of Mohabbat Ali (P.W.1) was situated. In the southern side, the field of Fakir Chand was situated. In the eastern side, the field of Haji Faiyaz was existing. They began the work of peeling from 9 to 10 'O' clock from morning. When they reached at the field, the labourer who were engaged in the work of peeling were standing equipped with their Palkati and Daranti. In the intervening period, he did not take any meal as he proceeds after takine meal rather he had taken juice of sugar cane as well as water between 10 a.m. to 4.30 p.m. The cart was standing towards western side of the field. At the crucial moment of the incident, the deceased Ajaz real brother of Mohabbat Ali (P.W.1) was standing at the distance of 10 paces towards the hill. When the incident took place, P.W.2 Aladeen had gone for trunks of the sugar cane. He was standing towards western side from the cart at a distance of 20 paces.

26. The station officer concerned did not make any interrogation with respect to the said incident from him. His statement was recorded next day of the incident. He had not gone for the spot inspection done by the station officer concerned. This fact was brought to the notice of the Station Officer concerned that at the crucial moment of execution of incident, he was peeling sugar cane. Haneef was also present beside him This fact was divulged by him that the accused Nazam was saying that Ajaz (deceased) was doing pairvi in the case pending in civil court, . In case this fact has not been reduced in writing by the Station Officer concerned, he could not put forth any reason for it. This fact was not unfolded by him that as soon as Nazam came, he said that since deceased (Ajaz) is pairokar in the matter pending in the civil court hence he will not spare him. The first shot hit in the right side under arm of Ajaz as a consequence of which he toppled on the

ground When the malfactors hit shots ,they were standing in the western side of the cart. The second shot was fired by Hasam pointing towards Ajaz (deceased) on his eye from close range, when he fell down. When the shots were fired by the Nazam ,the deceased Ajaz was lying on the corner of north-west from the cart. Hasam reached near Ajaz and had fired. The blood of deceased Ajaz was lying on the cart. The trunks of sugar cane were also soaked with blood. The place where deceased Ajaz was lying was saturated with blood. Hasam had caused gun shot injury to deceased Ajaz at the distance of 2-3 paces. He had not seen any injury on the person of Ajaz (deceased) except two injuries. Only two firing was done at the spot. The assailants had unleashed reign of terror and horror as a result of which they could not muster courage to follow them or to come forward to pursue them. This fact was brought in the notice of the station officer concerned in case it has not been reduced in writing, he could not put forward any reason. Ajaz succumbed to injuries on the spot as a result of sustaining shots of fire. He did not raise any scream on the spot. In the adjoining of the sugar cane field, the labourer working in the brick kiln came on the spot. Amongst the persons present on the spot were Ghasetoo Julaha and Gafoor Julaha belonging to his village. He was not aware about their parentage. Besides them, five to seven persons came on the spot. Mohabbat Ali (P.W.1) had departed from the place of occurrence till those persons arrived on the spot. The persons standing on the spot were curious of knowing reason from him. In the meantime two police constables came on the spot and a number of persons gathered on the spot. He had not seen to Mohabbat Ali thereafter on the place of occurrence. Whatever was narrated by him previously that he remained present before the police personnel was correct description. Thereafter the police personnel had brought the corpse of Ajaz at the police chawki picking up from the place of occurrence. Till then five to seven police personnel had come at the spot. The police personnel had brought the corpse of Ajaz from the place of occurrence from 7 to 7.30 p.m. Hakim Ali Advocate was present with the police personnel at that moment. The ladies belonging to his family had also gathered at the police chawki. He could not say with regard to distance of house of Mohabbat Ali (P.W.1) from police chawki. The corpse of deceased Ajaz was kept at the police station concerned about 20 to 25 minutes.

27. He had seen to Mohd. Azad s/o Fajla and Tanjeem Ali s/o Akhtar Ali on the spot. They had also accompanied with the dead body of Ajaz to the police station. He had gone with the corpse at the mortuary Muzaffar Nagar from the police chawki and came along with the dead body in the evening at 8.00 p.m. The dead body of Ajaz was associated with one Sub-inspector and constable. At that moment, at the mortuary, Mohd. Ajad s/o Fazla , Nawab s/o Idrish , Firozuddin s/o Shakiuddin , Tanjeem Ali s/o Akhtar Ali, Shaukat Ali s/o Ghaseeta were present. The Station Officer had seen the corpse of Ajaz at the mortuary. At that moment aforementioned persons were present. He was not aware what formalities were conducted by the Station Officer concerned at the mortuary. The station officer concerned stayed at that moment about 10 to 20 minutes who departed from the mortuary leaving two police constables. He could not give any detail as to whether next day the Station Officer

concerned came at the mortuary or not. When he (P.W.2) departed from the mortuary, Hakim Ali Advocate and Mohabbat Ali (P.W.1) were present there,. He could not give detail about the duration of their stay. The station officer concerned did not take his signature at mortuary. He could not give any detail as to whether the station officer concerned got any material written by Mohabbat Ali or not. He came across with Mohabbat Ali at about 12. 00 to 1 "O' clock next day ,then Mohabbat Ali informed him that he has got report registered against Hasam and Nazam s/o Malkhoo. Mohabbat Ali (P.W.1) departed from him after giving this information. The miscreants were not arrested by the police personnel. The miscreants surrendered themselves at the police station Mopa after several days, then they were sent at Chhapar police station. He (P.W.2 Aladeen) is an illiterate person. He could not disclose properly about the post of police personnel who came on the spot. A number of police personnel came on the spot.

28. He supported the prosecution case. He proved his presence at the place of occurrence. He disowned that he had not seen the occurrence and given false testimony against the accused on account of village factionalism. He also proved the place of occurrence.

29. The prosecution has examined Dr. Rajesh Singh as P.W.3 on 17.10.2006. He stated on oath that he was posted as Child Speciallist at District Hoispital Muzaffar Nagar on 17.1.2005. He had examined the corpse of Ajaz s/o Gafoor brought by constable C.P.1255 Harpal Singh and Constable CP 906 Udaiveer Singh , Police Station Chhapar District Muzaffar Nagar. He had found the seal intact affixed on the dead body of Ajaz. The post-mortem of deceased Ajaz was done by him on 17.1.2005 at about 2.40 p.m. The age of the deceased Ajaz was approximately 40 years. He was a man of average built. During the course of autopsy, he found that right eye and mouth were opened. Left eye was pressed and sunk. Rigor mortis was present in all four limbs. In the internal examination, he found that seven and eight ribs were fractured. Pleura was lacerated. Left and right lungs were lacerated. Pericardium was normal. Both chambers were empty weighing to 250 grams ascending aorta ruptured. Thorax cavity containing 2500 ml blood clotted below chest. The injuries found on the person of deceased Ajaz have already been discussed in the preceding paragraph.

30. The papers were brought by the constable with dead body of Ajaz. The injuries found on the person of the deceased was about one day old. The death of Ajaz had occurred on account of fire arm injuries. The death of Ajaz was opined to have been caused at 4.30 p.m. on 16.1.2005. The post mortem report was prepared after making meticulous examination. The post mortem report was duly proved by him which was marked as Ext.Ka.2. He had handed over to the constables in sealed cover one sweater, one joursey, one shirt, one vest, one under wear, one pant, one pair sock, 18 pellets removed from the dead body, one plastic wad, one wad piece made from card board. He had also got their signatures in respect to this.

31. He further divulged in his cross examination that the post mortem number is allotted from the District Hospital. The

number of post mortem was allotted on 17.1.2005 at about 11.50 a.m.with the seal of District Hospital Muzaffar Nagar which is paper no.6/7. On this paper of District Hospital it was marked as Ext.Kha.1. The distance from District Hospital to post mortem house is about 3 to 5 kilometres. He proved that on 17.1.2005 from the concerned constables these papers were obtained at about 2.30 p.m.

32. The corpse takes two to three hours in starting rigor mortis in the month of January. The rigor mortis disseminates in the entire body withiin twelve hours. Ascending aorta denotes the blood oozing from the ventricles. In case the blood exudes profusely from ascending aorta, it cannot be determined by looking to the injuries that the victim had succumbed to injuries forthwith or sometime later. It is correct to say that injury no.1 has been shown towards downward. The said injury has been caused from a distance of three feet. No external material has been recovered from the injury no.1. There was no blackening in injury no.3. Injury no.3 was caused from more than 6 feet below to 5 cm from scapula. Injury no.3 has clearly been shown in the post mortem report. Vertebral column remained intact. Left and right lungs were lacerated. Notice being had to the injury no.3 ,it can be said that the assailant was standing towards right side. The approximate time shown in the post mortem report is probably correct. There will not be variation of two to four or six hours. The assessment of death is made on the basis of rigor mortis present on the body. Rigor mortis can disseminate within 12 hours and can exist next 22 hours. The stomach of the deceased Ajaz was empty. According to the post mortem examination, injury was caused on the vital part of the body with fire arm. It is correct to say that the word "shock haemmorhage ' has not been used but the inference can be drawn that the injuries were caused on the vital part with the shooting of fire arms. There is no mention of tearing of clothes in the post mortem report. Whatever papers were brought during the course of post mortem were thoroughly examined and then a conclusion is drawn. He does not express distinct opinion on account of being any variation in the police report. He notes down the elements found during the course of post mortem. During the course of post mortem, gall bladder was not found, it may be on account of operation of stone and gall bladder was removed. Bladder was found empty.

33. The prosecution has examined Station Officer Virendra Singh posted at Purkaji District Muzaffar Nagar on 17.10.2006. He stated on oath that he was posted on 16.1.2005 at police Station Chhapar in the cap;acity of Station Officer. On that very date in his presence, Mohabbat Ali (P.W.1) got a report registered against Hasam and Nazar vide Case Crime No. 6 of 2005 under section 302 IPC. He proceeded from the police station concerned having requisite papers i.e. chick FIR, inquest in association with Prem Prakash Giri (Sub-inspector) and Constable Ishwar Chand (HCP), Anek Singh HCP on police geep driver Rajpal. On the place of occurrence HCP Asarpal, Constable Udaiveer Singh, Constable Satyapal , Constable Harpal of Chawki Basera were present at the place of incident. On reaching at the spot, S.I. Sri Giri was instructed to make arrangement of dragon light or petromax for carrying out the Panchayatnama of deceased Ajaz.

The statement of Mohabbat Ali (P.W.1) was recorded on the spot. The statement of eye witness Haneef was recorded on the place of occurrence. Sri Prem Prakash Giri (S.I.) collected the plain and blood stained soil from the place of occurrence in two distinct containers of which fard was prepared and was noted in the case diary. Thereafter the police team raided at the house of the assailants but they were not arrested. He (P.W.4 Station Officer) and police personnel stayed at the police chawki Basera in the night.

34. Next day, on 17.1.2005 the Panchayatnama was copied. The statement of the witnesses of Panchayatnam was recorded. The statement of ocular witness Aladeen was also recorded. He made spot inspection in association with complainant Mohabbat Ali (P.W.1) and prepared the site plan which was duly marked as paper no.2 and the same was proved by him. This document was marked as Ext.Ka.3. On 22.1.2005, the police personnel raided at the house of assailants but they could not be arrested. Both the accused persons namely Hasam and Nazam were arrested by him and HCP Asarpal at about 8.40 a.m. on the Madak road near the burial ground on the tip off of spy of police .The police team recovered 315 bore pistol with a cartridge and 12 bore pistol with two cartridges. No public witness has come forward prior to arrest of the accused persons. The police team had searched to others but no incriminating articles were recovered from their possession. Both the pistols were fit for firing. Both the accused could not show licence for keeping the pistol and cartidges. Both the pistols and cartidges were sealed in different bundles giving clear nomenclature. The fard was duly prepared and the signature of the witnesses was obtained. The copy of the Fard was given to the accused persons and their thumb impression and signatures were obtained. The fard was duly proved by the P.W.4 Virendra Singh which was exhibited Ka.4. A bundle duly sealed was uncovered before the court from which 315 bore pistol and a live cartridge was taken out. On seeing that pistol and cartridge, the witness told that the said pistol and cartridge were recovered from Hasam. The pistol, cartridge and clothes were marked as Ext. 1,2 & 3. The next bundle was opened before the court from which a 12 bore pistol with two cartidges were taken out. On seeing to that, the witness (P.W.4) told that the said pistol and cartridges were recovered from accused Nazam. The pistol was maked as Ext.Ka.4 and the live cartidges were marked as Ext. 5 & 6. The bundle of these articles was marked as Ext.Ka.7. The statement of the accused Hasam and Nazam was recorded on the spot. The accused were brought at the police station and the case was registered.The case crime No.16 of 2005 under section 25 Arms Act Act registered against Hasam and the case no. 17 of 2005 under section 25 Arms Act was registered against Nazam. On 29.1.2005 the post mortem report of deceased Ajaz was received which was duly noted in the case diary. The recovered articles were sent to Forensic Laboratory Agra on 2.2.2005 through constable 790 Sumer Singh. On 3.2.2005 the statement of S.I. Prem Prakash Giri, Constable Harpal Singh and Constable Udaiveer Singh was recorded. On 5.2.2005 after collecting clinching and credible evidence, charge sheet no. 7 of 2005 was submitted against Hasam and Nazam which was duly signed and prepared by him. The said charge

sheet was marked as Ext.Ka.5. On 6.2.2005, the statement of scribe of the FIR constable/clerk 1035 Virendra Pawar was recorded. On 24.9.2005, the report received from the Forensic Laboratory was sent to the court concerned.

35. The prosecution witness no.4 Virendra Singh Station Officer was cross-examined by the accused counsel. During cross examination, he deposed that the investigating officer uses one case diary in a case. It was divulged by him that from 16.1.2005 to 22.1.2005 he had conducted the investigation of this case. He had other investigations also. In the parcha of 22nd January, the Chief Judicial Magistrate concerned had examined from 22nd January 2005. It is correct that the parcha of 17th February 2005, the Chief Judicial Magistrate had examined and dated as 4th February 2005.The parcha of 22nd January had ended in zig zag manner. There is no mention of starting and ending of investigation in any parcha. He had not unfolded the name of the eye witnesses in the return G.D.to whom he had examined during investigation. He had not made any copy in the case diary with regard to weapon recovered from the accused persons. It is wrong to say that he had prepared the entire case diary anti-dated and anti-time. P.W.4 Viredra Singh was messed up with regard to information given to him with regard to this murder. The case was registered in his presence. No information was conveyed from police station Chhapar through wireless set that Ajaz (deceased) was loading trunks of sugar cane and the assailants had done to his death. It is wrong to say that the information with regard to the murder of Ajaz (deceased) was received in police station Chhapar prior to 5.15 p.m. He had rested at the police chawki in the night after arriving at the spot. He could not recollect as to whether any police officer had reached at the spot or not. In case during investigation, the circle officer concerned come and gives some directions, it is not necessary to incorporate the same in the case diary as there is no such rule. He (P.W.4 Virendra Singh) had reached at the spot at about 6.30 p.m. and got prepared the Panchayatnama in about two hours. He admitted that on the Panchayatnama and other related documents, he had not put his signature. He proved his presence at the moment of preparation of Panchayatnama but could not show as to why he had not put his signature. The light of dragon light was very intensive and radical. In the said light, the work of preparation of Panchayatnama and other things could be done easily. He could not ascertain as to whether Prem Prakash S.I. had taken blood saturated soil and plain soil prior to preparation of Panchayatnama but he admitted that he had not put his signature. The corpse of Ajaz (deceased) was sent after 8.30 p.m. but he could not divulge exact time. The receiving of papers of the dead body are to be submitted in the police line. The dead body was sent with Tempo. The papers relating to the dead body of Ajaz were entered in the police line on 17.1.2005 at 8.00 a.m.

36. The spot inspection was made by him before afternoon on 17.1.2005 but he could not unravel exact time. In exhibit Ka.3 at no point it has been displayed that the blood was lying on the particular place. The place of occurrence was encircled with sugar cane crops from three side. The place of occurrence Basera-Barwa is existing at half furlong from the main road. He could not

ascertain the correct direction. It is wrong to say that he did not have knowledge of correct direction because the site plan was prepared at the police station. It is correct that in Ext.Ka.3 he had mentioned about the directions. He could also not recollect as to whether there is other ways to arrive at the place of occurrence. He (P.W.4 Virendra Singh) had seen peeled sugar cane and trunk of sugar cane at the spot but he had not noted in the case diary as to whether these articles were soaked with blood. There is no mention in the case diary with regard to Daranti or Palkati. This fact has also not been incorporated in the site plan. There is no mention of blood lying on it. It is wrong to say that S.I. Giri was sent at Muzaffar Nagar mortuary for filling up the Panchayatnama. At the place of occurrence no eye was found lying. The witness Mohabbat Ali (P.W.1) did not inform him that he was holding trunks at the time of occurrence rather he had divulged the fact of putting fodder near the cart. It was not unfolded by P.W.1 Mohabbat Ali that he had earlier gone at the police chawki and the police personnel present at the Chawki directed him to go at the police station concerned to get the first information report lodged.

37. Aladeen (P.W.2) had stated that at the time of incident, he was peeling sugar cane. The witness Aladeen had unfolded the name of Hasam who had told that Ajaz was doing pairvi in the civil court. He had not collected any paper with regard to case pending in the civil court during investigation. Aladeen (P.W.2) had not specifically told when two shots were fired and they did not chase the assailants on account of unleashing the reign of terror rather he told that both the assailants had fired single shot each.

38. The miscreants were arrested on 22.1.2005 on the tip of prior information. He had written in the Fard that the pistol recovered from Hasam was in functioning condition. The same fact was incorporated for the second accused that the pistol recovered from him was functional. Both the pistols were not sent by him for ballistic examination because the cartridges were neither recovered at the spot nor subsequently. Both the pistols were sealed on which his signature was made in the capacity of witness. He proved that the incriminating articles including pistols were recovered from the assailants. The charge sheet was submitted against the accused after collecting credible and clinching materials showing their complicity.

39. The prosecution has examined S.I.Prem Prakash Giri on 27.2.2007 as P.W.5. He was at that time posted at Special Investigation Department District Ghaziabad. He stated on oath that on 16.1.2005, he was posted as S.I.at police station Chhapar. On that day, the Case Crime No. 6 of 2005 under section 302 was registered against Hasam and others. He in association with Station Officer Virendra Singh as well as police personnel and the then Station Officer with requisite papers reached at the place of occurrence Gram Basera. On the direction of the then Station Officer, he prepared the Panchayatnama vide Ext.Ka.6 and other requisite papers in relation to deceased Ajaz s/o Gafoor on which he had put his signature. He prepared the photo Nash, letter to R.I., letter to C.M.O. He prepared the Fard of blood stained and plain soil , Challan lash these were marked as Ext. Ka.7,Ka.8, Ka.9 Ka.10 and Ka.11. After carrying out the Panchayatnama and other necessary

papers, the corpse of Ajaz was sealed and was sent for post mortem under the vigil of constable Harpal Singh and constable Udaiveer Singh.

40. During cross examination, it was divulged by him that Panchayatnama (Ext.Ka.6) was prepared at the direction of the then Station Officer Virendra Singh but Virendra Singh Station Officer had not put his signature on the Panchayatnama. Panchayatnama was not prepared on the dictate of the the Station Officer.The then Station Officer had directed him to fill up the Panchayatnama. He could not recollect as to whether complainant was present or not.The panchayatnama was being prepared in the dragon light and petromax light. He could not ascertain what papers were being prepared by the then Station Officer. The panchayatnama was prepared from 6.30 p.m. to 8.30 p.m. The witnesses of the Panchayatnama had not partcipated in any activity from 6.30 p.m. to 8.30 p.m. He had seen the injury sustained on the right side under arm and the left eye. The dead body of the deceased Ajaz was saturated with blood. He had not shown any injury on the back side of deceased (Ajaz) in the challan lash. The corpse of Ajaz was lying in the north side of the village concerned at a distance of one kilometre. There was no road near the place of occurrence. He could not divulge how long he stayed at the place of occurrence. He could not recollect how long he stayed at the place of occurrence after 8.30 p.m.In his presence, Circle Officer concerned came but he could not recollect how long the circle officer remained there. He did not have knowledge from whom the circle officer concerned enquired . The corpse of deceased (Ajaz) was lying in the mid of the field. The sugar cane was lying scattered on the spot. After the incident, he had gone only once to fill up the Panchayatnama at the place of occurrence. He had departed from the police station concerned in association with Station Officer concerned at about 5.15 p.m. for visting the spot. The complainant of the case was going with them. He could not recollect as to whether on 17.1.2005 he was present at the police station concerned in the morning or not. He did not visit to Muzaffar Nagar mortuary on 17.1.2005. He denied that the Panchayatnama of the deceased (Ajaz) was completed in the mortuary at Muzaffar Nagar and the time which has been narrated by him for proceeding to the place of occurrence, at that moment the name of any miscreant did not surface. He could not remind at what time in the night he had collected blood stained and plain soil.He denied that the Fard was prepared at the police station concerned.

41. The prosecution has examined C.C.No. 1035 Virendra Kumar on 27.2.2007 who was posted at Police Station Purkaji District Muzaffar Nagar. He stated on oath that on 16.1.2005, he was posted as Constable Clerk at police station Chapar. He had registered the Case Crime No. 6 of 2005 under section 302 IPC on the written information of Mohabbat Ali (P,.W.1). He had prepared the Chick FIR , paper No.4 of this case which has been written and signed by him and was marked as Ext.Ka.12.This case was entered in G.D.No. 24 at 17.15 hours on 16.1.2005. The carbon copy of the G.D.paper no.1/6 which has been prepared by him in the shape of original was duly written and proved.The original G.D.was before him. The corbon copy was marked as Ext. Ka. 13.On 22.1.2005,

the then Station Officer Virendra Singh had arrested both the accused namely Hasam and Nazam s/o Malkhoo at about 11.30 a.m. with 12 bore country made pistol and cartridges and 315 bore pistol and cartridges. The accused persons were brought at the police station concerned and the Case Crime No. 16 of 2005 and 17 of 2005 under sections 25/27 Arms Act were registered against Hasam and Nazam. The fard of recovery of fire arms with cartridges was duly prepared and annexed with the Chick FIR as Ext.Ka.14. The particulars of this case was duly entered in G.D.No. 16 at about 11.30 a.m. on 22.1.2005. The carbon copy of the G.D.written and signed by him was duly proved and was marked as Ext.Ka.15.

42. During cross examination, it was averred by the P.W.6 Virendra Kumar that prior to registration of this case, Station Officer Virendra Singh had departed with police Geep in investigation of Rapat No.19 at 12.45 p.m. His return is mentioned in Rapat No.22 at 17 hours. No case was registered at police station on 16.1.2005 prior to the instant case. He had not given information of this case to Control Room Muzaffar Nagar. The information of this incident was given by the then Station Officer because the case was registered at the police Station in his presence. There is no mention in the G.D. for sending the special report on 16.1.2005 till 12.00 (Night). There is no mention in the G.D. As it is not required for the arrival of the High Officers of the Police. It had taken about 15 to 20 minutes in preparing the chick and GD of this case at the police station concerned. At that moment, the Station Officer Virendra Singh was writing the case diary. He proved that the case was registered on the same day. He denied that the chick or GD with regard to case registered under section 25 Arms Act was prepared at the inkling and connivance of the station officer concerned.

43. The prosecution has examined S.I. Harpal Singh as P.W.7 on 27.2.2007 who was posted at Police Station Kotwali District Bulandshahar. He stated on oath that he was posted as S.I. at Police Station Chhapar on 22.1.2005. The Case Crime No. 16 of 2005 and 17 of 2005 under section 25 Arms Act were registered on the same day. Thereafter, its investigation was entrusted to him. He recorded the statement of the accused Hasam and Nazam who were in the lock up. He entered the fard of recovery and the arrest of the accused in the C.D. He has recorded the statement of Constable Virendra kumar, scribe of FIR. On 30.1.2005, he recorded the statement of complainant Virendra Singh, witnesses Pramod Kumar, Parvesh Kumar HCP Asarpal Singh and also made spot inspection. He prepared the site plan on the spot . During cross examination he proved the same to have been written & signed by him. The site plan was duly marked as Ext.Ka.16. He collected credible and clinching evidence against the accused appellants thus they were charge sheeted under section 25/27 Arms Act. The charge sheet was duly marked as Ext.Ka.17 & 18 site plan of Hasam case Ext.as Ka.19 and was submitted before the court concerned for cognizance. He proved the charge sheet which was written and signed by him. The same was sent to the District Magistrate for concurrence. He sanctioned the same on 11.3.2005. The signature of the then District Magistrate was duly identified by him. This was exhibited as Ka.20. The

sanction in respect of Hasam was obtained on 11.3.2005 which is paper no.8. He proved the signature of the then District Magistrate Raj Kumar on the same which was also signed by him (P.W.7) vide Ext.Ka.21. In his cross examination he deposed that the charge sheet against Hasam and Nazam was sent to the concerned court on 30.1.2005. It is wrong to say that the entire recovery and other course of action of this case viz. Statement and site plan etc. was done in clandestine and bogus manner inside the police station concerned.

44. In support of defence Rishipal Singh, Radio Station Officer City Control Room, Muzaffarnagar was examined as D.W.1 on 13.8.2007. He stated on oath that on 16.1.2005 he was posted as Radio Station Officer City Control Room Muazaffar Nagar. He has proved photo copy of the log book dated 16.01.2005 of city control room, Muzaffarnagar in which the entry was made by the then operator on duty at 17:05 p.m. that deceased Ajaz was shot dead in his field by assailants.

45. After hearing counsel for the parties and considering the merit of the case, learned court below has recorded conviction of both the accused and passed the sentence

46. Being aggrieved by the aforesaid judgment and order of the trial court dated 23.4.2009, this appeal has been preferred by the accused-appellants.

47. We have heard Shri Nazrul Islam Jafri Senior Advocate assisted by Shri S.I. Jafri, learned counsel for appellants and Shri Vikas Sahai, learned Additional Government Advocate appearing on behalf of State and perused the entire material on record.

48. It is submitted by Sri Shri N.I. Jafri learned senior counsel appearing on behalf of the appellants that the presence of alleged eye witnesses PW-1 Mohabbat Ali and PW-2 Aladeen on spot at the time of incident is highly doubtful. The occurrence was not witnessed by anyone. PW-1 Mohabbat Ali being the brother of the deceased is highly entrusted witness. There was no field or house of PW-2 Aladeen near the spot therefore he had no occasion to be present on the spot at the time of incident. Name of one witness Haneef was also mentioned in F.I.R. as eye witness but he has not been examined.There are major contradictions and inconsistencies in the statements of both the witnesses of fact on material points. Their testimonies inspire no confidence. There was no strong motive for committing the murder of Ajaz. Motive assigned to the accused appellants has not been proved. F.I.R. is ante-timed. According to the prosecution case, the incident has taken place at about 4.30 p.m. and the first information report has been registered at 17.15 hours covering a distance of 16 kilometres which creates serious doubt about the verity and genuineness of the first information report lodged within 45 minutes. The first information report was not in existence at the time of conducting the inquest of the deceased. The investigatingt officer had not found any cart or darati from the spot. The prosecution has to stand on its own legs.

49. Learned counsel for the appellants further submitted the prosecution has failed to prove its case beyond reasonable doubt against the

accused appellants but the learned Sessions Judge has erroneously convicted and sentenced the accused appellants relying upon untrustworthy and uncorroborated testimonies of the prosecution witnesses. The judgment and order passed by the learned trial judge is not tenable in the eyes of law hence deserves to be set aside and the appeal may be allowed.

50. Per contra Shri Vikas Sahai, learned A.G.A. appearing on behalf of State contended that the prosecution version is consistently proved and established by testimonies of prosecution witnesses on fact as well as other formal prosecution witnesses and is fully supported by medical evidence. The presence of witnesses is proved to be natural and statements are nothing but truthful disclosure of actual facts, leading to the occurrence. It will not be permissible for the court to discard the statement of such witnesses on account of minor contradictions on some points because witnesses are rustic villagers. In criminal cases prosecutioin is not bound to prove motive. It is well settled principle of law that when incident has been proved by the ocular evidence, there is no need to prove motive. F.I.R. is not ante time but it has been promptly registered. It has been further contended that wholesome study of the evidence on record establishes guilt of the accused beyond reasonable doubt. Learned Trial Judge took into consideration every aspect of the case and rightly convicted the appellants for charges under Section 302 I.P.C. The direct evidence of Mohabbat Ali (P.W.1) and Aladeen (P.W.2) suppored by medical evidence pointing guilt against the accused appellants are consistent with the prosecution version ,hence the plea of the accused appellants with regard to presence of mens rea fully stands proved. Even if there is absence of motive, it would not benefit the accused when there is reliable and acceptable version of the eye witnesses supported by medical evidence pointing against them. The prosecution is not bound to prove the motive of any offence in a criminal case, in as much as motive is known only to the perpetrator of the crime and may not be known to others if the motive is proved by the prosecution, the court has to consider it and see whether it is adequate.The testimony of the prosecution witnesses are cogent, credible and trustworthy and have a ring of truth hence it cannot be stifled or overshadowed on account of minor variation which only indicates that they are not tutored.

51. Now we have to scrutinize and evaluate the ocular version of the prosecution witnesses on fact because it has been contended on behalf of appellants that the prosecution witnesses were not present on the spot and they have not witnessed the incident as claimed by them and their testimonies are contradictory and under circumstances does not inspire confidence.Prosecution has examined PW-1 Mohabbat Ali, PW-2 Aladeen as witnesses of fact. We now take into consideration the relevant portion of the testimony of the aforesaid witnesses to decide reliablity of their testimony. **PW-1 Mohabbat Ali** brother of deceased is the complainant of the incident. He has stated that on 16.01.2005 he along with Haneef, Aladeen (PW-2) and his brother Ajaz (deceased) were doing the work of removal of peels of sugarcane in his field. At around 4 - 4:30

p.m. in the day, both the accused Hasam and Nazam who belong to his village came there with tamancha in their hands. They stated that Ajaz (deceased) was doing pairokar work against them in pending civil case, he would not be spared alive. Both of them fired on Ajaz with the firearm in their hand. The first fire hit on right back of the deceased and the second fire hit on left eye and he died on spot. He further stated that house of the accused person is nearby his house and there was dispute regarding drainage due to which they committed the murder of his brother Ajaz (deceased). In his cross examination he has deposed that at the time of incident he was present on the spot and has seen the incident. He has also stated position of Ajaz (deceased) and the witnesses on spot at the time of incident. He has also stated that he had shown each and every place to the Investigating Officer at the time of spot inspection by him. **PW-2 Aladeen** is an independent eye witness, he has explained his presence on the spot at the time of incident. He has deposed that he is resident of the same village. He has no field near the spot but on getting information regarding peeling work of the sugarcane, he had reached there for doing the work of removal of peels from the sugarcane and at the time of incident he was present there and had seen the incident from a distance of 20 paces. He has also stated that both the accused Hasam and Nazam appeared on spot about 4- 4:30 p.m. with tamancha in their hands. Both of them fired on Ajaz with firearm in their hand. Before firing, accused Nazam exhorted saying that Ajaz is the pairokar of the pending civil case, he would not be spared. He has supported the statements of PW-1 Mohabbat Ali and stated that fire of accused Nazam hit on right back side of the deceased and other fire opened by Hasam hit on left eye of the deceased. He has identified both the accused present in the court during the trial. He stated that Ajaz died on the spot. In his cross examination, he has deposed the fact that both the accused fired on Ajaz, he has fully supported the testimony of PW-1 Mohabbat Ali.

52. In detailed cross examination of PW-1 Mohabbat Ali and PW-2 Aladeen, there are some contradictions and ambiguity of time and place of inquest of the deadbody of the deceased. There are some contradictions on the point of time of incident and time of registration of F.I.R. but there is no contradiction or inconsistency on the point of manner, place, motive of incident and identification of the accused persons. There is complete consistency and coherence in examination-in-chief and cross examination of the statement of both the witnesses on above points of manner, place, motive of incident and identification of the accused. It is settled law that it is only the serious contradiction and omission which materially effects prosecution but not every contradiction or omission as held in ***Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas and Another reported in (2013) 12 SCC 796*** that minor contradictions, inconsistencies or insignificant embellishments that do not affect core of prosecution case should not be taken to be a ground to reject the prosecution evidence.

53. It is also relevant here that PW-1 Mohabbat Ali and PW-2 Aladeen, both are illiterate and rustic villagers. On the basis of some contradictions their testimonies cannot be discarded. Their

evidence should be considered as a whole and from the point of view of trustworthiness.

54. In the case of ***State of Uttar Pradesh Vs. Krishna Master and Anothers (2012) 12 Supreme Court Cases 324,*** it has been held by Hon'ble Apex Court that a rustic winess, who subjected to fatiguing, taxing and tiring cross-examnation for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to gruelling cross-examination should not be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime. In the present case cross of Mohabbat Ali (P.W.1) and Aladeen (P.W.2) continued for several months as such any embellishment or exaggeration in their testimonies cannot be discarded if the same is otherwise credible.

55. It has been contended by learned counsel for appellants that PW-2 Aladeen has deposed on last page of his cross examination that the complainant (PW-1) had met him on the next day of incident and told him that he had lodged F.I.R. against the accused-appellants Hasam and Nazam. On the basis of this fragment statement of PW-2, he contended that PW-2 Aladeen was not present on the spot at the time of incident but no conclusion can be drawn on the basis of fragment of the statement of witness but whole statement is to be seen. In his examination-in-chief and many places in cross examination PW-2 has clearly stated that he was present on the spot at the time of incident and has witnessed entire incident.

56. Learned counsel for appellants contended that PW-1 Mohabbat Ali being brother of the deceased Ajaz, is an interested and partisan witness. As regard statement of interested witness, there is no bar in law on examining family members as witness. In case of murder involving family members, it is family member who comes forward to lodge F.I.R. and discloses correct facts. If the statement of a witness is bound to be credible, reliable and trustworthy there would not be any reason for the court to reject such evidence merely on the ground that witness was a family member or interested witness or a person known to the effected party as laid down by Hon'ble Apex Court in the case of ***Amit Vs. State of Uttar Pradesh reported in (2012) 4 SCC 107*** that an interested witness must have some direct interest in having accused somehow convicted for some extraneous reason and a near relative of victim is not necessarily an interested witness.

57. In ***Hukum Singh Vs. State of Rajastan, (2000) 7SCC 490,*** Hon'ble the Supreme Court has held that only premise for dubbing them as "interested witnesses" is that they were the kith and kin of the deceased. Why should such witnesses be termed as interested witnesses? If they had seen the occurrence they would certainly have the interest to bring the offence of the murder of their breadwinner to book. Normally the kith and kin of the deceased, if they had seen the occurrence would not absolve the real offenders and involve innocent persons in that murder.

58. Learned counsel for appellants submitted that in F.I.R. presence of eye witness Haneef has also been mentioned but this witness was not examined for reason best known to the prosecution. As regards non examination of the witness Haneef who is named in F.I.R., it is not requirement of law to examine each and every witness to prove the prosecution case. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of Evidence Act.

59. Medical evidence (postmortem report) fully corroborates the prosecution version as well as testimony of prosecution witnesses. In postmortem report exhibit Ka-2 of the deceased firearm injuries are found on right side back of the chest and on left eye of the deceased. Thus ocular evidence has been fully supported by medical evidence.

60. The presence of witnesses is proved to be natural and their statements are nothing but disclosure of actual facts relating to the occurrence. There is nothing on record to show that PW-2 Aladeen had any animous against the accused appellants. The testimony of prosecution witnesses of fact are cogent credible and trustworthy.

61. Learned counsel for appellants contended that there was no strong motive on the part of the accused persons to commit murder of the deceased and motive assigned has not been proved. Perusal of record shows that in this case motive has been mentioned in the F.I.R. PW-1 Mohabbat Ali and PW-2 Aladeen, both have stated that there was dispute of drainage between complainant and accused persons and this was the cause of committing murder. PW-1 has stated in his cross examination that there was a civil case pending in the court in which (deceased) was pairokar. Learned counsel for the appellants contended that no documentary evidence of alleged pending case has been filed and alleged motive has not been proved. So far as motive is concerned, it is settled law that motive is not a sine qua non for commission of a crime. Failure to prove motive or absence of evidence on point of motive would not be fatal to the prosecution case where guilt is proved from the reliable evidence. In fact motive is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime.

62. In case of ***Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793,*** Hon'ble Supreme Court has held that proof of motive satisfies the judicial mind about the likelihood of the authorship but its absence only demands deeper forensic search and cannot undo the effect of evidence otherwise sufficient. Motives of men are often subjective, submerged and unamenable to easy proof that Courts have to go without clear evidence thereon if other clinching evidence exists.

63. In ***Vijay Shankar v. State of Haryana, (2015) 12 SCC 644,*** Hon'ble Apex Court has held that in each and every case, it was not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence. Proof of motive only adds to the weight and value of evidence adduced by the prosecution.

If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of the prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution.

64. In ***Abdul Waheed v. State of U.P.,(2016) 1 SCC 583,*** the Hon'ble Apex Court has held that proof of motive of the accused towards the deceased heightens the possibility of the crime. Proof of motive adds weight and value to the evidence of the eyewitnesses.

65. In case in hand both the witnesses of fact have proved the prosecution version and their testimonies is fully supported by medical evidence therefore motive loses its significance.

66. So far as the contention of learned counsel for appellants is concerned that Buggi (Bullock Cart) and instruments of peeling the sugarcane (Daranti and Palkati) which were said to be with the witnesses at the time of incident were not recovered by the I.O., in fact it was the duty of the I.O. to take in possession and prepare memo of the case properties but if there is any laxity on the part of the I.O. in this regard, it could not be a ground to doubt the testimony of PW-1 and PW-2 which were clear and cogent. The consistent and reliable testimony of PW-1 Mohabbat Ali and PW-2 Aladeen cannot be disbelieved on ground of any act or omission on the part of the investigating officer. As held by Full Bench of this Court in case of ***Gopal Vs. State of U.P. reported in 1999 (39) ACC 98*** that investigation of the case if found faulty, even mischievous and collusive could not be a ground to reject ocular testimony of the informant who lodged the F.I.R. promptly. If eye witness is believable the mere weakness of investigation should not be a ground to reject the testimony.

67. So far as this argument is concerned that the F.I.R. is ante timed, it is correct that according to chick F.I.R., it was lodged within 45 minutes after covering a distance of 16 Kms. In F.I.R. time of incident has been mentioned as 4:30 p.m. distance of police station from the spot 16 Kms. and it was registered at 05:15 p.m. but only on this basis it cannot be said that F.I.R. is ante timed. Nowadays there are several fast modes of covering distance and it has not been asked by the informant (PW-1) in his statement that by what means he covered a distance of 16 Kms. in 45 minutes to reach to the police station for lodging F.I.R. Therefore lodging the F.I.R. after covering a distance of 16 Km. can be said as prompt F.I.R. The informant PW-1 is an illiterate man of village atmosphere, it may also be possible that the time of incident mentioned in F.I.R. may be approximate and not exact 4:30 p.m. In his written report informant has stated time of incident as about 4:30 p.m. In his statement PW-1 Mohabbat Ali and PW-2 Aladeen both eye witnesses have stated that incident occurred around 4:00 to 4:30 p.m.

68. Defence has examined DW-1 Rishipal Singh who was posted on 16.01.2005 as Radio Statioin Officer City control room Muzaffarnagar who has proved photo copy of original log book dated 16.01.2005. In his statement he has

stated that then operator Ranjit Singh has made entry at 17:05 hrs. in it that it was informed by police station that Ajaz (deceased) was shot dead by assailants in the field. On the basis of aforesaid statement, learned counsel for appellants contended that time of incident was different from time mentioned in F.I.R. and F.I.R. is ante timed. As regards information of murder of deceased by the assailants sent by the police station to city control room prior to the registration of the F.I.R. as contended by learned counsel for appellants is concerned, on this basis it cannot be said that F.IR. was ante timed because there may be possibility of getting the information before registration of F.I.R. by some other means.

69. As discussed above, both the witnesses of fact are rustic witnesses there may be some difference in mentioning accurate time of incident. In chick F.I.R. and concerned G.D. time of registration of F.I.R. is clearly mentioned and proved by PW-6 Constable Virendra Kumar PW-5. Sub-Inspector Prem Prakash Giri has conducted inquest on the same day and prepared the inquest report. In the inquest report crime number and the time of incident are mentioned which has been proved by PW-5 in his statement. There was no delay in lodging the F.I.R. In view of the entire facts and circumstances it cannot be said that F.I.R. is ante timed and lodged after consultation with police.

70. It is true that there are some minor contradictions in the depositions of the prosecution witnesses of facts that too in regard to the subsequent events and not to the actual incident. Considering the entire facts. and circumstances of the case, we are of the considered opinion that contradictions are not so material which goes to the root of the case and materially affect the core of the prosecution case. Therefore, minor contradictions cannot be taken to be a ground to reject the testimony of the prosecutions witnesses of facts. In the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. If the evidence is untrustworthy and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission.

71. The learned trial judge has drawn wrong inference against the accused appellants with regard to recovery of fire arms with cartidges from their possession. The medical evidence is consistent with the use of the fire arms. The fire arms have been recovered at the

pointing of the accused appellants from their possession. Even though the offence under the Arms Act is quite distinct from the different sections of the Indian Penal Code but the acquittal under one provision of law will not exculpate the accused appellants from the offence under the penal provisions . Section 27 of the Indian Evidence Act is in the nature of an exception to the general rules contained in the two preceeding sections i.e. under section 25 and 26. Section 25 makes inadmissible any confession by an accused person to a police officer. Under section 26 no confession by any person while he is in the custody of a police officer shall be proved against such person unless it be made in the presence of a Magistrate. Section 27 says that such part of the information given by an accused person while in the custody of a police officer may be proved against him as distinctly relates to the fact which is thereby discovered. It therefore makes admissible a confession made while in police custody if the other conditions laid in it are fulfilled. Being an exception to the general rule it has to be strictly construed. The section does not permit the admission in evidence of the whole of the confession, but of such portion only of it as can be said to relate distinctly to the fact discovered. There does not seem to be any controversy on this aspect of the section. The accused appellants were arrested on 22.1.2005 at 8.40 a.m. by the police personnel and two pistols and cartridges were recovered from their possession In view of this the portion of the alleged joint statement by the accused appellants wherein they admitted that they had committed the murder of Ajaz with the pistols recovered from their possession, this fact would be admissible in evidence. Mere acquittal of the accused appellants for the charges under sections 25/27 Arms Act for the reasons given by the learned trial court would not give any benefit to the accused appellants whose presence on the spot and by whose firing the deceased succumbed to the injuries has been fully proved by the evidence of Mohabbat Ali (P.W.1) and Aladeen (P.W.2). The learned trial court swayed by the so called irrelevant technicalities which resulted into the acquittal of the appellants under the Arms Act

72. On the basis of discussion made here-in-above and also considering the material evidence on record, we are of the considered opinion that findings of conviction for the offence punishable under Section 302 I.P.C. recorded by the trial court are well substantiated by the evidence on record. The trial court has appreciated the evidence in the right perspective. We do not find any justification to interfere with the finding of conviction recorded for the offence punishable under Section 302 I.P.C., therefore the conviction recorded against the accused appellants under Section 302 I.P.C. is hereby maintained and affirmed. The instant appeal is **dismissed** accordingly.

73. The order dated 23.04.2009 passed by Additional Sessions Judge Court No. 9 Muzafar Nagar in Sessions Trial No. 405 of 2005 (State of Uttar Pradesh Vs. Hasam and another) arising out of Case Crime No. 6 of 2005 under Section 302 Indian Penal Code Police Station- Chhapar, District- Muzaffarnagar, is hereby affirmed. Accused-appellants are in jail. They shall serve out the sentence as awarded by the learned trial court and affirmed by this Court.

74. Let a copy of the judgment be certified and sent along with the lower court record to the court below immediately for compliance and necessary entry be made in the relevant register.

(2019)11ILR A570

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 3231 of 2015

Arvind Bajpai ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri A.N. Mishra, Sri Lal Chandra Mishra (A.C.)

Counsel for the Opposite Party:
Sri Syed Ali Murtaza (A.G.A.)

A. Evidence Law-Indian Evidence Act,1872 – Section 32 - Dying declaration – Statement under section 161 Cr.P.C - Only evidence against the accused-appellant is the statement recorded under Section 161 Cr.P.C. of the victim. It does not find support from any other evidence - statement under Section 161 Cr.P.C. that was relied upon as the dying declaration, does not fulfill the requirement of law and fact - Dying declaration was not recorded by the Investigating Officer before two reliable witnesses, therefore, statement recorded under Section 161 Cr.P.C. does not qualify as a 'dying declaration'.

B. Indian Penal Code, 1860 – Conviction - Where on the evidence, two possibilities are available or open one which goes in favour of prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt - no iota of evidence to hold accused-appellant guilty - No incriminating circumstances and cogent evidence - Trial Court has convicted and sentenced accused-appellant in a serious offence on the basis of statement of victim under Section 161 Cr.P.C assuming it 'dying declaration' without any corroboration - accused-appellant is entitled to benefit of doubt and deserves acquittal. (Para 26,33,34,35,39,40,41)

Jail appeal allowed (E-7)

List of cases cited:-

1. Paniben Vs St. of Guj. (1992) 2 SCC 474

2. Bhagwan Singh & ors. Vs St. of M.P. (2002) 4 SCC 85

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SCC 1622

4. Kali Ram Vs St. of H.P. (1973) AIR 2773

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellant stood for trial in Sessions Trial No. 762 of 2012 (State v. Arvind Bajpai, Crime No. 464 of 2012), under Section 302, Police Station Barra, district Kanpur Nagar, pending in the Court of Additional District and Sessions Judge, Court No.6, Kanpur Nagar and came to be decided by the said Court vide judgment and order dated 09.04.2015 convicting and sentencing him under Section 302 IPC to undergo imprisonment for life and fine of Rs. 5,000/-. Appellant sought interference of this Court by filing this Jail Appeal from Jail through Jail Superintendent concerned.

2. Prosecution story, in brief, is that PW-1 Vishal Bajpai, submitted a written

Tehrir Ex. Ka-1 getting it scribed by PW-2 in the Police Station Barrar stating that his mother Smt. Aneeta Bajpai was present in the house at 8:00 a.m. on the fateful day i.e. 25.05.2012. Accused (his father) came there and set her at fire by pouring kerosene oil on her. PW-1 and 2 went to take water at that time. When they came back to house, came to know that accused (father) set victim at fire. Accused started to abuse PW-1 and 2 also. Ex.Ka-1 further recites that incident was witnessed by Vinod Tiwari and Kalka Prasad (both unexamined), residents of same vicinity. Victim was taken to hospital, where she was admitted for medical treatment.

3. On the basis of written Tehrir, chick First Information Report (herein after referred to as 'FIR') was registered by Head Constable clerk, Arvind Kumar, PW-4, as Case Crime No. 464 of 2012 under Sections 307, 323, 504 IPC against accused-appellant and entry of case was made by him in General Diary, copy whereof is Ex. Ka-4. During course of treatment, victim Smt. Aneeta Bajpai succumbed to burn injuries on 07.06.2012.

4. PW-3, Dr. Sanjeev Kumar, who was posted on 03.06.2012, as Medical Officer in District Hospital, Kanpur Nagar, conducted autopsy over dead body of Smt. Aneeta Bajpai, aged about 40 years, wife of Arvind Bajpai and prepared postmortem report Ex. Ka-2. Doctor opined that Smt. Aneeta Bajpai died due to burn injuries and infection.

5. PW-6, SI Chandra Prakash Bhatt, held inquest over dead body of deceased, prepared panchayat-nama, Ex. Ka-6, and case was converted to Sections 304, 323 and 504 IPC. Later on, Court directed it to be converted in Section 302 IPC.

6. PW-5, SI Ghanshyam Yadav, undertook investigation and during the course of investigation recorded statements of Panch witnesses and other witnesses. After completing entire formalities of investigation, he submitted charge-sheet Ex.Ka-7 against accused.

7. Case, being exclusively triable by Court of Sessions, was committed to Sessions Judge, wherefrom, it was transferred to Additional Sessions Judge, Court No. 6, Kanpur Nagar for disposal in accordance with law.

8. Trial Court framed charge on 10.01.2013 against accused under Section 302 IPC, which reads as under :-

"मैं, अमरजीत त्रिपाठी अतिरिक्त जिला एवं सत्र न्यायाधीश, 'न्यायालय कक्ष संख्या–6', कानपुर नगर आप ***अरविन्द बाजपेई*** *के विरूद्ध अधोलिखित* ***आरोप विरचित*** *करता हूँ :–*

यह कि दिनांक 25.05.2012 को समस 8.00 बजे पूर्वान्ह, स्थान म.नं. ई.डब्लू.एस. 285 गुज्जन विहार, कर्रही, चौकी व थाना क्षेत्र बर्रा, जनपद कानपुर नगर में आपने अपनी पत्नी अनीता बाजपेई की हत्या करने की नियत से मिट्टी का तेल उस पर डालकर जला दिया, जिससे उसकी मृत्यु हो गई और आपने हत्या का अपराध कारित किया। तद्नुसार आप उपरोक्त का यह कृत्य ***भारतीय दण्ड संहिता*** *की* ***धारा 302*** *के अन्तर्गत दण्डनीय एवं इस न्यायालय के प्रसंज्ञान में है।*

अतः मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप उपरोक्त का विचारण इस न्यायालय द्वारा किया जाये।

"I, Amarjeet Tripathi, Additional District and Sessions Judge, Court Room No. 6, Kanpur Nagar, frame you, Arvind Bajpeyee, with the following charge:-

That on 25.05.2012 at 8:00 a.m. at the House No. EWS 285, Gunjan Vihar, Karrahi, Police Outpost and PS - Barra, District - Kanpur Nagar, you, with the intention to kill your wife, poured her with kerosene and set her a fire, resulting in her death, thereby you committed an offence of murder. Accordingly, this act of yours is an offence punishable under Section 302 IPC and is in the cognizance of this court.

I hereby direct you that for the aforesaid charges, you be tried by this court.

The aforesaid charges were read over and explained to the witnesses who pleaded not guilty and sought trial."

(English Translation by Court)

9. Accused denied charges leveled against and claimed trial.

10. In order to substantiate its case, prosecution examined as many as seven witnesses in the following manner :-

Sr. No.	Name of PWs	Nature of witness	Paper proved
1	Vishal Bajpai	Fact	Ex. Ka-1
2	Vikas Bajpai	Fact	Ex.Ka-12
3	Dr. Sanjeev Kumar	Formal	Ex.Ka-2
4	HC Arvind Kumar	Formal	Ex.Ka-3 and 4
5	SI Ghanshyam Yadav	Formal	Ex.Ka-7, 8, 9, 10 and 14
6	SI Chandra Prakash Bhatt	Formal	Ex.Ka-5

11. On closure of prosecution evidence statement of accused under Section 313 Cr.P.C. was recorded by Court explaining all incriminating evidence and circumstances. Accused denied prosecution story in toto and all formalities of investigation were said to be wrong. He claimed false implication and statement of witnesses is said to be wrong. He did not choose to adduce evidence in defence. In response of question no.9, he answered that his wife herself died.

12. After hearing counsel for the parties and analyzing entire evidence led by prosecution on record, Trial Court has found accused-appellant guilty and convicted him, as stated above. Feeling aggrieved and dissatisfied with impugned order of conviction and sentence, present appeal has been filed through Jail.

13. We have heard Sri Lal Chandra Mishra, Advocate (Amicus Curiae) for appellant and Sri Syed Ali Murtaza, learned A.G.A for State-respondent at length and have gone through the record carefully with valuable assistance of learned Counsel for parties.

14. Learned Amicus Curiae assailed order of conviction and sentence advancing following submissions :-

i. There is no motive to accused-appellant to commit murder of his wife.

ii. PW-1 and PW-2 are not eye-witnesses. As per FIR, they were not present in the house at the time of incident. Later, they both turned hostile.

iii. Witness named in FIR namely Vinod Kumar and Kalka were not produced from the side of prosecution.

iv. Victim is said to be admitted in the Hospital for medical treatment but eventually her dying declaration under Section 32 of Indian Evidence Act has not been recorded till her death with no proper explanation.

v. It is a case of no evidence but Trial Court has wrongly convicted accused relying on statement under Section 161 Cr.P.C. made by victim before Investigating Officer during investigation.

vi. Prosecution has failed to establish its case beyond reasonable doubt.

15. Learned A.G.A. opposed the submission of learned counsel for accused-appellant and submitted that accused-appellant is named in FIR, Investigating Officer recorded statement of victim under Section 161 Cr.P.C., in which she has given statement against her husband, which is admissible in evidence under Section 32 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872,) after her death. Incident took place in the house of accused-appellant and accused-appellant has been rightly convicted by Trial Court.

16. Although place, time and date of occurrence, death of victim due to burn injuries could not be disputed from the side of prosecution but according to learned counsel counsel for accused-appellant, he is not responsible for the present crime. Even otherwise PW-1 and PW-2, though have turned hostile but they proved that their mother got injured by burn injuries in the house and evidence of doctor shows that victim died due to burn injuries. In this way, time, date and place of incident and death of Smt. Aneeta Bajpayee due to burn injuries stand established.

17. Thus, only two questions remain for consideration of this Court are "Whether accused-appellant is responsible for causing burn injuries to victim-Aneeta Bajpayee due to which, she succumbed to death" and "Whether Trial Court rightly convicted him or not?"

18. We may now proceed to consider the rival submissions of learned counsel for parties and briefly consider evidence of prosecution.

19. PW-1, Vishal Bajpayee, Informant, did not support prosecution case and turned hostile. He deposed in his statement that on 25.05.2012, at about 8:00 am, his father (accused) neither entered the house, nor assaulted her mother, nor poured kerosene oil on her. In his cross-examination, he deposed that he submitted written report, Ex.Ka-1, against her father at the behest of other people and signed it without reading. His mother herself was burnt with oil. Witness was declared hostile on the request of prosecution and was subjected to lengthy cross-examination.

20. PW-2, Vikash Bajpayee, also did not support prosecution case. Witness was declared hostile on the request of State Counsel. In his cross examination, he deposed that he did not see the incident by his own eyes and he was not present in the house at the time of incident.

21. Both the witnesses withstood lengthy cross-examination by prosecution but nothing could be brought so as to support prosecution case and their statement could be disbelieved. As per FIR itself, both witnesses did not appear to be eye-witnesses.

22. PW-3, Dr. Sanjeev Kumar deposed that on 3.6.2012 he was posted in District Hospital, Kanpur Nagar and on

postmortem duty, at about 2:50 pm, he conducted autopsy over the dead body of Smt. Aneeta Bajpayee and found superficial deep burn injuries over her body. Line of redness was also present. He noted ante-mortem injuries as under :-

"About 60% superficial to deep burn injury our back, abdomen."

23. Doctor opined that death was possible one day prior to postmortem and might have occurred due to Coma and infection due to ante mortem burn injuries.

24. PW-5, SI Ghanshyam Yaday, deposed that on 24.6.2010, he commenced investigation, recorded statements of Vishal Bajpayee, victim-Aneeta Bajpayee, witness Vikas Bajpayee under Section 161 Cr.P.C., visited spot on pointing out of Vishal and prepared site plan, Ex.Ka-5. In statement under Section 161 Cr.P.C., victim told him that her husband poured kerosene oil and set her at fire. He arrested accused and recorded his statement. On the death of Aneeta Bajpayee on 7.6.2012, PW-6, SI Chand Prakash, held inquest, prepared inquest report Ex. Ka-6, case was converted into under Section 302 IPC and he submitted charge-sheet under Section 302 IPC against the accused-appellant. In his cross-examination, he deposed that victim remained alive 12-13 days after the incident and her dying declaration could not be recorded for the reason that she died before he took investigation.

25. PW-6, SHO Chand Prakash Bhatt, deposed that on 26.5.2012, he was posted as In-charge, outpost, PS Barrar, District Kanpur Nagar. He took investigation of case Crime No. 364 of 2012 under Section 307 IPC, recorded statement of Smt. Aneeta Bajpayee, in which, she stated that on 25.5.2012, at about 8:00 am, her husband entered the house, started abusing, poured kerosene oil and set her at fire. She rushed out of her house and jumped into a dirty canal to save herself. People of the same vicinity took out her from the Canal. She sustained burn injuries on her body. He visited spot, prepared site plan and on receiving information of her death, he held inquest over the dead body of Aneeta Bajpayee.

26. It is thus evident from record that victim died after 12-13 days from the incident due to burn injuries. It is said that her statement under Section 161 Cr.P.C. has been recorded by PW-6 but no statement under Section 32 of Act, 1872 was recorded where as victim remained alive 12-13 day after the incident took place. Only evidence against accused-appellant is statement under Section 161 Cr.P.C. of victim said to have been made before Investigating Officer, which does not find support from any other evidence. Reason shown by prosecution for not recording statement under Section 32 of Act, 1872 does not appear to be cogent and convincing. Apart from that, PW-2 specifically stated in his cross-examination that it was wrong to say that his mother told Investigating Officer that her husband set her at fire.

27. Before us, it was contended on behalf of appellant that the said statement of victim under Section 161 Cr.P.C. cannot be accepted as dying declaration for the reason that it was recorded by Investigator as statement under Section 161 Cr.P.C. and not as statement under Section 32 of Act, 1872 and admittedly

statement of victim was not attested by two respectable witness as required in Police Regulation.

28. Paragraph 115 of Police Regulations reads as under :-

"The officer investigating a case in which a person has been so seriously injured that he is likely to die before he can reach a dispensary where his dying declaration can be recorded ***should himself record the declaration at once in the presence of two respectable witnesses,*** *obtaining the signature or mark of the declarant and witnesses at the foot of the deceleration."* ***(Emphasis added)***

29. Section 32(1) of Act, 1872, provides as under:-

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

30. Going by Section 32(1) of Act, 1872, it is quite clear that such statement would be relevant even if the person who made statement was or was not at the time when he made it under the expectation of death. Having regard to extraordinary credence attached to such statement fall under Section 32(1) of Act, 1872 time and again Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a 'dying declaration'.

31. As far as implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Act, 1872, then whatever credence would apply to a declaration governed by Section 32(1), should automatically deemed to apply with all force to such a statement though recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 Cr.P.C. of a victim having regard to the subsequent event of death of the person making statement who was a victim would enable prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Act, 1872 and thereby commend

all the credence that would be applicable to a dying declaration recorded and claimed as such.

32. We now propose to deal the validity of the dying declaration. Court in **Paniben vs. State of Gujarat, (1992) 2 SCC 474,** laid down certain principles regarding dying declaration, which are as under :-

"Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. 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 either 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. this Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. ***(Mannu Raja v. State of M.P.).***

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. ***(State of M.P. v. Ram Sugar Yadav, Ramawati Devi vs. State of Bihar).***

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

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. ***(Rasheed Beg v. State of Madhya Pradesh).***

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

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

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

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

(ix) Normally the court in Order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has

said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. ***(Nanahau Ram and Anr. v. State of M.P.).***

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. ***(State of U.P. v. Madan Mohan).***

33. In the case in hand we thus found that statement under Section 161 Cr.P.C. which was relied upon as dying declaration, does not fulfill the requirement of every provisions of law and fact.

34. PW-6, Chandra Prakas Bhatt, deposed that on 26.05.2012, he undertook investigation, recorded statement of Smt. Aneeta Bajpai (injured). He further deposed in cross-examination that dying declaration was not got recorded because she had come to her house after getting cured from hospital. He did not take container and Match box in his possession from spot; she died after five days from the date of incident. Thus, it is very clear, when Investigator recorded statement of victim under Section 161 Cr.P.C., she was not under the expectation of death and she remained alive about two weeks. Evidently, dying declaration was not recorded by Investigating Officer before two reliable witnesses, therefore, statement under Section 161 Cr.P.C. does not fall under the category of 'dying declaration' under Section 32 of Act,1872.

35. It is well settled that where on the evidence, two possibilities are available or open one which goes in favour of prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt.

36. In **Bhagwan Singh & Others v. State of M.P. (2002) 4 SCC 85,** Court repeated one of the fundamental principles of criminal jurisprudence 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. Court observed as under:-

*"7. The golden thread which runs through the web of administration of justice in criminal case is that if t****wo 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.*** *Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided."* ***(Emphasis added)***

37. In **Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SCC 1622,** Court said that at any rate, the evidence clearly shows that two views are possible - one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered poison (potassium cyanide) to Manju but at the same time a fair possibility that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone appellant is entitled to benefit of doubt resulting in his acquittal.

38. In **Kali Ram v. State of Himachal Pradesh, 1973 AIR 2773,** Court made following observations:

"Another golden thread which runs through the web of the

administration of justice in criminal cases is that ***if two views are possible*** *on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence,* ***the view which is favourable to the accused should be adopted.*** *This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."*
(Emphasis added)

39. We have deeply considered entire evidence available on record to connect accused-appellant with present crime but find no iota of evidence to hold accused-appellant guilty.

40. We are surprised as to how without any incriminating circumstances and cogent evidence, Trial Court has convicted and sentenced accused-appellant in a serious offence on the basis of statement of victim under Section 161 Cr.P.C assuming it 'dying declaration' without any corroboration. Sentencing of accused-appellant in this manner erodes public faith on judicial system.

41. Considering the entire facts and circumstances and evidence led by the prosecution, in entirety, we do not find any cogent and convincing evidence against accused-appellant to connect him with present crime and, in our considered opinion, accused-appellant is entitled to benefit of doubt and deserves acquittal.

42. Appeal is, accordingly, **allowed**. Impugned judgment and order dated 09.04.2015 passed, in Sessions Trial No. Sessions Trial No. 762 of 2012 (State v. Arvind Bajpai, Crime No. 464 of 2012), by Additional District and Sessions Judge, Court No.6, Kanpur Nagar, is hereby set aside. Appellant is acquitted of charges levelled against him. He is in jail and shall be released forthwith, if not wanted in any other case.

43. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

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

45. Before parting, we provide that Sri Lal Chandra Mishra, Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A578

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 3345 of 2012

Gajendra ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Prateek Samadhiya (A.C.), Sri Shams Uz Zaman, Sri Sunil Kumar

Counsel for the Opposite Party:
Sri Mahesh Chandra Joshi (A.G.A.)

A. Evidence Law-Indian Evidence Act,1872 – Section 118; Indian Penal Code, 1860 - Sections 376 and 506 I.P.C. - victim PW-2 is real daughter of the accused-appellant & PW-1 is the wife of accused. No occasion for PW-1 and PW-2 to falsely implicate the accused. No requirement that the evidence of the rape victim cannot be accepted unless it is corroborated in material particulars. Victim is a competent witness under Section 118 of Evidence Act, 1872 - her evidence must receive the same weight as is attached to an injured in cases of physical violence - where direct evidence is trust worthy, it can be believed. Motive does not carry much weight - merely because that there was no strong motive proved to commit the present offence, prosecution case cannot be disbelieved - accused-appellant committed rape upon her daughter PW-2 and an offence punishable under Section 376 I.P.C., - Trial Court rightly analyzed evidence led by prosecution and found the accused guilty and convicted him for having committed rape, an offence punishable under Sections 376 and 506 IPC - The measure of punishment should be proportionate to gravity of offence - Conviction and sentence awarded by Trial Court is liable to be maintained and confirmed.(Para 5,10,21,24,27, 29, 30,31,32)

Jail appeal dismissed. (E-7)

List of cases cited:-

1. St. of Pun. Vs Gurmeet Singh & ors. (1996) 2 SCC 384

2. St. of Mah. Vs Chandra Prakash Kewalchand Jain AIR (1990) SC 658

3. St. of Pun. Vs Gurmit Singh & ors. AIR (1996) SC 1383

4. St. of H.P. Vs Raghubir Singh (1993) 2 SCC 622

5. Lokesh Shivakumar Vs St. of Kar. (2012) 3 SCC 196

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

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

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

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

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Present jail appeal has been directed by accused-appellant Gajendra against the judgement and order dated 08.08.2012 passed by Govind Ballabh Sharma, Additional Sessions Judge, Court No.3, Ghaziabad in Session Trial No.1281 of 2011 (State Vs. Gajendra Singh) under Section 376 and 506 IPC, P.S. Loni, District Ghaziabad. By the impugned judgement and order dated 08.08.2012, accused-appellant Gajendra has been convicted under Section 376 I.P.C. and sentenced to imprisonment for life with a fine of Rs.1,00,000/- and in default of payment of fine, he shall undergo one year additional rigorous imprisonment; and further he has been convicted under Section 506 I.P.C. and sentenced to rigorous imprisonment for seven years with a fine of Rs. 5,000/- and in default of payment of fine, two years additional rigorous imprisonment.

2. Brief facts of the case emerging in First Information Report (hereinafter

referred to as "FIR") is that PW-1 Madhubala wife of Gajendra submitted a written report, Ex.Ka-1, in Police Station Loni, District Ghaziabad, stating that on 09.06.2011 at about 3:00 PM, she had gone to market to purchase vegetables. Her husband i.e. accused-appellant Gajendra and her minor daughter aged about 14 years (victim's name is withheld by us) were present in the house. When she returned after taking vegetables, she saw that genitals of her daughter was bleeding and she was weeping. On being asked, she told that accused-appellant (father of victim) committed rape with her and put wooden cylinder (Lakadi ka Belan) in her genitals. When she asked her husband, why he has done so, he threatened her to kill, due to which she was afraid and remained silent. She went to her parental house with victim daughter and narrated entire story to her family members. Thereafter, she got victim medically examined in a private hospital, later due to not getting any relief, she took her in G.T.B. Hospital, Sahadara, Delhi.

3. On the basis of written report Ex.Ka-1, Constable Rahul Kumar (not examined), registered Chick F.I.R. Ex.Ka-5 as Case Crime No. 708 of 2011, under Section 376 and 506 I.P.C. against accused-appellant. Entry of case was made by him in General Diary, copy whereof is Ex.Ka-6.

4. PW-5 lady Doctor Nitasha Gupta, medically examined victim and prepared her medical report Ex.Ka-4. She found G.C. conscious oriented; pulse fair, BP-110/70 mm/hg; pubic hair present, not matted; external genitalia (N); hymen torned; posterial wall-tear present 7 cm, clots present; faecal seen through tear; abdomen tenderness present, rigidity present, guarding present.

5. PW-4 S.I. Rajpal Singh, undertook investigation of case, commenced investigation, recorded statement of constable registering F.I.R., Informant PW-1 Madhubala, PW-2 victim and other witnesses; visited spot; prepared site plan Ex.Ka-3. On 15.06.2011, accused-appellant Gajendra was arrested by Investigating Officer. He got recorded statement of victim under Section 164 Cr.P.C. before Magistrate concerned and after completing entire formalities of investigation submitted charge sheet Ex.Ka-4 against accused in the Court of C.J.M. concerned.

6. Case, being exclusively triable by Court of Sessions, was committed by C.J.M. to Sessions Court, Ghaziabad where-from it was transferred to Additional Sessions Judge, Court No. 1, Ghaziabad for disposal according to law.

7. Trial Court framed charges accused-appellant Gajendra on 07.02.2011 under Sections 302 and 506 IPC which read as under :-

आरोप

मैं गोविन्द बल्लभ शर्मा अपर सत्र न्यायाधीश कोर्ट संख्या 3, गाजियाबाद आप गजेन्द्र सिंह को निम्नलिखित आरोप से आरोपित करता हूँ-

1. यह कि दिनांक 9.6.2011 को समय करीब 3:00 बजे दिन स्थान अपने घर स्थित मौहल्ला अमर विहार लोनी थाना- लोनी जि० गाजियाबाद में अपनी पुत्री कु० सुरेखा अवयस्क उम्र 14 वर्ष के साथ जबरन अयुक्त बलात्संग किया। इस प्रकार आपने ऐसा

अपराध किया जो भारतीय दंड संहिता की धारा 376 के अन्तर्गत दंडनीय है और मेरे प्रसंज्ञान में है।

2. यह कि उपरोक्त दिनांक समय व स्थान पर जब आपकी पत्नी ने आपसे पुत्री कु० सुरेखा उम्र 14 वर्ष के साथ बलात्कार करने के बारे में पूछा तो आपने उसे जान से मारने की धमकी दी। इस प्रकार आपने ऐसा अपराध किया जो भारतीय दंड संहिता की धारा 506 के अन्तर्गत दंडनीय है और मेरे प्रसंज्ञान में है।

अतएव एतद्द्वारा आपको निर्देशित किया जाता है कि आपके विरूद्ध उक्त आरोप का विचारण इस न्यायालय द्वारा किया जाये।

Charge

I, Govind Ballabh Sharma, Addl Session Judge, Court No 3, Ghaziabad charge you, Gajendra Singh, as under:

1 . That on 9.6.2011 at around 3 pm in your house situated at Mohalla Amar Vihar Loni, P.S. Loni, Distt Ghaziabad, you forcibly committed rape on your daughter Km Surekha, minor, aged 14 years, thereby committing an offence punishable u/s 376 IPC which is in my cognizance.

2 . That when your wife asked you about having committed rape on daughter Km Surekha, aged 14 years, on the aforesaid date, time and place, you held out life threat to her, which is punishable u/s 506 IPC and is in my cognizance.

It is hereby directed that the aforesaid charges be tried against you by this court.

8. Accused-appellant denied the charges against him and claimed to be tried.

9. In order to substantiate its case, prosecution examined as many as five witnesses out of whom PW-1 Madhubala, PW-2 victim and PW-3 Santu are witnesses of fact whereas PW-4 S.I. Rajpal Singh and PW5 Dr. Nitasha Gupta are formal witnesses.

Srl. No.	Name of PW	Nature of witness	Paper proved
1.	Madhubala	Fact	Ex.Ka-1
2.	Victim	Fact	Ex.Ka-2
3.	Santu	Fact	---
4.	Rajpal Singh	Formal	Ex.Ka-3, 4, 5 and 6
5.	Dr. Nitasha Gupta	Formal	Ex.Ka-4, M.L.C.

10. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Trial Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto. Entire prosecution story is said to be wrong and concocted. In response of question no. 13, he said that Informant and victim implicated him falsely. Victim was subjected to rape by his maternal uncle but he was implicated. Accused-appellant did not chose to lead any evidence in defence.

11. Trial Court, after hearing learned counsel for the parties and appreciating entire evidence, oral and documentary, found accused-appellant guilty and convicted and sentenced him as stated above.

12. Feeling aggrieved and dissatisfied with impugned judgement and order of conviction, accused-appellant preferred present appeal through Jail.

13. We have heard Sri Prateek Samadhiya, learned Amicus Curiae appearing for appellant and Sri Mahesh Chandra Joshi, learned A.G.A for State-respondent at length and travelled through the record with the valuable assistance of learned counsel for the parties.

14. Learned Amicus Curiae for appellant assailing verdict of conviction of accused-appellant, advanced his submissions in following manners :-

(i) Accused-appellant has falsely been implicated in the present case.

(ii) There is no motive or occasion for accused to commit the present crime.

(iii) No body has seen accused-appellant to commit crime.

(iv) PW-1 and PW-3 are not eye witnesses. Victim was subjected to rape by her maternal uncle and accused-appellant has been implicated with the collusion of PW-1 and PW-2.

(v) Medical evidence is not compatible with oral version.

(vi) Victim PW-2 has given evidence against the accused-appellant under the pressure of her mother and maternal uncle.

(vii) Prosecution failed to establish its case beyond reasonable doubt; Trial Court did not appreciate evidence on record in the right perspective and has committed error in convicting accused. Therefore, accused-appellant is liable to be acquitted.

15. Learned AGA vehemently opposed the submissions advanced by learned counsel for appellant and submitted that accused-appellant is named in F.I.R.; he committed rape upon her own minor daughter; he deserves no sympathy; victim PW-2 and Madhubala PW-1 (mother of victim) supported prosecution story and gave evidence against accused-appellant; medical evidence is also compatible with oral evidence. Trial Court right convicted the accused-appellant and appeal is liable to be dismissed.

16. Now we may proceed to consider rival submissions of learned counsel for parties and evidence of prosecution available on record.

17. PW-1 Madhubala deposed that accused-appellant is her own husband. On the fateful day at about 3:00 PM, she had gone to market to purchase vegetables, her husband (accused-appellant) and her minor daughter (PW-2) aged about 14-15 years were present in the house. When she returned to her house after some time with vegetables, she saw that genitals of victim was bleeding, she was weeping and nervous. On being asked victim told that her father committed rape with her and put wooden cylinder (Lakadi ka Belan) in her genitals. When she asked her husband, why he did so, accused threatened her to take away his life. She was afraid and not allowed to go out of house. She went to her parental house with victim and there she narrated entire story to her family members. Victim was medically treated by private doctors but later on she admitted in G.T.B. Hospital, Sahadara, Delhi. She got report of incident scribed by village Pradhan Sohan Lal. She proved written report marked as Ex.Ka-1. In cross examination, PW-1 stated that she was married to accused-appellant 17 years prior. She has five issues with her valid wedlock. She withstood a lengthy cross-examination

but nothing adverse material could be extracted so as to disbelieve her statement. It is evident from her statement that when she went to market, her husband and victim were in house and when she returned home she found both of them there but victim was nervous and her genitals was bleeding.

18. PW-2 victim deposed that accused-appellant Gajendra is her father. On the fateful day, she was in the house and her father was also there. When her mother went to market for taking vegetables at about 3:00 PM, her father closed the door from inside and committed rape upon her forcibly and put wooden cylinder *(Lakadi ka Belan)* in her genitals due to which it was bleeding. When her mother returned to home, she narrated entire incident to her. Her father threatened her mother to kill her. Her mother took her to the house of her maternal uncle about two days after where she was medically treated but due to not getting any relief, she was taken to G.T.B. Hospital, Sahadara, Delhi where she remained admitted for one month and she is not felling well so far. In cross-examination, she stated that after the incident, she left studies. She remained in her maternal uncle's house from her childhood and came to the house of her father with her mother one month prior to incident. When incident took place, her brothers were not in the house. When her father raped her, she raised alarm but nobody came there. Witness withstood length cross-examination but nothing could be brought on record so as to disbelieve her statement. Certain minor variations occurred in her statement but they are not of such nature which may dent the root of case.

19. PW-3 Santu deposed that Informant PW-1 Madhubala is his real sister. His sister came to his house along with her daughter victim and told him that accused-appellant Gajendra committed rape upon her daughter and her genitals was bleeding much. She was admitted in G.T.B. Hospital, Sahadara, Delhi for treatment, where victim underwent three operations but she was not still feeling well. This witness is not eye witness, therefore, his statement does not require much scrutiny.

20. PW-5 Dr. Nitasha Gupta deposed that on 15.6.2011, she was posted in G.T.B. Hospital, Sahadara, Delhi. On the same day, she examined victim aged about 14 years, brought by her mother and maternal uncle, and found the victim unconscious, hymen torned, vagina and anus were both united, fecal mater was coming through genitals.

21. In the present case victim PW-2 is real daughter of accused-appellant. PW-1 is the wife of accused and closed to victim as well as accused. There is no occasion for PW-1 and PW-2 to implicate accused-appellant falsely. Incident took place in the house of accused. It has come in the statement of PW-2 that door was closed from inside and at the time of incident, she cried but nobody came, therefore, was no occasion for anyone to save her. In the statement under Section 313 Cr.P.C., accused-appellant simply denied the crime committed by him but he has not given any plausible explanation why his real wife and daughter were giving false evidence against him.

22. In **State of Punjab Vs. Gurmeet Singh and others, 1996 (2) SCC 384,** Court has held that:

"A rapist not only violates the victims privacy and personal integrity, but inevitably causes serious

psychological as well as physical harm in the process. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, on its shoulder has a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature to throw out an otherwise reliable prosecution case".

23. In **State of Maharastra Vs. Chandra Prakash Kewalchand Jain AIR 1990 SC 658,** Court has held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice.

24. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence.

25. In **State of Punjab Vs. Gurmit Singh and others AIR, 1996 SC 1383,** Court held that:

"In cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensibility. Minor contradictions or insignificant discrepancies in the statement of prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The cause may look for some assurance of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice".

26. In **State of H.P. Vs. Raghubir Singh (1993) 2 SCC 622,** Court held that:

"There is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity".

27. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

28. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is

fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

29. Considering the entire facts and circumstances of the case, evidence of prosecution in entirety, we have no hesitation to state that accused-appellant Gajendra committed rape upon her daughter PW-2 and put wooden cylinder (Lakadi Ka Belan) in her genitals, an offence punishable under Section 376 I.P.C., and threatened his wife when she sought to enquire from him, why he committed rape upon his own daughter.

30. In view of facts discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found accused guilty and convicted him for having committed rape, an offence punishable under Sections 376 and 506 IPC. Conviction and sentence awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court. Jail appeal lacks merit and liable to be dismissed.

31. So far as sentencing of accused-appellant is concerned, it is always a difficult task requiring balance of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in individual cases.

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

33. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment awarded to accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper

and no question arises to interfere in the matter on the point of punishment imposed upon him.

34. In view of above discussion, **the appeal lacks merit and is accordingly, dismissed.** Impugned judgement and order dated 08.08.2012, is maintained and confirmed.

35. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

36. Before parting, we provide that Sri Prateek Samadhiya, Advocate, who assisted as Amicus Curiae, appearing for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A586

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4163 of 2015

Pappu @ Nandu Pandey ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Prem Shanker Tiwari (A.C.)

Counsel for the Opposite Party:
Sri Nikhil Chaturvedi (A.G.A.)

A. Evidence Law-Indian Evidence Act,1872 – Circumstantial evidence - no eye witness of occurrence - chain of circumstantial evidence leading guilt of accused-appellant is not complete - the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established - The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. The circumstances should be conclusive in nature - There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused. Where on the evidence, two possibilities are available or open which goes in favour of the prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt - Trial Court has not marshalled entire evidence on record with care and caution - not correct in convicting accused-appellant, solely relying on the statement of PW-1, that too not supported by any other witnesses and overlooking other major contradictions in their evidence and missing chain of circumstantial evidence - accused-appellant is entitled to benefit of doubt - prosecution failed proving guilt of accused-appellant beyond reasonable doubt. (Para 35, 37, 45, 49,50)

Jail appeal allowed (E-7)

List of cases cited:-

1. Hanumant Govind Nargundkar & anr. Vs St. of M.P., AIR (1952)SC 343

2. Hukam Singh Vs St. of Raj. AIR (1977) SC 1063,

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SC 1622

4. Ashok Kumar Chatterjee Vs St. of M.P., AIR (1989) SC 1890

5. C. Chenga Reddy & ors, Vs St. of A.P. (1996) 10 SCC 193

6. Bodh Raj @ Bodha & Ors.Vs St. of J&K. (2002) 8 SCC 45

7. Shivu & anr. Vs Registrar General High Court of Karn. & anr. (2004) SCC 713

8. Tomaso Bruno Vs St. of U.P. (2015) 7 SCC 178.

9. Bhagwan Singh & ors. Vs St. of M.P. (2002) 4 SCC 85

10. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SCC 1622

11. Kali Ram Vs St.of H.P. (1973) AIR 2773

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Present jail appeal has been directed by accused-appellant Pappu @ Nandu Pandey against the judgement and order dated 11.5.2015 passed by Additional Sessions Judge, Court No.14, Meerut in Session Trial No.1395 of 2011 (State Vs. Pappu @ Nandu Pandey) under Section 302, 376 IPC, P.S. Partapur, District Meerut whereby Trial Court has convicted accused Pappu @ Nandu Pandey and sentenced him to rigorous imprisonment for ten years with fine of Rs.10,000/- under Section 376 IPC, in default of payment of fine, one years additional imprisonment; and rigorous imprisonment for life with fine of Rs. 20,000/- under Section 302 I.P.C., in default of payment of fine, two years additional imprisonment.

2. Factual matrix of the case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. PW-1, Jai Pakash submitted a written Tehrir Ex.Ka-1 on 31.10.2011 in Police Station Partapur, District Meerut stating therein that his own house was broken and it was not liveable, so his mother lived alone in the house of Sudhir (his cousin) and as usual, she slept in the night of 30.10.2011 in that house. His sister in law (Bhabhi) Smt. Kamlesh PW-2 was living in her own house and look after his mother (victim). In the morning on 31.10.2011 PW-2 Kamlesh came to see victim and saw that door was closed from inside. She tried to get it opened by giving voice but no response came from inside, so a boy was sent from the house of neighbouring Jogendra to open the door from inside. On opening door, PW-2 Kamlesh found his mother Bhagwati dead. There was a lot of bruises and blood on her face. Many people gathered on the spot. F.I.R. further recites that on 30.10.2011, PW-1 was present in the house of his Bhabhi, at about 10:00 PM. PW-1 and his nephew Yogesh, PW-3, after taking dinner, came to walk in the street towards his mother and saw that house of his mother was locked. They saw accused-appellant Pappu @ Nandu Pandey going towards roof of Jogendra from Sudhir's roof. All cloths of mother were removed from her body and she was half necked. It was suspected by PW-1 that victim was raped and murdered by accused-appellant Pappu @ Nandu Pandey.

4. On the basis of written Tehrir Ex.Ka-1, a Chick F.I.R. Ex.Ka-19 was registered by H.M., Naresh Kumar as

Case Crime no. 530 of 2011, under Section 302 and 376 I.P.C. against accused-appellant. Entry of case was made in General Diary.

5. PW-8, Inspector, Rampal Singh, under the direction of PW-9 B.D. Pushkar, the then Inspector, held inquest over the dead body of Smt. Bhagwati, prepared inquest report Ex.Ka-10 and other papers relating thereto.

6. PW-6 Dr. Ravindra Singh, conducted autopsy over the dead body of Smt. Bhagwati and prepared post mortem report Ex.Ka-8, expressing his opinion that death of victim was possible two days prior to post-mortem due to coma on account of head injuries. He found three ante-mortem injuries as under :-

(i) Lacerated wound 3 cm x 1 cm x bone deep on left side of forehead eyebrow.

(ii) Bilateral black eyes.

(iii) Lacerated wound 2 cm x 1 cm x bone deep on right side of chin (not clear in the P.M. report).

7. PW-7 Dr. Vikram Singh examined smear slide of Smt. Bhagwati and prepared his examination report, Ex.Ka-9, expressing his opinion that dead spermatozoa was found in the slide.

8. PW-9 B.D. Pushkar undertook investigation, visited spot with Informant PW-1, prepared site plan Ex.Ka-16, recorded statement of Informant, collected one blood stained pillow and one blood stained bed sheet, blood stained and simple earth, one bangle (Kada made by steal) and prepared memos thereof, collected one Jeans pant, underwear and baniyan belong to accused and taken into custody and prepared Fard thereof; recorded statement of other witnesses. After completing all formalities of investigation submitted charge sheet Ex.Ka-18 against accused-appellant.

9. Case, being exclusively triable by Court of Sessions, was committed to Sessions Court for trial.

10. Trial Court, framed charges against accused-appellant Pappu @ Nandu Pandey under Section 302 and 376 IPC on 01.02.2012 which read as under :

आरोप

''मै, साधना रानी, अपर सत्र न्यायाधीश, कोर्ट सं0–15, मेरठ आप पप्पू उर्फ नन्दू पांडे पर एतदद्वारा निम्न आरोप लगाती हूँ।

प्रथम, यह कि दिनांक 30.10.2011 को रात्रि में किसी समय स्थान ग्राम ढिढाला थाना परतापुर जिला मेरठ स्थित सुधीर के मकान पर सो रही वादी जय प्रकाश सिंह की मां के साथ आपने जबरन बलात्कार किया, इस प्रकार धारा 376 भा0दं0सं0 के अधीन दंडनीय अपराध किया जो इस न्यायालय मे प्रसंज्ञान में है।

द्वितीय, यहकि उपरोक्त दिनांक, समय व स्थान पर आपने वादी की मां के साथ बलात्कार करने के पश्चात जान से मारने की नीयत से वादी की मां की चोटें पहुँचाकर उसकी हत्या कर दी इस प्रकार आपका यह कार्य धारा 302 भा0दं0सं0 के अधीन दंडनीय अपराध है जो इस न्यायालय के प्रसज्ञान में है।

एतदद्वारा आपको, आदेशित किया जाता है कि आपका विचारण उक्त आरोप हेतु इस न्यायालय द्वारा किया जायेगा।''

Charge

"I, Sadhna Rani, Additional Sessions Judge, Court No. 15, Meerut, hereby charge you, Pappu @ Nandu Pandey with the following offences:-

Firstly, you at any time on the night of 30.10.2011 forcibly committed rape on the complainant Jai Prakash Singh's mother sleeping in Sudhir's house

located in village - Dhidhala, PS - Paratapur, and District - Meerut; thereby committing an offence punishable u/s 376 IPC, which is in the cognisance of this court.

Secondly, on the aforesaid date, time and place, you, having committed rape on the complainant's mother, inflicted injuries on her person with the intention to kill her, and murdered her; thereby you committed an offence punishable u/s 302 IPC, which is in the cognisance of this court.

It is hereby ordered that you shall be tried for the aforesaid charges by this court."

11. Accused-appellant pleaded not guilty and claimed to be tried.

12. In order to substantiate its case, prosecution examined as many as nine witnesses out of whom PW-1 Jai Prakash, PW-2 Kamklesh, PW-3 Yogesh and PW-4 Beena are witnesses of fact and PW-5 Shiv Raj Singh, PW-6 Dr. Ravindra Singh, PW-7 Dr. Vikram Singh, PW-8 Inspector Rampal Singh and PW-9 the then Inspector B.D. Pushkar are formal witnesses.

13. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto, story and statement of witnesses are said to be wrong and under the pressure of police. He claimed false implication in the present case.

14. Trial Court, after hearing learned counsel for the parties and appreciating entire evidence led by prosecution on record found accused-appellant guilty and convicted him as stated above. Feeling aggrieved and dissatisfied with impugned judgement and order of conviction, present appeal has been filed through Jail.

15. We have heard Sri Prem Shanker Tiwari, learned Amicus Curiae appearing for appellant and Sri Nikhil Chaturvedi, learned A.G.A for State-respondent at length and gone through the record carefully.

16. Learned counsel for appellant assailing impugned judgement and order of conviction of accused-appellant, advanced his submissions, in the following manners :-

(i) This is a case of circumstantial evidence where there is no direct evidence against accused-appellant.

(ii) There is no complete chain of circumstantial evidence produced by prosecution.

(iii) There is no motive to accused to commit the present crime. Motive is completely missing in the prosecution case.

(iv) PW-3 Yogesh states nothing in support of PW-1 regarding landing of accused-appellant on Yogendra's roof.

(v) Except PW-1, no other witness states anything about the fact of case.

(vi) It is apparent from the prosecution case that accused was present on spot before registration of case which leads innocence of accused.

(vii) Seeing the age of deceased, there is no possibility of rape with victim

by any one. Medical evidence does not support theory of rape with victim.

(viii) There are many contradictions in evidence of witnesses rendering the case doubtful.

(ix) Prosecution, totally, failed to prove its case beyond reasonable doubt but Trial Court wrongly appreciated evidence and held accused-appellant guilty without proper application of mind.

17. Learned AGA opposed submissions of leaned counsel for appellant and submitted that accused is named in F.I.R.; he has been arrested immediately after the crime; his steal bangle (Kada), pant and underwear contained blood which was found to be human blood in the report of F.S.L. was recovered from the spot; PW-1 saw him landing on the roof of Yogendra from the house of Sudhir on 10:00 PM in the night on 30.10.2011 in which crime was committed; hence, prosecution has proved entire chain of circumstantial evidence and Trial Court rightly convicted accused-appellant.

18. Although, time, date, place and assassination of victim Bhagwati was not challenged from the side of defence but according to Advocate for appellant he is not responsible for the present crime. Death of Smt. Bhagwati and place where she was assassinated stand established from the evidence of prosecution.

19. Thus only question for consideration of this Court is, "whether accused-appellant is responsible for committing present crime and Trial Court has rightly convicted accused-appellant for the offence punishable under Sections 376 and 302 I.P.C. or not?"

20. Now we may proceed to consider rival submissions of learned counsel for parties and evidence of prosecution as well as some important decisions.

21. PW-1 Jai Prakash deposed that on 30.10.2011 he had gone to the house of PW-2 Kamlesh; his mother (deceased) was living in the house of his cousin; PW-2 Kamlesh was looking after the victim; in the evening on 10:00 PM, he was coming from the house of his Bhabhi PW-2 after taking meal along with his nephew Yogesh; door of his mother's house was closed whereupon he began to come back; he saw that accused-appellant Pappu @ Nandu Pandey was landing on Yogesh roof; he and his nephew Yogendra PW-3 came back to his house and slept; when on the next day, as usual, his sister-in-laws PW-2 Kamlesh visited the house of victim to provide tea and knocked door but it was not opened, then a boy was sent inside to open the door through Yogesh house's roof, who opened the door from inside; PW-2 saw that victim was lying on cot in naked position and there was sign of injuries on her face; he and other people present there saw the victim lying dead; and it was suspected that victim was killed by accused-appellant Pappu @ Nandu Pandey. In cross-examination at page 28 of paper book, he admitted that he had seen accused-appellant first time in the night of incident. He further deposed that when accused-appellant was caught by villagers and handed over to police, he saw him. When accused-appellant Pappu @ Nandu Pandey told in police station that he was resident of Bihar, he came to know about his residence. He further deposed in cross-examination at page 30 of paper book that there was an electric pole near the house of Yogendra. House of Yogendra and Sudhir are adjacent to each

other. When he went to his mother's house in the night, there was electric light.

22. It is relevant to mention here that there is no description of electric pole in FIR. It is evident from the statement of PW-1 that there was light of electric when he went to the house of his mother but PW-1 says that he saw accused landing on the roof of Yogendra in the light of mobile torch which inspires no confidence.

23. PW-2 Kamlesh deposed that on 30.10.2011 her mother-in-law Smt. Bhagwati (victim) was sleeping in the house of Sudhir after taking meal; at about 10:00 PM her son Yogesh PW-3 and Dewar Jai Prakash PW-1 went to see her mother-in-law but door was closed from inside and they came back; they saw accused-appellant landing on the roof of Yogendra from the house of Sudhir in the light of mobile torch; next morning, she, as usual, went to her mother-in-law, door was closed; she sent one Ankit in the house of Sudhir where mother slept, who opened the door from inside and she saw that victim Bhagwati was lying on cot with blood and her cloths were scattered all around; she cried whereupon many people around came there and then she came to know that accused-appellant committed rape and killed her (victim).

24. PW-3 Yogesh deposed that PW-1 is his uncle and he wrote a tehrir Ex.Ka-1 on the dictation of PW-1 Jai Prakash. In cross-examination, he deposed that Ex.Ka-1 was scribed in police station in the presence of police officials.

25. PW-4 Smt. Beena deposed that deceased Bhagwati happens to be her Tai (aunt) who lived in her other house in the village. On 30.10.2011, victim slept in the night after taking meal. In the next morning, when she and PW-2 Kamlesh went to that house and found door was closed from inside. She knocked door but no response. When she sent one Ankit in the house through Yogendra house who opened the door from inside, she entered the house and saw that victim Bhagwati was lying dead with blood on cot and her cloths scattered all around. On hearing noise of weeping, PW-1 Jai Prakash and PW-3 Yogesh came there and informed police. Police inquired accused-appellant who confessed that he was in drunken position, committed rape upon Bhagwati and killed her.

26. From the evidence of PW-1, PW-2, PW-3 and PW-4, it appears that except PW-1, no other witnesses saw accused landing on the roof of Yogendra house from the roof of Sudhir in the night of 30.10.2011.

27. PW-5 Shiv Raj Singh is not eye witness and he proved Fard / memo prepared by police.

28. Only circumstantial evidence against accused-appellant is :-

(i) PW-1 Jai Prakash saw accused-appellant landing on the roof of Yogendra's house from the roof of Sudhir's house where victim slept;

(ii) Sign of rape appeared over the body of deceased;

(iii) Alleged underwear of accused-appellant bearing siemens, one Jeans Pant with blood allegedly belonged to accused-appellant.

29. As per report dated 6.4.2013 of F.S.L., Agra, human blood was found but

no spermatozoa was found on the cloths allegedly belong to accused.

30. PW-5 Shiv Raj Singh deposed that police has taken one steal bangle (Kada), one pant, one underwear and one baniyan with spot of blood from the accused and prepared Fard. In his cross-examination, he admitted that when he reached the spot at about 7:00 AM and remained there by 10:00 AM, police was there from before with accused-appellant whereas Chick FIR Ex.Ka-19 reveals that it was registered in the police station concerned at about 8:30 AM on 31.10.2011, meaning thereby police arrived at spot before registration of case and accused was already present there. PW-4 Beena herself admitted that accused-appellant Pappu @ Nandu Pandey came there and police inquired from him.

31. PW-9 B.D. Pushkar, Investigating Officer stated in his cross-examination that accused-appellant was not present on spot.

32. PW-1 Jai Prakash states that he along with his nephew Yogesh, after taking meal at about 10:00 PM, went to the house of his mother. PW-3 Yogesh states nothing in his statement about these fact. Thus, he does not support statement of PW-1. PW-5 states that he reached on spot at about 7:00 AM in the morning and before reaching to spot, police and accused were present there whereas Chick FIR reveals that it has been registered in police station concerned at 8:30 AM in the presence of Investigating Officer.

33. F.S.L. report does not talk of any spermatozoa over the cloths of accused-appellant. Presence of accused-appellant on spot before registration of case leads his innocence. If he had committed any offence, he would not have remained present there.

34. Statement of PW-6 Dr. Ravindra Singh, conducting post mortem of deceased on 31.10.2011 at about 4:40 PM, shows that death was possible two days prior to post mortem due to Coma on account of head injury, while according to prosecution, victim was alive before 10:00 AM in the night of 30.10.2011, thus, medical evidence is not compatible with oral version.

35. Theory of accused-appellant landing on roof of Yogendra's house from the roof of Sudhir's house at about 10:00 PM in the night of 30.10.2011 inspires no confidence, therefore, we find that chain of circumstantial evidence leading guilt of accused-appellant is not complete.

36. In a case, which rests on circumstantial evidence, law postulates twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused.

37. In the case in hand there is no eye witness of occurrence. Case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not

be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

38. In ***Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343,*** a basic judgment of Supreme Court on appreciation of evidence, when a case depends only on circumstantial evidence, where Court said:

*"... **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.....** it must be such as to show that **within all human probability the act must have been done by the accused."***

39. In ***Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,*** Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

40. In ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,*** Court, while dealing with a case based on circumstantial evidence, held that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The **circumstances concerned 'must or should' and not 'may be' established.***

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

(emphasis added)

41. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

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

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

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

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

(emphasis added)

42. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

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

(emphasis added)

43. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court said :

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,** upon any other reasonable hypothesis than that of his guilt*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

44. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in ***Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.***

45. It is well settled that where on the evidence, two possibilities are available or open which goes in favour of the prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt.

46. In **Bhagwan Singh & Others v. State of M.P. (2002) 4 SCC 85,** Court repeated one of the fundamental principles of criminal jurisprudence 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. Court observed as under:-

"7. The golden thread which runs through the web of administration of justice in criminal case 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. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided.

47. In **Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SCC 1622,** Court said that at any rate, the evidence clearly shows that two views are possible - one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered the poison (potassium cyanide) to Manju but at the same time a fair possibilitiy that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone appellant is entitled to the benefit of doubt resulting in his acquittal.

48. In **Kali Ram v. State of Himachal Pradesh, 1973 AIR 2773,** Court made following observations:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

49. In the present case, there is no eye witness. None has seen accused-appellant murdering deceased - Smt. Bhagwati. PW-1 to 5 failed to establish guilt of accused-appellant. There is no other evidence on record to connect accused-appellant with the present crime. Hence it can be said that crime could have been committed by someone else. There is no complete chain of circumstances to indicate that accused-appellant is the only person who murdered Smt. Bhagwati.

50. Looking into entirety of facts and circumstances of the case, as discussed above, we are of the view that Trial Court has not marshalled entire evidence on record with care and caution and is not correct in convicting accused-appellant, solely relying on the statement of PW-1, that too not supported by any other witnesses, overlooking other major contradictions in their evidence and missing chain of circumstantial evidence. In our view, accused-appellant is entitled to benefit of doubt and it cannot be said that prosecution has been successful in proving guilt of accused-appellant beyond reasonable doubt.

51. In the result, **appeal succeeds and is allowed.** Impugned judgment and order dated 11.5.2015 passed by Additional Sessions Judge, Court No. 14, Meerut in Sessions Trial No.1395 of 2011 is hereby set aside. Accused-appellant is acquitted of charges leveled against him. He is in jail and shall be released forthwith, if not wanted in any other case.

52. Keeping in view provisions of Section 437-A Cr.P.C., accused-appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

53. Lower Court record along with a copy of this judgment be sent immediately to District Court concerned for compliance and further necessary action.

54. Before parting, we provide that Sri Prem Shanker Tiwari, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A596

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Jail Appeal No. 4305 of 2014

Shareef ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Awadhesh Kumar Mishra, Sri Madhvendra Singh.

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

A. Criminal Law -Indian Penal Code, Sections 363 - prosecutrix being 18 years of age, was a major and had gone with preparation by taking cash of Rs. 1 lac and golden and silver jewelry with her. Ingredients of enticing or kidnapping of any person from India or from lawful guardianship not made out. Essential ingredients of kidnapping from lawful guardianship, provided under Section 361 of I.P.C., could not be proved - The conviction and sentence awarded by trial Court for offence punishable under Section 363 of I.P.C., was not substantiated with evidence on record, for which this appeal is to be partly allowed. (Para 16)

B. Criminal Law -Indian Penal Code,1860 - Section 366 of I.P.C - offence punishable under Section 366 of I.P.C. was not proved beyond reasonable doubt - it was a consensual fleeing by prosecutrix, who was major and had left her home with preparation by taking Rs. 1 lac in cash and golden and silver ornaments - the conviction and sentence awarded for this offence punishable under Section 366 of I.P.C., was not substantiated by evidence on record, for which this appeal merits its allowance. (Para 17)

C. Criminal Law -Indian Penal Code,1860 - Section 376 I.P.C. - Offence of rape - Prosecutrix, in her statement recorded under Section 164 of Cr.P.C., has categorically said that she was forcibly subjected to rape. She has proved her testimony recorded under Section 164 of Cr.P.C., - In her cross-examination, there is no material contradiction, exaggeration or embellishment on this part of her testimony - she has reiterated that the accused was subjecting her to rape - there is no material variance - the offence punishable under Section 376 of I.P.C. was proved beyond doubt and for

which there was conviction by trial Judge. (Para 20,25)

D. Indian Penal Code,1860 - Section 428 I.P.C - Convict-appellant is being convicted for offence punishable under Section 376 I.P.C. with eight years rigorous imprisonment and fine of Rs. 10,000/-, and in default two years additional rigorous imprisonment for offence punishable under Section 376 I.P.C. - His previous incarceration in this very case crime number shall be counted towards this sentence under Section 428 of I.P.C. - acquitted of the charge leveled for offence punishable under Sections 363 and 366 of I.P.C. (Para 31)

Jail appeal partly allowed (E-7)

List of cases cited:-

1. Narbada Prasad Vs Chhagan Lal & ors. AIR (1969) SC 393

2. Kali Ram Vs St. Of H.P. AIR (1973) SC 2773

3. Partap Vs The St. of U.P. AIR (1976) SC 966

4. Shankarlal Gyarasilal Dixit Vs St. Of Mah. AIR (1981) SC 765

5. Thakorlal D. Vadgama Vs The St. Of Guj. AIR (1973) SC 2313

6. St. of Har. Vs Raja Ram AIR (1973) SC 819

7. Gopal Singh Vs St. Of Uttarakhand (2013) 3 SCC (Cri) 608

8. St. of U.P. vs. Babu Lal, AIR (2008) SC 582

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) read with Section 383 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed against the judgment of conviction and sentence made therein by Court of Additional Sessions judge, Court No. 5, Ghaziabad, in Sessions Trial No. 572 of 2013, arising out of Case Crime No. 1469 of 2011, under Sections 363, 366 and 376 of I.P.C., Police Station Loni, District Ghaziabad, wherein convict-appellant Sharif son of Babu has been convicted for offence punishable under Section 363, 366 and 376 I.P.C. and thereby he has been sentenced with three years rigorous imprisonment and fine of Rs. 3,000/- and in default of making payment of fine, rigorous imprisonment of six months under Section 363 of I.P.C., five years rigorous imprisonment with fine of Rs. 5,000/-, and in default one years additional rigorous imprisonment for offence punishable under Section 366 of I.P.C., ten years rigorous imprisonment and fine of Rs. 10,000/-, and in default two years additional rigorous imprisonment under Section 376 I.P.C., with a direction for concurrent running of sentences and adjustment of previous imprisonment, if any, in this very case crime number, as per Section 428 of Cr.P.C.

2. Memo of appeal contends that trial Court failed to appreciate facts and law placed upon record. There was no proof of rape with victim nor it was medically corroborated. First Information Report was delayed and no reason for this delay, was given. Prosecutrix was major, thereby, capable to understand her wellness. It was a fleeing with someone else but convict-appellant has been falsely implicated in this case crime number, having no independent eye-witness account. He was having no concern with prosecutrix. No circumstantial evidence was against him nor it was medically corroborated for offence of rape. Even

then, judgment of conviction was awarded by trial Court, which was based on surmises and conjunctures. Prosecution failed to prove charge beyond reasonable doubt and convict-appellant was entitled for benefit of doubt. Prosecutrix is mother of one healthy child and she never said that convict-appellant is father of that child. Hence, this appeal.

3. From the very perusal of record of lower court, it is apparent that First Information Report, Ex.Ka-1, was got lodged at Police Station Loni, District-Ghaziabad on 28.12.2011 at 09:15 hrs., for an occurrence of 11.12.2011, upon the report of Jameel, son of Mateen, against Sharif, Sheru and Sonu son of Babu and Noor Hasan son of Ismail, all resident of Badarpur, Loni, Ghaziabad, for an offence punishable under Sections 363, 366 I.P.C., with contention that Jameel's daughter prosecutrix "R", aged about 15 years, was enticed and taken away on 11.11.2011 by Sharif son of Babu, aged about 45 years with 5 kids. Sharif was residing in a rented portion of a house of Nanhe, situated at Yamuna city. He was used to visit applicant's house. On above date of occurrence, entire family members, except prosecutrix "R", were out of home, for attending a marriage ceremony and prosecutrix "R" was all alone at home. Prosecutrix "R" had taken cash of Rs.1,00,000/- and ornaments, with her. She was vehemently searched. But of no trace. This fleeing was assisted by his brothers Sheru, Shabu both son of Babu and his brother-in-law Noor Hasan son of Ismail, resident of Badarpur, Loni, Ghaziabad. Sheru and others are aware of their trace. Hence, this report for legal action.

4. On 05.01.2012, while S.I. Rajpal Singh Tomar along with his police team, after moving from police station vide G.D. Entry No. 17 by 08:35 p.m., with regard to investigation and search of prosecutrix of Case Crime No. 1469 of 2011 under Sections 363, 366 I.P.C., was busy in area of his police station, he met with police team led by other Sub-Inspector and an information was received that prosecutrix along with accused, is present at Loni triangle. They were in get up of someone else. Police team rushed on spot, on the way, informant Jameel, father of prosecutrix, met together. They went on spot. Jameel identified his daughter. The person present thereat could manged to run from spot. Prosecutrix "R" was apprehended at 10:00 A.M. Recovery memo, Ex. Ka-2, was prepared on spot. Her statement, under Section 164 of Cr.P.C. was got recorded. She was medically examined and her Medico Legal Report was got prepared. Her age determination test was got conducted, wherein she was held to be of 18 years. Spot map, Ex. Ka-4, was prepared. Investigation resulted submission of charge-sheet Ex.Ka-6, for offence punishable under Sections 363, 366 and 376 I.P.C. against Sharif, Sheru, Sabu, Sanu and Noor Hasan. Magistrate took cognizance over it on 31.3.2013. As offences punishable under Sections 363, 366 and 376 I.P.C. were exclusively triable by Court of Session, hence, file was committed to Court of Session by Court of Chief Judicial Magistrate, Ghaziabad, where Session Judge, vide order dated 28.3.2013, registered sessions trial number and then after vide order dated 28.3.2013, file was made over to A.S.J. Ist, Ghaziabad, wherein, learned counsel for the State and learned counsel for the defence, were heard and vide order dated 2.4.2013, charge for offences punishable under Sections 363, 366 and 376 I.P.C. were framed against Sharif

whereas charge for offences punishable under Sections 363 and 366 were framed against Sheru, Sabu, Sonu and Noor Hasan. The same is being written in its English translation by Court itself, the vernacular part is not being reproduced.

I, Shankar Lal, Additional District and Session Judge, Ghaziabad, Court No. 5, do hereby, charge you, Sharif:

"(1) That on 11.11.2011 at any time at Jamuna City, Badarpur, within area of Police Station Loni, District Ghaziabad along with your other friends enticed minor girl of Jameel, prosecutrix, aged about 15 years and thereby kidnapped from her lawful guardianship of her legal guardians. Thereby you committed offence of kidnapping punishable under Section 363 of I.P.C. within the cognizance of above Court.

(2) That on above date, time and place, you did kidnapping of minor daughter of informant Jameel, from his legal guardianship with intent that she will be compelled to marry or likely to marry or likely that she will be forced or seduced to illicit intercourse, thereby committed offence punishable under Section 366 of I.P.C. within the cognizance of above Court.

(3) That on above date, time and place, you enticed and thereby kidnapped minor prosecutrix daughter of informant and took her somewhere else where you committed rape against her wishes. Thereby, committed offence punishable under Section 376 of I.P.C. within the cognizance of this Court."

----------Sd----------

I, Shankar Lal, Additional District and Session Judge, Ghaziabad, Court No. 5, do hereby, charge you, Sheru, Sabu, Sonu and Noor Hasan:

"(1) That on 11.11.2011 at any time at Jamuna City, Badarpur, within area of Police Station Loni, District Ghaziabad along with your other friends enticed minor girl of Jameel, prosecutrix, aged about 15 years and thereby kidnapped from her lawful guardianship of her legal guardians. Thereby you committed offence of kidnapping punishable under Section 363 of I.P.C. within the cognizance of above Court.

(2) That on above date, time and place, you did kidnapping of minor daughter of informant Jameel, from his legal guardianship with intent that she will be compelled to marry or likely to marry or likely that she will be forced or seduced to illicit intercourse, thereby committed offence punishable under Section 366 of I.P.C. within the cognizance of above Court."

----------Sd----------

5. Charges were read over to accused persons. Who pleaded not guilty and claimed for trial. Prosecution examined informant PW-1 Jameel, PW-2 and prosecutrix 'R', daughter of Jameel, PW-3, Dr. Sumata Talib, PW-4 Sarfaraj, PW-5 Smt. Vakeela, PW-6 Investigating Officer S.I. Rajpal Singh Tomar, PW-7 Constable Rahul Kumar.

6. With a view to obtain explanation, if any, and version of accused persons, their statements were got recorded under Section 313 of Cr.P.C. wherein each of accused persons gave one and same answer to each of the questions put to them under Section 313 of Cr.P.C. In answer of each questions that testimony of PW-2, PW-6 are wrong. Regarding testimony of PW-3 Dr. Sumata

Talib about Ex. Ka-3 and Medico Legal Examination made on prosecutrix as well as testimony of PW-6, regarding preparation of recovery memo Ex. Ka-2, thereby determination of age by medico legal age determination wherein age of prosecutrix was held to be of 18 years, has not been submitted. Each of accused persons replied that they are innocent and they have been falsely implicated in this very case crime number.

7. No evidence in defence was there.

8. After hearing learned Additional District Government Counsel (Cri) and learned counsel for the defence, the impugned judgment of conviction and sentence was made therein, regarding convict Sharif for offence punishable under Section 363, 366 and 376 and judgment of acquittal of those charges, leveled against Sheru, Sabu, Sonu and Noor Hasan, was passed.

9. No state appeal or appeal by prosecutrix or informant, against judgment of acquittal, passed for accused Sheru, Sabu, Sonu and Noor Hasan, is there on record. This appeal is limited against judgment of conviction and sentence passed therein for convict-appellant Sharif, who has been convicted and sentenced as above.

10. Heard Sri Madhvendra Singh, Advocate, holding brief of Sri Awadhesh Kumar Mishra, learned counsel for the appellant as well as Sri Munne Lal, learned AGA for the State.

11. Learned counsel for the appellant argued that charge was made for offence of kidnapping of a minor girl of informant, whereas she has been held to be of 18 years of age in medical age determination. Hence, neither she was minor nor of unsound mind. Being above 18 years, offence punishable under Section 363 I.P.C. is not made out. Same was the situation for offence punishable under Section 366 I.P.C. Because in Ex.Ka-1, itself it was mentioned that prosecutrix had eloped herself with preparation by taking Rs. 1 lac in cash and golden ornaments. She was major and held to be of 18 years in medical age determination, hence, she went upon her own volition, after making preparation by taking Rs. 1 lac and golden ornaments, while fleeing. Hence, it was not kidnapping or abduction, with above essential ingredients of having intention that she will be compelled to marry or likely to marry or likely that she will be forced or seduced to illicit intercourse. Co-accused persons Sheru, Sabu, Sonu and Noor Hasan, against whom, same set of evidence was there, have been acquitted of the offence of kidnapping and abduction with a view that she will be compelled to marry or likely to marry or likely that she will be forced or seduced to illicit intercourse. No appeal against above judgment of acquittal is there. Hence, there was no proof beyond reasonable doubt for those offences against convict-appellant Sharif too. Regarding offence of rape, there is material contradiction, exaggeration and embellishment, with no corroboration from medical evidence or independent eye-witness account. Even then, above conviction with above deterrent punishment, is there.

12. There remained single testimony of prosecutrix, that too, with major contradiction. Convict-appellant has been sentenced with ten years rigorous

imprisonment, which is the highest one for offence punishable under Section 376 I.P.C. and he is languishing in jail since 11.11.2011. Punishment awarded is of maximum ten years, out of which seven years has been served by convict-appellant. Whereas, punishment for offence of rape, provided under Section 376 of I.P.C., was imprisonment of either description of a term, which shall not be less than seven years, which may be for life or for a term which may extend to ten years and shall also be liable to fine and the maximum sentence of ten years with fine of Rs. 10,000/-, has been imposed whereas minimum sentence was seven years without fine but the Presiding Judge has sentenced with ten years rigorous imprisonment and fine of Rs. 10,000/-, which shows that second portion of punishment has been exercised, in which maximum sentence of ten years with fine of Rs. 10,000/-, has been awarded. Hence, this Court of appeal to give a sentence for period already undergone.

13. Sri Munne Lal, learned AGA argued that trial judge has rightly appreciated facts and law, placed before it and has convicted appellant Sharif for offence punishable under Section 363, 366 and 376 I.P.C., wherein sentence of three years rigorous imprisonment with fine of Rs. 3,000/-, and in default six months additional imprisonment under Section 363 I.P.C., five years rigorous imprisonment and with fine of Rs. 5,000/-, and in default one year additional imprisonment under Section 366 I.P.C. and ten years rigorous imprisonment and with fine of Rs. 10,000/-, and in default one year additional imprisonment under Section 376 I.P.C. has been awarded, which was adequate sentence in perspective of fact of circumstances, in which accused being relative of prosecutrix and of being 45 years of age, enticed prosecutrix, was minor and committed rape with her. He was having siblings, even then committed this offence. Hence, even on the point of sentence, appeal be dismissed.

14. Apex Court in **Narbada Prasad vs Chhagan Lal And Ors AIR 1969 SC 393,** has held that in an appeal the burden is on the appellant to prove how the judgment under appeal is wrong? He must show where the assessment has gone wrong? In criminal trial Apex Court in **Kali Ram vs State Of Himachal Pradesh AIR 1973 SC 2773,** has propounded that the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. In Partap vs **The State of U.P. AIR 1976 SC 966,** Apex Court has held that prosecution has to prove case beyond all reasonable doubt whereas accused is to prove only establishing preponderance of probabilities. Though Apex Court in **Shankarlal Gyarasilal Dixit vs State Of Maharashtra AIR 1981 SC 765** has propounded that feasibility of defence does not shape prosecution case and suspicion how so strong cannot take place of proof.

15. Section 363 I.P.C. provides:- "whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." Kidnapping from lawful guardianship has been defined under Section 361 I.P.C. that "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, i.e. for punishment of offence under Section 363 I.P.C." Section 361 I.P.C. and its ingredients are to be proved, which requires taking or enticing of a minor under 16 if male and under 18 if female, from lawful guardianship or a person of unsound mind of any age, without consent of that guardian. Apex Court in **Thakorlal D. Vadgama vs The State Of Gujarat AIR 1973 SC 2313,** has propounded the words "whoever takes or entices any minor" under Section 361 I.P.C. and observed as to what actually means. According to the Supreme Court, the word "takes", does not necessarily connote taking by force and does not confined to use of force, actual or constructive. These words merely mean "to cause to woke", "to support" or "to get into possession". The gravamen of this offence under Section 361 I.P.C. lies in the taking or enticing of a minor, specified in this section out of the keeping of the lawful guardianship without the consent of such guardian.

16. On a plain reading of this Section, the consent of the minor, who is taken or enticed, is wholly immaterial, it is only the guardian's consent which takes the case within its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of minor to be taken out of the keeping of the lawful guardianship would be sufficient to attract this Section 361 I.P.C., as has been held by Apex Court in **State of Haryana Vs. Raja Ram AIR 1973 SC 819.** In the present case, Ex. Ka-1, First Information Report was got lodged by PW-1 Jameel, who, in his cross-examination, has said prosecutrix to be of 15 to 16 years and she was missing since evening of 11.11.2011. This occurred, while this informant and other family members, were not at their house and prosecutrix eloped with cash of Rs. 1 lac and ornaments of gold and silver and when being searched, it was apprised by Sarfaraz and his wife that Sharif had come and had taken prosecutrix with him. Meaning thereby, Ex.Ka-1, was got reported on the basis of information given by Sarfaraz and his wife and this witness is not eye-witness account of same. He, in his cross-examination, has specifically said that he is not aware as to when and with whom his daughter went. Whereas, prosecutrix has been held to be of 18 years of age in medico legal examination, wherein, she was written to be of 18 years by Medical Board of Chief Medical Officer, Ghaziabad. She, in her examination, was having with no mark of injury over her person. Hence, prosecutrix being of 18 years, was major and she had gone with preparation by taking cash of Rs. 1 lac and golden and silver jewelry with her. Hence, this was not an enticing or kidnapping of any person from India or from lawful guardianship because the essential ingredients of kidnapping from lawful guardianship, provided under Section 361 of I.P.C., could not be proved. Hence, the conviction and sentence awarded by trial Court for offence punishable under Section 363 of I.P.C., was not substantiated with evidence on record, for which this appeal is to be partly allowed.

17. Regarding offence punishable under Section 366 of I.P.C., prosecutrix being major had gone with convict

appellant with preparation by taking Rs. 1 lac in cash and golden and silver ornaments with her, as was written in Ex. Ka-1. Recovery memo, Ex. Ka-2, reveals that prosecutrix was recovered from Loni Tiraha and she had never made any protest or any complaint in between leaving house and recovery at Loni. Prosecutrix, in her statement recorded under Section 164 of Cr.P.C., Ex. Ka-1, has said herself to be of 15 years and has admitted that she went with Sharif with cash of Rs. 1 lac at Agra, where she resided for two months. But she never lodged any protest or any report about his abduction or kidnapping. Hence, offence punishable under Section 366 of I.P.C. was also not proved beyond reasonable doubt. Rather, it was a consensual fleeing by prosecutrix, who was major and had left her home with preparation by taking Rs. 1 lac in cash and golden and silver ornaments. Hence, the conviction and sentence awarded for this offence punishable under Section 366 of I.P.C., was not substantiated by evidence on record, for which this appeal merits its allowance.

18. Regarding charge No. 3 i.e. offence of rape, punishable under Section 376 I.P.C., Section 375 of I.P.C. provides "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:--

(Firstly) -- 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.

19. Section 376 I.P.C. provides for punishment of rape that - (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."

20. Prosecutrix, PW-2, in her statement recorded under Section 164 of Cr.P.C., Ex. Ka-1, has categorically said that she was forcibly subjected to rape. She has proved her testimony recorded under Section 164 of Cr.P.C., Ex. Ka-1. In her cross-examination, there is no material contradiction, exaggeration or embellishment on this part of her testimony. Rather, she has reiterated that the accused was subjecting her to rape. Though, a lengthy cross-examination at various stages has been made by learned counsel for the defence but rather offence of rape, there is no material variance.

21. PW-3, Dr. Sumata Talib, in her testimony has formally proved Ex.Ka-3 (Medico Legal Report). There is no contest on her testimony.

22. PW-6, Sub-Inspector Rajpal Singh Tomar, in his testimony, has proved that while deputed as Investigation Officer of this case crime number, he got prosecutrix medically examined. Then after, her statement was got recorded under Section 164 of Cr.P.C. Spot map was got prepared. Formal proof of Ex. Ka-4 and Ex.Ka-5, was made by this witness.

23. PW-7, Constable-Clerk Rahul Kumar, who has formally proved registration of this case crime number, chick FIR and G.D. Entry of same, Ex.Ka-6 and Ex.Ka-7. There is no variance in his testimony.

24. PW-4, Sarfaraz, is hostile witness, who has denied that he had ever disclosed the fact that Sharif had taken prosecutrix and this was disclosed by him to informant.

25. PW-5, Shakeela, wife of Sarfaraz, who too, had resiled from this statement of informant PW-1. These were the evidence, who given by prosecution on record. Hence, under all above evidence, the offence punishable under Section 376 of I.P.C. was proved beyond doubt and for which there was conviction by trial Judge.

26. Moreso, learned counsel for the appellant has pressed his appeal on the point of sentence, with request of imposing sentence of period undergone. Hence, judgment of conviction is not so being disputed.

27. Regarding Section 376 I.P.C., the minimum sentence provided for offence of rape is seven years and in case of punishment, less than seven years, Court is required to write reasons being adequate and special reasons to be mentioned in the judgment for imposing a sentence of imprisonment for a term less than seven years.

28. Apex Court in **Gopal Singh vs State Of Uttarakhand (2013) 3 SCC (Cri) 608** has propounded:-

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the

potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, etc. etc."

29. Though in a case of rape, when an adult commits rape on a girl of tender age, deterrent punishment is called for, taking a lenient view is out of question. Once a person is convicted for offence of rape, he should be treated with heavy hands and undeserved indulgence or liberal attitude in not awarding adequate sentence is improper. As per law laid down by Apex Court in **State of U.P. vs. Babu Lal, AIR 2008 SC 582,** the adequate and proper sentencing is to be made.

30. In the present case, convict-appellant has been sentenced with ten years rigorous imprisonment. Prosecutrix, who was major, was subjected to rape. Under all above facts and circumstances, award of eight years rigorous imprisonment with fine of Rs. 10,000/-, and in default two years rigorous imprisonment will proved to be adequate sentence.

31. Accordingly, this appeal is to be **partly allowed** regarding conviction and sentence awarded for offence punishable under Sections 363, 366 and 376 I.P.C., hence, the conviction and sentence awarded by trial Court is being amended as follows:-

Order

(1) Convict-appellant Sharif is being convicted for offence punishable under Section 376 I.P.C. He is being sentenced with eight years rigorous imprisonment and fine of Rs. 10,000/-, and in default two years additional rigorous imprisonment for offence punishable under Section 376 I.P.C. His previous incarceration in this very case crime number shall be counted towards this sentence under Section 428 of I.P.C. He is being acquitted of the charge leveled for offence punishable under Sections 363 and 366 of I.P.C.

(2) Copy of the judgment along with lower Court record be transmitted to trial Court for amendment of warrant of conviction and sentence as per above conviction and sentence and for follow up action.

(2019)11ILR A605

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4771 of 2017

Mukesh @ Murari ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ashok Kumar Yadav (A.C.)

Counsel for the Opposite Party:
Sri Syed Ali Murtaza (A.G.A.)

A. Evidence Law-Indian Evidence Act,1872 – Circumstantial evidence - last seen - no eye witness of occurrence - the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established - The facts so

established should be consistent only with the guilt of the accused - the circumstances should be conclusive in nature -There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused - it is not prudent to base conviction solely on "last seen theory" - "Last seen theory" should be applied taking into consideration the case of prosecution in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen - There is no evidence or any other link circumstantial leading to guilt of accused-appellant - complete chain of circumstantial evidence could not be established - prosecution could not prove complete links of circumstantial evidence beyond reasonable doubt against the accused-appellant - Trial Court committed an error in holding accused-appellant guilty under Section 302/34 IPC ignoring the missing link of circumstantial evidence and material contradiction in the statement of PWs. (Para 29, 30,39,40,41, 42,43,44)

Jail appeal allowed (E-7)

List of cases cited:-

1. Hanumant Vs The St. of M.P. AIR (1952) SC 343

2. Hukam Singh Vs St. of Raj. AIR (1977) SC 1063

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SC 1622

4. Ashok Kumar Chatterjee Vs St. of M.P. AIR (1989) SC 1890

5. C. Chenga Reddy & ors Vs St. of A.P. (1996) 10 SCC 193

6. Bodh Raj @ Bodha and ors. Vs St. of J&K. (2002) 8 SCC 45

7. Shivu and Another Vs R.G. High Court of Karnataka and Another, (2007) 4 SCC 713

8. Tomaso Bruno Vs St. of U.P., (2015) 7 SCC 178.

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

10. Jaswant Gir v. St. of Pun. (2005) 12 SCC 438

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal has been filed by accused-appellant, Mukesh @ Murari through Superintendent of District Jail, Kannauj against impugned judgment and order dated 30.11.2016 passed by Smt. Preeti Srivastava, Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No. 340 of 2008, (State v. Mukesh and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 read with 34 IPC. By impugned judgment, accused-appellant has been convicted and sentenced under Section 302 read with 34 IPC for life imprisonment along-with fine of Rs.5,000/-. In the event of default of payment of fine, he has to undergo further two years simple Imprisonment.

2. Prosecution story, in brief, is that on 21.07.2008, PW-3 Kishori Lal submitted a written report Ex.Ka-2 in Police Station, Kannauj, stating therein that on 21.07.2008 at about 10:00 AM, he was informed by villagers that one dead body of an unknown person was lying in the filed of one Shovran Lal son of Pitam Singh , resident of Haibatpur Katra, Police Station Kannauj, District Kannauj.

3. PW-7 Sub Inspector R.V. Singh Chauhan, on the said information held

inquest over the dead body of unknown person after nominating punch witnesses and prepared inquest report Ex.Ka-6 and other relevant papers thereto; sealed dead body and sent for postmortem, got prepared photographs of dead body. He also collected one towel, one shirt of deceased, one pants of light blue colour, one under wear, one set of plastic sleeper and prepared fard Ex.Ka-1 thereof.

4. PW-5 Dr. Nanhoomal conducted postmortem over the dead body of unknown person aged about 25 years and found one ligature mark 32 x 4 cm around the neck as ante mortem injury. Doctor further opined that death was possible due to shock asphyxia as a result of strangulation on account of ante mortem ligature mark and three days prior to postmortem. He prepared postmortem report Ex.Ka-4.

5. PW-6 C.P. Rajkumar Srivastava converted the matter at crime no.1020 of 2008, under Section 302 IPC against unknown person on the basis of postmortem report dated 22.07.2008 and entry of the case was made in General Diary, copy whereof is Ex.Ka-5.

6. PW-8, Dayanand Singh the then Inspector In-charge of Police Station Kannauj, District Kannauj, on 22.07.2008 under took investigation of case crime no.1020 of 2008, under Section 302 IPC and commenced investigation, recorded statement of witnesses, visited spot and prepared site plan Ex.Ka-11. On 28.07.2008 he tried to know about the deceased.

7. On 05.08.2008, PW-1 Munni Devi submitted a written report Ex.Ka-1 in Police Station Kannauj stating that his son Sunder Lal was taken by accused Mukesh @ Murari in the morning of 19.07.2008 from her house and since then he is missing. She came to know that a dead body of unknown person was found in the Village Haibatpur Katra and prayed that she may be permitted to see the clothes of dead body, so as to know where about of her son. She was shown photographs and clothes of deceased whereupon it was recognized to be of Sunder Lal.

8. PW-8 SI Dayanand Singh further recorded statement of PW-1 Smt. Munni Devi, PW-4 Smt. Suman; Rajesh, Smt. Sarojini and Babu Ram (not examined); arrested accused Mukesh @ Murari and Shera, recorded their statements and after completing entire formalities of investigation, submitted charge-sheet against Moolchand, Shera and accused-appellant Mukesh @ Murari.

9. After taking cognizance of the offences, case being exclusively triable by Court of Sessions was committed to Sessions Court, where from it was transferred to Additional District and Sessions Judge, Court No.2, Kannauj for disposal according to law.

10. Trial Court framed charges on 06.12.2008 against accused persons Mukesh , Moolchand and Shera, under Sections 302 read with 34 IPC, which reads as under :-

"मैं बृजेश कुमार अपर सत्र न्यायाधीश कक्ष सं0 2 कन्नौज में आप अभियुक्तगण मुकेश, मूलचन्द व शेरा को निम्न आरोप से आरोपित करता हूँ:—

यह कि दि. 19.7.08 की सुबह 20.7.08 की रात्रि तक किसी समय व स्थान हैबतपुर कचरा अन्तर्गत थाना कन्नौज जिला कन्नौज में आप लोगों ने एक राय होकर वादिनी श्रीमती मुन्नी देवी के पुत्र सुन्दरलाल की हत्या करने के सामान्य आशय के

अग्रसरण में उसकी हत्या विपासन द्वारा की। इस प्रकार आप लोगों ने भा.द.सं. की धारा 302 सपठित धारा 34 के अधीन दण्डनीय अपराध कारित किया जो मेरे संज्ञान में है।

एतद्द्वारा मैं यह निर्देश देता हूँ कि उक्त आरोप में आप अभियुक्तगण का विचारण इस न्यायालय द्वारा किया जायेगा।"

"I, Brijesh Kumar, Additional Sessions Judge, Room No. 02, Kannauj charge you accused persons Mukesh, Moolchand and Shera with the following charges :-

01. That, from the morning of 19.07.08 to the night of 20.07.08, at some time and place Haibatpur Katra falling under Police Station- Kannauj, District- Kannauj; you people, with a consensus, in furtherance of your common intention of committing the murder of Sunderlal son of Shrimati Munni Devi- the complainant, committed his murder by Vipasan. In this manner you people committed an offence punishable under Section 302 I.P.C. read with Section 34 I.P.C., which is in my cognizance.

I, hereby direct that the trial of you accused persons for the aforementioned charge shall be conducted by this court. "

(English Translation by Court)

11. Accused persons denied the charge levelled against them, claimed false implication, pleaded not guilty and claimed trial.

12. Other accused persons, namely, Moolchand and Shere died during trial and their case stood abated as mentioned in para 8 of the judgement of Court below.

13. In order to substantiate its case, prosecution examined as many as eight witnesses, out of whom PWs 1, 2 and 4 are witnesses of fact and rest are formal witnesses.

14. PW-1 is mother of deceased Sunder Lal, she proved last seen theory and written report Ex.Ka-1 which was submitted by her in Police Station concerned. PW-2 Gauri and PW-4 Smt. Suman, sisters of deceased Sunder Lal also proved last seen theory. PW-3 is a Village Chaukidar who submitted report Ex.Ka-2 informing Police about the dead body. PW-5 is Doctor who conducted postmortem over the dead body of unknown person, later identified as Sunder Lal and prepared postmortem report Ex.Ka-4. PW-6 C.P. Raj Kumar converted case under Section 302 IPC against unknown person on the basis of postmortem report. PW-7 SI R.V. Singh Chauhan held inquest report over the dead body of deceased and prepared inquest report and other relevant papers. PW-8 Dayanand Singh, the then Inspector In-charge of Police Station Kannauj conducted investigation and submitted charge-sheet.

15. Subsequent to closure of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded by Trial Court, explaining entire evidence and other incriminating circumstances. In the statement, accused-appellant gave an usual answer by submitting that entire story of prosecution was wrong; statement of witnesses are wrong and he desired to lead evidence. Further in response of question no.15, he stated that he is a labour, his parents are old and he was implicaed falsely in the present case by Police because one day he refused to work of Police without money.

16. He examined Smt. Ram Sarojini wife of Sher Singh @ Shera as DW-1. She deposed that she has contested an

election of Member of Block Development Council in 2005. Rakesh son of Radhey Shyam contested against her but she won the election, due to which Rakesh had grudge with her. At that time Constable Raj Bahadur used to visited the house of Rakesh. Her husband was taken to Police Station by Constable Raj Bahadur stating that some inquiry is to be made whereupon she also went to Police Station with her husband. Her husband was detained in Police Station saying that he would be free by evening but he was kept about four days and falsely challaned thereafter.

17. Trial Court, after hearing learned counsel for both the parties and considering entire evidence (oral and documentary) led by prosecution, found accused-appellant guilty of committing an offence of murder of Sunder Lal punishable under Section 302 IPC, convicted and sentenced, as stated above.

18. We have heard Sri Ashok Kumar Yadav, learned Amicus Curiae for appellant and Sri Syed Ali Murtuza, learned AGA for State and travelled through record with valuable assistance of learned counsel for parties.

19. Learned counsel for accused-appellant assailed impugned judgement and order of conviction and sentence, took us through the record and advanced following submissions :-

i. No body has seen accused-appellant committing murder of Sunder Lal.

ii. Case rests on circumstantial evidence. PWs 1, 2 and 4 are the member of same family and related to deceased. They are only witnesses of last seen.

iii. There is no other evidence direct or circumstantial to connect accused-appellant with the present crime.

iv. There is no motive to accused-appellant to commit murder of Sunder Lal.

v. As per prosecution case, dead body of Sunder Lal was allegedly lying in the field of one Shovran Lal resident of Haibatpur Katra, Police Station Kannauj. There is no missing report of victim. Body of deceased was identified after two weeks from his murder by PW-1 on the basis of photographs and his clothes along-with other articles.

vi. There is no complete chain of circumstantial evidence leading to guilt of accused-appellant.

vii. There are major contradiction in the statement of witnesses rendering prosecution case doubtful and unreliable.

viii. Prosecution failed to establish its case beyond reasonable doubtful and accused-appellant is entitled to benefit of doubt.

20. Learned AGA opposed the submissions and submitted that there is no reason to prosecution to falsely implicate or connect accused-appellant with the present crime like murder; deceased Sunder Lal was identified by her mother by seeing his clothes and other articles; PWs 1, 2 and 4 established last seen theory that they have seen victim last in the association of accused-appellant; it is only the accused-appellant who can offer explanation what happened with the victim and who murdered him; accused-appellant has not offered any proper explanation; accused-appellant is only and only person who committed murder of Sunder Lal; hence Trial Court has rightly convicted accused-appellant.

21. Although murder of Sunder Lal could not be disputed from the side of defence but according to his Advocate for accused-appellant, he is not responsible for the death of Sunder Lal. Evidence of PW-3 Kishori Lal, PW-7 SI R.V. Singh Chauhan and PW-5 Dr. Nanhoomal established that dead body of unknown person, later on identified as Sunder Lal was found in the field of one Shovran resident of Haibatpur Katra and he was assassinated by some one by compressing his neck and ante mortem ligature mark was found on his neck.

22. Thus the only question remains for consideration is "whether accused-appellant has committed murder of Sunder Lal or not and Trial Court has rightly convicted him as stated above or not?"

23. It would be appropriate for us to consider, briefly, statements of witnesses of prosecution as well as the rival submissions of learned Counsel for parties.

24. PW-1 Munni Devi deposed that on the fateful day at about 08:00 AM, she was present in her house along-with her daughter Gauri and her son Sunder Lal; accused-appellant Mukesh came and took her son Sunder Lal on the pretext of work (majdoori); when her son refused to go with him, accused-appellant assured to come after some time and accused-appellant and her son went together; thereafter victim did not come back to his house; in the morning, she contacted accused Mukesh and asked about her son Sunder Lal (victim), who answered that he left him (victim) near Phoolmati Mandir; Mukesh disappeared thereafter; after three days, she came to know that one dead body was found in the field in Haibatpur Katra; she identified dead body as her son Sunder Lal in Police Station on seeing photographs and his clothes; and she admitted in her cross-examination that there was no enmity between both.

25. PW-2 Gauri, happens to be sister of deceased, deposed that on the day of incident at about 08:AM, she (Gauri), her mother (PW-1 Munni Devi) and victim (Sunder Lal) were in the house; accused-appellant Mukesh came to her house and took victim with him on the pretext of work (majdoori); when he did not come back, she and her mother searched him every where but after a drastic search victim was not found; in the same night and next morning, he asked accused-appellant Mukesh about his brother but he answered that he had left victim near Phoolmati Mandir; three days after, she came to know that a dead body was found in Haibatpur Katra, she went to Police Station and saw photographs, and Jeans pants, green shirt and black sleeper of her brother and recognized them to be of his brother Sunder Lal; Police told him that legs of body were tied with one towel which was shown to him, and she recognized it to be that of Mukesh.

26. PW-3 Kishori Lal, Chaukidar of Village Haibatpur, deposed that he has submitted a written report Ex.Ka-2 stating that a dead body was one unknown person was lying in the filed of one Shovran situated at Haibatpur Katra.

27. PW-4 Smt. Suman, sister of deceased Sunder Lal, deposed that she was living along-with her husband and children in the house of her mother; deceased Sunder Lal was her brother; on the fateful day at about 07:30 AM,

accused-appellant Mukesh took his brother on the pretext of work (majdoori) in his presence; at that time her mother, sister Gauri and Sita were also present in the house; when his brother Sunder Lal did not return to his house in the evening, her mother went to the house of accused-appellant Mukesh but neither he (Mukesh) nor his brother (Sunder Lal) was found there; third day when she came to Saraimeer, she saw accused Moolchand near water tank; about 15 or 16 day, after the incident, she came to know that a dead body of unknown person was found in Haibatpur Katra, then she, her sister Gauri and her mother went to Police Station along-with Santosh and Babu, and seeing the photographs and clothes of her brother; they identified it to be of victim Sunder Lal.

28. PWs 1, 2 and 4 are the witnesses of last seen, who have seen the victim last in the company of accused-appellant. There is no other evidence to connect accused-appellant with the present crime. Evidently from the date, victim is said to have been taken by accused-appellant on the pretext of work (majdoori). PW-1 appeared in Police Station first time after two weeks of incident while PWs 2 and 4 stated that they came to know about the dead body of one person in Haibatpur Katra after two or three days.

29. In a case, which rests on circumstantial evidence, law postulates, twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused.

30. In the case in hand there is no eye witness of occurrence and case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

31. In **Hanumant v. The State of Madhya Pradesh, AIR 1952 SC 343,** as long back as in 1952, Hon'ble Mahajan, J. expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

*"... **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.....** it must be such as to show that **within all human probability the act must have been done by the accused."***

(emphasis added)"

32. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,** Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

33. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,** Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

*"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The **circumstances concerned 'must or should' and not 'may be' established.***

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

(emphasis added)

34. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

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

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

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

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

(emphasis added)

35. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

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

(emphasis added)

36. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir,**

2002(8) SCC 45 Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgment said:

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,** upon any other reasonable hypothesis than that of his guilt,*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

37. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.**

38. In **State of U.P. vs. Satish, 2005(3) SCC 114,** Court said :-

"The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

39. In **Jaswant Gir v. State of Punjab, 2005(12) SCC 438,** Court also said that in absence of any other links in chain of circumstantial evidence, it is not possible to convict appellant solely on the basis of last seen evidence, even if, version of witnesses of fact in this regard is believed.

40. It is settled that it is not prudent to base conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of prosecution in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen.

41. In the present case, only evidence against the accused-appellant to connect him with the present crime is last seen theory as set forth by PWs 1, 2 and 4. There is no evidence or any other link circumstantial leading to guilt of accused-appellant. Evidence of PWs 1, 2 and 4 also inspires no confidence for the reasons that there are major contradiction

in their evidence. PWs 1 and 2 talk of knowledge of dead body in Haibatpur Katra after three days of his disappearance while PW-4 deposed that after 14-15 days from disappearance of his brother, she came to know that one dead body was found in Haibatpur Katra thereupon she along-with her mother and sister went to Police Station and recognized photographs and other articles belonged his brother Sunder Lal. Evidently PW-1 went to Police Station concerned two weeks after disappearance of her son and submitted written report Ex.Ka-1. There is no plausible explanation as to why missing report of victim was not got registered in Police Station earlier. Other links of circumstantial evidence are completely missing.

42. Considering the entire evidence of last seen theory and legal preposition discussed above. In our view, complete chain of circumstantial evidence could not be established. Other point raised by learned Counsel for accused-appellant need not be discussed.

43. In our considered opinion, we are of the view that prosecution could not prove complete links of circumstantial evidence beyond reasonable doubt against the accused-appellant and Trial Court committed an error in holding accused-appellant guilty under Section 302/34 IPC ignoring the missing link of circumstantial evidence and material contradiction in the statement of PWs.

44. In view of aforesaid discussion and legal preposition, **present jail appeal is hereby allowed.** Impugned judgment and order dated 30.11.2016 passed by Smt. Preeti Srivastava, Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No. 340 of 2008, (State v. Mukesh and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 read with 34 IPC is set aside.

45. Accused-appellant is acquitted of charged levelled against him. He shall be released forthwith, if not wanted in any other crime.

46. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

47. Lower Court record along-with a copy of this judgment be sent back immediately to District Court concerned and also copy of this judgment be sent to Superintendent Jail concerned through District Judge concerned for immediate compliance and further necessary action.

48. Before parting, we provide that Sri Ashok Kumar Yadav, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A615

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4842 of 2011

Ashok ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Noor Mohammad, Sri Uttar Kumar Goswami (A.C.), Sri Yogesh Srivastava

Counsel for the Opposite Party:
Sri Ratan Singh (A.G.A.)

A. Evidence Law-Indian Evidence Act,1872 – Time, date and place of incident and murder of victim stand established - PW-5 is only the alleged eye witness - Conduct of PW-5 like not informing the owner or Police about incident till PW-8 arrived is not natural - Explanation submitted by him is not cogent and convincing - PW-5 has failed to establish the guilt of accused-appellant - no other evidence on record to connect accused-appellant with the present crime - it can be said that crime could have been committed by someone else - prosecution failed to prove its case beyond reasonable doubt against accused-appellant - Trial Court has not appreciated the entire evidence in right prospective and committed manifest error in convicting the accused-appellant.(Para 21,39,40)

B. Evidence Law-Indian Evidence Act, 1872 - Section 134 - Number of witnesses - No particular number of witnesses required for the proof of any fact." - conviction can be based on single and sole testimony but it must be cogent, natural and reliable - if there are doubts about the testimony, Court will insist on corroboration - Time-honoured principle is that evidence has to be weighed and not counted - It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction - where on the evidence, two possibilities are available or open which goes in favour of the prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt.(Para 29,30,31, 35)

Jail appeal allowed (E-7)

List of cases cited: -

1. Namdeo Vs St. of Mah. (2007) 14 SCC 150

2. Kunju @ Balachandran Vs St. of T. N. AIR (2008) SC 1381

3. Jagdish Prasad Vs St. of M.P., AIR (1994) SC 1251

4. Vadivelu Thevar Vs St. of Mad. AIR (1957) SC 614

5. Yakub Ismailbhai Patel Vs. St. of Guj. (2004) 12 SCC 229

6. St. of Har. Vs Inder Singh & ors. (2002) 9 SCC 537

7. Bhagwan Singh & ors Vs St. of M.P., (2002) 4 SCC 85

8. Sharad Birdhichand Sarda Vs St. of Mah. AIR (1984) SCC 1622

9. Kali Ram Vs St. of H.P.

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal under Section 383 Cr.P.C. has been filed by accused-appellant Ashok through Superintendent of District Jail, Ghaziabad against

judgment and order dated 13.07.2011 passed by Sri Mohammad Ibrahim, Additional District and Sessions Judge, Court No. 05, Gautambudh Nagar in Session Trial No. 441 of 2010, (State versus Ashok), Crime No.450 of 2010, Police Station Kasna, District Gautam Budh Nagar, under Section 302 IPC. By the impugned judgment accused-appellant has been convicted under Section 302 IPC and sentenced to undergo life imprisonment with a fine of Rs.5000/-. In the event of default in payment of fine, he has to undergo further six months imprisonment.

2. Prosecution case in short is that informant, PW-1, Indrajeet @ Pintu resident of Village Parwana, Police Station Khanpur, District Bulandsahar, was residing in Sirsa, Police Station Greater Noida, District Gautam Budh Nagar. His brother (victim) Raju Sharma was engaged in service at a hotel, Tikaram, Deepu and accussed-appellant Ashok also worked in Hotel. On fateful night 03.05.2010 at about 11:00 PM there was a quarrel between accussed Ashok and Raju (victim) over making more breads. After a while, when victim Raju sat on the cot, Ashok inflicted a blow with danda, on his head, due to which Informant's brother died. On receiving information in the morning of 4th May, 2010, Informant went to the place of occurrence and found his brother dead on cot. PW-1 got a written report Ex.Ka-1 scribed by one Munna Bhai, PW-4, and presented the same to the Officer In-charge, Police Station Kasna, District Gautam Budh Nagar.

3. On the basis of written report Ex.Ka-1, chick First Information Report (hereinafter referred to as "FIR") Ex.Ka-10 was registered at case Crime No.450 of 2010, under Section 302 IPC by Constable Clerk PW-7 Jeet Singh who made an entry of case in the General Diary (hereinafter referred to as "GD"), copy whereof is Ex.Ka-11.

4. PW-6 SI Ram Sewak held inquest over the dead body of deceased Raju, prepared inquest report Ex.Ka-2 and other papers relating thereto. Dead body was sealed and sent for postmortem.

5. PW-3 Dr. Dinesh Mohan Saxena conducted autopsy on the dead body of Raju on 04.05.2010 at 05:10 PM and prepared postmortem report Ex.Ka-3. According to him deceased was aged about 40 years; and at the time of postmortem, Rigor mortis was present; and body of deceased was thin built. On external examination Doctor found following ante mortem injuries on the person of deceased:-

i. Lacerated wound 3cm x 1cm left side of forehead, extending left eye brow. It is surrounded by abraded contusion 10cm x 4cm extending left side of face.

ii. Lacerated wound 1cm x 0.5cm, left side of face 2cm medial to left ear x bone deep.

6. On internal examination, left temporal bone and frontal bone were fractured; membrances were lacerated; brain were lacerated, temporal lobe, large hematoma over and in between brain; in heart some blood was present; stomach contained 150ml semisolid material.

7. In the opinion of PW-3 Dr. Dinesh Mohan Saxena, victim died due to

ante mortem head injuries. Death was possible ¾ day prior to postmortem.

8. PW-9 Inspector Arun Kumar Singh, undertook investigation of case, took copy of FIR and other relevant papers relating to investigation, recorded statements of PW-7 and PW-1, proceeded to spot and visited spot, prepared site plan Ex.Ka-13, thereafter he collected blood stained, simple earth and string of cot, prepared fard thereof, Ex.Ka-12, recorded statement of PW-8. On 05.05.2010 PW-9 arrested accused-appellant at Parichowk at about 13:40 PM, recorded disclosure statement of accused-appellant and recovered danda (stick) allegedly used in the commission of offence at the pointing out of accused-appellant from the sand, prepared recovery memo thereof Ex.Ka-4 and site plan Ex.Ka-14 place of recovery of the weapon.

9. PW-9 after completing entire formalities of investigation submitted charge-sheet Ex.Ka-5 against accused-appellant under Section 302 IPC in the Court concerned.

10. Chief Judicial Magistrate, Gautam Budh Nagar took cognizance of offence under Section 302 IPC against accused-appellant. Case being exclusively triable by Court of Sessions, was committed to the Sessions Judge.

11. Trial Court framed the charge against the accused-appellant which reads as under :-

"मैं, मौ0 इब्राहीम, अपर जिला एवं सत्र न्यायाधीश एफ0टी0सी0–2 गौतमबुद्व नगर आप अभियुक्त अशोक को निम्न आरोप से आरोपित करता हूँ–

1– यह कि दिनांक 3.5.2010 को समय 23:00 बजे स्थान शर्मा होटल कासना थाना कासना गौतमबुद्वनगर में आपने वादी के भाई राजू के और आप अभियुक्त के मध्य रोटी बनाने के ऊपर झगड़ा होने के कारण उसके सिर पर डंडा मार दिया जिससे उसकी मृत्यु हो गयी। इस प्रकार आपने भा0द0सं0 की धारा 302 के अन्तर्गत दण्डनीय अपराध कारित किया जो कि इस न्यायालय के प्रसंज्ञान में है।

एतद् द्वारा आपको निर्देशित किया जाता है कि उपरोक्त आरोप में आपका विचारण इस न्यायालय में किया जायेगा।"

"I, Mohd. Ibrahim, Additional District and Sessions Judge, F.T.C.-2, Gauram Budh Nagar charge you accused Ashok with the following charge:-

Firstly - That on 03.05.2010 at about 23:00 hours consequent upon an altercation which took place between you and deceased Raju brother of informant on the issue of making bread at Sharma Hotel, Kasna, Police Station Kasna, District Gautam Budh Nagar you inflicted on his head with danda which resulted in his (Raju) death. Thereby you have committed offence punishable under Section 302 IPC which is within the cognizance of this Court.

You hereby direct that you will be tried by this Court for the aforesaid charge.

(English Translation by Court)

12. Accused-appellant pleaded not guilty and claimed trial.

13. In order to prove guilt of accused-appellant, prosecution examined as many as nine witnesses, in the following manner:-

Sr. No.	Name of PW	Nature of witness	Paper proved
1	Indrajeet	Fact	Ex.Ka-1
2	Constable Satish Kumar	Formal	Ex.Ka-2
3	Dr. Dinesh Mohan	Formal	Ex.Ka-3

	Saxena		
4	Munna Bhai	Formal	Ex.Ka-1
5	Teeka Ram	Fact	Ex.Ka-4
6	S.I. Ram Sewak	Formal	Ex.Ka-9
7	Constable Jeet Singh	Formal	Ex.Ka- 10 & 11
8	Murli Dhar Sharma	Fact	Ex.Ka-12
9	S.I. Arun Kumar Singh	Formal	Ex.Ka-15

14. PW-1 Indrajeet is brother of deceased Raju and informant but he is not eye witness; PW-2 Constable Satish Kumar is witness of inquest who was present at the time of inquest, Body was handed over to him for postmortem; PW-3 Dr. Dinesh Mohan Saxena conducted autopsy on the dead body of deceased and prepared postmortem report Ex.Ka-3; PW-4 Munna Bhai is a scribe of written tehreer Ex.Ka-1, he scribe Ex.Ka-1 at the dictation of PW-1; PW-5 Teeka Ram is eye witness of incident; PW-6 SI Ram Sweak is a formal witness and held inquest over the dead body of Raju; PW-7 Constable Jeet Singh registered chick FIR Ex.Ka-11 and made an entry in G.D. PW-8 Murli Dhar Sharma, owner of Hotel, is witness of fard of blood stained and simple earth, he is not eye witness; and PW-9 SI Arun Kumar Singh is Investigating Officer of the case and arrested accused-appellant and recorded his disclosure statement and on his pointing out, recovered Danda allegedly used in commission of crime and submitted charge sheet against accused Ashok.

15. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by the Trial Court on 07.06.2011, explaining entire evidence and other incriminating circumstances and evidence. Accused-appellant in his statement under Section 313 Cr.P.C. claimed false implication and denied the prosecution story in toto, entire proceeding of investigation was said to be wrong and he did not choose to lead any evidence in his defence.

16. Ultimately case came to be heard and decided by Additional Sessions Judge, Court No.5, Gautam Budh Nagar. On appreciation of evidence available on record and after hearing both the parties, Trial Court recorded verdict of conviction and sentence against the accused-appellant as stated above.

17. Feeling aggrieved and dissatisfied with the impugned judgement and order, accused-appellant approached this Court through Superintendent of District Jail, Ghaziabad, assailing the impugned judgement.

18. We have heard Sri Uttar Kumar Goswami, learned Amicus Curiae for appellant and Sri Ratan Singh, learned AGA for State at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

19. Learned Amicus Curiae for accused-appellant assailing impugned judgement and order of conviction and sentence, took us through the record and advanced following submissions :-

1. It is a case of direct evidence but no cogent and convincing evidence has come against the accused.

2. Except PW-5, no other eye witness has been produced from the side of prosecution. PW-5 is not reliable witness and his evidence is not worthy to credence.

4. Evidence of PW-5 is self contradictory.

5. Prosecution has failed to prove its case beyond reasonable doubt.

6. Trial Court did not appreciated the evidence in right prospective and wrongly convicted the accused-appellant.

20. Learned AGA opposed the submissions and submitted that accused-appellant is named in the FIR, evidently he was present on spot with victim and some quarrel has taken place between accused-appellant and deceased Raju before the incident which lead to incident; Danda allegedly used in the commission of offence has been recovered at the pointing out of accused-appellant; Prosecution successfully established its case and Trial Court has rightly convicted the accused-appellant.

21. Although time, date, place of incident and death of victim Raju could not be challenged from the side of the defence but according to Advocate he is not responsible of murder of Raju. Even otherwise from evidence of PW-3 Dr. Dinesh Mohan Saxena, PW-5 Teeka Ram and PW-6 SI Ram Sweak. Time, date and place of incident and murder of victim stand established.

22. Thus the only question remains for consideration of Court is "whether accused-appellant committed murder of Raju by inflicting blunt object injury on his head and Trial Court has rightly convicted him or not?"

23. Now we may proceed to consider rival contentions made by learned Counsel for parties and briefly evidence of prosecution witnesses.

24. PW-1 Indrajeet happens to be brother of deceased Raju, deposed that victim Raju worked in Sharma Hotel; Teekaram, Deepu and Ashok also worked there. On the fateful night i.e. 03.05.2010 at about 11:00 PM there was quarrel between accused-appellant Ashok and victim Raju over making much bread in the Hotel whereupon accused-appellant Ashok attacked Raju with Danda. He was told this fact by Teekaram and Deepu. Thus it is very clear that PW-1 is not eye witness of the incident, hence his statement required no much scrutiny.

25. PW-5 Teekaram is only alleged eye witness, deposed that on 23.05.2010, he, accused-appellant Ashok, victim Raju and one Deepu were present in the Hotel which belonged to Murli Dhar Sharma, PW-8. Accused-appellant Ashok used to make bread on Tandoor and victim Raju cooked other material; Raju was close to owner of the Hotel; On the fateful night i.e. 03.05.2010, owner of the Hotel and his son went to his house at about 10:00 PM taking entire money; he (PW-5), victim Raju, accused-appellant Ashok and Deepu remained in Hotel; In the night there was a quarrel between accused-appellant Ashok and victim Raju over making more breads; both used to drink. Victim Raju had taken liquor, accused-appellant started abusing Raju who objected and laid on the cot and was mumbling. Both were lying close by; he and Deepu laid on the roof of Leelawati Dharamkanta at the distance of 100 yards

from place of incident; accused-appellant Ashok went towards Jungle and took a Danda from there and attacked on the head of Raju three times with Danda and fled away from there with Danda, they could not speak anything due to fear of evil; in the morning they narrated entire story to owner of Hotel when he came with his son; 2nd or 3rd day of incident police apprehended accused-appellant Ashok and took Hotel by vehicle and on his pointing out, recovered a thick Danda with blood allegedly used in the commission of offence from the sand at about 04:00 PM on 05.05.2010; and recovery memo thereof Ex.Ka-4 was prepared before him, he signed over it.

26. In the cross-examination, he (PW-5) deposed that Accused-appellant took out the danda (stick) from the pile of sand and Leelawati Dharamkanta is at the distance of 100 yards from Hotel. Raju and Ashok used to sleep in the Varanda of Hotel while he and Deepu used to sleep at Leelawati Dharamkanta. Accused-appellant Ashok and Raju slept on the cot in the fateful night and there was dark at 11:00 PM in the night but there was two lighting in the Hotel, he saw accused-appellant going towards western side of jungle, after five minutes accused-appellant returned with danda; the said danda was made of Eucalyptus having three nails; he does not know where owner owner's of Hotel resides and Hotel was on the main road; they went to sleep to Leelawati Dharamkanta at about 10:45 PM; accused-appellant Ashok ran away from spot and head of victim Raju was bleeding, he was in the Hotel till Ashok was arrested, at the time of incident Deepu was also awake. Thus it is apparent from the evidence of this witness (PW-5) that at the time of incident he was on the roof of Leelwati Dharamkanta which is at 100 yards far from the place of incident and there was dark and it was not possible to him to witness how many nails were fixed in the danda. He further admitted that he did not see touching it and it was of old wood. Accused-appellant ran away from spot with Danda.

27. More so other witness Deepu did not come forward to support prosecution story and prosecution did not give any proper explanation for not producing him in evidence. It has also come in the evidence of this witness that deceased Raju, among other servants, was very close to owner of the Hotel. There is no explanation to this witness, why he did not inform Police or owner of Hotel, until owner of Hotel arrived in the morning. The witness further states that there was nobody except victim and accused-appellant in Varanda and after the incident, he came in the Hotel when owner arrived.

28. PW-5 is only eye witness who has been produced from the side of prosecution in support of its case. Evidence of this witness found no corroboration with any other evidence. It has come in the statement of this witness that Deepu and two other persons were also present in Leelawati Dharamkanta but he could not tell the name of those persons who are said to be present in Leelawati Dharamkanta in the fateful night. In absence of any corroboration evidence of PW-5 inspires no confidence.

29. It is settled legal position that conviction can be based on single and sole testimony but it must be cogent, natural and reliable. In view of Section 134 of Indian Evidence Act,1872

(hereinafter referred to as 'Act,1872'). Section 134 of Act, 1872, reads as under:-

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

30. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872. But if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

31. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

32. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

33. In **Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

34. In **State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

35. It is well settled that where on the evidence, two possibilities are available or open which goes in favour of the prosecution and other which benefits an accused, the accused is undoubtedly entitled to benefit of doubt.

36. In **Bhagwan Singh & Others v. State of M.P., (2002) 4 SCC 85,** Court repeated one of the fundamental principles of criminal jurisprudence 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. Court observed as under:-

"7. .....The golden thread which runs through the web of administration of justice in criminal case 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. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided....."

37. In **Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SCC 1622,** Court said that at any rate, the evidence clearly shows that two views are possible - one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered the poison (potassium cyanide) to Manju but at the same time a fair possibilitiy that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone the appellant is entitled to the benefit of doubt resulting in his acquittal.

38. In **Kali Ram v. State of Himachal Pradesh, 1973 AIR 2773,** Court made following observations:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

39. In the present case, PW-5 is only the alleged eye witness. Conduct of PW-5 like not informing the owner or Police about incident till PW-8 arrived is not natural. Explanation submitted by him is not cogent and convincing. Thus PW-5 has failed to establish the guilt of accused-appellant. There is no other evidence on record to connect accused-appellant with the present crime. Hence it can be said that crime could have been committed by someone else.

40. Considering the entire fact and evidence produced by prosecution, in its entirety and legal proposition discussed herein before, in our considered view, prosecution failed to prove its case beyond reasonable doubt against accused-appellant and Trial Court has not appreciated the entire evidence in right prospective and committed manifest error in convicting the accused-appellant, hence the appeal succeed and liable to be allowed.

41. **Present jail appeal is hereby allowed.** Impugned judgment and order dated 13.07.2011 passed by Sri Mohammad Ibrahim, Additional District and Sessions Judge, Court No. 05, Gautambudh Nagar in Session Trial No. 441 of 2010 arising out of Case Crime No. 450 of 2010, Police Station Kasna, District Gautam Budh Nagar, under Section 302 IPC is set aside. He shall be released forthwith, if not wanted in any other crime.

42. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

43. Lower Court record along-with a copy of this judgment be sent back immediately to District Court concerned and also copy of this judgment be sent to Superintendent Jail concerned through District Judge concerned for immediate compliance and further necessary action.

44. Before parting, we provide that Sri Uttar Kumar Goswami, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)11ILR A623

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Misc. Writ Petition No. 21113 of 2019

Ram Kailash Tripathi & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Chandra Pal Singh

Counsel for the Respondents:
A.G.A.

A. Criminal Law -Code of Criminal Procedure,1973 - Section 482 - quashing of criminal proceeding in respect of non-compoundable offences-heinous and serious offences cannot be quashed on the basis of settlement/compromise under section 482 Cr.P.C./Article 226-only offences which are private in nature having no impact on the society can be quashed-exercise of power under Section 482Cr.P.C./Article 226 can not be permitted, when the matter is under investigation. (Para 3,4,5,6)

Writ petition dismissed (E-6)

List of cases cited:-

1. Gian Singh Vs. State of Punjab, 2012(10) SCC 303

2. Narinder Singh Vs. State of Punjab (2014) 6 SCC 466

3. State of M.P. Vs. Laxmi Narayan & Ors.(3 Judges),AIR 2019 SC 1296

4. State of Rajasthan Vs. Shambhu Kewat (2014) 4 SCC 149

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

1. Heard Sri Chandra Pal Singh, learned counsel for the petitioners and the learned A.G.A.

2. This writ petition has been filed, seeking a writ of mandamus, directing the respondent concerned, not to arrest the petitioners, with a further prayer for

quashing the impugned FIR dated 15.7.2019 registered as Case Crime no. 0559 of 2019, under Sections 376, 452, 323, 506 IPC, P.S. Handiya, District Prayagraj (Allahabad).

3. It is submitted by learned counsel for the petitioners that as parties have amicably settled their dispute, victim herself filed an application to the Superintendent of Police that the FIR was lodged on false allegations, no offences are made out, FIR be quashed, in the light of ***Gian Singh v. State of Punjab, 2012(10) SCC 303*** and ***Narinder Singh vs. State of Punjab (2014) 6 SCC 466.***

4. The Apex Court in State of ***M.P. Vs. Laxmi Narayan & Ors. (3 Judges), AIR 2019 SC 1296,*** while resolving the conflict between ***Narinder Singh (supra)*** and ***State of Rajasthan Vs. Shambhu Kewat (2014) 4 SCC 149,*** as regards quashment of proceedings under Article 226 / Section 482 CrPC on the ground of compromise / settlement, held as under: -

"10. Now so far as the decision of this Court in the case of Narinder Singh (supra) is concerned, this Court in paragraph 29.6 admitted that the offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, this Court further observed that the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed. Its further corroboration with the medical evidence or other evidence is to be seen, which will be possible during the trial only. Hence, the decision of this case in the case of Narinder Singh (supra) shall be of no assistance to the accused in the present case.

11. ...

12. ...

13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed

in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

5. The upshot of the above legal position is that non-compoundable offences can be quashed under Article 226 of Constitution of India/ 482 CrPC, which are overwhelmingly and predominantly of civil character arising out of commercial transactions, matrimonial / family disputes and parties have resolved their disputes amicably, as such offences are private in nature having no impact on the society. But heinous and serious offences involving mental depravity or offences like murder, rape, dacoity etc and the offences under the special statutes like Prevention of Corruption Act or offences committed by public servants while working in that capacity cannot be quashed on the basis of settlement / compromise. However, where the High Court finds that these offences are merely incorporated without any material to support, it can quash the proceedings relating to such offences. For this purpose, it would be open for the High Court to examine whether the materials collected, if proved, would lead to framing of charge. This exercise is only permissible, when a charge sheet is filed or a charge is framed and / or during the trial, not when the matter is under investigation.

6. In the present case, an offence of rape is alleged to have been committed by the accused, matter is still under investigation, FIR cannot be quashed at the initial stage on the basis of settlement/ compromise between the parties, as the alleged offence is heinous and against the society.

7. The writ petition is **dismissed**.

(2019)11ILR A626

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 40 of 2011
connected with
First Appeal No. 107 of 2011
with
First Appeal No. 157 of 2016

Prachi ...Appellant
Versus
Shailendra Kumar ...Opposite Party

Counsel for the Appellant:
Sri Rakesh Pandey, Sri Vishnu Pratap Pandey

Counsel for the Opposite Party:
Sri Ghanshyam Dwivedi, Sri M.S. Pipersania

A. Civil Law-Hindu Marriage Act, 1955 - Section 24 - Maintenance *pendente lite* - u/s 125 Cr.P.C. - Inspite of award of maintenance under section 125 Cr.P.C.- wife can seek maintenance under section 24 of Act 1955 – Scope of section 24 of Hindu Marriage Act, 1955 is not circumscribed by section 125 Cr.P.C.

Held:- There is no prohibition contained in section 24 of Hindu Marriage Act, 1955 whereunder maintenance can be denied on account of an order of maintenance already passed under section 125 Cr.P.C. To the contrary, read together, maintenance awarded under section 125 Cr.P.C. shall be adjusted in the amount of maintenance awarded under section 24 of the Hindu Marriage Act 1955. (Para 39)

Appellant being legally wedded wife of plaintiff, not having any independent source of income, is therefore entitled to maintenance under section 24 of Act 1955 irrespective of order passed under section 125 Cr.P.C. in her favor. (Para 39)

B. Civil Law-Hindu Marriage Act, 1955 - Section 12(1)(c) – Divorce - Fraud - Pleadings - Order VI Rule 4 C.P.C.- Particulars to be given - Plaintiff must duly plead as to how 'fraud' was committed upon him by giving exact date and specific particulars.

Once the ground of fraud played in the settlement of marriage, was sought to be set up by the plaintiff, it was incumbent upon him to categorically plead how the marriage came to be finalized between parties and by whom by giving exact date and specific particulars – Plaint of divorce petition completely silent as to how 'fraud' was committed upon the plaintiff.

Held:-Plaintiff failed to plead that the marriage of parties was got solemnized by playing fraud. (Para 30, 31)

C. Civil Law-Code of Civil Procedura,1908 - Order VI Rule 4 - Fraud - Pleadings - If specific particulars of fraud not given - Consequence - Court cannot consider the issue of fraud as no amount of evidence can be looked into until and unless a fact has been pleaded. (Para 31)

First Appeal partly allowed (E-5)

List of cases cited: -

1. Hirachand Srinivas Managaonkar Vs Sunanda (2001) 4 SCC 125

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

1. First appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar) has been filed by appellant Prachi, challenging Judgement dated 4.12.2010 and Decree dated 22.12.2010, passed by Principal Judge, Family Court, Allahabad in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi) under

section 12 (1) of Hindu Marriage Act 1955 (hereinafter referred to as Act, 1955), whereby marriage between parties has been declared, a nullity.

2. First Appeal No. 107 of 2016 (Shalendra Kumar Vs. Prachi) has been filed by plaintiff Shailendra Kumar, challenging findings recorded by Principal Judge, Family Court, Allahabad on Issue Nos. 1,2 and 3 in judgement dated 4.12.2010 rendered in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi).

3. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) has been filed by appellant Dr. Prachi Sharma challenging Order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad in Marriage Petition No. 37 of 2002 (Shailendra Kumar Vs. Prachi Sharma), whereby application filed by appellant under section 24 of Act, 1955 (Paper No. 47 Ka) has been allowed and plaintiff has been directed to pay only a consolidated sum of Rs. 10,000/- to the appellant towards litigation expenses. appellant had also challenged order dated 6.2.2009, passed by Principal Judge, Family Court, Allahabad, whereby review application (Paper No. 69 Ka) filed by appellant, seeking review of order dated 24.11.2008, has been rejected.

4. We have heard Mr. Tej Prakash Mishra, learned counsel for defendant appellant Prachi and Mr. Ghanshyam Dwivedi for plaintiff Shailendra Kumar in First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar), Mr. Ghanshyam Dwivedi for plaintiff-appellant Shailendra Kumar and Mr. Rakesh Pandey for defendant-respondent Prachi in First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi), Mr. Rajesh Kumar Tripathi, Advocate, holding brief of Mr. Vishnu Pratap Pandey, learned counsel for plaintiff-appellant Dr. Prachi Mishra and Mr. Ghanshyam Dwivedi, representing defendant-respondent Shailendra Kumar in First Appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar). We shall, hereinafter, referred Dr. Prachi Sharma as appellant and Shailendra Kumar as plaintiff.

5. According to plaint allegations, marriage of appellant Prachi was solemnized with plaintiff Shailendra Kumar on 27.11.2002 at Allahabad in accordance with Hindu Rites and Customs. According to plaintiff, marriage between parties never consummated, and as such, no issue was born out of aforesaid wedlock. After expiry of a period of one year and few days, plaintiff Dr. Shailendra Kumar filed Marriage Petition No. 37 of 2002 (Dr. Shailendra Kumar Vs. Dr. Prachi Sharma) under section 12 of Act, 1955 for a decree declaring marriage of parties as nullity. Plaintiff took as many as seven grounds for declaration of marriage as nullity. According to plaintiff, appellant has very weak eye-sight and cannot perform her house hold job without wearing spectacles. The aforesaid fact was concealed by parents of appellant at time of marriage. Appellant is also suffering from incurable form of disease in teeth. She was alleged to be suffering from Pyria and Peritonitis. The said fact was concealed before marriage and also at time of marriage. Appellant was further alleged to be suffering from Jaundice and abdominal pain, since before marriage and also at the time of marriage. Marriage

of parties was got solemnized concealing the aforesaid. It was also alleged that parents of appellant concealed her age inasmuch as she was aged about 38 years at time of marriage, whereas, same was alleged to be 30 years at time of marriage. It was also pleaded that after marriage when appellant came to house of plaintiff, her behaviour was abnormal and unnatural which was like a psychotic patient. Appellant was also suffering from tuberculosis at the time of marriage, which fact has been concealed from plaintiff and his family. Lastly, it was pleaded that neither before marriage nor at time of marriage, it was disclosed by parents of appellant that she is hard of hearing and uses a hearing aid.

6. Upon issuance of summons in Marriage Petition No. 37 of 2002 (Dr. Shailendra Kumar Vs. Dr. Prachi Sharma), appellant appeared and filed an application under section 24 of Act, 1955 for payment of interim maintenance and litigation expenses (Paper No. 47 Ka). Aforesaid application was partly allowed by Court below vide order dated 24.11.2008 and only a sum of Rs. 10,000/- was awarded to appellant towards litigation expenses. Feeling aggrieved by order dated 24.11.2008, since no interim maintenance was awarded, appellant filed review application (Paper No.69 Ka) seeking review of order dated 24.11.2008. However, same was rejected by Court below vide order dated 6.2.2009. Orders dated 24.11.2008 and 6.2.2009, passed by Principal Judge, Family Court, Allahabad. The same have been challenged by appellant in First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar).

7. Suit filed by plaintiff Dr. Shailendra Kumar was contested by appellant. She filed a written statement dated 18.5.2009 (Paper No. 82 Ka) whereby, not only she denied plaint allegations but also raised additional pleas. According to appellant, she, after completing M.A. (Economics) Course, joined as a research scholar in Allahabad University and ultimately, submitted her thesis. Upon knowledge of the fact that appellant is unmarried and her marriage is to be settled, father of plaintiff himself proposed marriage of his son plaintiff with appellant. Father of plaintiff sent his bio-data and expected bio date of appellant along with photograph. Father of appellant, sent bio-data and her photographs to father of plaintiff. Later on father of plaintiff demanded horoscope of appellant, which was duly sent. Father of plaintiff intimated that horoscope of boy and girl are tallying and therefore, he (father of plaintiff) is desirous of marrying his son with appellant. In furtherance of aforesaid, father of plaintiff desired to have a look at the girl that is appellant. As such, aforesaid ceremony was held in a rented house of elder brother of appellant, at L-113 Sarojni Nagar, New Delhi. The aforesaid ceremony was attended by plaintiff along with his parents and brother. They saw appellant and also had conversation with her. Plaintiff separately met appellant and talked to her. Appellant duly disclosed about her educational qualifications and research papers. Later on father of plaintiff gave his consent for marriage of plaintiff with appellant and fixed 14.1.2002 as date for holding "Bagdan Ceremony", which is an important pre marriage ritual performance in the caste of parties. Accordingly, on 14.1.2002, the said ceremony was solemnized at Scientific Apartment. In the aforesaid ceremony, parents of plaintiff, his Bhabi

and younger brother came. As per his capacity, father of appellant, gave cash, goods and jewellery. In reciprocation, parents of plaintiff gave a ring, two sarees as well as fruits and sweets to appellant. In this ceremony, plaintiff and appellant stayed together for two hours and understood eachother. Father of plaintiff-expressed his desire to send certificates and mark-sheets, pertaining to educational qualification of appellant. Later on father of plaintiff send application form to appellant for applying in Chandigarh University. However, as appellant was not awarded Ph. D degree upto that stage, she could not apply. Appellant, categorically denied factum regarding sufferance from any diecease. Before marriage she was suffering from jaundice but upon proper medical treatment she recovered. As per opinion of Doctor, appellant was only having weakness and therefore, advised to have restricted diet. Inspite of aforesaid fact having been disclosed and papers relating to medical prescription of appellant, having been given, yet family of plaintiff gave greasy food to appellant which was not conducive for her health. She never suffered from Tuberculosis, Piereia, Hepatitis disease or abdominal pain. Lastly, it is also pleaded that father of appellant had given a cheque of Rs.1,00,000/- and Rs. 5,75,000/- in cash towards dowry along with other goods, jewellery and costly sarees. Plaintiff and his family raised a demand of Rs. 20,00,000/- towards dowry. As part of their technique, plaintiff on the pretext of taking appellant to a doctor, dropped her at her brother's place in New Delhi on 1.12.2002. Later on father of plaintiff called father of appellant at Delhi and took him to Kurukshetra. Some papers were got executed at Kurukshetra, in respect of which, F.I.R. was lodged at New Delhi. Appellant is younger to plaintiff by three years. Marriage was solemnized after holding due enquiry, when parents of appellant could not fulfil illegal demand of plaintiff, suit for annulment of marriage has been filed maliciously on false grounds.

8. Plaintiff filed replication (paper no.37 Ga) whereby he denied contents of written statement and reiterated pleadings raised in plaint.

9. It may be noticed that initially, matrimonial petition was filed in the Court of District Judge, Kurukshetra. Subsequently, appellant filed Transfer Application (Civil) No. 772 of 2013 (Smt. Prachi Sharma Vs. Shailendra Kumar) before Supreme Court. Same was allowed vide order dated 8.8.2005 and Matrimonial Petition, pending in Court of District Judge, Kurukshetra, was transferred to Court of District Judge, Allahabad. Later on, District Judge, Allahabad transferred matrimonial petition to Family Court, Allahabad. Accordingly, same came to be registered as Matrimonial Petition No. 37 of 2002 (Shailendra Kumar Vs. Prachi).

10. After exchange of pleadings, parties went to trial. Court below on the basis of pleadings of parties, framed following issues for determination:

(I) Whether marriage of appellant has been solemnized with plaintiff by playing fraud as ailment of appellant prior to her marriage as well as at the time of marriage was deliberately concealed from plaintiff. If yes, it's effect?

(II) Whether in the bio-data of appellant, her age was wrongly shown to

be less, deliberately concealing her real age. If yes, it's effect.

(III) Whether on account of physical and mental ailment of appellant, no conjugal relationship could be established between the parties. If yes, it's effect?

(IV) Whether appellant and her father have committed cruelty upon plaintiff and his family members?

(V) Whether plaintiff has abandoned appellant after subjected her to cruelty for demand of dowry. If yes, it's effect?

(VI) Relief.

11. Court below upon consideration of pleadings of parties, oral and documentary evidence adduced by parties, proceeded to decide above mentioned issues framed by it. Plaintiff, in order to prove his case, adduced himself as P.W.1. No other witness was adduced by plaintiff. He also filed documentary evidence, which are mentioned in the impugned judgement.

12. Appellant in order to prove her defence, adduced herself as D.W.1, Ramesh Prasad Kala as D.W.2, Professor Dr. Girish Chandra Tripathi as D.W.3, Brij Lal Nagpal as D.W.4. Appellant also filed documentary evidence which has also been described in impugned judgement.

13. It may be noticed here that plaintiff took as many as seven grounds in support of his plea regarding declaration of marriage as nullity in terms of section 12 of Act 1955. It was pleaded by plaintiff that appellant has a very weak eye sight. Consequently, she cannot perform her house hold job without spectacles. But aforesaid fact was concealed by parents of appellant at the time of marriage. Plaintiff further pleaded that appellant is suffering from incurable form of disease in teeth. She is suffering from Pyria and Peritonitis but the same was not disclosed before marriage or at the time of marriage. In addition to aforesaid grounds, it was also alleged that appellant is suffering from Jaundice and abdominal pain, which facts were never disclosed. The age of appellant at the time of marriage was disclosed as 30 years whereas, appellant actually was aged about 38 years at the time of marriage. When appellant, after marriage came to her marital home, her behaviour was abnormal and unnatural like that of a psychotic patient; She was suffering from mental disorder. It was also alleged that appellant is suffering from tuberculosis and aforesaid fact was not disclosed either before marriage or at the time of marriage. Lastly, it was urged that parents of appellant did not disclose either before marriage or at the time of marriage that appellant was hard of hearing and used hearing aid.

14. Out of the aforesaid seven grounds pleaded by plaintiff, only one ground was accepted by Court below i.e. parents of appellant did not disclose either before marriage or at the time of marriage that appellant was hard of hearing and using hearing aid. Other grounds taken by plaintiff could not be established in evidence, as such disbelieved by Court below.

15. Issue Nos. I, II and III were decided together. Court below concluded that appellant was not suffering from any of the diseases, alleged by plaintiff. It further held that appellant is younger to plaintiff by three years. It also held that

marriage between parties was solemnized on 27.11.2002. Appellant came to her matrimonial home on 29.11.2002. Thereafter, she went to her brother's house on 1.12.2002, as such, marital relations between the parties, were never established. Court below further held that parents of appellant did not disclose to family of plaintiff either before marriage or at the time of marriage that appellant was hard of hearing and used a hearing aid. Issue No. IV was not decided by Court below on the ground that the same has been framed unnecessarily, as such, no finding is required to be returned on the point whether appellant and her father committed cruelty upon plaintiff and his family members. Issue No.V was decided in favour of plaintiff and it was held that appellant was not subjected to cruelty for demand of dowry nor she was disowned by plaintiff. Lastly, Court below concluded that plaintiff is entitled to decree of annulment of marriage as it was got solemnized by parents of appellant by playing fraud.

16. Learned counsel for appellant has challenged findings recorded by Court below on the point that marriage of parties has been obtained by practising fraud as disability of appellant i.e hard of hearing and using a hearing aid was never disclosed, either before marriage or at time of marriage. As such, marriage between parties was got solemnized by playing fraud and therefore liable to be declared a nullity in terms of section 12 of Act 1955. He submits that marriage of parties has been declared, a nullity, by a decree of Court under section 12 of Act 1955. The only ground on which Court below has passed aforesaid decree is that appellant was having defect in hearing at the time of marriage and was using a hearing aid which fact was concealed from plaintiff. According to learned counsel for appellant, above ground by itself is not sufficient/enough to anull marriage of parties as the same does not fall within the ambit of section 12 or section 5 of Act 1955. In order to pass a decree of nullity of marriage under section 12 of Act 1955, Court below is mandatioraily required to declare marriage to be voidable at the instance of plaintiff on the grounds mentioned in clauses a,b,c and d of sub-section (1) of section 12 of Act 1955. The ground taken by Court below is not at all sufficient to declare marriage of parties, voidable, at the instance of plaintiff. He further submits that marriage of plaintiff was finalized with appellant by father of plaintiff. However, father of plaintiff was not adduced as a witness to prove the element of fraud, alleged to have been played by family members of appellant in the settlement of marriage, nor there is any pleading raised in plaint as to how and by whom alleged fraud was played. He, lastly submits that ceremonies solemnized before actual marriage completely bely the case of plaintiff since he and his family members had duly seen and talked with appellant. Court below has erroneously shifted burden to prove pre-marraige ceremonies upon appellant. Filing of petition by plaintiff after more than a period of one year from the date of marriage is a malicious design on the part of plaintiff to a decree of nullity of marriage on non existent ground.

17. Mr. Ghanshyam Dwivedi, learned counsel representing plaintiff has supported impugned judgement and decree on the basis of findings recorded therein.

18. Before proceeding to consider correctness of findings recorded by Court below that marriage between parties has been obtained by fraud inasmuch as it was not disclosed either before marriage

or at the time of marriage by parents of appellant that she was hard of hearing and consequently, used a hearing aid, it shall be useful to reproduce section 12 of Act 1955, which relates to voidable marriages:

*"**12 Voidable marriages .** (1) Any marriage solemnised, whether before or after the commencement of this Act, **shall be voidable and may be annulled by a decree of nullity on any of the following grounds**, namely:-*

*(a) that the marriage has **not been consummated owing to the impotence of the respondent;** or]*

*(b) that the marriage is in **contravention of the condition specified in clause (ii) of section 5;** or*

*(c) that the **consent of the petitioner,** or where the consent of the guardian in marriage of the petitioner 13 [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was **obtained by force or by fraud as to the nature of the ceremony** or **as to any material fact or circumstance concerning the respondent;** or*

*(d) that the respondent was **at the time of the marriage pregnant by some person other** than the petitioner.*

*(2) **Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:-***

*(a) on the ground specified in **clause (c) of sub-section (1) shall be entertained** if-*

*(i) the petition is presented **more than one year after the force had ceased to operate or,** as the **case may be, the fraud had been discovered**; or*

*(ii) the **petitioner has, with his or her full consent, lived with the other party** to the marriage as husband or wife after the force had ceased to operate or, as the case may be, **the fraud had been discovered;***

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

(Emphasis added)

19. Section 11 of Act 1955 relates to void marriages. As per section 11 of Act 1955 any marriage solemnized after commencement of Act 1955 shall be null and void, if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of Act 1955. As noted above, section 12 on the other hand deals with "voidable marriages". Any marriage solemnized whether before or after commencement of Act 1955 shall be voidable and may be annulled by a decree of nullity on the grounds detailed in section 12 of Act 1955 itself.

20. The terms 'void' and 'voidable' are not defined in Act 1955. The aforesaid

terms are defined in the Contract Act, 1872 as under:

Section 19. Voidability of agreements without free consent.--*When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract* ***voidable*** *at the option of the party whose consent was so caused.*

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception --If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.--A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

20. Agreement void where both parties are under mistake as to matter of fact.--*Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is* ***void.***

Explanation.--An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

21. When an agreement is enforceable at law, it becomes a contract. Based on validity, there are several types of contract, i.e. valid contract, void contract, illegal contract, etc. Void contract and voiadable contract are quite commonly miscontrued, but they are different. Void contract, implied a contract which lacks enforceability by law, whereas voidable contract, alludes to a contract wherein one party has the right to enforce or rescind the contract, i.e. the party has to right to put the contract to end.

22. For better appreciation a comparison chart is given herein below, giving differences between void and voidable contract:

Void Contract	**Voidable Contract**
The type of contract which cannot be enforceable is known as void contract.	The contract in which one of the two parties has the option to enforce or rescind it, is known as voidable contract.
Section 2 (j) of the Indian Contract Act, 1872.	Section 2 (I) of the Indian Contract Act, 1872
The Contract is valid, but subsequently becomes invalid due to some reasons.	The contract is valid, until the party whose consent is not free, does not revokes it.
Subsequent illegality or impossibility of any act which is to be	If the consent of the parties is not independent.

performed in the future.	
No right in favour of parties to the contract which is void	Yes, but only to the aggrieved party.
Not given by any party to another party for the non-performance, but any benefit received by any party must be restored back.	Damages can be claimed by the aggrieved party.

23. Thus a void contract may be defined as a contract which is not enforceable in the Court of law. At the time of formation of the contract, the contract is valid as it fulfils all the necessary conditions required to constitute a valid contract, i.e. free consent, capacity, consideration, a lawful object, etc. but due to a subsequent change in any law or impossibility of an act, which are beyond the imagination and control of the parties to the contract, the contract cannot be performed, and hence, it becomes void. Further, no party cannot sue the other party for the non-performance of such contract.

24. Voidable contract on the other hand is a contract which can be enforceable only at the option of one of two parties to the contract. In this type of contract, one party is legally authorized to make a decision to perform or not to perform his part. The aggrieved party is independent to choose the action. The right may arise because the consent of the concerned party is influenced by coercion, undue influence, fraud or misrepresentation, etc. The contract becomes valid until aggrieved party does not cancel it. Moreover, the party aggrieved has the right to claim damages from the other party.

25. Similarly, term 'fraud' has not been defined in Act 1955. The same has been defined in Section 17 of Contract Act,1872 as follows:

"17. "Fraud" defined.--*"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent1, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:--*

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.--Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak2, or unless his silence, is, in itself, equivalent to speech."

26. The issues which evolve for consideration are "whether plaintiff duly pleaded that marriage of parties was got solemnized by playing fraud and burden to plead and prove the same was upon plaintiff?" Secondly, " whether non

disclosure by parents of appellant that she was having hearing deficiency and used a hearing aid either before marriage or at time of marriage, is a ground on which a decree of nullity of marriage, can be passed".

27. Marriage in Hindus is a pious social obligation which is required to be performed for continuation of society in an orderly manner and also for satisfaction of physical desire of men and women. Apex Court in **Hirachand Srinivas Managaonkar V. Sunanda, 2001 (4) SCC 125** has therefore observed that object of Act 1955 is to maintain marital relationship and not to encourage snapping of such relationship. Following was observed in paragraph 16 of aforesaid judgement:

"At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."

28. In the present case, plaintiff is a Doctor whereas, appellant has obtained her Doctrate Degree i.e. Ph.D. in Economics. Upon perusal of plaint, we find that there is no averment in the entire plaint as to how marriage of parties was finalized. It is only in the testimony of witnesses, manner in which marriage of parties came to be finalized, has been unearthed.

29. Learned counsel for appellant took us to testimony of P.W.1 Shailendra and thereafter, to testimony of D.W.1 Dr. Prachi and D.W.2. Ramesh Kala, father of appellant. From perusal of statement-in-chief/examination-in-chief of D.W.2, we find that marriage on behalf of plaintiff was initiated and finalized by his father. However, for reasons best known to plaintiff, he did not adduce his own father, who admittedly had finalized marriage between parties on his behalf to explain as to how marriage between parties came to be finalized.

30. Secondly, as noted above, plaint of marriage petition filed by plaintiff is completely silent as to how 'fraud' was committed upon plaintiff. Order VI Rule 4 C.P.C. clearly provides for the manner in which pleadings are to be made where fraud is alleged. For ready reference Order VI Rule 4 C.P.C. is quoted herein under:

"Particulars to be given where necessary" *- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

31. Unfortunately, we find that Court below while deciding divorce petition completely overlooked aforesaid facts. Even though plaint is completely silent regarding manner in which fraud was played, Court below has proceeded to consider this issue. It has completely lost sight of the fact that no amount of evidence can be looked into until and unless a fact has been pleaded. Once the factum regarding fraud having been played in settlement of marriage, was sought to be relied upon by plaintiff, it was incumbent upon him to categorically plead as to how marriage came to be

finalized between parties and by whom by giving exact date and specific particulars. The absence of material facts in this regard by plaintiff in plaint clearly establish that plaintiff did not approach Court below with clean hands.

32. Having taken notice of Section 12 of Act 1955, we repeatedly asked learned counsel for plaintiff as to how ground pleaded by plaintiff for annulment of marriage could be covered under section 12 of Act 1955. Learned counsel for plaintiff took us through impugned judgement and highlighted with emphasis on observations made by Court below, whereby Court below erroneously shifted burden upon appellant to establish that fraud was not played. It is well established that it is always the positive fact which is required to be proved. Therefore, burden was upon plaintiff himself to plead and prove the element of fraud in solemnization of marriage of parties. Plaintiff has to stand on his own legs and he cannot derive benefit from weakness in the defence of defendant.

33. When analysed from aforesaid point of view, we find that Court below has erroneously shifted burden to prove fraud upon appellant. Furthermore, after having perused section 12 of Act 1955, we find that ground pleaded by plaintiff for grant of a decree of nullity of marriage solemnized between parties is not covered within ambit and scope of section 12.

34. When confronted with the facts as noted above, learned counsel for plaintiff could not urge any thing new but supported impugned judgement on the strength of findings and observations contained therein.

35. First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi) has been filed by plaintiff Shailendra Kumar challenging the findings recorded by Court below on Issue Nos. I, II and III. Learned counsel for plaintiff did not press this appeal. Consequently, same is liable to be dismissed.

36. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) which has been filed challenging order dated 24.11.2008, whereby application under section 24 of Act 1955 filed by defendant appellant has been allowed only to the extent of granting litigation expenses of Rs. 10,000/- and review petition seeking review of order dated 24.11.2008, has been dismissed vide order dated 6.2.2009, we find that the short questions are involved in above appeal is "whether appellant is not entitled to any maintenance under section 24 of Act 1955" and "whether denial of same to appellant by Court below is justified or not".

37. From perusal of impugned order dated 24.11.2008, we find that Court below has refused to award interim maintenance to appellant solely on ground that she has already been awarded maintenance at the rate of Rs. 2,000/- per month in maintenance case. Consequently, there is no necessity to award further maintenance to appellant.

38. Section 24 of Act 1955 provides for payment of interim maintenance during pendecny of matrimonial dispute. For ready reference Section 24 of Act 1955 is reproduced herein below:

"24 Maintenance pendente lite and expenses of proceedings *:-Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no*

independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]"

39. There is no prohibition contained in section 24 of Act 1955 whereunder maintenance can be denied on account of an order of maintenance already passed under section 125 Cr.P.C. To the contrary, it is provided that maintenance awarded under section 125 Cr.P.C. shall be adjusted in the amount of maintenance awarded under section 24 of Act 1955.

40. Learned counsel for appellant submits that marriage of parties was solemnized on 27.11.2002 in accordance with Hindu Rites and Customs. After marriage, appellant came to her marital home on 29.11.2002. plaintiff is alleged to have dropped appellant at her brother's place in New Delhi on 1.12.2002. As such, appellant has been forced to live separately from plaintiff and with her parents. Consequently, appellant is not residing separately out of her own will. Appellant is legally wedded wife of plaintiff. As such, plaintiff is legally and morally bound to maintain appellant. She is not having any independent source of income and therefore entitled to maintenance under section 24 of Act 1955 irrespective of order passed under section 125 Cr.P.C.

41. Plaintiff contested application filed by appellant under section 24 of Act 1955. However, he admitted that his salary is Rs. 37422/-. He also detailed deductions made from his salary. It was further pleaded by plaintiff that since appellant has already been awarded maintenance under section 125 Cr.P.C. , there is no legal right of appellant to seek maintenance under section 24 of Act 1955.

42. Court below considered the case of parties. Vide order dated 24.11.2008, it only allowed litigation expenses. Upon perusal of order dated 24.11.2008, we find that Court below has erred in law in refusing to grant interim maintenance to appellant. We further find that Court below has rejected review application filed by appellant on the ground that there is no legal error nor there is any error much less an error apparent on the face of record necessitating review of order dated 24.11.2008. In our view Court below has failed to appreciate that jurisdiction under section 24 of Act 1955 is not circumferenced by section 125 Cr.P.C. As noted above, any amount of maintenance awarded under section 125 Cr.P.C. shall be adjusted in the amount of maintenance awarded under section 24 of Act 1955. Consequently, First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) is hereby partly allowed. Order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad is modified. Appellant shall be entitled to monthly maintenance at the

rate of Rs. 12,000/-. The amount of maintenance awarded under section 125 Cr.P.C. i.e. Rs. 2,000/- shall be adjusted in aforesaid amount. Plaintiff is directed to pay aforesaid amount to appellant from date of application till 31.8.2019. Since we have already modified the order dated 24.11.2008, there is no necessity to decide validity of order dated 6.2.2009, whereby review petition filed by appellant, seeking review of earlier order dated 24.11.2008 has been rejected.

43. First Appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar) is hereby allowed. Judgement dated 4.12.2010 and decree dated 22.12.2010 passed by Vijai Kumar Khatri, Principal Judge, Family Court, Allahabad in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi) is hereby set aside and aforesaid marriage petition is dismissed.

44. First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi) is also dismissed.

45. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) is partly allowed and judgement and order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad is modified and order dated 6.2.2009, dismissing review of the appellant, is hereby set aside and it is provided that the appellant Dr. Prachi Sharma is entitled to monthly maintenance of Rs. 12,000/-. The amount of maintenance awarded under section 125 Cr.P.C. i.e. Rs. 2,000/- shall be adjusted in the aforesaid monthly maintenance granted by this Court under section 24 of Act 1955. Aforesaid maintenance shall be payable from the date of application till 31st August, 2019. The entire amount, as directed, shall be paid directly to the appellant by husband Dr. Shailendra Sharma or deposited in the Family Court. If amount is deposited by plaintiff Shailendra Kumar, same shall be released by Court below without any further delay. In case of default, it shall be open to appellant to take execution proceedings for recovery. It is provided that cost in all appeals is made easy.

(2019)11ILR A638

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 133 of 2018

Latoori Singh ...Appellant
Versus
Sushila Devi ...Respondent

Counsel for the Appellant:
Sri Ram Sanehi Yadav

Counsel for the Respondent:
Sri Hari Mohan Srivastava, Sri Neeraj Srivastava

A. Civil Law-Guardian and Wards Act, 1890 - Section 25 - Guardianship & custody of minor - consideration - paramount interest of minor is the primary criteria for deciding custody and guardianship of a minor.

Held:- It is well crystallized that paramount interest of minor is the primary criteria for deciding custody and guardianship of a minor. A minor who is below five years of age, shall ordinarily be allowed to stay with his mother. Similarly, in case of minor girls, it has been the consistent view that their custody should remain with the mother, till they attain the age of majority. (Para 13)

B. Guardianship & custody of minor - Practice and Procedure - Court while deciding the issue regarding appointment of guardian of minor and also custody of minor must have a dialogue/conversation with the minor and then assess & return a finding regarding paramount interest of child. (Para 16)

Held:- Court below was under legal obligation to decide the status of parties, the intention of minor in residing with his mother or grandfather and then return a finding, as to in whose custody the paramount interest of minor child would be best protected. Court below having failed to undertake the aforesaid exercise; jurisdiction exercised not accordance with law.

First Appeal Allowed (E-5)

List of cases cited: -

1.Mritunjay Vs Hari Shankar Dixit (First Appeal Defective No. 138 of 2019 decided on 8.7.2019).

2. Lekha Vs P. Anil Kumar (2006) 13 SCC 555

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

1. Present first appeal under section 47 of Guardian and Wards Act, 1890 (hereinafter referred to as "Act 1890") has been filed by Latoori Singh, challenging judgement dated 23.1.2018 and decree dated 5.2.2018, passed by Principal Judge, Family Court, Kasganj in Suit No. 25 of 2015 (Smt. Sushila Devi Vs. Latoori Singh) under section 25 of Act 1890, whereby and whereunder, plaintiff-respondent Smt. Sushila Devi has been appointed as guardian of minor Kuldeep and further defendant-appellant has been directed to hand over custody of minor Kuldeep to plaintiff-respondent Sushila Devi.

2. Brief facts shorn of unnecessary details giving rise to present first appeal are that marriage of plaintiff-respondent was solemnized with Subhash chandra S/o defendant-appellant Latoori Singh in accordance with Hindu Rites and Customs. From aforesaid wedlock, son Kuldeep was born. Unfortunately, Subhash chandra father of minor Kuldeep died on 7.10.2012. Upon death of Subhash chandra S/o defendant-appellant Latoori Singh, custody of minor Kuldeep was retained by defendant-appellant whereas, Smt. Sushila Devi, mother of minor Kuldeep, went to her parental home. On 27.8.2016, plaintiff-respondent Sushila Devi filed Suit No. 25 of 2015 (Smt. Sushila Devi Vs, Latoori Singh) under section 25 of Act, 1890 for appointment of herself as Guardian of minor Kuldeep and also for custody of minor.

3. According to plaint allegations, marriage of plaintiff-respondent Sushila Devi was solemnized with Subhash Chandra in accordance with Hindu Rites and Customs. From the aforesaid wedlock, a son, Kuldeep, was born. Unfortunately, Subhash Chandra husband of plaintiff-respondent Sushila Devi died on 7.10.2012 in an accident. Defendant-appellant is allege to have got some papers signed from plaintiff-respondent as well as her father and on false pretext that health of plaintiff-respondent is not keeping good, retained custody of minor Kuldeep. Upon regaining health, plaintiff-respondent came to her marital home on 12.8.2015 but was not allowed by her in-laws to enter the house. According to plaintiff-respondent, it is alleged that defendant-appellant on the basis of certain papers which were got signed by him from plaintiff-respondent and her father, pleaded that plaintiff-respondent has no concern with minor as well as

property of her late husband. Photo copy of alleged paper was handed over to plaintiff-respondent on 12.8.2015. On basis of the same, defendant-appellant is alleged to have denied custody of minor Kuldeep to his natural guardian i.e. mother, Smt. Sushila Devi, on 20.8.2015. Accordingly, plaintiff-respondent, Smt. Sushila Devi, filed Suit No. 25 of 2015 (Smt. Shusheels Devi Vs. Sri Latoori Singh) for custody of minor Kuldeep and also for appointment of herself as Guardian of minor Kuldeep.

4. Suit filed by plaintiff-respondent was contested by defendant-appellant. He filed a written statement dated 29.9.2015 (Paper No. 10-a) whereby, not only plaint allegations were denied but also additional pleas were raised. According to defendant-appellant, allegations made in plaint were false. Plaintiff-respondent herself went to her parental home along with her jewellery, goods and utensils. A panchayat was held in the presence of Nawab Singh, Pooran Singh, Swadan Singh, Brijesh Kumar, Prajapalan Verma and Ex-M.L.A. Ramswaroop wherein, plaintiff-respondent expressed her desire to live at her parental home. Accordingly, plaintiff-respondent was paid a sum of Rs. 80,000/- cash by defendant-appellant as well as entire amount payable under L.I.C. Policy of deceased Subhas chandra i.e. Rs. 2,05,000/-. Plaintiff-respondent further agreed for remarriage and gave custody of minor Kuldeep in his favour. A memorandum to that effect was prepaed and noterised on 27.7.2015. It was thus pleaded by defendant-appellant, that plaintiff-respondent is not entitled to the custody of minor Kuldeep nor is she entitled to be appointed as her guardian.

5. After exchange of pleadings, parties went to trial. Plaintiff-respondent Smt. Sushila Devi, in order to prove her case adduced herself as P.W.1. She also filed documentary evidence. Defendant-appellant, in proof of his defence, adduced himself as D.W.1 Saudan Singh as D.W.2 and Nawab Singh as D.W.3.

6. On the basis of pleadings raised by parties, Court below framed following issues for determination:

(i) Whether on the basis of conjugal relationship between plaintiff-respondent and Subhash Chand, son of defendant-appellant, a son Kuldeep was born.

(II) Whether plaintiff-respondent/defendant-appellant have ignored the child.

(III) The interest of the child is best protected in the company of plaintiff-respondent of defendant-appellant.

(IV) Relief.

7. Issue no-I was decided in favour of plaintiff-respondent. It was held by Court below that from the wedlock of plaintiff-respondent Smt. Sushila Devi and Subhash chandra S/o defendant-appellant, a son Kuldeep was born. Issue No. II was decided in favour of plaintiff-respondent and it was held that plaintiff-respondent has not neglected her minor child Kuldeep. Court below further held that burden to prove Issue No-II was upon defendant-appellant, which burden he has failed to discharge. Issue No. III was decided holding that interest of minor is best protected in the company of his natural mother Smt. Sushila Devi. Defence put forward by defendant-appellant on the basis of unregistered agreement dated 27.7.2015 was not believed by Court below. Further Court below also observed that defendant-appellant has failed to prove that as per

her wish, plaintiff-respondent has re-married. Since plaintiff-respondent is natural guaridan of minor Kuldeep, as such, she is entitled to custody of minor Kuldeep and further liable to be appointed as his guardian. In respect of Issue No. IV, Court below held that plaintiff-respondent is entitled to relief prayed for, as such, she is liable to be appointed as guardian of minor and also the custody of minor Kuldeep. Accordingly, suit filed by plaintiff-respondent was decreed vide judgement dated 23.1.2018 and decree dated 5.2.2018. Feeling aggrieved by aforesaid judgement and decree, passed by Court below, defendant-appellant has now approached this Court by means of present first appeal.

8. We have heard Mr. Ram Sanehi Yadav, learned counsel for defendant-appellant and Mr. Hari Mohan Srivastava, learned counsel for plaintiff-respondent.

9. Learned counsel for defendant-appellant while assailing impugned judgement and decree passed by Court below, has urged, that though mother is natural guardian of minor but natural guardian can be denied custody and guardianship of minor for strong and compelling reasons. Court below while passing impugned judgement and decree has not adverted itself to the facts and circumstances of the case and therefore, exercised its jurisdiction in a mechanical manner, which is unsustainable in law. He further submits that Court below has not weighed conditions of parties, as such, Court below has not returned a finding with regard to the protection of interest of minor in the company of plaintiff-respondent or defendant-appellant. Court below has further not considered the issue as to whether mother has remarried or not.

10. Mr. Hari Mohan Srivastava, learned counsel for plaintiff-respondent, has supported impugned judgement and decree on the basis of findings recorded therein. Learned counsel for plaintiff-respondent further submits that since minor Kuldeep is of tender age, Court below has not committed any illegality in appointing mother i.e. plaintiff-respondent who is also a natural guardian as the guardian, of minor and further directing defendant-appellant to hand over custody of minor to plaintiff-respondent. There does not exist any such reason or circumstance on the basis of which natural guardian could be deprived the guardianship and custody of minor Kuldeep.

11. Upon consideration of submissions raised by counsel for parties, issue which arises for determination before this Court is:- "Whether Court below was right in appointing plaintiff-respondent as guardian of minor Kuldeep and further handing over of possession of minor in favour of plaintiff-respondent".

12. Before proceeding to consider rival submissions, it is necessary to reproduce sections 25 and 47 of Act 1890:

"25. Title of guardian to custody of ward.*--(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.*

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the

first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

***47. Orders appealable.**--An appeal shall lie to the High Court from an order made by a 1[***] Court,--*

(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or

(b) under section 9, sub-section (3), returning an application; or

(c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or

(d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or

(e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or

(f) under section 32, defining, restricting or extending the powers of a guardian; or

(g) under section 39, removing a guardian; or

(h) under section 40, refusing to discharge a guardian; or

(i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order; or

(j) under section 44 or section 45, imposing a penalty."

13. From the perusal of Section 25 of Act 1890 it is apparent that there are no directions contained in the section itself in accordance with which application for guardianship and custody shall be decided. However, as law has developed on the subject concerned, it is well crystallized that paramount interest of minor is the primary criteria for deciding custody and guardianship of a minor. Apart from above, it is now further established that a minor who is below five years of age, shall ordinarily be allowed to stay with mother. Similarly in case of minor girls, it has been the consistent view that their custody should remain with mother till they attain age of majority. It shall be useful to refer to a Division Bench judgement of this Court in First Appeal Defective No. 138 of 2019 (Mritunjay Vs. Hari Shankar Dixit) decided on 8.7.2019. In paragraphs 7, 8, 9, 10 and 11 Court has said as under:

"7. While determining the question of custody of a minor child, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

8. In Mausami Moitra Ganguli v. Jayant Ganguli (2008) 7 SCC 673, it has been held that the principles of law in relation to the custody of a minor child are well settled. 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.

9. In the above case, a passage from Halsbury's Laws of England (4th Edn., Vol. 13) was reproduced which reads as under:

"809. Principles as to custody and upbringing of minors.- Where in any

proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

10. Earlier, Apex Court in Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840, ruled that the children are not mere chattels, nor are they mere playthings for their parents. ***Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded 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.***

11. Following the above authorities, in Santhini Vs. Vijaya Venketesh (2018) 1 SCC 1 Court expressed the same view holding as under:

"It is to be borne in mind that in a matter relating to the custody of the child, ***the welfare of the child is paramount and seminal.*** *It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective." (emphasis added) "*

14. Supreme Court in **Lekha Vs. P. Anil Kumar 2006 (13) SCC 555**, had dealt with the issue regarding guardianship and custody of minor under section 25 of Act 1890 and observed as follows in paragraphs 15, 16, 17 and 19:

*"**15.** Sk. Moidin v. Kunhadevi [AIR 1929 Mad 33 (FB)] was a case of a father, a motor driver, applying for writ of habeas corpus to get custody of his 7-year-aged child. Nobody was available in his house to look after such child. The Full Bench held that the Court has to look to an application under habeas corpus in the interest of the child as being paramount. The Court held that prima facie in the eye of the law, the father is the natural guardian and custodian of the person of his child. But it has been the law for a very long time both in England and in this country that what a court has to look to on applications under habeas corpus is the interest of the child as being paramount.*

***16.** In Samuel Stephen Richard v. Stella Richard [AIR 1955 Mad 451 : 56 Cri LJ 1192] the High Court in deciding the question of custody held as follows: (AIR p. 452)*

"In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not "ipso facto' entitle him to custody. The principal considerations or tests which

have been laid down under Section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under Section 25.

The application of these tests casts an "arduous' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure the welfare of the ward--a no mean task but the highest fulfilment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others."

17. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka [(1982) 2 SCC 544 : AIR 1982 SC 1276] this Court held as under: (SCC p. 565, para 17)

"17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

19. The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. ***If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a*** *mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court in S. Soora Reddi v. S. Chenna Reddi[AIR 1950 Mad 306 : (1950) 1 MLJ 33] where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no ground whatever for depriving him of his parental right of custody." (Emphasis added)*

15. Thus from the aforesaid observations, it is explicitly clear that even though father is natural guardian but simply on that ground he is not entitled to the custody and guardianship of minor

children. Court while deciding guardianship and custody of a minor is to be guided by the observations made by Court as referred to above. When the case in hand is examined in the light of observations made by Court above, the balance tilts in favour of mother i.e. defendant-appellant.

16. In the present case, Court below while deciding the issue regarding appointment of guardian of minor and also custody of minor has clearly omitted to have a dialogue with the minor and secondly return a finding regarding paramount interest of child is best protected in the company of plaintiff-respondent or defendant-appellant. Unfortunately, neither parties have given date of birth of minor. Since Subhas chandra, father of minor died on 7.10.2012, Court presumes that the minor child is not less than 8 years of age. Consequently, it was obligatory upon Court below to have conversation with minor child and then assess as to whether minor Kuldeep wants to stay with his grand father or his mother. Court below while deciding issue no.3 which indirectly also relates to paramount interest of minor child in the company of plaintiff-respondent or defendant-appellant of necessity, had also to look into the financial status of parties. However, Court below upon an erroneous assumption that since Latoori Singh grandfather of minor is 60 years of age and suffering from desease, as such, in case of his untimely death, there would be no one to look after minor child. As such, appointed plaintiff-respondent as guardian of minor and further directed defendant-appellant to hand over custody of minor to plaintiff-respondent. In our view this finding recorded by Court below, for holding guardianship of minor in favour of plaintiff-respondent and also for handing over custody of minor in favour of plaintiff-respondent, is unsustainable in law. As already noted above, Court below was under legal obligation to decide the status of parties, the intention of minor in residing with his mother or grand father and then return a finding, as to in whose custody the paramount interest of minor child is best protected. Court below having failed to undertake the aforesaid exercise, we are of the view that it has not exercised jurisdiction vested in it in accordance with law.

17. Consequently, the present appeal succeeds and is allowed. The judgement dated 23.1.2018 and decree dated 5.2.2018, passed by Principal Judge, Family Court, Kasganj, in Suit No. 25 of 2015 (Smt. Sushila Devi Vs. Latoori Singh) under section 25 of Act 1890, are set aside. The matter is remanded to Court below for decision afresh in the light of observations made in the body of judgement. Court below shall make an endeavour to decide the case, preferably within a period of three months from the date of presentation of certified copy of this order by either of the parties. Cost made easy.

(2019)11ILR A645

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No. 427 of 2019

Nirbhay Kapoor ...Appellant/Plaintiff
Versus
M/s Kamero Technosys Ltd. & Anr.
...Respondents/Defendants

Counsel for the Appellant:

Sri Ashish Kumar Srivastava

Counsel for the Respondents:
Sri Manoj Kumar Srivastava, Sri Nimai Dass, Sri Udai Chandani, Sri Sundeep Agarwal, Sri Vinod Kant

A. Company Law-Companies Act 2013 - Section 430 r/w Section 9 of the C.P.C. & Order 7 Rule 11 (d) of the C.P.C. - Jurisdiction of Civil Court is excluded in cases where the matter in dispute, is required to be determined by the Tribunal constituted under the Companies Act, 2013. If the dispute falls outside the jurisdiction of the Tribunal under the Companies Act 2013, then only the civil court shall have jurisdiction under Section 9 of the Civil Procedure Code. (Para 23)

B. Jurisdiction - Civil Court - ouster of a jurisdiction of a Civil Court has to be considered having regard to the contentions raised in the plaint, averments disclosing cause of action and the relief sought for therein, in entirety - When the plaint read as a whole does not disclose material facts giving rise to a cause of action which may be entertained by a civil court, the plaint may be rejected in terms of Order 7, Rule 11 of the C.P.C. (Para 19)

C. Code of Civil Procedura,1908 - Section 9 – Civil suit - Suit before civil court by an ex-director as an individual under Section 9 of the C.P.C. - for declaratory relief of lien and injunction on the basis of Minutes of Meeting of the then Directors with respect to the properties of the defendant Company and five other companies - Not maintainable. (Para 17)

Held: - Section 430 of the Companies Act 2013 specifically provides that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under the Act or any other law for the time being in force. Under Clause (e) and Clause (f) of sub-Section 2 of Section 242, the Tribunal has the power to terminate, set aside or modify any agreement, howsoever, arrived at between the Company and the Managing Director or any other Director or Manager. (Para 16, 17)
Alleged Minutes of the Meeting drawn by the Directors plaintiff-appellant and the defendant-respondent no.2, dated 10.2.2016 relating to property held by the Company in its own name under Section 187 of the Act fall within the powers of the Tribunal conferred under Section 242 of the Act. Suit filed by the plaintiff was not maintainable under Section 9 of the Civil Procedure Code as it was barred by the provisions of Section 430 of the Companies Act 2013. (Para 17, 24)

First Appeal dismissed (E-5)

List of cases cited: -

1.Shashi Prakash Khemka Vs NEPC Micon (Now called NEPC India Ltd.) & ors. (Civil Appeal No. 1965-1966 of 2014, decided on 8.1.2019).

2. Madras Bar Association Vs UOI & anr (2015) 8 SCC 583.

3. Robust Hotel Pvt. Ltd. & ors Vs EIH Ltd. & anr. (2017)1 SCC 622.

4.Church of North India Vs Lavajibhai Ratanjibhai & ors. (2005) 10 SCC 760.

5.Jitendra Nath Biswas Vs M/s Empire of India and Ceylone Tea Co. and anr. (1989) 3 SCC 582.

6. SAS Hospitality Pvt. Ltd. Vs Surya Constructions Pvt. Ltd. & ors 2019 (212) Company Cases 102.

7.Prasanta Kumar Mitra & ors Vs India Steam Laundry (P) Ltd. & ors. (APO 112 of 2017 decided on 5.9.2018).

8. Nahar Industrial Enterprises Ltd. Vs Hong Kong & Shanghai Banking Corp. (2009) 8 SCC 646.

9.Jyoti Ltd & ors. Vs Bharat J. Patel (2015) 14 SCC 566.

10. Dhulabhai & ors Vs The St. of M.P. AIR 1969 SC 78.

11. Raj. St. Road Transport Corp. & anr Vs Krishna Kant & ors. (1995) 5 SCC 75.

12. Dwarka Prasad Agarwal Vs Ramesh Chand Agarwal (2003) 6 SCC 220.

13.Sahebgouda Vs Ogeppa (2003) 6 SCC 151.

14.Dhruv Green Field Ltd. Vs Hukam Singh (2002) 6 SCC 416.

15.Swamy Atmananda & ors. Vs Sri Ramakrishna Tapovanam & ors. (2005) 10 SCC 51.

16. Church of North of India Vs Lavajibhai Ratanjibhai & ors. (2005) 10 SCC 760.
17. Punjab Wakf Board Vs Sham Singh Harike (2019) 4 SCC 698

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

Controversy

Maintainability of a suit by the plaintiff - appellant (Ex-director) as individual under Section 9 of the Civil Procedure Code for declaratory relief of lien and injunction on the basis of Minutes of Meeting of the then Directors (plaintiff and the defendant - respondent No.2 and their two guests), dated 10.2.2016, with respect to the properties of defendant-respondent no.1 Company and five other companies, is involved in the present appeal.

1. Heard Sri Ashish Kumar Srivastava, learned counsel for the plaintiff-appellant and Sri Udai Chandani and Sri Nimai Dass, learned counsel for the defendants-respondents.

Facts

2. Briefly stated facts of the present case are that the plaintiff-appellant was one of the Directors in the respondent no.1 Company. The defendant-respondent No.1 is a Limited Company. It purchased an immovable property being House No.19/1, B.L.K.-B, Okhla Industrial Area, Phase -2, New Delhi (hereinafter referred to as the "disputed property"). The plaintiff-appellant and the defendant-respondent No.2 and their family members were Directors in six companies, namely, M/s. Himalayan Bioxteracts Pvt. Ltd., Kamero Technosys Ltd., Virat Residency Ltd., Dynacon Cares Ltd., Dynacon Systems Ltd. and Duet Marketing Pvt. Ltd. The plaintiff-appellant and the defendant-respondent no.2 and their two guests drawn **Minutes of the Meeting dated 10.2.2016,** which is reproduced below :-

"MINUTES OF THE MEETING OF THE DIRECTORS OF KAMERO TECHNOSYS LIMITED HELD ALONGWITH TWO OTHER GUESTS ON 10/02/2016 AT ROOM NO. 600 OF VIJAY INTERCONTINENTAL HOTEL AT 12.30 P.M.

The Following person were present -

1. Nirbhay Kapoor - Director Kamero Tecnosys Ltd.

2. Pankaj Kumar Gupta - Director of Kamero Technosys Ltd.

3. Brijesh Saxena -Guest

4. Muqaddar Ali -Guest

This meeting was convened with a basic object of finishing the problems faced by both the directors of Kamero Technosys Limited in day to day working of Company and also to find out an amicable solution for separation of the both directors from the business done by both of them jointly. Various decisions

were taken during the course of discussions held and an amicable solution was found out for separation of the both the above named directors of Kamero Technosys Limited which was acceptable to both of them. As a token of remembrance and also acceptance of the decisions taken in the meeting these are enumerated below. Both the directors are signing this document in the presence of other two guests willingly. Without any force or coercion and in token of their acceptance of the decisions taken in the meeting which they will follow in the best interest of the Organization as a whole and for the other director also. The amicable decisions reached between both the directors are enumerated below -

1. That the Company Kamero Technosys Ltd which will be taken over by Shri Pankaj Kumar Gupta will be made liability free to the extent of liabilities of shoe division which was looked after by Shri Nirbhay Kapoor. In that respect the liability of Export obligation under EPCG Scheme, the liability of pending Excise matters, recovery by DGSND on any disputed matter of excise if any, clearance of Creditors of Shoe division and the Cash Credit limit of Rs 100.00 lacs alongwith interest till date of its clearance will be paid by Shri Nirbhay Kapoor. Further, it was also agreed between both the directors that expenses of the factory at C-6 Site-1, Panki Industrial Area, Kanpur up to 31st March 2016 will be borne by both the directors equally and thereafter if the setup of shoe division remains there then the expense part will be borne by both the directors equally till the setup of shoe division is removed from C-6 Site-1, Panki Industrial Area, Kanpur. For the part of above stated expenses of Excise, DGFT dept. etc a buffer amount of money will be retained in Kamero Technosys Ltd from the part of Shri Nirbhay Kapoor.

2. That Rs 100.00 Lacs of the cash of the Company held by Shri Nirbhay Kapoor at the time of dispute in July, 2012 will be added to his account (pt. no. 7).

3. That the six common Companies will be divided in the following manner -

Pankaj Kumar Gupta	***Nirbhay Kapoor***
Himalayan Bioxteracts Pvt. Ltd.	*Dynacon Cares Ltd.*
Kamero Technosys Ltd.	*Dynacon Systems Ltd.*
Virat Residency Ltd.	*Duet Marketing Pvt. Ltd.*

4. The matter of immovable assets in the above six companies was discussed and it was amicably decided to find out the valuation of immovable assets and divide them amongst both the directors. Both the directors were agreeable to this proposition readily. After discussions with various property dealers by both the directors the following valuation of the properties was made which was readily acceptable to both the directors -

Name of the Property	***Valuation reached amicably (Rs in Crores)***
1. C-6, Panki Industrial Area, Site - 1, Kanpur	*17.00*
2. Okhla factory at Delhi	*6.00*
3. Land at Rania, Kanpur Dehat	*7.50*
4. Property at Sarojini Nagar, Kanpur	*1.25*
5. Flat at Lajpat Nagar, Kanpur	*0.30*
6. Flat at Jangpura Extension, Delhi	*1.25*

7. Factory at G-116, Site-3, Panki, Kanpur	*1.00*
Total	***34.30***

5. That the above properties will be divided amongst both the directors as mentioned below -

Pankaj Gupta	***Valuation***	***Nirbhay Kapoor***	***Valuation***
C-6 Site-1, Panki	*17.00*	*Okhla, Delhi*	*6.00*
Flat at Jangpura ext.	*1.25*	*Land at Rania*	*7.50*
		Sarojini Nagar, Kanpur	*1.25*
		Flat at Lajpat Nagar, Knp.	*0.30*
		G-116 Site-3, Panki Knp	*1.00*
Total Valuation	***18.25***	***Total Valuation***	***16.05***

It was amicably decided that both the directors are at their free will to keep the property or to sale it. In case of sale of property the other director will sign the Sale deed without any questions or hindrance. The proceeds of sale of the property will go to the credit of the director who sells his part of property and will be paid to him. The Long Term Capital gains, if any, arising on sale will be borne by the director who is selling his part of Immovable property and the other director will in no way be responsible for that part of expense.

6. The matter of Plant and machinery owned in the group was discussed. The Plant & Machinery of Shoe division was valued at Rs 2.50 Crores by Shri Nirbhay Kapoor which was readily acceptable to the other director. The machines of Mould division was valued at Rs 0.75 Lacs and that of Adhesive plant and other misc. machines was valued at Rs. 0.40 Lacs by both the directors. The machines at G-116 Site-1 factory were valued at Rs 0.07 lacs. It was amicably decided by both the directors that the machines of Shoe division will be taken over by Shri Nirbhay Kapoor at the above valuation and the rest machines will be taken over by Shri Pankaj Kumar Gupta also at the above valuation. It was also decided that out of the machines of Shoe division one desma machine of 18 Stations will be taken over by Shri Pankaj Kumar Gupta at a valuation of Rs 0.40 Lacs to which the other director readily agreed.

7. The final position of payment between both the directors is placed below-

Particulars	***Pankaj Kr. Gupta***	***Nirbhay Kapoor***
Fixed Assets	*18.25*	*16.05*
Cash	*0.00*	*1.00*
Plant	*1.22*	*2.10*
18 Station	*0.40*	*0.00*
TOTAL	***19.87***	***19.15***

The sum total of the valuation of the Immovable & movable properties stated above come to Rs 39.02 Crores (19.87+19.15). Half share of the sum total of valuation comes to Rs. 19.51 Crores (39.02/2) i.e. each director's share of the property comes to Rs 19.51 Crores. To balance both the director's valuation

an amount of Rs 0.36 Lacs will be paid by Shri Pankaj Kumar Gupta to Shri Nirbhay Kapoor (19.87-19.51)(19.51-19.15).

8. Besides the above it was also decided that the proceeds of sale of Land at Bhadurgrah, Haryana of Rs 1.46 Crores will be divided amongst both the directors in equal proportion, after deducting expenses of Rs 4.00 lacs incurred on its sale and Tax on Long term capital gains to be calculated as per I. Tax Act, 1961.

9. It was also decided that the advance payment of flats made in one of the Company of Rs 23.00 Lacs approx. which was received back will be divided equally amongst both the directors.

10. Both the directors also readily agreed that the payments received from Defence Organizations for sale of Shoes in Kamero Technosys Ltd will go to the credit of Shri Nirbhay Kapoor and will be paid to him even after separation. In the event of payment received being less than the liabilities then that shortfall will be borne by Shri Nirbhay Kapoor.

11. It was also readily agreed by both the directors that any liability of the common six companies arising of the period prior to 31st July, 2012 will be borne equally by both the directors even after separation.

12. It was also readily agreed between both the directors that the Brand "KAMERO" will be the sole property of Shri Pankaj Kumar Gupta and the brand "DYNACON" will be the sole property of Shri Nirbhay Kapoor.

13. It was also decided amicably that the shares of both the directors standing in the name of each other will be transferred in the name of the director to whom the Company is going. It was also decided that the directors will give resignations unconditionally from the directorship of the Company which is going to the other director.

14. It was also decided that the director who is resigning will also give a letter to the Banker of the Company informing about his unconditional resignation and also to remove his name from the Authorized signatory of that Company.

Finally the meeting concluded and it was amicably decided that the process of separation should be completed at the earliest."

3. Subsequently, agreement to sell dated 21.5.2016, was entered by the defendant-respondent No.1 with someone for sale of the disputed property for Rs.5,40,00,000/-. The plaintiff-appellant asked the defendant-respondents to pay to him Rs. 8,55,00,000/- in terms of the Minutes of the Meeting dated 10.2.2016. Since this amount was not paid, therefore, the plaintiff-appellant filed O.S. no.79 of 2019 (Nirbhay Kapoor Vs. M/S Kamero Technosys Ltd And Another) praying for declaration of lien over assets of three companies, namely, M/s. Himalayan Bio Extracts Pvt. Ltd., Kamero Technosys Ltd. and Virat Residency Ltd. The relief for permanent injunction was also sought to restrain the defendant-respondents from transferring the disputed property. The aforesaid suit was dismissed by the impugned order dated 25.3.2019, passed by the Additional Civil Judge (S.D.)/ACMM, 9th, Kanpur Nagar, on the ground that it is not maintainable in view of the provisions of Section 430 of the Companies Act 2013 (hereinafter referred to as "the Act 2013") read with Order 7 Rule 11 (d) of the C.P.C.

4. Aggrieved with this order the plaintiff-appellant has filed the present appeal under Section 96 of the Civil Procedure Code.

5. Both the learned counsel for the parties jointly submit that pure question of law as to the maintainability of the suit is involved in the present appeal and, therefore, without calling for the records and paper book, the appeal may be finally heard on the following question. Accordingly, this appeal has been heard on the following question :-

"Whether under the facts and circumstances, the suit filed by the plaintiff-appellant was not maintainable under Section 9 of the Civil Procedure Code being barred by the provisions of Section 430 of the Companies Act, 2013"?

Submissions on behalf of the plaintiff-appellant

6. **Sri Ashish Kumar Srivastava, learned counsel for the plaintiff-appellant submits, as under:**

i) That the plaintiff-appellant was Director and share holder in the companies in respect of which declaratory relief was sought in the suit. An agreement dated 10.2.2016 was entered between the Directors of the companies under which with respect to the disputed property, it was agreed that when the defendant-respondent no.1, shall sell the aforesaid property, the proceeds thereof shall be transferred to the plaintiff-appellant. The defendant-respondent no.1 has sold the said property for Rs.5,40,00,000/- but has not transferred/paid that amount to the plaintiff-appellant. This caused the plaintiff-appellant to file the suit in question i.e. O.S. No.79 of 2019, seeking a relief for declaration and permanent injunction against the defendant no.1 - Company.

ii) The Civil Court was having jurisdiction to decide the aforesaid suit and not the NCLT. The bar provided under Section 430 of the Companies Act, 2013, was not applicable. Section 230 of the Act, 2013, relates to the proposed agreement and not covers the agreement already entered and acted upon. Therefore, neither Section 230 nor Section 231 were applicable and consequently, Section 430 of the Act, 2013, is not attracted on the facts of the present case. Therefore, the court below has committed a manifest error of law to reject the plaint as barred by jurisdiction.

7. **In rejoinder, Sri Ashish Kumar Srivastava, learned counsel for the plaintiff-appellant submits, as under:-**

i) Clause 8 of Section 118 of the Act 2013, attracts only in the circumstances when there is a dispute with regard to the minutes or the resolution. In present set of facts, there is no such dispute. Therefore, this provision is not attracted on the facts of the present case.

ii) Section 241 of the Act 2013 is attracted when any member of the Company makes a complaint. In the present case, there is no such complaint. Therefore, neither Section 241 nor Section 244 are applicable.

iii) The plaint has been rejected not on the ground of cause of action under Clause (a) of Order VII Rule 11 CPC but it has been rejected only invoking Clause (d) on a finding that the suit is

barred by Section 430 of the Companies Act.

iv) The dispute with regard to properties of the Company can be adjudicated only in a civil suit. In the present case the dispute is with regard to the properties of company. Therefore, the suit was maintainable and not barred by Section 430 of the Act 2013. Reliance is placed on the judgment of the Supreme Court in **Jail Mahal Hotels Private Limited Vs. Devraj Singh and others (2016) 1 SCC 423 (para 18).**

Submissions on behalf of the defendants-respondents

8. **Sri Nimai Das, learned counsel for the defendants-respondents submits, as under:**

i) As per own averments of the plaintiff-appellant, in paragraph 5 of the plaint that he and his family members resigned from the Companies, namely, M/s. Himalayan Bioxteracts Pvt. Ltd., Kamero Technosys Ltd. and Virat Residency Ltd. Therefore, after resignation the plaintiff-appellant has no concern or lien of any nature whatsoever over the properties of the aforesaid companies.

ii) As per plaint, declaratory relief has been sought against the aforesaid three companies but only Kamero Technosys Ltd. has been made as defendant in the suit as well as before this Court as defendant-respondent. The rest of the two companies against which declaratory relief and relief of permanent injunction have been sought were not parties either in the aforesaid suit No.79 of 2019 or are parties in this appeal.

iii) The reference of paragraph 10 of the plaint made by learned counsel for the plaintiff-appellant is wholly irrelevant in as much as the averment made in paragraph 10 does no give any cause of action to the plaintiff-appellant since the plaintiff-appellant has no concern with the defendant-respondent no.1 - Company.

iv) Cause of action disclosed in paragraphs 17 & 18 of the plaint is that some person came to the plaintiff-appellant on 15.1.2019 and requested him to sign the sale deed being Ex-Director of the Company so that there may not arise any dispute in future. On 17.1.2019, the plaintiff-appellant came to know about the sale of the properties and on 21.1.2019, the defendant-respondent no.1 has refused to make payment of the sale proceeds of the properties in question.

v) Clause (a) of the Order VII Rule 11 C.PC. provides for rejection of plaint in the event the plaint does not disclose any cause of action. Since the plaintiff-appellant has not disclosed any cause of action with respect to the disputed property, therefore, the plaint was rightly rejected under Clause (a) of Order VII Rule 11 C.P.C.

(vi) The suit was barred by the provisions of Section 430 of the Companies Act read with Section 9 C.P.C. and, therefore, it was rightly rejected in view of clause (d) of Order VII Rule 11 C.P.C.

vii) The alleged cause of action for filing the suit is the alleged minutes of the meeting of the Directors of the defendant-respondent no.1-Company, dated 10.2.2016. **Firstly**, the said minutes of the meeting is not in accordance with the provisions of sub Section 8 of Section 118 of the Act, 2013 and, **secondly**, in any case the remedy lies under Section 241(1) of the Act to apply to the Tribunal under Section 244. Therefore, the suit was

clearly barred by provisions of Section 430 of the Act inasmuch as the NCLT was having jurisdiction to decide such type of dispute.

viii) Powers of the Tribunal has been provided in Section 242 of the Act 2013. The procedure before the Tribunal and Appellate Tribunal has been provided in Section 424 of the Act, 2013.

9. In support of his submissions, learned counsel for the defendant-respondent no.1 has relied upon the judgments of Hon'ble Supreme Court in **Shashi Prakash Khemka Vs. NEPC Micon (Now called NEPC India Ltd.) & Others (Civil Appeal Nos. 1965-1966 of 2014, decided on 8.1.2019), Madras Bar Association Vs. Union of India and another (2015) 8 SCC 583, Robust Hotels Private Limited & others Vs. EIH Limited & another(2017)1 SCC 622, Church of North India Vs. Lavajibhai Ratanjibhai & Ors (2005) 10 SCC 760, Jitendra Nath Biswas Vs. M/s. Empire of India and Ceylone Tea Co. and another (1989) 3 SCC 582 and the judgment of Delhi High Court in SAS Hospitality Pvt. Ltd. Vs. Surya Constructions Pvt. Ltd. & others 2019 (212) Company Cases 102 and the judgmnts of Calcutta High Court in Prasanta Kumar Mitra & Ors Vs. India Steam Laundry (P) Ltd. & Ors. APO 112 of 2017 decided on 5.9.2018.**

Discussion and Findings

10. Before I proceed to examine rival submissions, it would be appropriate to reproduce the provisions of Section 9, Order VII Rule 11 C.P.C. and Section 430 of the Act 2013, as under:-

Civil Procedure Code

"Section 9. Courts to try all civil suits unless barred-- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

[Explanation I].--A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[Explanation II]. For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.].

***Order VII Rule 11 Rejection of plaint**-- The plaint shall be rejected in the following cases:--*

(a)where it does not disclose a cause of action;

(b)where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c)where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d)where the suit appears from the statement in the plaint to be barred by any law :

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is

satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Section 430 of the Companies Act 2013

430 Civil Court Not to Have Jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force 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 or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."

11. The Minutes of the Meeting of the Directors of the defendant-respondent no.1 - Company alongwith two guests was drawn on 10.2.2016 to show that by the aforesaid Minutes of the Meeting the plaintiff-appellant and the defendant-respondent no.2 admitted to divide six Companies out of which two were private and four were limited Companies, amongst themselves. This was not the meeting of the Board of Directors of the six Companies or the defendant-respondent no.1 - Company. Such a meeting is not referable any of the provisions of the Act 2013, but it relates to the properties/assets of the Companies.

12. Section 151 and 152 of the Act 2013 provides for appointment of Directors of the Company. Undisputedly, directors are not the owners of the Company. They are merely Officers of the Company. Duties of Directors is provided in Section 166 of the Act, 2013, which is reproduced below:-

"166 **Duties of Directors.** (1) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.

(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

(6) A director of a company shall not assign his office and any assignment so made shall be void.

(7) If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees."

13. Sub-Section (4) of Section 166 mandates in clear terms that a Director of the Company shall not involve in a situation in which he may have a direct or indirect interest that conflicts or possibly may conflict, with the interest of the Company. Sub-Section (1) and (2) mandates that a director of a Company shall act in accordance with the articles of the Company and he shall act in good faith in order to promote objects of the Company for the benefits of its members as a whole, and in the best interest of the Company, its employees, the community and for the protection of environment. Powers of the Board of Directors is provided in Section 179 and restriction thereon is provided in Section 180 of the Act. Perusal of Section 179 would reveal that the minutes of the meeting, although was not of Board of Directors; yet in any event its subject matter can not be included within the powers conferred under Section 179 for dividing the properties/assets of the Company by its two directors amongst themselves. **Section 187 (1) of the Act 2018, clearly provides that all investments made or held by a Company in any property, security or other asset shall be made or held by its own name,** provided that the company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit. **Contravention of sub-section 1 of Section 187 has been made punishable under sub-section 4.** Section 189 provides for maintaining register of all contracts or arrangements in which Directors are interested. It is not the case of the plaintiff-appellant that the disputed minutes of the meeting dated 10.2.2016 is an arrangement under Section 184 or 188 of the Act which has been entered in the register. Section 230(1) of the Act provides that in case a compromise or arrangement is proposed--

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, then the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs. Under Section 231 of the Act Tribunal has power to enforce the compromise or arrangement under Section 230 of the Act. The alleged minutes of the meeting dated 10.2.2016 does not fall under Section 230 of the Act.

14. Section 241 of the Act empowers any member of a Company to apply to the Tribunal in certain circumstances provided such member has a right to apply under Section 244, for an order under Chapter XVI and in that event power has been conferred upon the Tribunal for appropriate action under Section 242 of the Act.

15. Sections 241, 242 and 245 of the Act are relevant, which are reproduced below:-

"241. **Application to Tribunal for Relief in Cases of Oppression, etc** (1) Any member of a company who complains that--

(a) the affairs of the company have been or are being conducted in a

manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2)The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

242. **Powers of Tribunal** (1) If, on any application made under section 241, the Tribunal is of the opinion--

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for--

(a) the regulation of conduct of affairs of the company in future;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) restrictions on the transfer or allotment of the shares of the company;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which

would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(h) removal of the managing director, manager or any of the directors of the company;

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j)the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(l)imposition of costs as may be deemed fit by the Tribunal;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1)shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

(5) Where an order of the Tribunal under sub-section (1)makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

(8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

245. **Class Action** (1) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members

or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:--

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company's memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against--

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

(2) Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

(3)(i)The requisite number of members provided in sub-section (1)shall be as under:--

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(ii) The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

(4) In considering an application under sub-section (1),the

Tribunal shall take into account, in particular-

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a)to (f) of subsection (1);

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be--

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

(5) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:--

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) two class action applications for the same cause of action shall not be allowed;

(d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

(6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

(7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

(9) Nothing contained in this section shall apply to a banking company.

(10) Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1)."

16. Admittedly, the disputed property was purchased by the defendant-respondent no.1 - Company in its own name which is in accordance with the provisions of Section 187 of the Act. Whatsoever may be the nature of the alleged Minutes of the Meeting dated 10.2.2016, but it relates to the affairs of the defendant-respondent-Company which may be complained under Section 241(1)(a) of the Act 2013 by making application before the Tribunal. **Under Clause (e) and Clause (f) of sub-Section 2 of Section 242, the Tribunal has the power to terminate, set aside or modify any agreement, howsoever, arrived at between the Company and the Managing Director or any other Director or Manager,** upon such terms and conditions as may in the opinion of the Tribunal be just and equitable in the circumstances of the case. The Tribunal has power to terminate, set aside or modify any agreement between the Company or any person other than those referred to in Clause (e). A class of member or members, depositor or depositors may also apply to the Tribunal in the circumstances mentioned in sub-section 1 of Section 245 of the Act.

17. **Thus, the alleged Minutes of the Meeting drawn by the Directors plaintiff-appellant and the defendant-respondent no.2, dated 10.2.2016 relating to property held by the Company in its own name under Section 187 of the Act fall within the powers of the Tribunal conferred under Section 242 of the Act. Section 430 of the Act specifically provides that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under the Act or any other law for the time being in force.**

18. Under Section 9 of the C.P.C. civil court shall have jurisdiction to try all suits of a Civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Thus, the Civil Court shall have jurisdiction to try all types of suits unless the same is ousted, expressly or by necessary implication vide **Robust Hotels (P) Ltd. and others Vs. EIH Limited and others (2017)1 SCC 622 (para 31), Nahar Industrial Enterprises Ltd. Vs. Hong Kong & Shanghai Banking Corpn, (2009) 8 SCC 646** and **Jyoti Limited & Others Versus Bharat J. Patel (2015) 14 SCC 566 (para 7) etc.**

19. **The question of ouster of a jurisdiction of a Civil Court needs to be construed having regard to the Scheme of the Act as also the object and purport it seeks to achieve. A plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint. For this purpose, averments disclosing cause of action and the relief sought for therein must be considered in entirety. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which may be**

entertained by a civil court, it may be rejected in terms of Order 7, Rule 11 of the C.P.C.

20. The principles relating to exclusion of jurisdiction of Civil Court has been summarised by Hon'ble Supreme Court in **Dhulabhai and Others Vs. The State of Madhya Pradesh, AIR** 1969 SC 78; as under:

"(1) Where the statute gives a finality to the orders of the special tribunals, the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply. "

(Emphasis supplied by me)

21. The aforesaid principles also finds support from the law laid down by Hon'ble Supreme Court in various judgments including the judgments in **Rajasthan State Road Transport Corporation and another vs. Krishna**

Kant and Others (1995) 5 SCC 75, Dwarka Prasad Agarwal Vs. Ramesh Chand Agarwal - (2003) 6 SCC 220, Sahebgouda vs. Ogeppa (2003) 6 SCC 151, Dhruv Green Field Ltd. Vs. Hukam Singh (2002) 6 SCC 416 and **Swamy Atmananda & Ors. Vs. Sri Ramakrishna Tapovanam & Ors, (2005) 10 SCC 51** and **Church of North of India Vs. Lavajibhai Ratanjibhai & Ors. (2005) 10 SCC 760 (PARA 40 & 41).** However, the principle aforementioned would not mean that in a given case if the Court has jurisdiction to determine a part of the relief claimed it will not confine itself thereto and reject the plaint in its entirety.

22. The crux of my conclusion is that the jurisdiction of Civil Court is excluded in cases where the matter in dispute is required under the Act 2013 to be determined by the Tribunal. If a matter fall outside the jurisdiction of the Tribunal under the Act 2013, the civil court shall have jurisdiction under Section 9 of the Civil Procedure Code.

23. Similar is the ratio of decision in a recent judgment and Hon'ble Supreme Court in **Punjab Wakf Board Vs. Sham Singh Harike, 2019 4 SCC 698,** where the controversy was with respect to the jurisdiction of Tribunal under the Wakf Act, 1995.

24. Perusal of the plaint of O.S. no.79 of 2019, reveals that the plaintiff-appellant has set up a case that he and the defendant-respondent no.2 and their family members were directors in six companies and there arose some dispute between him and other Directors relating to the conduct of the affairs of the Company and in that event two guests, namely, Brijesh Saxena and Muqadar Ali intervened and an agreement dated 10.2.2016 (alleged minutes of the meeting) was entered on calling of a meeting of Directors but the defendant-respondent no.2 has not complied with the conditions of the aforesaid minutes of the meeting. It has been mentioned in paragraphs 5 to 16 of the plaint that in terms of the Minutes of the Meeting the plaintiff-appellant and his family members resigned from Directorship on 11.3.2016 but the defendant-respondents sold the disputed property and have not complied with the terms of the Minutes of the Meeting. The cause of action arose when on 15.1.2019 some persons came to the plaintiff-appellant with regard to purchase by them the Plot No.C-6, Panki Industrial Area, Site 1, Panki, Kanpur and requested him to sign the sale deed and thereupon the plaintiff-appellant contacted the defendant-respondent no.2 and demanded money in terms of the Minutes of the Meeting dated 10.02.2016 which the defendant-respondent no.2 refused. **Thus, the cause of action disclosed in the plaint clearly indicates the complaint of the plaintiff-appellant with respect to the property of the defendant-respondent-Company and conduct of its affairs. Therefore, the suit was clearly barred by the Provisions of Section 430 of the Act.**

25. The Scheme of the Act 2013, exhaustively provides for all matters relating to a Company and its conduct and affairs. Jurisdiction has been exhaustively provided in such matters to Tribunal which is a specialised body constituted under the Act. The matters for which jurisdiction has not been conferred upon the Tribunal, has been provided specifically. In this regard reference may

be had to Section 37 of the Act which provides for filing of a suit in certain circumstances. The case of the plaintiff-appellant is not covered by Section 37 of the Act.

26. All the reasons aforestated leads to an irresistible conclusion that the O.S. No.79 of 2019, filed by the plaintiff-appellant under Section 9 of the Civil Procedure Code was barred by the Provisions of Section 430 of the Act 2013 and, therefore, the plaint was lawfully rejected in terms of the provisions of Order VII Rule 11 C.P.C. The impugned order has been passed by the court below in accordance with law which does not require any interference.

27. For all the reasons aforestated, I do not find any merit in this appeal. Consequently, the appeal is **dismissed**. The question framed above is answered in affirmative by holding that under the facts and circumstances of the case the suit filed by the plaintiff-appellant was not maintainable under Section 9 of the Civil Procedure Code as it was barred by the provisions of Section 430 of the Companies Act 2013.

(2019)11ILR A663

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 479 of 2019

Shri Prateek Agarwal ...Appellant
Versus
Smt. Richa Garg ...Respondent

Counsel for the Appellant:
Sri Syed Irfan Ali

Counsel for the Respondent:

A. Civil Law-Family Court Act, 1984 - Section19 - Order VIII Rule 10 CPC - Order admitting written statement of defendant and rejecting objection there to – Is an interlocutory order - Not appealable u/s 19 of the Family Courts Act.

Held: - Order of Court below accepting written statement filed by defendant is in the nature of 'interlocutory order', and, order rejecting application of appellant under Order VIII, Rule 10 C.P.C. is only consequential, therefore, appeal is not maintainable. (Para 17)

B. Civil Law-Hindu Marriage Act, 1955 - Section 24 - Divorce Petition - Written statement - Order VIII Rule 10 CPC - time lapse between the date when the wife's interim maintenance application under Section 24 of Act, 1955 was allowed and the date on which written statement was filed, should be taken.

Held: - When divorce petition is filed by husband and on the first date fixed for written statement, wife seeks time to enforce her rights of interim maintenance under Section 24 of Act, 1955, so long as this application is not decided, it cannot be said that wife was under an obligation to file written statement. (Para 18)

C. Civil Law-Code of Civil Procedure,1908 - Order VIII Rule 1 - Filing of Written statement beyond 30 days - No formal application for this purpose necessary.

Held:- If Trial Court accepted written statement when filed – to be treated as implied permission. No formal application for this purpose is necessary. No specific procedure for this purpose has been prescribed nor need be introduced considering

the nature of proceedings. When a written statement is accepted by Trial Court, it results in allowing parties to contest the matter on merits instead of deciding the matter ex-parte. (Para 20)

First Appeal dismissed (E-5)

List of cases cited: -

1. V.C.Shukla Vs St. thr. CBI AIR 1980 SC 962.

2. Central Bank of India Vs Gokul Chand AIR 1967 SC 799.3. Mohan Lal Magan Lal Thacker Vs St. of Guj. 1968 CriLJ 876.

4. Amar Nath & ors. Vs St. of Haryana & ors. (1977) 4 SCC 137.

5. Sethuraman Vs Rajamanickam (2009) 5 SCC 153.

6. Sangram Singh Vs Election Tribunal Kotah and ors. AIR (1955) SC 425

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

1. Heard Sri Syed Irfan Ali, learned counsel for appellant.

2. The appeal has been filed against order dated 08.5.2019 passed by Sri Rajesh Narain Mani Tripathi, Additional Principal Judge, Family Court No.04, Aligarh admitting written statement of defendant and rejecting objection of appellant filed under Order VIII Rule 10 of Code of Civil Procedure, 1908 (*hereinafter referred to as* "C.P.C.").

3. Appellant Prateek Agarwal filed Divorce Petition No.1243 of 2017 in the Court of Principal Judge/Family Court vide petition/complaint on 16.11.2017. Divorce Petition founded on Section 13(ia) of Hindu Marriage Act, 1955 *(hereinafter referred to as "Act, 1955")* i.e. 'cruelty'. Summons were issued to respondent Smt. Richa Garg for filing written statement and 12.02.2018 was fixed for the said purpose.

4. Written statement was not filed and further dates fixed are 16.03.2018, 04.05.2018 and 12.07.2018. Appellant thereafter filed an application No.12A/1 dated 10.07.2018 under Order VIII, Rule 10 C.P.C. requesting Family Court to decree suit in favour of appellant under Order VIII, Rule 10 C.P.C. Family Court fixed 24.10.2018 for disposal of aforesaid application. On 24.10.2018 Presiding Officer was on leave and on the same date written statement was filed by defendant-respondent. Objecting to the said filing of written statement, appellant filed an objection (Paper No.15Ka) stating that written statement has not been filed within time prescribed under Order VIII, Rule 1 C.P.C. hence it cannot be accepted particularly when it has been filed without seeking any permission of Court below and therefore, it should be rejected. Application 12Ka and objection 16Ka have been rejected by Sri Rajesh Narain Mani Tripathi, Additional Principal Judge, Family Court No.4, Aligarh vide judgment and order dated 08.05.2019 hence this appeal.

5. Trial Court has rejected aforesaid applications on the ground that defendant-respondent appeared through counsel on 12.02.2018 and on the same date filed an application under Section 24 of Act, 1955 seeking payment of interim maintenance for herself and for contesting the case, whereupon 16.03.2018 was fixed. Ultimately, aforesaid application filed under Section 24 of Act, 1955 i.e. Paper No.8Ka was allowed vide order dated 23.8.2018 and thereafter 29.9.2018 was

fixed for disposal of application 12Ka, which was adjourned to 24.10.2018 since Presiding Officer was on leave. On 24.10.2018 also Presiding Officer was on leave. Defendant-respondent filed written statement on that date. In effect, written statement was filed within 67 days from the date when application under Section 24 of Act, 1955 was accepted i.e. 23.08.2018 and hence it cannot be said that there is no compliance of Order VIII, Rule 10 C.P.C.

6. In our view, order dated 08.05.2019, which is under appeal, is in the nature of interlocutory and therefore under Section 19 of Family Courts Act, 1984 *(hereinafter referred to as "Act, 1984")*, appeal is not maintainable.

7. What an 'interlocutory order' is, has been considered by Supreme Court in **V.C.Shukla vs. State through CBI, AIR 1980 SC 962** and following propositions have been laid down :

"(1) that an order which does not determine the rights of the parties but only one aspect of the suit or the trial is an interlocutory order;

(2) that the concept of interlocutory order has to be explained in contradistinction to a final order. In other words, if an order is not a final order, it would be an interlocutory order;

(3) that one of the tests generally accepted by the English Courts and the Federal Court i to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue; because, in our opinion, the term 'interlocutory order' in the Criminal Procedure Code has been used in a much wider sense so as to include even intermediate or quasi final orders;

(4) that an order passed by the Special Court discharging the accused would undoubtedly be a final order inasmuch as it finally decides the rights of the parties and puts an end to the controversy and thereby terminates the entire proceedings before the court so that nothing is left to be done by the court thereafter;

(5) that even if the Act does not permit an appeal against an interlocutory order the accused is not left without any remedy because in suitable cases, the accused can always move this Court in its jurisdiction under Article 136 of the Constitution even against an order framing charges against the accused. Thus, it cannot be said that by not allowing an appeal against an order framing charges, the Act works serious injustice to the accused."

8. In Webster's New World Dictionary "interlocutory" has been defined as "an order other than final decision".

9. "Interlocutory" order in its common legal parlance means such order which does not decide rights and liabilities of parties concerning a particular aspect. Orders which are of purely interim or temporary nature, do not decide or touch the important rights or liabilities of parties are interlocutory orders.

10. In the context of Section 397(2) Cr.P.c., it has been held that orders summoning witnesses, adjourning cases, orders on bail, calling for reports and such other steps in aid of pending proceedings, are all interlocutory orders.

11. In **Central Bank of India vs. Gokul Chand AIR 1967 SC 799**, Court said that orders regarding summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and admissibility of a document or relevancy of a question are interlocutory orders.

12. In **Mohan Lal Magan Lal Thacker vs. State of Gujarat 1968 CriLJ 876**, Supreme Court held that finality of an order should not be judged by correlating that order with the controversy in the complaint. The fact that the controversy still remained alive was irrelevant. There may be some interlocutory orders, which may have effect of becoming final order and they are appellable.

13. In **Amar Nath and others vs. State of Haryana and others (1977) 4 SCC 137** an order for summoning accused persons was held to be not an "interlocutory order" but an order whereagainst revision under Section 397 Cr.P.C. was maintainable on the ground that it affects valuable right of accused since he has been summoned for facing the trial and it admittedly prejudiced his rights and therefore, revision is maintainable.

14. An order passed under Sections 91 and 311 Cr.P.C. whether 'interlocutory' or not came up for consideration in **Sethuraman vs. Rajamanickam (2009) 5 SCC 153**. Court held that such orders are 'interlocutory orders' and hence not revisable under Section 397(2) Cr.P.C.

15. In the light of exposition of law discussed above, we find that in the present case, written statement filed by defendant-respondent has been accepted by Trial Court on the ground that though 12.02.2018 was fixed for filing written statement after issuing summons/notice to defendant-respondent but on that date defendant-respondent filed application under Section 24 of Act, 1955 praying for grant of interim maintenance showing that she was in financial scarcity for contesting the case. Therefore, first it become necessary to decide whether defendant-respondent was in the capacity of filing written statement without providing any interim maintenance and for deciding this aspect, various dates were fixed i.e. 16.03.2018, 04.05.2018, 12.07.2018 and 21.08.2018 and order was passed on 23.08.2018 when application of defendant-respondent was accepted and plaintiff-appellant was directed to provide interim maintenance to defendant-respondent. From that date, when application of Section 24 of Act, 1955 was allowed, within 67 days, written statement was filed hence it cannot be said that written statement filed by defendant-respondent was not within the time prescribed under Order VIII Rule 1 C.P.C.

16. Court therefore accepted written statement of defendant-respondent and this acceptance, in effect, only results in giving opportunity to parties to contest the matter so that divorce petition may be decided on merits after hearing both the parties.

17. In our view, this order of Court below accepting written statement filed by defendant-respondent is in the nature of 'interlocutory order', and, order rejecting application of appellant under

Order VIII, Rule 10 C.P.C. is only consequential, therefore, we are clearly of the view that appeal is not maintainable.

18. Even otherwise, on merits, we do not find that the view taken by Court below is erroneous, inasmuch as, in family disputes, when divorce petition is filed by husband and on the first date fixed for written statement, wife comes with the complaint that she needs financial assistance and seeks time to enforce her rights of interim maintenance under Section 24 of Act, 1955, so long as this application is not decided, it cannot be said that wife was under an obligation to file written statement even though had financial crisis to contest the case. The view, therefore, taken by Court below that for the purpose of Order VIII Rule 10 C.P.C., in the facts of this case, time lapsed between the date when application under Section 24 of Act, 1955 was allowed and date on which written statement was filed, should be taken, which is only 67 days it cannot be said that there was non compliance of filing written statement within time by respondent-wife.

19. It is however contended that written statement was filed on 24.10.2018 without seeking permission of Court and therefore Order VIII Rule 1 providing only 30 days' time will apply and not 90 days' time.

20. In this regard we are of the view that no formal application for this purpose is necessary. If Trial Court accepted written statement when it is filed, it can be treated as if it has granted permission. Any specific procedure for this purpose neither has been prescribed nor need be introduced considering nature of proceedings. When a written statement is accepted by Trial Court, it results in allowing parties to contest the matter on merits instead of going to decide the matter ex parte.

21. In **Sangram Singh vs. Election Tribunal Kotah and others AIR 1955 SC 425** Court said that procedure of trial is made for the purpose of deciding a dispute in compliance of principles of natural justice and no technical view should be taken for such procedure.

22. Therefore, whenever statutory provisions in respect of procedure are to be considered, such view has to be taken which advances an adjudication on merits after hearing both the parties instead of ex parte decision. No person has a vested interest and right to seek adjudication of a dispute ex parte by taking advantage of any technical fault or issue. Courts must follow a procedure which, as much as possible, consistent with statutory provisions, principles of natural justice and leans in favour of a decision on merits after contest instead of ex parte decision.

23. In view of above discussion, appeal is dismissed as not maintainable as well as on the ground of involving no arguable issue at the stage of hearing under Order 41, Rule 11 C.P.C.

24. Interim order, granted on 26.6.2019, stands discharged.

(2019)11ILR A667

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

THE HON'BLE PIYUSH AGRAWAL, J.

PIL No. 1474 OF 2019

Support India Welfare Society
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shree Prakash Giri

Counsel for the Respondents:
C.S.C., Sri Shyam Mani Shukla, Sri Suresh C. Dwivedi

A. Public Interest Litigation-Article 226 of the Constitution- Doctrine of the Public Trust-public has a right to expect certain lands and natural areas to retain their natural characteristic-certain cmmon properties such as rivers,seashore,forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public-the roman law provides that the natural resources were either owned by no one(res nullious) or by everone in common (res communious). (Para 29)

B. Illegal encroachments over pond(Pokhar) by the land mafias in collusion with the local officials-no effective step was taken for the removal of the encroachment-State functionaries have not complied with the directions of the Supreme Court in this regard-the District Magistrate is directed to issue the necessary directions for the restoration of the pond. (Para 2, 6,8 to 37)

C. Constitution of India-Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country-Article 51-A(g) is provides one of the fundamental duties to protect and improve the natural environment-these two articles have to be considered in the light of Article 21. (Para 30)

PIL disposed off (E-6)

List of cases cited:

1. Hinch Lal Tiwari Vs. Kamala Devi & Ors. (2001) 6 SCC 496
2. Jagpal Singh & Ors. Vs. State of Punjab & Ors.AIR 2011 SC 1123
3. Jagat Narain And Ors. Vs. State of U.P. And Ors.2015(3) ADJ 466 (DB)
4. P.S. Shisodia Vs. Board of Revenue Alld.2008(1) R.D. 15
5. State of Orissa Vs. Government of India(2009) 5 SCC 492
6. Meghwal Samaj Shiksha Samiti Vs. Lakh Singh (2011) 11 SCC 800
7. L. Krishnan Vs. State of Tamil Nadu2005(4) CTC 1 (Madras)
8. Ram Kumar Vs. Zila Adhikari/District D.D.C.,2002 (2) AWC 1577
9. Shardadeen Vs. State of U.P. (2005) 1 AWC 919
10. Iqbal Ahmad and Ors Vs. D.D.C.,Deoria and Ors (2005) 98 RD 580
11. Ram Naumee Vs. State of U.P. & Ors (2011) 5 All LJ 721
12. Prem Singh Vs. State of U.P. and Ors.(2012) 11 ADJ 404 (DB)
13. Karnataka Housing Board Vs. C. Muddaiah, (2007) 7 SCC 689
14. M.C. Mehta Vs. Union of India (2006) 3 SCC 399
15. N. Kannadasan Vs. Ajoy Khose (2009) 3 SCC (Civ) 1
16. Lal Bahadur Vs. State of U.P. (2018) 15 SCC 407

(Delivered by Hon'ble.Pradeep Kumar Singh Baghel, J. &
Hon'ble Piyush Agrawal, J.)

1. This Public Interest Litigation (PIL) has been instituted by the petitioner, who claims to be the Chairman of the Legal Cell of the registered Society, "Support India Welfare Society". One of the objects of the Society is to take up the cause of public importance for its redressal for the marginal sections of the society.

2. The grievance raised in this Public Interest Litigation is in respect of illegal encroachments over pond over Plot Nos. 253 & 254 situated at Village - Rajpur, Tehsil & District - Agra by the land *mafias* in collusion with the local officials. The said plots are intended to be used for the construction of multi-storey building by the powerful and influential persons of the city. It is stated that in the District - Agra, the land *mafias* are indulged in encroachments of the public utility land, particularly, ponds/water bodies. The petitioner has brought on the record a copy of the revenue record to demonstrate that Plot Nos. 253 & 254 are recorded as pond (*Pokhar*).

3. It is stated that the petitioner had made several representations to the concerned authorities and when no action was taken, the petitioner filed Public Interest Litigation No. 4502 of 2018, which was disposed of by this Court vide order dated 4th October, 2018, directing the District Magistrate, Agra to take appropriate action, in accordance with law.

4. Pursuant to the order of this Court, the petitioner submitted a detailed representation on 22/27th October, 2018 before the District Magistrate, Agra. The District Magistrate, Agra directed to conduct an inquiry and it was found that Plot Nos. 253 area 0.1150 hectare has been encroached upon by the RCL Public School and a direction was issued to the Nagar Nigam, Agra for the removal of the encroachment and to restore the pond. It is stated that in spite of the order of the District Magistrate, Agra dated 6th May, 2019, no effective step has been taken for the removal of the encroachment. The petitioner has brought on the record some of the documents to indicate that the encroachment still exist.

5. We have heard learned counsel for the petitioner and learned standing counsel for the State.

6. The learned counsel for the petitioner submits that the Supreme Court, in a large number of judgements, has issued directions to all the Chief Secretaries of the States for removal of the encroachments from the water bodies. Learned counsel for the petitioner has placed reliance on the judgment in the case of **Hinch Lal Tiwari Vs. Kamala Devi & Others, Jagpal Singh & Ors. Vs. State of Punjab & Ors., Jagat Narain And Others Vs. State of U.P. And Others**, and **P.S. Shisodia Vs. Board of Revenue Alld..**

7. This Court also, following the judgements of the Supreme Court, has issued directions to the authorities for the compliance of the judgements of the Supreme Court.

8. It is apposite at this stage to set out the relevant statutory provisions contained in Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 and the executive orders, which deals with the Ponds/water bodies in this state.

"Section 4: Vesting of estates in the State:- (1) As soon as may be after the commencement of this Act the State Government may, by notification, declare that as from a date to be specified, all estates situate in Uttar Pradesh shall vest in the State and, as from the beginning of the date so specified (hereinafter called the date of vesting), all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances.

(2) It shall be lawful for the State Government, if it so considers necessary, to issue, from time to time, the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of sub-section (1) shall be applicable to and in the case of every such notification.

117. Vesting of certain lands, etc. in Gaon Sabhas and other local authorities.-

1) At any time after the publication of the notification referred to in Section 4, the State Government may, [by general or special order to be published in the manner prescribed,] declare that as from a date to be specified in this behalf, all or any of the following things, namely-

(i) lands, whether cultivable or otherwise, except lands for the time being comprised in any holding or grove,

(ii) forests,

(iii) trees, other than trees in a holding on the boundary of a holding or in a grove or abadi,

(iv) fisheries,

(v) hats, bazars and melas, except hats, bazars and melas held on lands to which the provisions of clauses (a) to (c) of sub-section (1) of Section 18 apply or on sites and areas referred to in Section 9, and

(vi) tanks, ponds, private ferries, water channels, pathways and abadi sites,-

which had vested in the State under this Act shall vest in a Gaon Sabha or any other local authority established for the whole or part of the village in which the said things are situate, or partly in one such local authority (including a Gaon Sabha) and partly in another:

Provided that it shall be lawful for the State Government to make the declaration aforesaid subject to such exceptions and conditions as may be [specified in such order].

(2) Notwithstanding anything contained in this Act or in any other law for the time being in force, the State Government may, 4[by general or special order to be published in the manner prescribed,] declare that as from a date to be specified in this behalf, all or any of the things specified in clauses (i) to (vi) of sub-section (1) which after their vesting in the State under this Act had been vested in a Gaon Sabha or any other local authority, either under this Act or under Section 126 of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, shall vest in any other local authority (including a Gaon Sabha) established for the whole or part of the village in which the said things are situate.

(3) Where any declaration has been made under sub-section (1) or sub-section (2) vesting any of the things specified in clauses (i) to (vi) of sub-section (1) in any Gaon Sabha, and the village or the part of the village in which that thing is situate lies outside the circle of the Gaon Sabha, such Gaon Sabha or its Land Management Committee shall in

respect of that thing perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Act or the U.P. Panchayat Raj Act, 1947, on a Gaon Sabha or a Land Management Committee, as the case may be, as if that village or part of village also lay within that circle.

(4) Where a declaration has been made under sub-section (1) or sub-section (2) vesting any of the things specified in clauses (i) to (vi) of sub-section (1) in a local authority other than a Gaon Sabha and the village or the part of village in which the thing is situate is outside the limits of such local authority, or where after any declaration is made under sub-section (1) or sub-section (2), the thing vests or, as the case may be, had vested in a Nagar Mahapalika under Section 126 of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, such local authority shall in respect of that thing perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Act or the U.P. Panchayat Raj Act, 1947, on a Gaon Sabha or Land Management Committee:

Provided that the local authority shall in the performance, discharge and exercise of its functions, duties and powers under this sub-section follow such procedure as may be prescribed.

(5) Where any of the things specified in clauses (i) to (vi) of sub-section (1) is vested in a local authority other than a Gaon Sabha the provisions of Sections 126 and 127 shall, subject to such exceptions and modifications, if any, as the State Government may specify in this behalf [by general or special order to be published in the manner prescribed] apply, mutatis mutandis, to such local authority.

(6) The State Government may at any time, [by general or special order to be published in the manner prescribed], amend or cancel any [declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority, and resume such thing, and whenever the State Government so resumes any such things, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that things:

Provided that the State Government may after such resumption make a fresh declaration under sub-section (1) or sub-section (2) vesting the thing resumed in the same or any other local authority including a Gaon Sabha), and the provisions of sub-sections (3), (4) and (5), as the case may be, shall mutatis mutandis, apply to such declaration."

9. Regard being had to the fact that the Commissioner - cum - Secretary of Board of Revenue, U.P. has issued a circular dated 4th October, 2012. In compliance of the Judgements of the supreme Court and with reference to of this court in

The relevant part of the circular reads as under:

"इस सम्बन्ध में मुझें यह कहने का निदेश हुआ है, कि ग्राम सभाओं की भूमि पर तालाब/पोखर/चारागाह एवं कब्रिस्तान पर अवैध कब्जा/ अतिक्रमण को हटवाने के सम्बन्ध में प्रमुख सचिव, राजस्व विभाग, उत्तर प्रदेश शासन की अध्यक्षता में बहुसदस्यीय समिति का गठन किया गया है (छाया प्रति संलग्न)। अतः अनुरोध है कि उक्त गठित समिति का प्रचार प्रसार अपने क्षेत्र के दैनिक

समाचार पत्रों/केबल चैनलों पर नियमित आधार पर कराना सुनिश्चित करें, तथा अपने अपने मण्डल / जनपद के समस्त ग्राम सभाओं के सदस्यों से अवैध कब्जा / अतिक्रमण की शिकायतें प्राप्त कर समयबद्ध रूप से जॉच की कार्यवाही सुनिश्चित कर कृत कार्यवाही की प्रगति से अपने मण्डलायुक्त के माध्यम से परिषद को पाक्षिक रूप से उपलब्ध कराना सुनिश्चित करें"

10. As can be seen from the above statutory provisions, it is legislative intent to protect the water bodies as they are necessary to maintain the environmental balance.

The growing population and unrestricted water extraction has resulted serious consequences for human life. The Central and the State Governments have floated several schemes for ground water recharge.

11. A survey of the law on their subject would be necessary and can be started with- **Hinch Lal Tiwari** (supra). This case arose from a judgement of this Court. The Supreme Court elaborately considered the relevant provisions of the Uttar Pradesh Zaimindari Abolition & Land Reforms Act, 1950 and held as under:-

"8. A perusal of the provision extracted above makes it clear that tanks, ponds, private ferries, water channels, pathways and abadi sites which had vested in the State under Section 4 of the Act shall vest in the Gaon Sabha or any other local authority established for the whole or any part of the village in which the said things are situate, or partly in one such local authority and partly in another, from the date specified in the notification issued by the Government in this behalf. Section 122-C authorises the Assistant Collector, in charge of the sub-division to earmark the classes of land noted hereunder either on his own motion or on the resolution of the Land Management Committee, for the members of the Scheduled Castes and the Scheduled Tribes and agricultural labourers and village artisans. It would be apt to refer to clause (a) of sub-section (1) of Section 122-C which reads as follows :

"122-C. Allotment of land for housing site for members of Scheduled Castes, agricultural labourers etc. - (1) The Assistant Collector in charge of the sub-division of his own motion or on the resolution of the Land Management Committee, may earmark any of the following classes of land for the provision of abadi sites for the members of the Scheduled Castes and the Scheduled Tribes and agricultural labourers and village artisans -

(a) lands referred to in clause (i) of sub-section (1) of Section 117 and vested in the Gaon Sabha under that section;"

And the said clause (i) runs as follows :

" 117. (1)(i) lands, whether cultivable or otherwise, except lands for the time being comprised in any holding or grove,"

9. The term" land" is defined in Section 3, sub-section (14) to mean land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming. The definition excludes land dealt with in Sections 109, 143, 144 and Chapter 7. We may note that we are not concerned with the excepted categories. From a combined reading of the provisions aforementioned, it is plain that the subject-matter of allotment of house sites is lands referred to in clause (i) of sub-section (1) and not tanks,

ponds, private ferries, water channels, pathways referred to in clause (vi) of sub-section (1) of Section 117 of the Act. It appears to us that due to inappropriate drafting the expression "and abadi sites" is wrongly placed in clause (vi).

13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in non-abadi sites."

12. In **State of Orissa Vs. Government of India,** considering the importance of water, it has been observed that "the right to get water is a part of right to life guaranteed by Article 21 of the Constitution.

13. In **Meghwal Samaj Shiksha Samiti Vs. Lakh Singh,** a village pond land was allotted to an educational institute. The High Court set aside the allotment order and held that pond land can not be allotted for any other purpose. The matter was carried to the Supreme Court. The Court, following the decision of **Hinch Lal Tiwari** (supra), rejected the plea that land was allotted for other public purpose, to build a Hostel for students of backward class.

14. In ***Jagpal Singh*** (supra), the Supreme Court has taken a judicial notice that since independence, in large part of the country, unscrupulous persons using muscle powers, money power and political influence, they have systematically encroached on the public utility lands. The Court has also observed that this has been done with the active connivance with the State - authorities and local power vested interests and Gundas. The Court, following its earlier judgement in ***Hinch Lal Tiwari*** (supra), which has also been followed by the Madras High Court in ***L. Krishnan Vs. State of Tamil Nadu,*** has further observed that most of the ponds in the country have been filled with earth and their original character has been destroyed. The relevant part of the judgement reads as under:-

"16. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari vs. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court in L. Krishnan vs. State of Tamil Nadu, 2005(4) 9 CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

18. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus

destroying their original character. This has contributed to the water shortages in the country.

20. In Uttar Pradesh the U.P. Consolidation of Holdings Act, 1954 was widely misused to usurp Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices.

21. For the reasons given above there is no merit in this appeal and it is dismissed.

15. The Court has issued directions to all the State Governments in the country for the eviction of the illegal/unauthorized occupants of the Gram Sabha's land. The directions issued by the Supreme Court read as under:-

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/ unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

16. This Court also, in a large number of cases, has considered the matter relating to ponds. In ***Ram Kumar Vs. Zila Adhikari/District Deputy Director of Cosolidation,*** this Court has held as under:-

"22. However, while allotting the land of Gaon Sabha, it has to be kept in mind that the land of Gaon Sabha is basically for public purpose, public in general and the society has interest in the public land. Public land should not be allotted only to serve individual interest, protection of ponds, tanks, mountains have been held to be necessary for environment protection and pollution control. Thus, the consolidation authorities while allotting the Gaon Sabha land should normally desist from allotting ponds, tanks, mountains, land in nature of forest"

17. In ***Shardadeen Vs. State of U.P.,*** this Court has held as under:-

"8. <u>Ponds are lifelines of villages. One of the reasons of alarming</u>

decrease in water level of the underground water particularly during recent years is drying up of the ponds. The ponds have become dry either due to disuse or by active efforts of interested persons by filling the same with earth. There are some authorities of this Court which have held that no person can mature his right through adverse possession over Gaon Sabha land as under U.P.Z.A. & L.R. Act and the Rules there is no limitation prescribed for filing suit by Gaon Sabha for ejectment of trespasser. In view of this if a person is in unauthorized occupation of a plot entered in revenue record as pond or any part thereof, he cannot mature his title by prescription however long his possession may be. In view of the aforesaid Hinch Lal Tewary authority of Supreme Court plot entered as pond in the revenue records even if it has ceased to be a pond or any portion thereof cannot be allotted to any person. No authority can pass order permitting or recording change of user of pond. In view of this even if a plot which was entered as pond after Zamindari Abolition and vested in State/Gaon Sabha or any portion thereof has been allotted to any person then the said allotment is void and liable to be ignored. There is therefore, no legal bar in cancelling the entry in revenue record of such plot or any part thereof in favour of a person after hearing him.

9. It is expected that the authorities particularly Collectors and Deputy Collectors will initiate special drive to get such plots completely vacated which were entered as ponds belonging to State/Gaon Sabha just after Zamindari Abolition and restore the same to their original position. Let a copy of this order be given to Shri S.P.Mishra, learned standing counsel for communication to authorities concerned."

In ***Iqbal Ahmad and others Vs. Deputy Director of Consolidation, Deoria and others.,*** this Court has held as under:-

"14. In these circumstances, the direction of the Apex Court in Hinch Lal Tiwari v. Kamla Devi (supra) to maintain Ponds, Water Channels, Pokhras, Garhi (land covered by water) etc. recorded in the revenue records on the date of vesting as covered by under section 132 of the U.P.Z.A. And L.R. Act be complied forthwith and land covered by water be restored and maintained in the interest of the public in order to maintain ecological balance and protecting environment. For this purpose special measures needs to be taken??? the grass route level so that directions??? the Apex Court be complied with Accordingly, State Government is directed to make a thorough investigation of each village of each District throughout State of Uttar Pradesh in respect of Forests, Tanks, Ponds and Garhi, Water Channel and Riverbed etc. on the basis of the revenue records of the date of vesting, i.e., Ist July, 1952 by constituting a Special Investigation Team consisting of revenue authorities and other concerned officials and Environmentalists and take appropriate steps for compliance for the Apex Court's directions in Hinchlal Tiwari v. Kamla Devi (supra). The State Government of Uttar Pradesh is also directed to make compliance of this order within one year from the date of service of this order to Standing Counsel/Chief Secretary of Government of Uttar Pradesh to be circulated to all the District Magistrates and Consolidation Authorities of the State of Uttar Pradesh."

In ***Ram Naumee Vs. State of U.P. & Others,*** this Court held thus:-

"18. It is apt to consider the judgment of the Apex Court in Jagpal Singh v. State of Punjab, JT 2011 (1) SC 617: (2011) 11 SCC 396: AIR 2011 SC 1123. This was a case with respect of a Village Pond. In that connection, the Apex Court has made certain observations which are relevant for the present purposes. The Apex Court has deprecated the action of the State Authorities either in allotting the public utility land in favour of a person or in permitting an encroacher to occupy such public utility land. It has relied upon its earlier decision M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, JT 1999 (5) SC 42; where the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over Rs. 100 crores. It has been observed that the principle laid down in the said decision of M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, JT 1999 (5) SC 42: will apply with even greater force in cases of encroachment of village common land. In para 15 of the report, the settlement of such Gaon Sabha land to private persons and commercial enterprises on payment of some money has not been approved and it has been provided that even if there is general order in favour of such settlement, the same should be ignored."

18. A Division Bench of this Court in ***Prem Singh Vs. The State of U.P. and others,*** taking note of the direction issued to the Principal Secretary (Revenue), Government of Uttar Pradesh, has issued a fresh direction to the State Government in the following terms:-

"4. In view of direction noticed in the aforesaid circular, we are of the considered view that if complaints regarding unauthorized occupation over the public ponds or other similar public lands are received by the District Magistrate of a District, he should take all the required actions in view of law already settled in the case of Jagpal Singh and others.

5. In case, the District Magistrate finds some good reasons to seek guidance from the Members Committee indicated in Para-2 of the aforesaid circular, then he may refer the matter and seek guidance in appropriate cases.

6. So far as the present writ petition is concerned, we grant liberty to the petitioner to approach respondents no. 2 and 3 again with a certified copy of this order. The concerned respondents shall get appropriate inquiry made and take required action to protect public ponds as per law laid down by the Apex Court, expeditiously.

7. Let a copy of this order be furnished to the learned Standing Counsel for the State for communication to the Principal Secretary, Revenue, Government of Uttar Pradesh, who shall circulate a copy of this order to all the Divisional Commissioners as well as the District Magistrates so that number of such types of cases coming to this Court may be checked. The petition is, accordingly, disposed of. "

19. In ***Prem Singh*** (supra) case, the Division Bench has specifically issued a direction to the Principal Secretary (Revenue), Government of U.P., Lucknow to issue necessary circular to all the Commissioners and District Magistrates in the State to ensure

compliance of the directions issued by the Supreme Court in ***Hinch Lal Tiwari*** (supra) and ***Jagpal Singh*** (supra).

20. Our experience shows that a large number of Public Interest Litigation is filed in this Court raising grievance regarding the illegal encroachments over the water bodies. In the instant case also, earlier, the petitioner had approached this Court for a direction to the District Magistrate. The number of Public Interest Litigations, themselves, go to show that in spite of the judgement of the Supreme Court in ***Hinch Lal Tiwari*** (supra), which was delivered way back in the year 2001, no effective steps have been taken by the State and its functionaries to restore the ponds in their earlier status and shape.

21. Supreme Court's directions mentioned above have not received their due attention by the State functionaries. The judgement of ***Hinch Lal Tiwari*** (supra) was delivered more than 18 years back in ***Jagpal Singh*** (supra). The Supreme Court has issued positive directions to all Chief Secretaries for restoration of ponds. It is trite that law declared by the Supreme Court is binding upon all the authorities under Article 141 of the Constitution.

22. We are constrained to observe that the decision of the Supreme Court has not been implemented in the State. The casual approach adopted by the State functionaries cannot be appreciated. It is very disturbing state of affairs. The local authorities chose to by-pass not only statutory provisions, but also the directions issued by the Supreme Court and this Court.

23. Relevant, it would be to mention that rule of law is essence of a democratic society. In this context, the observations of the Supreme Court in the cases mentioned below are apposite.

24. In ***Karnataka Housing Board v. C. Muddaiah,*** it has been held thus:

"32. We are of the considered opinion that once a direction is issued by a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law is not complied with or is ignored, there will be an end of the rule of law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the court. In our judgment, upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. The argument of the Board, therefore, has no force and must be rejected."

25. In ***M.C. Mehta v. Union of India,*** it has been held thus:

"If this Court finds that the authorities had not taken action required of them by law and that their inaction is jeopardising the right to life of the citizens of this country or any section thereof, it is the duty of this Court to intervene. If it is found that the respondents are flouting the provisions of law and the directions and orders issued by the lawful authorities, this Court can certainly make appropriate directions to ensure compliance with law and lawful directions made thereunder."

26. In ***N. Kannadasan v. Ajoy Khose,*** it has been held thus:

"46. In Supreme Court Advocates-on-Record Assn.2 this Court laid down the qualities of a Judge: (SCC pp. 601-02, para 273):

"273. ... Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the Courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant or indifferent State agencies"

51. In our constitutional scheme, the judge-made law becomes a part of the Constitution. It has been so held in M. Nagaraj v. Union of India in the following terms: (SCC p. 238, para 9).

"9. ... The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368."

27. The Supreme Court in the long line of decisions has settled that a person has fundamental right under Article 21 for a decent life and not an animal existence. The decent life has very wide connotation. It includes pollution free environment, clean air and clean water. In this regard it is apposite to mention the Article 48-A of the Constitution which reads as under:

"48A. Protection and improvement of environment and safeguarding of forests and wild life.-- *The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."*

28. Article 51A of the Constitution deals with the legal duty of a citizen.

29. In the light of the aforesaid two Articles the Supreme Court has adopted the "Doctrine of the Public Trust". The basic principle of the "Doctrine of the Public Trust" is that the *public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land.* The doctrine of the public trust has its origin from the ancient Roman Empire. It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. The recent attention paid to the environment by the higher judiciary in the country bears a very close conceptual relationship to this legal doctrine. The Roman Law provides that the natural resources were either owned by no one (res nullious) or by everyone in common (res communious). The said Roman law has also been adopted by the English common law where the sovereign has power to own the natural resources. But it does not has power to grant these properties to private owners if the effect was to interfere with the public interest.

30. The Supreme Court recently in the case of **Lal Bahadur Vs. State of U.P.** has considered the violation of Master Plan on land reserved for green belt was changed to residential use. The matter arose from this State. The Court also considered other environmental issues and Modern Public Trust Doctrine and has quoted with approval Joseph L.Sax, Professor of Law, University of Michigan-proponent of the Modern Public Trust Doctrine-in an erudite article "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention".

"22. In M.C. Mehta Vs. Kamal Nath, it was held that any disturbance to the basic environment, air or water, and soil which are necessary for life, would be hazardous to life within the meaning of Article 21 of the Constitution. In such cases "polluter pays principle" can also be invoked to restore the environment and to control it. It held: (SCC pp.219-20, paras 8-10):

"8. Apart from the above statutes and the rules made thereunder, Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51-A(g) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution.

9. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to fundamental rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughterhouse and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the industries located in Delhi, the directions to tanneries etc., are all judgments which seek to protect the environment."

31. Coming to the case at hand, we find that no action had been taken by the Authorities for the demolition of the illegal structure, which was raised on the land of the pond. Only after filing of this Public Interest Litigation, a demolition has been carried out on 26th August, 2019. This act only goes to show that the authority concerned has not paid proper

attention to the judgements of the Supreme Court, mentioned above.

32. In view of the above discussion, we find that in the light of the directions issued by the Supreme Court as well as the Division Bench judgements of this Court, following directions are necessary to be issued for the strict compliance of the law:-

(i) The Chief Secretary of the State of Uttar Pradesh shall constitute a Committee in consultation with the Chairman, Board of Revenue, which shall monitor the compliance of the judgements of the Supreme Court and this Court. The said Committee shall also invite Justice Ram Surat Ram (Maurya) (Former Judge of this Court) as a special invitee in its meeting. Justice Maurya shall be paid Rs. 10,000/- (Rupees Ten Thousand) remuneration for attending each such meeting in addition to his conveyance and other charges;

(ii) the Collectors of each District of the State shall entrust the the Additional District Magistrate (Finance & Revenue) to make a list of ponds which are recorded in the revenue records in the year 1951-52. He shall also prepare a list of the ponds which are under the encroachment or in respect of which the lease has been granted;

(iii) we charge the Additional District Magistrates (Finance & Revenue) of each District of the State to comply these directions;

(iv) the Collectors shall proceed to cancel the lease of the ponds and restore the ponds in accordance with law and directions issued by the Supreme Court. The Collectors shall send a progress report in every six month to the Committee constituted by the Chief Secretary;

(v) the Committee shall hold its meeting, at least, after every three to four months and monitor the progress of restoration of ponds in the State. In case any legal impediment arises, the Collector shall apprise the monitoring Committee, which shall issue appropriate guidance to the Collector concerned in accordance with law; and

(vi) the other Committees, which were constituted earlier at State level and District level, shall also send their report to the Monitoring Committee.

33. We make it clear that any negligence in compliance of the orders of the Supreme Court and this order shall be treated as a negligence of duty and appropriate action shall be taken against the concerned Officer(s) under the relevant Service Rules.

34. We are constrained to issue these directions having regard to the fact that after lapse of 18 years, the State functionaries have not complied with the directions of the Supreme Court as well as this Court.

35. Coming back to this case, we find that the demolition has been made on 26th August, 2019, in which five rooms, one Office and one wash-room is mentioned, but no further information has been furnished to this Court whether the pond has been restored to its original shape and present status of the matter.

36. The District Magistrate, Agra is directed to issue the necessary directions for the restoration of the pond to its original shape and a compliance report be filed to the Registrar General within three

months. The Registrar General shall place it on the record.

37. This Public Interest Litigation is disposed of in the above terms.

(2019)11ILR A681

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.11.2019

BEFORE
THE HON'BLE JASPREET SINGH, J.

S.C.C. Revision No. 157 of 2015

Prem Bahadur Dalela ...Revisionist
Versus
Umeshraj Bali ...Opposite Party

Counsel for the Revisionist:
Sri Amrendra Nath Tripathi

Counsel for the Opposite Party:
Sri Hari Mohan Mathur, Sri Adnan Ahmad, Punita Pandey

A. Evidence Law-Indian Evidence Act, 1872 - Section 114 - Illustrations (e) and (f) - Indian Post Office Act, 1898 - Sections 3 and 14 - General Clauses Act - section 27 - Presumption of service of notice by refusal - Merely making a bald denial is not sufficient to rebut the presumption of service of notice by refusal - Positive evidence required.

Held:- Presumption of service of a letter sent under registered cover, if the same is returned back with the postal endorsement that the addressee refused to accept, is a legal presumption. The aforesaid presumption can be rebutted and it is open for a party concerned to place the evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden primarily lies upon the party who challenges the factum of service.

Merely making a bald denial to indicate that the revisionist was at Hardoi is not sufficient to rebut the presumption of service of notice by refusal. The revisionist has filed certain documents which indicate that the revisionist was working and posted at Hardoi, however, these documents do not indicate that at the relevant time and date, the revisionist with his entire family was actually residing at Hardoi or at some other address than the one mentioned in the notice. The revisionist has also not given any positive evidence to indicate that he was residing at Hardoi. (Para 20,22)

Revision dismissed (E-5)

List of Cases Cited: -

1. Ram Murti Devi Vs Pushpa Devi & ors. (2017) 15 SCC 230.

2. Trilok Singh Chauhan Vs Ram Lal (2018) 2 SCC 566.

3. Parimal Vs Veena @ Bharti (2011) 3 SCC 545.

4.Gangaram Vs Smt. Foolwati 1970 SCC Online All 42 (Full Bench)

5.Shiv Murat & anr. Vs St. of U.P. 2014 2014 SCC Online All 6135.

6. Ugrasen Vs Parmeshwari Devi 2014 (9) ADJ 356

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Sri Amrendra Nath Tripathi, learned counsel for the revisionist and Sri Adnan Ahmad, learned counsel for the opposite parties.

2. The instant SCC Revision has been preferred under Section 25 of the Provincial Small Cause Courts' Act, being aggrieved against the judgment dated

07.05.2015 passed by the Additional District Judge, Court No. 9, Lucknow (acting as SCC Court) in SCC Suit No. 18 of 1999 by means of which the suit of the opposite parties has been decreed.

3. Sri Amrendra Nath Tripathi has challenged the impugned judgment dated 07.11.2015 primarliy on the ground that the notice for termination of tenancy dated 16.03.1999 which is alleged to have been served on the revisionist by refusal, has wrongly been held to be served , inasmuch, as there was clear evidence to the effect that on the alleged date when the said notice is said to have been refused by the revisionist and was addressed at Lucknow but at the given time he was on his posting at Hardoi and accordingly the presumption which has been drawn is incorrect which has resulted in miscarriage of justice. The second ground raised by Sri Tripathi is that the rate of rent was Rs. 100/- per month which has erroneously been held by the Trial Court to be Rs. 600/-, whereas there was enough material on record including the statement of the opposite party no. 1 which indicated that he had no material to prove that the rate of rent was Rs. 600/- per month and despite the said statement, the Court below has ignored the same and has upheld the rate of rent to be Rs. 600/- which is erroneous. Another ground has been raised though feebly argued that the opposite party no. 1 is not the owner-landlord rather the original landlord was one Sri K.N. Mathur and upon his death one Smt. Veena Srivastava had claimed title over the property in question.

4. It has also been submitted that in the SCC proceedings Order 14 of the C.P.C. is not applicable, however, in the present case, the Trial Court by means of its order dated 19.03.2005 had framed 7 issues. It has been submitted that though the framing of issues is not necessary but at the same time once the Court has proceeded to frame the issue then it was incumbent on the Court to have decided all the issues. It has been submitted that from the perusal of the impugned judgment it would indicate that the Court has not decided all the issues and rather has encapsulated the controversy in four issues whereas issue no. 6 and 7 which were framed on 13.09.2005 have not been decided at all. On the strength of the aforesaid submissions it has been submitted that the judgment passed by the Court dated 07.11.2015 is bad in the eyes of law and cannot sustain the judicial scrutiny.

5. Per contra, Sri Adnan Ahmad, learned counsel appearing for the opposite parties has submitted that the finding regarding the service of notice is purely, a finding of fact and in view of the limited jurisdiction exercised by the Court in terms of Section 25 of the Provincial Small Cause Courts Act, such finding cannot be disturbed unless they are perverse. It has further been submitted that the original notice was returned unserved with the endorsement of refusal, was placed on the record. It has been submitted that it is not the argument of the learned counsel for the revisionist that the notice was incorrectly addressed. It has also not been indicated by the revisionist that if he alone was not present at Lucknow then whether his entire family had also moved out of Lucknow. It has also been argued that on the given date when the notice was refused, the revisionist was in Lucknow as he was placed under Suspension and was present

at Lucknow at the relevant time. It has further been submitted that even otherwise once the notice was returned unserved with the endorsement of refusal then it was the duty of the revisionist to have rebutted the aforesaid presumption of service by examining the postman, however, by merely making a bald denial the presumption cannot stand rebutted and in the present case the revisionist has not undertaken any exercise to rebut the presumption nor attempted to produce the postman as a witness. In the aforesaid circumstances, the presumption of service by refusal has rightly been recorded by the Trial court which requires no interference.

6. It has also been argued by Sri Ahmad that as far as the rate of rent is concerned, the court below has relied upon a document bearing Paper No. C-48 dated 24.07.1990 which contained the handwriting and signatures of the revisionist himself. The aforesaid document was a rent note which was admitted by the revisionist. The rate of rent was clearly mentioned in the said rent note, accordingly, the Court below has rightly held the rate of rent to be Rs. 600/- per month and this again being finding of fact cannot be upset in revisional jurisdiction under Section 25 of the Provincial Small Cause Courts' Act.

7. Sri Ahmad has also submitted that the reference to Smt. Veena Srivatastava who was claiming title is also misconceived, inasmuch as, she had attempted to seek her impleadment in the present SCC suit which was rejected. Moreover, her title suit seeking declaration and injunction against the opposite party no. 1 was also contested wherein the opposite party no. 1 had also led his counter claim and the same was finally decided in favour of the opposite party no. 1 by means of judgment and decree passed by the Civil Judge (Senior Division) Mohanlal Ganj, Lucknow in R.S. No. 149 of 2007 wherein the counter claim of the opposite party no. 1 was decreed on 01.09.2015. It has also been urged that this issue is not open for the revisionist, inasmuch as, he being a tenant has no right to challenge the title of his landlord.

8. Sri Adnan Ahmad Ahmad lastly submitted that though in the proceedings governed by the Provincial Small Cause Court's Act , Order 40 C.P.C. prescribes that the provisions of Order 14 C.P.C. are not applicable in proceedings governed by the Provincial Small Cause Court's Act. In view thereof, even if the issues were framed by the Trial Court on 19.03.2005 the same do not give any leverage to the revisionist. From the impugned judgment, it was pointed out that after noticing the various contentions of the parties, the Judge, Small Causes had framed the points for determination which have been decided. The points for determination is different to the issues as framed. Moreover, as per Order 20 Rule 4 C.P.C., the judgment of the Small Cause Court need not contain more than the points of determination and the decision thereon. Once the legislative mandate has been complied with as shall be evident from the impugned judgment merely because at some earlier point of time, the issues were framed and not all issues decided thereafter it will not vitiate the judgment more so when the revisionist has failed to point out what prejudice has been caused to him. In view of the above, the opposite party has prayed that the revision lacks merit and deserves to be dismissed.

9. The Court has heard the learned counsel for the parties and also perused the record.

10. Briefly the facts giving rise to the above revision are being noticed hereinafter first:-

11. One Sri Kameshwar Nath Mathur, the original plaintiff had instituted a suit for arrears of rent and ejectment against the revisionist Prem Bahadur Dalela which was registered as SCC Suit No. 18 of 1999. It was pleaded that the property in question i.e. House No. 295/309, Asharfabad, Deen Dayal Road, P.S. Chowk, Lucknow of which Sri K.N. Mathur was its owner and landlord, a part of the said house was let out to the revisionist on a monthly rent of Rs. 600/- per month. The tenanted portion comprised of two rooms, a kitchen, a latrine and a bathroom. It was further pleaded that the revisionist paid rent at the rate of Rs. 600/- per month, apart from the aforesaid, the electricity charges were paid separately. The revisionist committed default in payment of rent from March, 1993 and despite having made several requests to vacate the premises, the revisionist failed. Ultimately, Sri K.N. Mathur through his Advocate sent a composite notice for demand and ejectment dated 16.03.1999 which was sent to the revisionist at his correct address through registered post. The said notice was served on the revisionist on 23.03.1999 by refusal. Since at the time of filing of the Suit in the year 1999 the rent had accumulated for 72 months, however, on account of the law of limitation Sri K.N. Mathur claimed rent only for the last 36 months i.e. from May 1996 till April 1999 at the rate of Rs. 600 per month amounting to Rs. 21,460/-as well as the damages for wrongful use and occupation at the rate of Rs. 20/- per day with the effect from 24.04.1999 till 05.05.1999.

12. The revisionist/defendant contested the proceedings by filing his written statement which was later on amended. The main defence of the revisionist was the rate of rent of the premises in question was Rs. 100/- per month and not 600/- as alleged by the plaintiff. Even the extent of tenanted accommodation was disputed and it was pleaded that the revisionist had only one room, one store room a latrine and a bathroom apart from a kitchen as part of his tenancy. The revisionist disputed the service of notice and specifically pleaded that at the time when the alleged notice is said to have been served on the revisionist, he was posted at Hardoi and was on his official duty. The demand for arrear of rent was also disputed coupled with the fact that since the landlord had failed to accept the rent, hence, the revisionist started depositing the rent before the Court of Civil Judge (Junior Division), North, Lucknow in terms of Section 30 (1) of the U.P. Act 13 of 1972 Act which was registered as Misc. Case No. 199 of 1998 and later the said suit was dismissed for default for which the tenant had moved an application for restoration, however, the same also came to be dismissed. It was also pleaded that the plaintiff had instituted the suit to trouble and harass the tenant and as such neither there were arrears of rent nor the alleged notice for demand and ejectment was served on the tenant, accordingly, the suit was liable to be dismissed.

13. It will be relevant to mention that during the pendency of the

proceedings before the Trial Court, Sri K.N. Mathur expired and in his place Sri Umesh Raj Bali was substituted. The parties filed their documentary evidence. The plaintiff examined himself as P.W. 1 whereas the revisionist appeared as the sole defendant-witness.

14. The Trial Court after considering the respective pleadings as well as evidence, both oral as well as documentary, alongwith the case laws cited by the parties decreed the suit of the plaintiff-opposite party by means of judgment dated 07.11.2015. The Trial Court framed had four points for determination, which encompassed the controversy emerging from the pleadings of the parties. The Trial Court recorded a finding that the notice for demand of rent and ejectment was duly served on the defendant-revisionist. It also held that the rate of rent was Rs. 600/-per month and the defendant-revisionist was a defaulter in arrears and consequently decreed the suit.

15. It is this judgment dated 07.11.2015 which has been assailed before this Court by means of the instant revision on the ground as already noticed hereinabove first.

16. Before proceeding further, it will be apposite to notice the scope of Section 25 of the Small Cause Courts Act, the decision of the Apex Court in the case of ***Ram Murti Devi Vs. Pushpa Devi and Others*** *reported in* ***2017 (15) SCC 230*** while considering the scope of revision under Section 25 of the Provincial Small Cause Courts' Act has stated in following words whcih reads as under:-

"29. The High Court was hearing a revision under *Section 25 of the 1887 Act.* What is the scope of *Section 25 of the 1887 Act* came for consideration before this Court in *Hari Shankar v. Rao Girdhari Lal Chowdhury [Hari Shankar v. Rao Girdhari Lal Chowdhury,* AIR 1963 SC 698] , where this Court laid down the following in para 9: (*Hari Shankar case [Hari Shankar v. Rao Girdhari Lal Chowdhury,* AIR 1963 SC 698] , AIR p. 701)

"9. The section we are dealing with, is almost the same as Section 25 of the Provincial Small Cause Courts Act. That section has been considered by the High Courts in numerous cases and diverse interpretations have been given. The powers that it is said to confer would make a broad spectrum commencing, at one end, with the view that only substantial errors of law can be corrected under it, and ending, at the other, with a power of interference a little better, than what an appeal gives. It is useless to discuss those cases in some of which the observations were probably made under compulsion of certain unusual facts. It is sufficient to say that we consider that the most accurate exposition of the meaning of such sections is that of Beaumont, C.J. (as he then was) in *Bell & Co. Ltd. v. Waman Hemraj [Bell & Co. Ltd. v. Waman Hemraj,* 1937 SCC OnLine Bom 99 : AIR 1938 Bom 223] where the learned Chief Justice, dealing with Section 25 of the Provincial Small Cause Courts Act, observed: (SCC OnLine Bom paras 3-4)

"3. The object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law.

4. The section does not enumerate the cases in which the Court may interfere in revision, as does, Section 115 of the Code of Civil Procedure, and I

certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction, or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at.'

This observation has our full concurrence."

30. Further, in *Mundri Lal v. Sushila Rani [Mundri Lal v. Sushila Rani,* (2007) 8 SCC 609] which was a case arising from Act 13 of 1972 and a revisional jurisdiction under Section 25 of the 1887 Act, in paras 22 and 23, this Court held that the jurisdiction under Section 25 of the Provincial Small Cause Courts Act, is wider than Section 115 CPC. It is further held that pure finding of the fact based on appreciation of evidence although may not be interfered but there are several circumstances in which the Revisional Court can interfere with the finding of fact. In paras 22 and 23 following was stated: (SCC pp. 617-18)

"22. There cannot be any doubt whatsoever that the revisional jurisdiction of the High Court under Section 25 of the Provincial Small Cause Courts Act is wider than Section 115 of the Code of Civil Procedure. But the fact that a revision is provided for by the statute, and not an appeal, itself is suggestive of the fact that ordinarily revisional jurisdiction can be exercised only when a question of law arises.

23. We, however, do not mean to say that under no circumstances finding of fact cannot be interfered therewith. A pure finding of fact based on appreciation of evidence although may not be interfered with but if such finding has been arrived at upon taking into consideration irrelevant factors or therefor relevant fact has been ignored, the Revisional Court will have the requisite jurisdiction to interfere with a finding of fact. Applicability of the provisions of Section 2(2) of the Act may in that sense involve determination of mixed question of law and fact."

17. Similarly in the case of ***Trilok Singh Chauhan Vs. Ram Lal,*** reported in ***2018 (2) SCC 566,*** once again while considering the scope of Revision under Section 25 of the Provincial Small Cause Courts Act the Apex Court has stated and the relevant portion reads as under:-

*"**14.** The High Court was exercising the jurisdiction under Section 25 of the 1887 Act, which provision is as follows:*

*"**25. Revision of decrees and orders of Courts of Small Causes.**--The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."*

15. The scope of Section 25 of the 1887 Act, came for consideration before this Court on several occasions. In Hari Shankar v. Rao Girdhari Lal

Chowdhury [Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698] , in paras 9 and 10, this Court laid down the following: (AIR p. 701)

"9. The section we are dealing with, is almost the same as Section 25 of the Provincial Small Cause Courts Act. That section has been considered by the High Courts in numerous cases and diverse interpretations have been given. The powers that it is said to confer would make a broad spectrum commencing, at one end, with the view that only substantial errors of law can be corrected under it, and ending, at the other, with a power of interference a little better than what an appeal gives. It is useless to discuss those cases in some of which the observations were probably made under compulsion of certain unusual facts. It is sufficient to say that we consider that the most accurate exposition of the meaning of such sections is that of Beaumont, C.J. (as he then was) in Bell & Co. Ltd. v. Waman Hemraj [Bell & Co. Ltd. v. Waman Hemraj, 1937 SCC OnLine Bom 99 : (1938) 40 Bom LR 125 : AIR 1938 Bom 223] , where the learned Chief Justice, dealing with Section 25 of the Provincial Small Cause Courts Act, observed: (SCC OnLine Bom paras 3-4).

"3. ... The object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law.

4. The section does not enumerate the cases in which the Court may interfere in revision, as does, Section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction, or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at.'

This observation has our full concurrence.

10. What the learned Chief Justice has said applies to Section 35 of the Act, with which we are concerned. Judged from this point of view, the learned Single Judge was not justified in interfering with a plain finding of fact and more so, because he himself proceeded on a wrong assumption."

16. Another judgment which needs to be noted is judgment of this Court in Mundri Lal v. Sushila Rani [Mundri Lal v. Sushila Rani, (2007) 8 SCC 609] . This Court held that jurisdiction under Section 25 of the 1887 Act, is wider than the revisional jurisdiction under Section 115 CPC. But pure finding of fact based on appreciation of evidence may not be interfered with, in exercise of jurisdiction under Section 25 of the 1887 Act. The Court also explained the circumstances under which, findings can be interfered with in exercise of jurisdiction under Section 25. There are very limited grounds on which there can be interference in exercise of jurisdiction under Section 25; they are, when (i) findings are perverse or (ii) based on no

material or (iii) findings have been arrived at upon taking into consideration the inadmissible evidence or (iv) findings have been arrived at without consideration of relevant evidence."

18. It is in light of the aforesaid that the decision and judgment passed by the Trial Court is to be examined. Considering the first submission of the learned counsel for the revisionist regarding the presumption of notice of demand and ejectment. The plaintiff in para 4 had specifically pleaded that the notice dated 16.03.1999 was sent to the defendant by registered post and it was refused by him on 23.03.1999 and thus the notice is deemed to be served by refusal. The original notice was brought on record filed by the plaintiff bearing Paper No. C-6. From the perusal of the record which is available before this Court, it indicates that the aforesaid notice was addressed to the revisionist at the correct address 295/3059 near City Montessory School, Asharfabad, Lucknow. The original postal receipt has also been brought on record. It is not the case of the defendant-revisionist that the said notice has been incorrectly addressed or insufficiently stamped. The ground raised by the defendant is that on the date when the alleged notice is said to have been served, the revisionist was at Hardoi.

19. This Court upon considering the entire evidence lead by the revisionist finds that nowhere the revisionist ever stated that on the given day he was residing at Hardoi or he was at Hardoi along with his entire family.

20. Merely making a bald denial to indicate that the revisionist was at Hardoi is not sufficient to rebut the presumption of service of notice by refusal. The revisionist has filed certain documents along with the document list bearing Paper No. C-79 which all relate to his service and salary certificates. All the aforesaid documents indicate that the revisionist was working and posted at Hardoi, however, these documents do not indicate that at the relevant time and date, the revisionist with his entire family was actually residing at Hardoi or at some other address than the one mentioned in the notice. The revisionist has also not given any positive evidence to indicate that he was residing at Hardoi. Moreover, he has filed his identity card wherein his permanent address has been shown as 295/309, Asharfabad, Lucknow which is bearing No. C-79/80 which is the address at which the notice was sent.

21. The learned counsel for the revisionist has relied upon the decision of the Apex Court in the case of ***Parimal Vs. Veena @ Bharti,*** reported in ***2011 3 SCC 545*** and also in the case of ***Gangaram Vs. Smt. Foolwati,*** reported in ***1970 SCC Online All 42 (Full Bench)*** and in the case of ***Shiv Murat and Another Vs. State of U.P 2014*** reported in ***2014 SCC Online All 6135.*** In all the aforesaid cases, the Court has considered the aspect of presumption. The proposition as laid in the aforesaid decisions is not in dispute to the extent that the presumption of service of a letter sent under registered cover, if the same is returned back with the postal endorsement that the addressee refused to accept, is a legal presumption. The aforesaid presumption can be rebutted and it is open for a party concerned to place the evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities

never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden primarily lies upon the party who challenges the factum of service.

22. As far as the aforesaid proposition is concerned, there is no quarrel. However, the law in so far as the presumption of notice is concerned has also been considered by a co-ordinate Bench of this Court in the case of ***Ugrasen Vs. Parmeshwari Devi*** reported in ***2014 (9) ADJ 356.*** The question before the Court was who has to prove the endorsement of refusal was wrong. In other words, the question to be decided was that whose responsibility was to seek the production of the postman to prove the endorsement of refusal.

23. The aforesaid aspect was considered in light of the statutory provisions as well as various authorities on the subject. The relevant portion of the aforesaid report is reproduced hereinafter:-

7. Another relevant provision is section 114, Illustrations (e) and (f), Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1972") which reads as under:

"114. Court may presume existence of certain facts.--The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--

...

(e) The judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;"

8. The third is Indian Post Office Act, 1898 (hereinafter referred to as "Act, 1898"). Sections 3 and 14 thereof, relevant for the purpose of present case, are reproduced as under:

"3. Meanings of "in course of transmission by post" and "delivery".-- For the purposes of this Act,--

(a) a postal article shall be deemed to be in course of transmission by the post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII;

(b) the delivery of a postal article of any description to a postman or other person authorized to receive postal articles of that description for the post shall be deemed to be a delivery to a post office; and

(c) the delivery of a postal article at the house or office of the addressee, or to the addressee or his servant or agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee."

"14. Post Office marks prima facie evidence of certain facts denoted.-- In every proceeding for the recovery of any postage or other sum alleged to be due under this Act in respect of a postal article,--

(a) the production of the postal article, having thereon the official mark of the Post Office denoting that the article has been refused, or that the addressee is

dead or cannot be found, shall be *prima facie* evidence of the fact so denoted, and

(b) the person from whom the postal article purports to have come, shall, until the contrary is proved, be deemed to be the sender thereof."

10. Though in the three statutes referred to above, the oldest one is Act, 1872 but in fact the provisions relating to Post Office Act are older, going to 1866 when the first Post Office Act was enacted. In the then British Indian Territory governed by the British Government, postal services were established by ap pointing a Director, Post Office by the Governor General in Council in order to regulate this branch of public service and revenue, in the light of experiences gained by English postal legislation and development of Post Offices. Commenting upon the Post Office service in England, in *Whitfield v. Lord he Despencer,* [(1778) 2 Cowp. 754.] Lord Mansfield had said:

"The Post Master has no hire, enters into no contract, carries on no merchandise or commerce. But the post office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy therefore between the case of the Post Master and a common carrier."

11. Following the above decision, in a recent case, in *Triefus and Co. Ltd. v. Post Office,* [(1957) 2 Q.B. 352.] it was held that Post Office is a branch of revenue and Post Master General does not enter into any contract with a person who entrusted, to the Post Office, a postal packet for transmission overseas.

12. Presently also, the Post Office service in India, with which this Court is concerned, is not in the hands of any private individual or corporate body but a Department of Government of India and on certain matters, it is regulated by various Statutes including the Act, 1898.

13. I have referred to the above two decisions in *Whitfield* (supra) and *Triefus and Co. Ltd.* (supra) for the reason that the system of Post Office in India has been observed to be similar as it was in England. The Apex Court referring to certain provisions of Act, 1898, in *Union of India v. Mohd. Niazim,* [(1980) 1 SCC 284 : AIR 1980 SC 431 : 1979 (5) ALR 230 (SC) (Sum.).] said:

"These are only some of the provisions of the Act which seem to indicate that the post office is not a common carrier, it is not an agent of the sender of the postal article for reaching it to the addressee. It is really a branch of the public service providing postal services subject to the provisions of the Indian Post Office Act and the rules made thereunder. The law relating to the post office in England is not very much different from that in this country."

14. The aforesaid decision was rendered considering the provisions in Act, 1898 which was enacted by repealing previous Act of 1866, so as to consolidate and amend the law relating to Post Office in India.

15. The post office in India, thus, is an institution established by a statute. "Postage" required to avail of the postal services has been defined in section

2(f) of Act, 1898 as "the duty chargeable for the transmission by post of postal articles". Under section 4 the exclusive privilege of conveying letters is reserved to the Central Government with certain exceptions which are not significant. Section 17 of the Act says that "postage stamps" shall be deemed to be issued by Government for the purpose of revenue. The provisions of the Act indicate that the post office is not a common carrier. It is not an agent of sender of the postal article for reaching it to the addressee. It is really a branch of the public service providing postal services subject to the provisions of Act, 1898 and the Rules made thereunder. It is in this context, section 14 of Act, 1898 would also be a matter of relevance which says that the production of the postal article, having thereon the official mark of Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be *prima facie* evidence of the fact so denoted. The Statute provides a *prima facie* evidence of the mark given by Postal Department on the postal article sent by post regarding its correctness, though the word "*prima facie*" shows that it is liable to be disproved by adducing evidence otherwise. Meaning thereby, mere denial by the party in respect to whom endorsement has been made by postal agent otherwise, would not be sufficient unless he adduces evidence to discredit *prima facie* evidence in the shape of endorsement made by postal department on the article concerned. This provision read with section 114 of Act, 1872 and section 27 of Act, 1897, makes the situation quite clear.

16. It appears that in various decisions, while considering the question of service of notice, most of the times, provisions of Act, 1898 and its implication have been omitted even when the service was sought to be effected by registered post.

17. Initially the issue of service of notice under section 106 of Transfer of Property Act, 1882 (hereinafter referred to as "Act, 1882") was considered by Privy Council in *Harihar Banerji v. Ramshashi Roy.* [AIR 1918 PC 102] The Court said, if a letter, properly directed, containing a notice to quit, is proved to have been put into post office, it is presumed that letter reached its destination at the proper time according to the regular course of business of post office and was received by the person to whom it was addressed. The presumption would apply with still greater force to such letters, which the sender has taken precaution, to register, and is not rebutted, but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself. Here was a case where service of notice was not denied by all and one of the person has admitted its service, therefore, a presumption was drawn. So the facts of this case makes it clear that the presumption was rightly drawn.

18. In *Sukumar Guha v. Naresh Chandra Ghosh*, [AIR 1968 Cal. 49.] a Single Judge (Hon'ble Amresh Roj, J.) referring to section 114, Illustration (f) of Act, 1872, section 106 of Act, 1882 and section 27 of Act, 1897 said that presumption under section 27 of Act, 1897 can arise only when a notice is sent by registered post while there may arise a presumption under section 114 of Act, 1872 when notice is sent by ordinary post or under certificate of posting. Both the presumptions are rebuttable. When the cover containing notice has been returned to the sender by postal authorities, then

that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Whether it was tendered and, if so, to whom tendered, remains a matter to be ascertained on evidence. If acceptable evidence is available that it was tendered to the party personally, then such facts may bring the service of notice within the second mode, namely, tendered or delivered personally to such party. If however, tender or delivery is not to the party personally but to a member of his family or a servant, then it may be effective tender or delivery only when the notice was addressed to the residence of the party. Such personal tender or vicarious tender may be effective even if it was through the agency of post office, and proof of that tender comes from testimony of any person present at the event, and not only by examining the postman. Here what I finds that when Court talks of evidence, we read it in the context of section 114 of Act, 1872. A registered envelop received back from postal authority with the endorsement of postman of "refusal" will constitute a valid evidence to show that it was served upon the addressee but he refused to accept unless proved otherwise and for that purpose examination of postman for constituting a *prima facie* evidence, further, would not be required, in view of section 14 of Act, 1898. This section 14 of Act, 1898 has been omitted from consideration by the Court.

19. This Court in *Wasu Ram v. R.L. Sethi,* [1963 AWR 472.] said:

"The question whether a communication sent through the post was received by the address is one of fact, but in many cases it may be difficult and inconvenient if not impossible, to produce the postal official who delivered the letter or the money order. To obviate this difficulty the Evidence Act permits certain presumptions to be made under certain circumstances, section 16 provides that "when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact". The illustration (a) to this section explains that in a question "whether a particular letter was despaired, the facts that it was the ordinary course of business for all letter put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant". Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and proper business, in their relation to the facts of the particular case. Illustration (e) to this section says that "the Court may presume that judicial and official acts have been regularly performed"; and Illustration (f) says that the Court may presume that "the common course of business has been followed in particular cases". The combined effect of these two sections is to raise a presumption that a communication sent by post was received in the ordinary course by the addressee, and if it was returned to the sender with the endorsement "refused", the postman must have tendered it but delivery could not be made because of the refusal of the addressee. These presumptions are based on human experience and common sense. Our experience tells us that millions of letters which are posted are delivered in due course to the address, though in exceptional cases letters do get lost. The onus of proof is on the person who asserts that the abnormal happened in his case

and the communication sent by post did not follow its normal course to destination."

20. It further held:

"Whenever a communication is sent by post there is a presumption that it was duly delivered or tendered. If the communication is returned by the post office with the endorsement "refused" the presumption will be that it was tendered by the postal authorities in their ordinary course of business to the addressee who refused. The strength of the presumption will vary according to the fact of each case, being strong in the case of registered letters, and strongest in the case of money orders and insured articles the delivery of which cannot be made without observing certain precautions which are prescribed. Rules Under/Chap. VII of the Post and Telegraph Guide provide that in case of refusal the money order shall be returned to the remitter with the endorsement "refused". If the addressee states on oath that he never received the communication, the Court must decide after considering all the surrounding circumstances, whether he should be believed. The question is always one of fact, though I would add as a matter of plain common sense that a denial which is not only bare but barefaced and made by a person who stood to profit by his denial and, therefore, had all the motive in the word to deny, will not ordinarily weaken the presumption."

21. The above view was followed in *Asa Ram v. Ravi Prakash,* [AIR 1966 All. 519] and the relevant observation in para 3 thereof reads as under:

"3. Mr. Sinha then argued that a presumption of refusal could arise only if the endorsement "refused' was proved by evidence, and this could only be done by producing the postman who made the endorsement. I do not agree. If the landlord deposes that he sent an envelop containing the notice and that the same envelop was received by him with the endorsement "refused' which was not there before and he produces the envelop with the endorsement, this is a sufficient evidence to prove the endorsement. In this case the respondent appeared as a witness and proved the sending and the return of the envelope. On this evidence the Court could rely on the presumption authorized under section 114 of the Evidence Act."

22. Thereafter, the issue came to be considered by a Full Bench in *Ganga Ram v. Phulivati.* [AIR 1970 All. 446.] One of the three questions referred for consideration before Full Bench was "whether it is incumbent on the plaintiff to prove endorsement of "refusal' on the notice sent by registered post by producing postman or other evidence in case the defendant denies service on him?" Full Bench considered this question referring to provisions of all three Statutes, namely, Act, 1872; Act, 1897 and Act, 1898. Besides others, it also referred to Rule 64(1) of Indian Post Office Rules which reads as under:

"64 (1). If the sender of a registered article pays at the time of posting the article a fee of one anna in addition to the postage and registration fee, there shall be sent to him on the delivery of the article a form of acknowledgement which shall be signed by the addressee or if the addressee refuses to sign shall be accompanied by a statement to the effect that the addressee has refused to sign."

23. Having referred to various provisions of Act, 1898 and Rules framed thereunder, the Court said, when the

postmen or the clerks at the station of destination are required to do and what endorsements they are required to make, all such acts are clearly provided in the Statute. All such acts are done by them and all such endorsements are made by them in discharge of their offi cial duties. The Court, thus, proceeded further and held that a notice sent by registered post will be entitled to draw a presumption regarding due service of that notice vide Illustration (e) and (f) of section 114 of Act, 1872. In this re gard, the Court also referred to section 16 of Act, 1872 and said that as a propo sition, it cannot be disputed, when a letter is delivered to an accepting or re ceiving post office, it is reasonably expected that in the normal course it would be delivered to the addressee. That is the official and normal function of post office. Having said so, the Court further proceeded to hold that taking into consideration the manner in which the Post Office deals with registered let ters, the endorsement on the notice "Refused" strengthens the presumption that an attempt was made to deliver notice to the addressee. The Court in para 22 of the judgment clearly said:

"...with the endorsement "Refused" the presumption of service could be raised under section 27 of the General Clauses Act, and it would be a presumption of law, and not of fact."

24. It also held that a presumption of law is rebuttable unless it is made unrebuttable by some provision of law. The Full Bench disagreed with the view taken by Bombay High Court in *Vaman Vithal v. Khanderao Ram Rao,* [AIR 1935 Bom 247.] Nagpur High Court in *Jankiram Narhari v. Damodhar Ramchandra,* [AIR 1956 Nag. 266.] and Madhya Bharat High Court in *Tekchand Devidas v. Gulab Chand Chandan Mai,* [AIR 1957 MadhB. 151.] where the said three Courts have taken a view that there can be no presumption that endorsement of "refusal' was made by postman unless the postman is examined, and, such endorsement was inadmissible in evidence. The Full Bench thus answered the question, accordingly, holding that postman is not necessarily to be examined by plaintiff.

25. The above Full Bench judgment in *Ganga Ram* (supra) has been referred to and approved by Apex Court recently in *Samittri Devi v. Sampuran Singh.* [(2011) 3 SCC 556 : 2011 (99) AIC 50 (SC) : 2011 (85) ALR 462 (SC).]

26. This issue also came up before Apex Court in *Puivada Venkateswara Rao v. Chidamana Venkata Ramana,* [(1976) 2 SCC 409 : AIR 1976 SC 869.] and in para 10 of the judgment, it held:

"It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct."

27. In *Har Charan Singh v. Shiv Rani,* [1981 (7) ALR 206 (SC).] a three-Judge Bench (by majority held) with respect to notice when registered letter is returned with endorse ment of "refusal", said:

"Section 27 of the General Clauses Act, 1897 deals with the topic "Meaning of service by post' and says that where any Central Act or Regulation authorities or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting it by registered post, a letter containing the document, and unless the contrary is

proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgement due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under Illustration (f) to section 114 of the Indian Evidence Act whereunder it is stated that the Court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by pre-paying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under section 27 of the General Clauses Act as well as under section 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise."

28. Again this issue came to be considered by a two-Judge, Bench of Apex Court in *Anil Kumar v. Nanak Chandra Verma,* [(1990) 3 SCC 603 : AIR 1996 SC 1215.] and while overruling this Court's decision in *Shiv Dutt Singh v. Ram Das,* [AIR 1980 All. 280 : 1980 (6) ALR 457 (SC).] it was held, in para 2, as under:

"2. The question considered in both the decisions was to the statement on oath by the tenant denying the tender and refusal to accept delivery. It was held that the bare statement of the tenant was sufficient to rebut the presumption of service. In our opinion there could be no hard and fast rule on that aspect. Unchallenged testimony of a tenant in certain cases may be sufficient to rebut the presumption but if the testimony of the tenant itself is inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant to discharge the initial burden."

29. In *Jagdish Singh v. Natthu Singh* [1992 (19) ALR 297 (SC).] , the Court confirmed a decision of this Court in respect to presumption about service of notice received with the endorsement of "refusal" and held that presumption contemplated by section 27 of Act, 1897 must be drawn to deem service upon the addressee. In para 8 of the judgment, the Court said:

"In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by section 27 oi the General Clauses Act."

30. I find a straight answer as to who should disprove the factum of offer of registered letter when returned by postal authority with the endorsement of "refusal" in *Gujarat Electricity Board v. Atmaram Sungomal Poshani,* [(1989) 2 SCC 602 : AIR 1989 SC 1433.] where it has been held:

"There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption

by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. *The burden to rebut the presumption lies on the party, challenging the factum of service.* In the instant case, the respondent failed to discharge this burden as he failed to place material before the Court to show that the endorsement made by the postal authorities was wrong and incorrect. *Mere denial made by the respondent in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered cover."*
(Emphasis added)

31. Following the Apex Court decision in Gujarat Electricity Board (supra) this Court in *Jhabul Ram v. District judge, Ballia* [1994 (23) ALR 464.] has also said, in para 9, as under:

"9. *Bald denial of the petitioner could not absolve him from the burden of rebutting the presumption of service of notice arising from the endorsement by the postal authorities on the registered cover containing the notice.* The Court below did not commit any error, muchless an error apparent on the face of record, in holding that the notice in question was duly served on the petitioner."
(Emphasis added)

32. I find another Apex Court's decision straight on this issue i.e., *Basant Singh v. Roman Catholic Mission.* [2003 (1) AIC 1 (SC).] In paras 8 and 10 of the judgment, the Court observed:

"The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence."

"As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the Statute."

33. This Court has followed the above decision in *Noor Mohammad v. XIV Additional District and Sessions Judge, Kanpur Nagar.* [2006 (63) ALR 244.] Therein Revisional Court reversed Trial Court's order on the ground that tenant has tendered rent to landlord through money order which was received with the endorsement "refusal" by postman but when landlord denied tender of money order, tenant did not examine postman and hence failed to discharge burden lying upon him. In other words, the Revisional Court said that it is the sender who should examine the postman and not the sendee/addressee for whom the postal authorities have endorsed that it has refused to accept the article. This view of the Revisional Court was reversed by this Court, by ob serving:

"In respect of endorsement of refusal by the postman, there is no necessity to examine the postman to prove that. If there is any such duty then it is for the person denying tender by the postman."

34. This Court also in *Brij Nandan Gupta v. HI Addl. District Judge, Rampur,* [Writ-A No. 24853 of 1989, decided on 30.7.2012, reported in 2012 (94) ALR 593.] in para 21 of judgment said:

"Similarly, if a notice has been sent by landlord by registered post and it is received back with an endorsement made by an official of Post Office namely

Postman that il was refused by the addresee, presumption of service upon addressee shall be drawn unless the tenant prove that the letter was never offered to him by the Postman and endorsement made thereon is not correct. The tenant's bare denial would not be sufficient in such a case and he will have to prove his case by adducing relevant evidence. Such denial can be by making statement on oath and in such case onus would shift on the landlord to prove that refusal was by the tenant which he can show by summoning the postman and adducing his oral evidence. However, this is one aspect of the matter. Sometimes from the conduct of tenant or other circumstances, his denial even if on oath, can justifiably be disproved by the Court without having Postman examined."

35. This Court has also taken a same view in *Smt. Santosh Kumari v. 4th A.D.J., Bareilly.* [2013 (96) ALR 524.]

36. There are two authorities of this Court where a different view has been referred. I find it my duty to discuss them also.

37. *Smt. Sona Devi v. District Judge, Basti*, [1983 ARC 799.] is a decision of a Single Judge of this Court observing, when the endorsement of "refusal" is disputed by defendant-tenant deposing statement in the witness-box and stating on oath that no notice was served, the burden would shift on the plaintiff to prove that the Postman have tendered the notice to addressee. The Hon'ble Single Judge has referred to only section 27 of Act, 1897 with respect to presumption but other provisions including section 14 of Act, 1898 and other authorities of this Court have not at all been referred to. The decision, therefore, has been rendered without referring to relevant provisions which robbed off its binding authority on account of application of doctrine of the ignoratia/per incuriam.

38. In *Sagar v. Addl. District Judge, Lucknow*, [1986 (1) ARC 475.] the testimony of defendant denying the offer of registered letter and refusal was found believable and the Trial Court was satisfied with the rebuttal of the defendant but Revisional Court reversed the same which was not found to be correct by this Court. The Trial Court being the Court of facts when record a finding in a particular manner, which is not found to be perverse or contrary to record, the Revisional Court has no reason to interfere in the arena of evidence and believing or disbelieving the evidence in a particular manner.

39. When the endorsement made by a Postman by virtue of section 14 of Act, 1898 is to be treated *prima facie* evidence of correctness of endorsement, this is a statutory presumption of evidence and can be rebutted by addressee by adducing adequate evidence failing which it is the addressee who will fail and not the sender. It is thus for the addressee to examine the postman to demonstrate that the endorsement made by him (postman) is not correct and mere fact that sender could not identify the Postman would make no different since it is wholly irrelevant."

24. Thus, in light of the aforesaid authoritative pronouncements which deals with the entire conspectus of the case on the subject, it has been held that when the endorsement is made by a postman then by virtue of Section 14 of the Act of 1898, the same is to be treated *prima facie* evidence of correctness of the endorsement. This being a statutory

presumption of evidence, no doubt can be rebutted, by the person to whom the said postal article is addressed by adducing cogent and sufficient evidence, failing which the addressee will fail and not the sender. It is for the addressee to examine the postman to demonstrate that the endorsement made by him is not correct.

25. In light of the principles as extracted herein above, it would indicate that the revisionist as fallen much short of his requisite duty to rebut the presumption and, therefore, this Court has no hesitation to hold that the finding recorded by the Trial Court in so far as the service of notice is concerned does not suffer from any error and in this backdrop, it cannot be said that the presumption as raised by the Trial Court is erroneous. The Trial Court upon assessment of evidence has taken a view which is neither preposterous nor against the material on record. Thus, the aforesaid being a finding of fact cannot be disturbed in exercise of powers under Section 25 of the Provincial Small Causes Courts' Act.

26. The second submission of learned counsel for the revisionist in so far as the rate of rent is concerned, it would be relevant to point, that it is no more res-integra that admission is the best piece of evidence. In the instant case, the revisionist has admitted his signatures and handwriting on a rent note which was filed in original as document bearing No. C-48. The aforesaid rent note clearly indicates that the same was made by the revisionist and that it contains an admission that he has taken on rent a portion of the House No. 295/309, Asharafabad, Lucknow on a monthly rent of Rs. 600/- per month. In contradiction of the aforesaid document, there is no material which has been brought on record to dispute the said rate of rent. Though, a plea has been taken that the rate of rent was Rs. 100/- per month and by merely relying upon the documents as well as the papers tendered by which rent was deposited in the proceedings under Section 30 (1) of the U.P. Act No. 13 of 1972 it does not give any credence to prove the rate of rent hence the submission pales into insignificance since the proceedings under Section 30 Sub Section (1) of the Act of 1972 had been dismissed and there was no adjudication therein. Moreover, the proceedings under Section 30 are summary in nature and it only permits the alleged tenant to deposit the rent in Court at his own risk. The same cannot confer any benefit as the issue regarding the determination of rent is to be done in proceedings before the SCC Court upon leading of evidence.

27. The defendant has attempted to dispute the rent note by bringing on record another document alleged to be a rent note wherein the rate of rent has been mentioned as Rs. 100/-, however, it would be relevant to point that the same was a photocopy and the photocopy is not admissible in evidence. All this aspect of the matter has been considered by the Trial Court noticing that a photocopy is not admissible, accordingly, no error is committed by the Trial Court in coming to a finding regarding the rate of rent which is based on the evidence and admission of the revisionist himself.

28. In view thereof, this Court finds that no error can be pointed out in so far as the recording of the finding regarding the rate of rent is concerned by the Trial Court and moreover this also being a

finding of fact unless pointed out to be perverse cannot be disturbed by this Court.

29. As far as the other submissions of the learned counsel for the revisionist is concerned, suffice to submit that the Trial Court having not decided all the issues is not going to materially affect the judgment, inasmuch as, in view of the Order 20 Rule 4 C.P.C., the judgment of the Judge, Small Causes need only to contain the points of determination and its decision thereon. On perusal of the record, this Court is satisfied that the entire defence as raised by the revisionist has been encapsulated in the points of determination which have been framed by the Trial Court and it has given its finding on all the points of determination as framed and, therefore, merely non-deciding the issues as were framed earlier on 19.03.2005 which in terms of Order 40 C.P.C. was not applicable to Provincial Small Cause Court's proceedings and moreso in absence of any prejudice caused, the aforesaid submissions lacks merit and is rejected.

30. The last submission which was feebly argued by Sri Tripathi regarding the title not being with the opposite party no. 1 also fails, inasmuch as, the opposite party no. 1 had brought on record the copy of the judgment of the title suit decided by the Court of Civil Jude, Senior Division, Mohanlalganj, Lucknow wherein the counter claim of the opposite party no.1 was decreed while the suit of Sri Smt. Veena Srivastawa was dismissed. The aforesaid judgment has been brought on record along with the document list dated 26.09.2015 and Sri Tripathi could not dispute the same. In light thereof, the aforesaid plea regarding the title of the opposite party no. 1 is not open to be urged by the revisionist and consequently it fails.

31. In view of the detailed discussions hereinabove, this Court is of the definite opinion that the judgment dated 07.11.2015 passed by the Additional District Judge, Court No. 9, Lucknow (acting as Judge, Small Causes) in SCC Suit No. 18 of 1999 does not require any interference. The same is affirmed the revision lacks merit and is dismissed. Costs are made easy.

32. The interim order, if any, stands discharged.

33. The registry shall remit the record of the SCC Suit No. 18 of 1999 to the Court concerned within a period of three weeks from today.

(2019)11ILR A699

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 235 of 2004

Duli Ram Maurya ...Defendant/Appellant
Versus
Nand Ram ...Plaintiff/Respondent

Counsel for the Appellant:
Sri Nand Ram

Counsel for the Respondent:
Sri Prem Chandra, Sri A.K. Srivastava, Sri V.P. Singh

A. Property Law- Agreement for sale - Registered agreement for sale can only

be cancelled by executing registered deed of cancellation.

Held: - Learned lower Appellate Court has rightly held that when a registered agreement for sale has been executed between the parties, the same may be considered to have ceased to exist by execution of mere receipt and can only be cancelled by executing registered deed of cancellation. As far as report of expert is concerned under the law the reports submitted by two experts are only an opinion having no binding force. (Para 10)

Second Appeal dismissed (E-5)

(Delivered by Hon'ble Harsh Kumar, J)

1. Heard Sri A.K. Srivastava, learned counsel for appellant and perused the record.

2. The instant appeal has been filed against the impugned judgment and decree dated 22.11.2003 passed by Additional District Judge, Court No.2, District Budaun in Civil Appeal No.101 of 1998 setting aside the judgment and decree dated 18.8.1998 of Ist Additional Civil Judge (Junior Division), Buduan in O.S. No.109 of 1993.

3. The brief facts relating to the case are that plaintiff-respondent filed Civil Suit No.109 of 1993 in the Court of Civil Judge (Junior Division), Buduan for specific performance of contract with the averments that defendant being owner of property in dispute agreed to sell the same in favour of plaintiff for a sum of Rs.25,000/- and executed a registered agreement for sale in his favour after accepting Rs.13,000/- as earnest money and sale deed was agreed to be executed within 14 months on payment of balance sale consideration of Rs.12,000/-; that the plaintiff was always ready and willing to perform his part of contract and also served defendant with notice by registered post through his counsel and appeared in the office of Sub Registrar, Budaun on dates fixed i.e. 25.8.1992 and 2.9.1992 and got his presence registered, but defendant did not turn up, hence suit is being filed.

4. The defendant filed written statement denying plaint allegations with the averments that no agreement for sale was executed, rather defendant was in need of Rs.13,000/-, which was paid by plaintiff to the defendant with the condition that he will put his property as security, which condition was accepted by defendant and consequently impugned agreement for sale was got executed from defendant in favour of plaintiff and it was agreed that when defendant will re-pay the amount, the agreement will cease to exist; that Rs.13,000/- was re-paid by defendant to plaintiff, of which receipt was executed by plaintiff on 16.11.1992 stating that he does not want to get sale deed executed and since the agreement for sale ceased to exist, no cause of action arises to the plaintiff.

5. With regard to signatures of plaintiff over receipt of re-payment 32-A dated 16.11.1992, reports of finger print and handwriting experts were produced by plaintiff as well as defendant. Sri Vishan Kumar Sharma, the hand writing expert in his report produced by plaintiff stated that the disputed signatures do not tally with the admitted signatures of plaintiff while the other report by Sri Anoop Sinha produced by defendant stated that both signatures are identical.

6. The Trial Court relying on the defence case and considering that the

defendant has been a candidate for M.L.A. and M.P. elections and is presently Chairman of Municipal Board, Ujhani held that preparing a forged receipt, may not be imagined from him and moreover since plaintiff has purchased some other property on same date i.e. 16.11.1992 when the receipt 32-A was executed, so also there is every possibility that he would have received back money from defendant and possibility of receipt 32-A to be forged does not arise. The Trial Court accordingly dismissed the suit of plaintiff holding that defendant has succeeded in proving that he had taken a sum of Rs.13,000/- as loan, which has been paid through receipt 32-A.

7. Feeling aggrieved with the judgment and decree passed by the Trial Court plaintiff preferred Civil Appeal No.101 of 1998 under section 96 of Code of Civil Procedure before the District Judge, Buduan, which has been decided by Additional District Judge, Court No.2, Buduan by impugned judgment and decree, allowing the appeal and setting aside the judgment and decree passed by Trial Court and decreeing the suit for specific performance of contract. Feeling aggrieved, defendant has preferred instant appeal under section 100 of Code of Civil Procedure.

8. Learned counsel for appellant contends that the impugned judgment is wrong on facts and law and learned Appellate Court acted wrongly and illegally in disbelieving the receipt 32-A of repayment of loan; that the plaintiff had failed to prove his case and lower Appellate Court committed mistake in allowing the appeal and setting aside the judgment and decree passed by Trial Court without holding that findings arrived at by the Trial Court were perverse; that the impugned judgment and decree are liable to be set aside; that the instant appeal involves as many as 06 substantial questions of law, as proposed at page 9-10 of the memo of appeal.

9. Upon hearing learned counsel for appellant at length and perusal of record, I find that as per defence taken by defendant-appellant, he had taken Rs.13,000/- for a short period and executed agreement for sale with the condition that it will cease to exist on re-payment of amount and since the amount was repaid, the plaintiff-respondent agreed that he does not want to get sale deed executed by executing receipt 32-A. Learned lower Appellate Court at internal page 9 of it's judgment has reproduced the matter mentioned in receipt of repayment 32-A dated 16.11.1992 which states that money of advance sale consideration has been returned, so he does not want to get the sale deed executed. Learned lower Appellate Court at internal page 10 has also noticed that in above receipt there is no mention of interest which is alleged to have been paid by defendant at the rate of Rs.400/- per month in his cross examination, without there any pleadings or whisper of rate of interest or any receipt about payment of interest. It is also pertinent to mention that according to agreement for sale, sale deed was agreed to be executed within 14 months from 3.7.1991 i.e. upto 2.9.1992 and when sale deed was not executed by defendant for 13 months, the plaintiff served him with notice fixing 25.8.1992 and 2.9.1992 for execution of sale deed and remained present at the office of Sub Registrar, Buduan on dates fixed, so the question of executing a receipt of repayment 32-A on

16.11.1992 showing unwillingness to get sale deed executed becomes improbable. It is also noteworthy that when defendant-appellant, who is alleged to have contested elections of M.L.A. and M.P., as mentioned in internal page 11 of the judgment of Trial Court and was Chairman of Municipal Board, Nagar Palika, Ujhani, the story of obtaining loan of Rs.13,000/- by him from plaintiff and payment of interest @ Rs.400/- also becomes highly improbable. The lower Appellate Court has rightly held that plaintiff successfully proved the impugned agreement for sale and that he has always been ready and willing to perform his part of contract.

10. Learned lower Appellate Court has rightly held that when a registered agreement for sale has been executed between the parties, the same may be considered to have ceased to exist by execution of mere receipt and can only be cancelled by executing registered deed of cancellation. As far as report of expert is concerned under law the reports submitted by two experts are only an opinion having no binding effect under provisions of Section 45 of Indian Evidence Act.

11. In view of discussions made above, I find that the learned counsel for appellant has failed to show any illegality, incorrectness or perversity in the impugned judgment and decree passed by learned Appellate Court. The appeal does not involve any substantial question of law and is being devoid of merits is liable to be dismissed.

12. The appeal is accordingly **dismissed** with costs throughout. The impugned judgment and decree are affirmed.

13. Interim order, if any, stands vacated.

14. Let the lower court record be sent back to Court below along with a copy of this judgment for necessary action, if any.

(2019)11ILR A702

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.05.2017

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Second Appeal No. 240 of 2017

Satya Narain ...Appellant
Versus
Shiv Shankar & Ors. ...Respondents

Counsel for the Appellant:
Mohammad Aslam Khan, Sri Ujjwal Tripathi

Counsel for the Respondent:

A. Contract Law-Indian Contract Act, 1872 - Section 16 – Property - Cancellation of Sale deed - Fraud - undue influence due to fiduciary relationship - Old age

Held:- Plaintiff was first required to establish the fiduciary relationship between himself and the defendants before the onus to establish that such undue influence had not been exercised, could arise. – The plaintiff had to establish that defendants were his relatives and that the plaintiff was mentally unsound, illiterate and was unable to bear the undue influence applied by the defendants. Mere old age is not a ground to allege that one is mentally unstable and vulnerable to undue influence. Only when these allegations are established would the burden shift upon the defendants. (Para 9, 13)

The plaintiff could not prove fraud, undue influence or even existence of a fiduciary relationship. In the absence of these factors,

the validity of a registered document cannot be challenged. (Para 14)

Second Appeal dismissed (E-5)

List of Cases Cited:-

1. (Mst) Sabirunnisan Vs Hakimuddin (1997) 8 RD 658.

2. Smt. Suresh Wati Vs St. of U.P. & ors. (2005) 23 LCD 1662.

3. Subhas Chandra Das Mushib Vs Ganga Prasad Das Mushib & ors. AIR 1967 SC 878.
4. Iqbal Ahmad Vs Smt. Naiul 2004 (3) AWC 1974

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. This second appeal under section 100 of the Code of Civil Procedure, 1908 is directed against the judgment and decree dated 15.02.2017 passed by the Additional District Judge, Court No.3, Faizabad in Civil Appeal No.212 of 2012 upholding the judgment and decree dated 13.12.2012 passed by Judge, Small Causes/Civil Judge (Senior Division), Faizabad in Civil Suit No.18 of 1981 (Parmeshwar Deen v. Hausila Prasad and another) whereby the suit preferred by the appellant was dismissed.

2. Briefly stated the facts are that Parameshwar Deen filed a Civil Suit No.15 of 1981 against Hausla Prasad and Mata Badal for cancellation of a sale deed dated 27.07.1979 executed by Parmeshwar Deen in favour of the defendants. During the pendency of the suit, the plaintiff, Parameshwar Deen died and in his place Satyanarayana was substituted as plaintiff. Similarly, during the pendency of the suit, Hausla Prasad died and he was substituted by his son Shiv Shankar. Mata Badal, another defendant also died during the pendency of the suit and he was substituted by Mahavir, Ram Abhilakh, Ganga, Jamuna and Smt Krishna.

3. The suit was filed on the ground that Hausla Prasad and Mata Badal were the plaintiff's nephews; that the plaintiff was an old, illiterate and rustic person aged about 84 years; that he had no wife or children; that the defendants Hausla Prasad and Mata Badal started visiting his place and assisting him in agriculture as a result of which a fiduciary relationship was established between them; that the defendants persuaded the plaintiff to execute a Will so that the plaintiff would remain the owner of the property during his lifetime and by operation of the Will, the property would transfer to the defendants after the death of Parmeshwar Deen; that the defendants took the plaintiff to the office of the Sub-Registrar, Bikapur on 27.7.1979 on the pretext of executing a Will deed, however, the defendants fraudulently got a sale deed executed in their favour in respect of plot no.814 and half part of plot no.472; that when the plaintiff came to know about the execution of the sale deed, he asked the defendants to get the same cancelled, but on their refusal, the Civil Suit No.15 of 1981 was filed on 1.12.1980.

4. The case of the defence is that the defendants and the plaintiffs are not related to each other in any manner; that both had maternal place in the same village; defendants were goldsmiths by profession and sold utensils; that the plaintiff took a loan of Rs.4000 from them and as he was unable to pay, he expressed his desire to execute a sale deed of the property in dispute for a sum of Rs.8000; that the plaintiff went to the

office of the Sub Registrar and executed a sale deed in a fully conscious state and after receiving a sum of Rs.4000 in addition to the sum of Rs.4000 taken by him on loan Parmeshwar Deen executed the sale deed in favour of the defendants; that after the execution of the sale deed mutation also took place.

5. On the basis of the pleadings the trial Court framed five issues. First being as to whether the sale deed dated 27.7.1979 was liable to be cancelled. Satyanarayan examined himself as PW1 and Ram Kumar Singh as PW2. On behalf of the defendants one Shiv Shanker was examined as DW1, Ganga Prasad as DW2 and Ram Kumar as DW3. The plaintiff filed a copy of the sale deed, extracts of khatauni, details of Kutumb register. The defendants also find documentary evidence.

6. The trial Court found that the plaintiff had failed to establish his case and the sale deed was not liable to be cancelled. With these findings the trial Court dismissed the suit. On 13.12.2012 an appeal was filed before the District Judge which was also dismissed by the Additional District Judge on 15.2.2017.

7. Heard Sri Mohd Arif Khan, Senior Advocate assisted by Sri Ujjwal Tripathi, the learned counsel for the appellant at some length.

8. The submission of the learned counsel for the appellant is that when the document is challenged on the ground of fraud, and undue influence due to fiduciary relationship then the burden to prove the validity of the transaction shifts upon the defendants, who relies upon the document. His submission is that in this case the defendants have failed to establish that document was executed by Parameshwar Deen out of his free will and since the document has been obtained by playing fraud and undue influence, the suit ought to have been decreed. The contention of the learned counsel for the appellant is that it is established from record that both the defendants reside in the same village. Evidence has been led to the effect that they used to call Parmeshwar Deen as mama i.e. maternal uncle. The plaintiff's age as 84 years has not been disputed. He was illiterate and as such he was to be treated as a pardaah nasheen lady and consequently the burden was upon the defendants to establish that the sale deed was executed without any undue influence which they failed to discharge. In support of his contention, he has placed reliance upon the cases reported in *(Mst) Sabirunnisan v. Hakimuddin, (1997) 8 RD 658, and Smt. Suresh Wati v. State of U.P. and others, (2005) 23 LCD 1662.*

9. I have gone through the judgments very carefully and find that the lower Court has discussed the evidence in great detail. The plaintiff had to establish that defendants were his relatives i.e nephew (bhanjas) and that the plaintiff was mentally unsound, illiterate and was unable to bear the undue influence applied by the defendants. There is nothing on record to establish that the defendants were in any manner related to the plaintiff Parameshwar Deen. No evidence has been led regarding his mental and physical ailments or the capacity to take a sound decision. Mere old age is not a ground to allege that one is mentally unstable and vulnerable to undue influence. Only when these allegations are established does the

burden shift upon the defendants. Defendants have examined Ram Kumar (DW3), the marginal witness of the sale deed. He has proved the purchase of stamps, execution of the deed and the payment of consideration. The Lekhpal of the village was also a witness in the mutation matter and can be treated as an independent witness. No marginal witness has been produced by the plaintiff. Parmeshwar Deen, the original plaintiff died without entering the witness box. Whatever Satyanarayan has said is with reference to what he was told by Parameshwar Deen. Satyanaryan had no personal knowledge about the relationship or the allegation that the sale deed was executed in place of a Will. The case of the plaintiff's rests solely upon the oral evidence which has been discussed by the trial Court at length. It has been pleaded that subsequent to the execution of the sale deed, a Will was executed by Parameshwar Deen in favour of Satyanarayana in the year 1980. The trial Court has rightly concluded that if the plaintiff was fully conscious and capable of executing a Will deed in the year 1980, he cannot be said to have been suffering mental incapacity or other ailments in 1979, while executing the sale deed especially when there is no evidence to the contrary.

10. In *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib and others, AIR 1967 SC 878* the Apex Court quoted with approval the observation of Privy Counsel in *Raghunath Prasad v. Sarju Prasad, AIR 1924 PC 60,* which expounded three stages for consideration of a case of undue influence as under: -

"4. Under s.16 (1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor'?

* *
*

7. The three stages for consideration of a case of undue influence were expounded in the case of Raghunath Prasad v. Sarju Prasad in the following words :-

"In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached-namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in ,I position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?"

11. In *Subhas Chandra Das Mushib (supra)* it was also held that merely because the parties were nearly related to each other no presumption of undue influence can arise.

12. Reference may also be made to a judgment in the case of *Iqbal Ahmad v. Smt. Naiul, 2004 (3) AWC 1974* wherein this Court has held as under: -

"**11.** This legal position, in my opinion does not apply to the facts of the case before us. It is significant to note that the plaintiff No.1 was not a retarded brain or unsound mind person since his childhood or birth. The plaintiffs alleged that the plaintiff No.1 had attained the age of 80 years and since last 3-4 years on account of old age, illness etc., he had lost reasoning power and that he was not in a position to assess whether some act was to his benefit or to his disadvantage. Defendant No.1 disputed this fact. It was, therefore, for the plaintiff to have proved that the plaintiff No.1 was suffering from any deficiency. Since no evidence was led at all in this regard, it could not be said that he was suffering from any such deficiency or was dependent on some third person. Further defendant was the sister's son of the plaintiff No.1. Although in the plaint, it has been mentioned that the plaintiff No.1 was greatly relying on his sister, sister's husband and the defendant etc. but nothing was stated to show that he was dependent on defendant or the above relations. In para 4 of the plaint, it has been mentioned that plaintiff No.1 used to consult these relations in his matter. The fact of consultation itself indicates that the plaintiff No.1 was not of unsound mind as is being pretended by the plaintiffs. Nothing in the plaint shows that the defendant was in relationship of active confidence with regard to the plaintiff No.1. There was no evidence on record to show that there was any fiduciary relationship between them. That being the position, the legal presumption would be in favour of the defendant of the sale deed being duly executed by the plaintiff No.1 in favour of the defendant.

12. *In the case of Ishwar Dass Jain (dead) v. Sohan Lal (Dead), 2000 (1) AWC 2.1 (SC) (NOC) : (2000) 1 SCC 434, the Apex Court has held that there is a presumption of correctness of endorsement made in the deed (mortgage deed) by Sub-Registrar under Section 58 of the Registration Act. This presumption no doubt is rebuttable but in the instant case, no evidence has been led to rebut the presumption.*

13. In the case of A. Raghavamma and another v. A. Chenchamma and another, AIR 1964 SC 136 (V. 51 C 10), it has been held that there is an essential distinction between the burden of proof and onus of proof : burden of proof lies upon the person, who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

14. *In the case before us, the initial burden of proof was on the plaintiff but no attempt was made to lead evidence to show that the plaintiff No.1 was in any manner handicapped and advantage of this was taken by defendant to play fraud by misrepresentation etc. Had the plaintiff led any evidence, onus could have shifted to the defendant if the evidence led by the plaintiff was reliable."*

(emphasis supplied)

13. Thus, it is clear that the plaintiff was first required to establish the

fiduciary relationship between himself and the defendants before the onus of establishing that such undue influence had not been exercised. The Courts below have recorded a concurrent finding of facts that such a relationship did not exist between the parties, and the same cannot be interfered with by this Court as such findings cannot be said to be either perverse or based upon no evidence. In this light, the appellant's contention that the defendants were required to prove that the plaintiff executed the sale deed with a free will is liable to be rejected.

14. The Appellate Court has also discussed the case law cited by the appellant and has discussed the evidence led by the plaintiff and the defendant's. Both the Courts below have after due consideration found that the plaintiff has failed to prove his case. The plaintiff could not prove fraud, undue influence or even fiduciary relationship. In the absence of these factors the validity of a registered document cannot be challenged. Since the document has been upheld by the Courts below, obviously there is no need to examine other questions like possession etc. It is relevant to state that while one plot has been sold in its entirety, the other plot has been sold to the extent of its half share. In the circumstances, there is absolutely no clouds of suspicion surrounding the transaction and as such this Court does not find any reason to disagree with the conclusions drawn by the Courts below.

15. The second appeal is concluded by findings of fact which are concurrent. No substantial question of law is born out from the judgments calling for interference under section 100 CPC.

16. The second appeal is dismissed.

(2019)11ILR A707

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.11.2019

BEFORE
THE HON'BLE VIRENDRA KUMAR-II, J.

Second Appeal No. 256 of 2001

Radha Krishna Ji Esthapit Mandir
...Appellant
Versus
Ganesh Prasad Mishra & Anr.
...Respondents

Counsel for the Appellant:
Sri S.K. Tiwari, Sri Aakash Prasad, Sri Amitav Singh, Sri Arun Saxena, Sri S.P. Shukla

Counsel for the Respondents:

A. Civil Law-U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 - Section 1- Applicability - Not applicable if disputed shop/property is situated in village.

Held: - Disputed shop is situated in Village Kamlapur, and it does not fall within urban limits of city Sitapur or other municipalities or area specifically notified – Kamlapur, Maholi and Peer Nagar all are villages and part of Gram Panchayat. Therefore, the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 is not applicable to the disputed property/shop. Since disputed shop/property is not situated in urban area of the city Sitapur or any municipality or notified area, the Act No. 13 of 1972 is not applicable to the disputed property of this Suit No. 17 of 1994. (Para 40)

B. Civil Law-Transfer of Property Act, 1882 - Section 106(3) - Notice falling short of period specified in section 106(1) - Not Invalid - where a suit or

proceeding is filed after the expiry of the period mentioned in section 106(1).

Held:- For the sake of argument even if it is considered that three days were short of the clear 30 days for vacating the disputed shop by the respondents, would not make notice dated 03.08.1993 terminating tenancy of respondents on 31.08.1993, defective or invalid, because suit was instituted by the appellant/plaintiff on 12.01.1994 much after period of 30 days. The notice was issued on 03.08.1993, which was served on the respondent on 10.08.1993 by refusal as reported by Postman. (Para 22)

C. Transfer of Property Act, 1882 - Section 106 - Objection to the invalidity or insufficiency of notice under Section 106 of the TP Act should be specifically raised in the written statement, failing which it will be deemed to have been waived.

Held:- Since the respondents/defendants did not take a plea, in their written statement, that the notice- 9 Ga/ 8 Ga was defective as the period specified in the notice to vacate the suit property fell short by period of 03 days, it shall be deemed that they have waived plea in this regard – First Appellate Court has relied upon defect of short period mentioned in notice under Section 106 Transfer of Property Act and that complete/clear 30 days were not given to respondents to vacate the disputed shop is also not well founded, because defect of Notice- 9Ga was not pleaded by the respondents in their written statement. Appellate court has not considered that no plea of defective or invalid notice was taken at the earlier stage by the respondents before trial Court and no issue was framed in this regard that notice under Section 106 Transfer of Property Act was defective or invalid. (Para 25, 31, 33)

Second Appeal allowed (E-5)
List of cases cited: -

1. Sudhir G. Angur Vs M. Sanjeev (2006) 1 SCC 141.

2. Hardoi Zila Sahkari Bank Ltd, Hardoi Vs Smt. Sarla Gupta & anr. 2010 SCC Online All 741.

3. Reddy Ramamurthy (died) by LRS. Vs Goli Bhaskara Rao 2006 SCC Online AP 629.

4. Amina Khatoon & ors. Vs Smt. Johra Bibi & ors. AIR 1971 All 372.

5.Ganga Ram Vs Smt. Phulwati 1970 ALJ 336.
6. Dharam Pal Vs Harbans Singh (2006) 9 SCC 216.

7. Bhagabandas Agarwalla Vs Bhagwandas Kanu (1977) 2 SCC 646.

8. Balbir Singh Vs Kalawati AIR 1976 All 434.

9. Battoo Mal Vs Rameshwar Nath & anr. AIR 1971 Del 98.

10. Ambalal Sarabhai Enterprises Ltd. Vs Amrit Lal & Co. & anr. 2001 (8) SCC 397.

11. Smt. Champa Devi & anr. Vs Rent Control & Eviction Officer (1st) Alld. & anr. 2002 (1) AWC 673.

12. Thakur Rang ji Maharaj & anr. Vs Om Prakash Agarwal & anr. 2012 SCC OnLine All 1923.
13. Hazi Mohd. Rashid (D) thru. LRS Vs XIIth Additional District Judge Agra & anr 2013 (3) AWC 2274.

14. Thulasidhara Vs Narayanappa (2019) 6 SCC 409.

15. Gurnam Singh Vs Lehna Singh (2019) 7 SCC 641.

16. St. of M.P. Vs Dungaji (2019) 7 SCC 465.

17. S.V.R.Mudaliar (Dead) by Lrs. & ors. Vs (Mrs) Rajabu F.Buhari (Dead) by Lrs. & ors. AIR 1995 SC 1607.

18.Rani Hemant Kumari Vs Maharaja Jagadhindra Nath 10 CWN 630.

19. Smt. Sona Devi Vs Nagina Singh & ors. AIR 1997 Patna 67.

20. Jaideo Yadav Vs Raghunath Yadav & anr. 2009(3) PLJR 529

21. Doodhnath & anr. Vs Deonandan AIR 2006 All

22. Awadh Narayan Singh Vs Harinarayan (Second Appeal No. 47 of 2015, decided on 22.1.2015).

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

1. The present second appeal has been preferred assailing impugned judgment and decree dated 27.03.2001 delivered by the Court of Additional District Judge, III, Sitapur in Civil Appeal No. 6 of 2001: Ganesh Prasad Mishra and others Vs. Radha Krishna Ji Mandir, Kamlapur. The first appellate Court has set aside judgment and decree dated 19.12.2000 delivered by the Court of Civil Judge (Junior Division), Biswan Sitapur in Civil Suit No. 17 of 1994 (Radha Krishnaji Virajman Mandir, Kamlapur Vs. Ganesh Prasad Master and another. Learned trial Court vide judgment dated 19.12.2000 had decreed the suit of the plaintiff/appellant.

2. The present appeal admitted on the substantial question of law, Serial No. E, F, G, H formulated in the grounds of the appeal vide order dated 03.07.2001 passed by this Court. The relevant substantial questions of law are as follows:

"E. Whether the provision of U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 is applicable in the present case ?

F. Whether the notice dated 3.8.1993 fulfills the requirement of Section 106 of Transfer of Property Act ?

G. Whether in the present case notice under Section 106 Transfer of Property Act was required ?

H. Whether the judgment of the lower appellate court is vitiated as the lease in favour of the Defendant/ respondents was compulsorily registerable under Section 17 of the Registration Act as it was for a period of more than year ?"

3. It is contended by the appellant that appellant/plaintiff filed Civil Suit for eviction and damage for wrongful use and occupation (mesne profits), being owner of the disputed shop. The defendant no.1/respondent Ganesh Prasad Mishra was tenant at the rate of Rs. 7 per month. Defendant no.2/respondent is son of defendant no.1 and he is running the business of Cycles in the disputed shop. The defendants have no authority to make alteration or addition in the shop. They had dug the shop from inside and changed its original shape. The plaintiff/appellant tried to restrain them, from altering the position and the shape of the shop. The respondent/defendants did not pay heed to the objection raised by the plaintiff. Therefore, their tenancy was terminated through registered notice and appellant asked them to vacate the shop on 31.08.1993 and to pay the amount of damages. The respondents did not comply the notice, therefore, Suit was instituted in the Court of Civil Judge (Junior Division). Therefore, relief has been sought that judgment and decree passed by appellate Court be set aside and judgment and decree dated 19.12.2000 passed by the Court of Civil Judge (Junior

Division), Biswan Sitapur in Civil Suit No. 17/94 be restored and affirmed.

4. The factual matrix of the present case giving rise to institution of present second appeal is that plaintiff Radha Krishna Ji Temple Esthapit, Kamlapur, situated in Mazra Maholi, Pargana Peer Nagar, Tahsil Sidhauli, District Sitapur, is a registered trust and disputed shop belongs to the plaintiff and vested in it. The respondent no.1 Ganesh Prasad Mishra is tenant of the disputed shop at the rate of Rs. 7 per month and defendant no.2/respondent no.2 is his son and doing business of Cycles in this shop. The respondents dug the shop and broke the roof and constructed staircase and other illegal constructions without consent and permission of the plaintiff/appellant and altered the original shape and position of the shop. Therefore, tenancy of the respondent no.1 was terminated through registered notice and he was asked to vacate the shop by 31.08.1993.

5. Per contra respondents contended in their written statement that notice under Section 106 Transfer of Property Act was not given to them. They made constructions in the disputed shop by taking oral permission from representative Cashier Late Sri Ramendra Kumar Saxena of plaintiff/appellant after paying amount of Rs. 5000/-, who was looking after affairs of the temple and its other properties. It is further contended that they constructed two storied house and renovated disputed shop with consent and permission of Cashier Late Sri Ramendra Kumar Saxena. They constructed staircase 15 years ago for the purpose of repair of roof. The representative of plaintiff demanded amount of Rs. 25,000/- from them. The respondents refused to pay this amount. Therefore, suit was instituted on behalf plaintiff. It is also contended that plaintiff wants to give disputed shop to another person on higher rent. The respondent no.1 and 2 has accepted that they were tenant of disputed shop at the rate of Rs. 7/- per month from 50 years ago and paid up to date rent to the plaintiff.

6. The plaintiff contradicted contentions of written statement and reiterated the contention made in the plaint by means of reply filed by it.

7. The trial Court has framed following six issues, which are as under:

1– क्या विवादित दुकान नक्शा–नजरी वाद–पत्र अक्षर क, ख, ग, घ, प्रतिवादीगण से वाद–पत्र में बताये गये कारणों के आधार पर खाली कराये जाने योग्य है ?

2– क्या विवादित दुकान से मलवा हटाये जाने योग्य है तथा वादी कब्जा पाने का अधिकारी है ?

3– क्या वादी 5 हजार रूपये नुकसान की बाबत मुआवजा पाने के अधिकारी है ?

4– क्या सात रूपये प्रतिमाह के हिसाब से मुआवजा वादी पाने का अधिकारी है ?

5– क्या प्रतिवादी को धारा 106 सम्पत्ति अन्तरण अधिनियम की नोटिस तामील करायी गयी है ?

6– वादी किस अनुतोष को पाने का अधिकारी है ?

English version of issues framed by the trial Court is as follows:

"1. Whether the disputed shop shown by alphabets Ka, Kha, Ga, Gha in the site-map of the plaint, is liable to be vacated from the respondents on the basis of reasons narrated in the plaint ?

2. Whether the malba (debris) is liable to be removed from the disputed shop and the plaintiff is liable to get possession ?

3. Whether the plaintiff is liable to get compensation of Rs. 5 thousand for damages ?

4. Whether the plaintiff is liable to get compensation at the rate of Rs. Seven per month ?

5. Whether the respondent has been served the notice under Section 106 of the Transfer of Property Act ?

6. For which relief the plaintiff is entitled ?"

8. Learned trial Court of Civil Judge (Junior Division) recorded evidence of PW-1 Shiv Prakash Singh, PW-2 Mukut Bihari Mishra, PW-3 Ram Swaroop Singh and evidence of DW-1 Sant Saran Mishra, respondent no.2 and DW-2 Aanand Swaroop Awasthi. It has also considered documentary evidence relied upon by both the parties and delivered judgment dated 19.12.2000 and decreed the plaintiff 's suit and directed the respondents to vacate disputed shop within 45 days and also directed to remove construction material of illegal constructions. The relief regarding damages was refused.

9. Learned first appellate Court vide impugned judgment dated 27.03.2001 has allowed Civil Appeal No. 6 of 2001: Ganesh Prasad Mishra and others Vs. Radha Krishna Ji Mandir, Kamlapur and has set aside judgment and decree dated 19.12.2000 delivered by the Court of Civil Judge (Junior Division), Biswan Sitapur in Civil Suit No. 17/94: Radha Krishnaji Virajman Mandir, Kamlapur Vs. Ganesh Prasad Master and another.

10. The appellant/plaintiff being aggrieved by the impugned judgment and order has preferred the present second appeal.

11. During pendency of present second appeal, respondent no.1 Ganesh Prasad Mishra had expired and his legal representatives respondent nos. 1/1 to 1/5 were substituted. The respondent no. 1/1 Smt. Chandra Kali Mishra also expired during pendency of present second appeal. Her heirs respondent nos. 1/2 to 1/5 and respondent no.2 were already on record.

12. After death of learned counsel Sri P.L. Mishra, Advocate, engaged on behalf of respondents, Card Notices were issued. Notices issued against respondent no.2-Sant Sharan Mishra was served personally, as per report submitted by OSD on 22.01.2015. Vide order dated 29.10.2018, it was found that notices were served on respondent nos. 1/2 to 1/5. The substitution application (C.M.Application No. 109684 of 2017) was allowed regarding death of respondent no.1/1 with the direction that, "if none appears for the respondents, present second appeal shall be heard ex-parte and would be decided on merits".

13. Sri Arun Saxena, learned counsel for the appellant sought adjournment on 21.12.2018 and 21.01.2019. He did not appear on 08.03.2019. No one had appeared on behalf of respondents on 21.12.2017, 28.03.2019, 11.04.2019 and 30.04.2019 also. Therefore, this appeal was heard on 06.11.2019 ex-parte.

14. I have heard learned counsel for the appellant and perused the written arguments also.

15. Learned counsel for the appellant relying on **Sudhir G. Angur v.**

M. Sanjeev, (2006) 1 SCC 141 has argued that Hon'ble Supreme Court (Bench of three Judges) has held in paras 4, 5 and 11 as follows:

"4. After the revision was dismissed the appellants applied for rejection of the plaint under Order 7 Rule 11 CPC. According to the appellants the suit was not maintainable by virtue of Section 40 of the Mysore Act. This application was dismissed by the trial court on 6-8-2001. The trial court held that the question whether the Mysore Act applied or not would have to be decided on evidence. The appellants filed a revision before the High Court of Karnataka which has been dismissed by the impugned judgment.

5. At this stage, it must be mentioned that the Mysore Act has been repealed in the year 2003. Thus, even presuming the application under Order 7 Rule 11 was required to be allowed, even then the plaint would only have to be returned for presentation to the proper court. Now the proper court would be the Court of the Principal City Civil Judge, Bangalore which is the same court. Thus it would be an idle formality to have the plaint rejected to be presented again to the same court. In such a case no question of limitation would arise as the time taken in the earlier suit would get excluded. In the above view no further consideration was necessary. However, as the matter has been fully argued, we deal with all the contentions.

11. In our view, Mr G.L. Sanghi is also right in submitting that it is the law on the date of trial of the suit which is to be applied. In support of this submission, Mr Sanghi relied upon the judgment in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass* [AIR 1952 Bom 365 : 54 Bom LR 330] wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date, when the suit or proceeding comes on for trial or disposal. It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date, when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repealed. It could not be denied that now the Court has jurisdiction to entertain this suit."

16. Relying on the aforesaid precedent learned counsel for the appellant has further argued that Section 106 of Transfer of Property Act, 1882 has been substituted by Act no. 03 of 2003, vide Section 2 of amending Act, which got ascent of President on 31.12.2002. The amending Act provides transitory provisions as follows:

"3. Transitory provisions.- The provisions of section 106 of the principal Act, as amended by section 2, shall apply to-

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act;

(b) all notices which have been issued before the commencement of this

Act but where no suit or proceeding has been filed before such commencement."

17. On perusal of transitory provisions of Act No. 3 of 2003, it reveal that amended Section 106 of Transfer of Property Act, 1882 was made applicable to all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act.

First and Second appeal are deemed to be continuation of the suit.

18. A Coordinate Bench of this Court in Civil Revision No. 176 of 2006: **Hardoi Zila Sahkari Bank Limited, Hardoi V. Smt. Sarla Gupta And Another 2010 SCC Online All 741** has dealt with provisions of Section 106 on the basis of Transfer of Property (Amendment) Act, 2002 (Act 3 of 2003) passed by Parliament and U.P. Act No. 24 of 1954 and Article 254 of the Constitution of India and observed as follows:

.....

"21. Article 254 reads as under:--

"Inconsistency between laws made by parliament and laws made by the Legislature of States- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

22. Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to amending, varying or repealing the law so made by the Legislature of the State.

23. Article 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualifies the exception. If there is repugnancy between the law made by the State and that made by Parliament with respect to same field, the law made by Parliament shall prevail to the extent of the repugnancy and the law made by the State shall, to the extent of such repugnancy, be void. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together. For example, where both prescribed punishment for the same offense but the punishment differs in degree or kind or in the procedure prescribed. In all such cases the law made by the Parliament shall prevail over the State law in view of Article 254.

24. Under Article 254 of the Constitution, only in the following circumstances question of repugnancy comes (i) when there is direct conflict between the two provisions. This may happen- (a) Where one cannot be obeyed

without disobeying the other (b) two enactments may also be inconsistent although obedience to each of them may be possible without disobeying the other.

25. Presumably, the Parliament with a view to introduce a uniform law throughout the country avoiding defect found in practice passed the Transfer of Property (Amendment) Act, 2002. This object would be frustrated if the argument that both the U.P. Act No. No. 24 of 1954 and the Amending Act, 2002 should co-exist as the U.P. Act No. of 1954 has not been omitted. By State Amendment i.e. U.P. Act No. 24 of 1954 the period of notice of "fifteen days" as prescribed in Section 106 of the Transfer of the Property Act was substituted by the words "thirty days" but by the Transfer of Property (Amendment) Act, 2002 the entire 106 Section occurring in the Transfer of Property Act, 1882 has been substituted by a new Section prescribing therein the period of notice as fifteen days. Therefore, in view of the settled law, the Central Amendment Act would prevail over the U.P. Act No. 24 of 1954.

26. It may also be noted that though the notice to quit was sent by the respondents to the revisionist on 4.11.2004 providing 15 days time to vacate the premises but, admittedly, the suit was instituted by the revisionists in the year 2005, which is admittedly, much after 15 days time, provided in the notice.

27. Even otherwise as sub-Section 3 of Section 106 has been brought on the statute book by means of Amendment Act, 2002, it specifically provides that the notice under sub-Section 3 of Section 106 of the Act shall not deem to be not valid merely because the period mentioned therein falls short of the period specified under that subsection, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. Thus by fixation of law, proceedings cannot be vitiated on the ground of defective notice.

28. In a case reported in (1975) 1 SCC 192 : AIR 1975 SC 164 Boucher Pierre Andre v. Supdt. Central Jail, their Lordships of Hon'ble Supreme Court held that where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion (para 3).

29. In (1997) 1 SCC 650 Gajraj Singh v. State Transport Appellate Tribunal, after considering a number of earlier cases, Hon'ble Supreme Court observed as under:

"22.....Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

30. Aforesaid proposition of law has been affirmed by the Hon'ble Supreme Court in the cases reported in (2004) 6 SCC 59 State of West Bengal v. Sadan K. Bormal, (2005) 3 SCC 161 State of A.P. v. Pensioner's Association, (2000) 2 SCC 699 State of Maharashtra v. Laljit Rajshi Shah, (2008) 5 SCC 257 UCO Bank v. Rajinder Lal Kapoor.

31. In view of the above discussions, the provisions of the U.P. Act No. 24 of 1954 cannot be allowed to operate only because it has received the Presidential assent when the entire provision of Section 106 of the Transfer of Property Act has been substituted in

question is directly in conflict with the Central Act.

19. I have perused un-amended Section 106 of Transfer of Property Act, 1882 and amended Section 106 of Transfer of Property Act, on the basis of Act 03 of 2003, which are as follows:

Unamended:-

"106. Duration of certain leases in absence of written contract or local usage.- (1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

Amended:-

After substitution by Transfer of Property (Amendment) Act, 2002 (Act No. 3 of 2003), Section 106 of the Transfer of Property Act, 1882 reads as under:--

Duration of certain leases in absence of written contract or local usage:--

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to years, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in subsection (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]"

Substitution of Section 106 results in repeal of the earlier provision and its replacement by the new provision.

20. Learned counsel for the appellant has relied on **Reddy Ramamurthy (died) by LRs. Vs. Goli Bhaskara Rao 2006 SCC Online AP 629** of High Court of Judicature at Andra Pradesh at Hyderabad and argued that Andra Pradesh High Court in para 14 and

15 has considered Transfer of Property (Amendment) Act, 2002, Central Act No. 3 of 2003 and observed as follows :

"14. Accordingly, the Transfer of Property (Amendment) Act, 2002, Central Act No. 3 of 2003, was enacted and by Section 2 thereof, Section 106 of the Principal Act was amended specifically incorporating sub-section (3) under which a notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. Sub-section (3) as amended, undoubtedly, makes Ex. A.1 notice read with Ex. A.3 notice not invalid due to termination of tenancy on 11-10-1991 instead of 12-10-1991.

15. The amended Section 106 shall apply according to the transitory provision in Section 3 of the Amendment Act to all notices in pursuance of which any suit or proceeding is pending at the commencement of the Amendment Act. It is true that the suit was disposed of on 11-8-1994 and was not pending by the date of the Amendment Act coming into force. But this appeal by the defendant against the judgment and decree in the suit is undoubtedly pending then and even now. As clarified by Hon'ble Sri JusticeV.V.S. Rao in the orders on Review A.S.M.P. No. 338 of 2005, dated 13-12-2005, appeal is a continuation of the suit and even if the matter is pending at the appellate stage, the amended provision would apply. The contention to the contrary was negatived. The contention that this appeal is "not in pursuance of Exs. A.1 and A.3 notices and therefore, the amended provision does not apply, defeats the very purpose and object of the amendment. Even without the aid of the statement of objects and reasons for the Legislation, the plain, unambiguous and grammatical language of Sections 2 and 3 of Amendment Act makes it clear that the pendency of a *lis* in which eviction of tenant is sought, in pursuance of a notice to quit, is what all is required for the application of the amended provision, irrespective of whether the pending lis is at the instance of the landlord or the tenant. An appeal by tenant against eviction in pursuance of a notice to quit also arises in pursuance of such notice for adjudication of the validity or otherwise of the same. Such appeal, in effect and substance, becomes pending in pursuance of such notice only and any other construction will result in an absurd situation where the notice would have become valid, if the suit were pending and would have to be considered invalid, if the appeal is pending, though it is a continuation of the suit. While the constitutional and legal validity of the amendment is not in dispute, the transitory provision in Section 3 of the Amendment Act has to, therefore, apply with full force to all notices in pursuance of which any suit or appeal is pending at the commencement of that Act. In that view of the matter, the appeal has to fail."

Substantial Question of law F :-

21. Learned counsel for the appellant relying upon amended Section 106 Sub-Clause (3) has vehemently argued that a notice under Sub-Section (1) of Section 106 of Transfer of Property Act shall not be deemed to be invalid, merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is

filed after the expiry of the period mentioned in that sub-section.

There is substance in the argument of learned counsel for the appellant, because Section 106 sub-clause (3) provides that notice under sub-section (1) shall not be deemed to be invalid on the basis of fact that appellant/plaintiff sent notice-8 Ga/ 9 Ga on 03.08.1993 terminating tenancy of respondents on 31.08.1993.

22. Learned counsel for the appellant has further argued that according to provisions of amended Section 106 sub-clause (1) of Transfer of Property Act, period of notice has been prescribed 15 days in stead of 30 days. State Legislature of U.P. by means of Act No. 24 of 1954 has substituted period 30 days in place of 15 days. Amendment Act 03 of 2003 will prevail over, the aforesaid said amendment made under Section 106 of Transfer of Property Act,1882 by means of Act No. 24 of 1954. Therefore, at present 15 days notice is required for termination of lease from month-to-month.

On the other hand, according to amended Section 106 sub-clause (3) of Transfer of Property Act, 1882 is squarely applicable to the pending cases also. Therefore, for the sake of argument if it is considered that three days were short of the clear 30 days for vacating the disputed shop by the respondents, as per provisions amended by the Act No. 24 of 1954 by the Legislature of the State of U.P., would not make notice dated 03.08.1993 defective or invalid, because suit was instituted by the appellant/plaintiff on 12.01.1994 much after period of 30 days. The notice was issued on 03.08.1993, which was served on the respondent on 10.08.1993 by refusal as reported by Postman.

23. Learned trial Court has recorded specific finding regarding Issue No.5 that notice- 8 Ga sent to respondents by registered post along with acknowledgment. On original copy Notice - 9 Ga, post-man has endorsed the aforesaid fact that respondent **"Ganesh Prasad refused to accept notice"**, who was the original tenant of disputed shop. Therefore, notice under Section 106 Transfer of Property Act was sufficiently served on the respondent no.1/tenant.

24. Learned trial Court has relied upon precedent of this Court propounded in the case of **Smt. Amina Khatoon and others Vs. Smt. Johra Bibi and others, AIR 1971 Allahabad page 372 and Ganga Ram Vs. Smt. Phulwati, 1970 ALJ page 336.**

25. As far as, learned First Appellate Court has relied upon defect of short period mentioned in notice under Section 106 Transfer of Property Act and complete/clear 30 days were not given to respondents for vacating the disputed shop is also not well founded, because defect of Notice- 9Ga was not pleaded by the respondents in their written statement. On this score also, learned First Appellate Court could not record finding that notice under Section 106 Transfer of Property Act was defective on the aforesaid ground.

26. Learned counsel for the appellant has relied upon exposition of law propounded by Hon'ble Supreme Court in the case of **Dharam Pal v. Harbans Singh, (2006) 9 SCC 216** and argued that Hon'ble Supreme Court in paras 7 and 8 of the said judgment has held as follows:

"7. Learned counsel for the appellant submits that none of the two

recitals contained in the notice can fulfil the requirement of Section 106 of the Transfer of Property Act. One recital in the notice terminates the tenancy from the date of issue of notice. The other one requires the tenant to vacate the premises within 15 days from the date of the receipt of the notice. Both are bad in the light of the requirements spelled out by Section 106 of the Transfer of Property Act. The learned counsel seems to be right in urging the pleas. However, still we feel that the appellant cannot be allowed relief. Law is well settled that an objection as to the invalidity or insufficiency of notice under Section 106 of the Transfer of Property Act should be specifically raised in the written statement failing, which it will be deemed to have been waived. In the present case, the only objection taken in the written statement is that the notice issued by the plaintiff was "illegal, null and void and ineffective upon the right of the defendant". The thrust of the plea raised by the defendant-appellant in his written statement was that the notice was issued by the person who did not have the authority from the landlord to give the notice. The plea so taken has been found devoid of merit by the High Court and the courts below. The plea that the notice was insufficient in the sense that it did not give 15 clear days to the tenant to vacate or that the notice did not terminate the tenancy with the expiry of the month of the tenancy, has not been taken in the written statement.

8. Obviously for want of specific plea in the written statement, the trial court has not framed any issue reflecting an objection to the validity or sufficiency of notice, the plea in the manner in which it is sought to be urged before us. The plea as to insufficiency of notice should be deemed to have been waived by the appellant and cannot be allowed to be urged at this stage. No fault can be found with the judgment and decree of the High Court as also of the two courts below upholding the termination of tenancy and the plaintiff-respondent's entitlement to evict the tenant."

27. Learned counsel for the appellant has relied upon exposition of law propounded by Hon'ble Supreme Court in the case of **Bhagabandas Agarwalla v. Bhagwandas Kanu, (1977) 2 SCC 646** and argued that Hon'ble Supreme Court in paras 3 and 4 of its judgment has observed as follows:

"3. Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat.* "The validity of a notice to quit", as pointed out by Lord Justice Lindley, L.J. in *Sidebotham v. Holland* [(1895) 1 QB 378] , "ought not to turn on the splitting of a straw". It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendatism or over-refined subtlety, but it must be construed in a common sense way. See *Harihar Banerji v. Ramsashi Roy* [45 IA 222 (Bengal HC)] . The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation.

4. It is indisputable that under Section 106 of the Transfer of Property Act the notice to quit must expire with the end of the month of the tenancy, or in other words, it must terminate the tenancy with effect from the expiration of the month of the tenancy. If it terminates the tenancy with effect from an earlier date, it

would be clearly invalid. Now, here the notice to quit required the respondents to vacate the premises "within the month of October 1962" and intimated to them that otherwise they would be "treated as trespassers from November 1" in respect of the premises. The question is: what is the meaning and effect of the words "within the month of October, 1962" in the context in which they are used in the notice to quit? Do these words mean that the tenancy of the respondents was sought to be terminated at a date earlier than the expiration of the month of October 1962 and they were required to vacate the premises before such expiration? We do not think so. When the notice to quit required the respondents to vacate "within the month of October 1962", what it meant was that the respondents could vacate at any time within the month of October 1962, but not later than the expiration of that month. .....

28. Learned counsel for the appellant has relied upon exposition of law propounded by this Court in the case of **Balbir Singh v. Kalawati, AIR 1976 All 434 at page 333** and argued that in paras 9, 10 and 11 of its judgment this Court has held as follows:

"9. Lastly, it is urged that the notice to quit was invalid inasmuch as the plaintiff did not treat defendant No. 1 as a tenant of the Kothari and could not have any in tention to terminate his tenancy in report of the same. Before going into the merit of this contention it is important to state that in his written statement the defendant No. 1 had challenged simply the receipt of notice and not its validity. The validity of notice was not challenged even in the grounds of revision under Section 25 of the Small Cause. Court Act nor his point was pressed before the court. Even in this revision the ground on which-validity is attached has not been specifically set out. In *Kishanlal Singal v. Hari Kishan Lohia* [A.I.R. 1956 Assam 113.] is observed:--

"The question about notice to quit is not purely a question of law, but is a mixed question of law and fact. Hence if under the terms of the contract the tenants are entitled to a notice of one month instead of 15 days, they may be taken to have, waived the same and to have been satisfied with the sufficiency and validity of the notice especially when they raise, the point about the factum of service of notice only."

10. Again in *Batoo Mal v. Rameshwar Nath* [A.I.R. 1971 Delhi 98.] the observation is:--

"The failure of the tenant to raise the objection regarding the non-compliance with Section 106 of the T.P. Act at an early stage of the litigation would amount to a waiver of the plea by him."

11. I am in respectfully agreement with the aforesaid observations. Defendant No. 1 challenged only the service of notice and not its validity. He will therefore, be deemed to have waived the plea of invalidity of notice. So far as the service of notice is concerned there is ample material on the record to prove that it was duly served on the said defendant."

29. Learned counsel for the appellant has relied upon exposition of law propounded by Delhi High Court in the case of **Battoo Mal Vs. Rameshwar Nath and another, AIR 1971 Del 98 at page 761** and argued that following observation has been made by the Delhi High Court, which is as follows:

"The question whether the failure of the tenant taking the plea of non compliance with Section 106 of the Transfer of Property Act amounts to a waiver of the said plea and whether the landlord is thereby exempted from the necessity to comply with Section 106 of the Transfer of Property Act can be answered only after the nature of the compliance with Section 106 of the Transfer of Property Act is understood. We have stated above that such a compliance is not a jurisdictional condition nor does the inherent jurisdiction of a Court or the Rent Controller depend on the satisfaction of this condition. The compliance must, however, be pleaded by the landlord. But the failure to make such a pleading would not ordinarily amount to non-disclosure of the cause of action itself. It is for these reasons that we are inclined to the view that the failure of the tenants to raise the objection regarding the non-compliance with Section 106 of the Transfer of Property Act at an early stage of the litigation would amount to a waiver of the plea by them. It would depend upon the facts and circumstances of each case when the conduct of the tenant would amount to such a waiver. The greater the delay on the part of the tenant in raising such a plea the greater the probability of his conduct amount to waiver. This Court has consistently taken the view that the failure of the tenant to raise such a plea before the Controller would amount to a waiver of such a plea and, therefore, the plea cannot be raised for the first time in the first appeal much less in the second appeal. [Vide *Des Raj v. Ramji Lal Kundan Lal,* 1969 R.C.R. 54, (6) *Inder Singh v. Nanak Chand,* 1969 R.C.R. 79 (19) and *Pritam Singh v. Suraj Pershad,* 1969 D.L.T. 704]."

30. Learned First Appellate Court had not taken notice of contentions of respondents mentioned in written statement filed by the respondents. On perusal of written statement it reveal that respondent has mentioned in para 17 of Written Statement that notice under Section 106 of Transfer of Property Act was not sent to them by plaintiff/appellant. They have not taken plea that notice- 9 Ga/ 8 Ga was defective and period for vacation of short falls short by period of 03 days. In absence of such specific pleading respondents could not raise objection of defect on the basis of short period mentioned in notice dated 03.08.1993, claiming it to be defective and invalid.

31. Learned appellate court has recorded finding regarding notice under Section 106 Transfer of Property Act incorrectly. It has not considered that no plea of defective or invalid notice was taken at the earlier stage by the respondents before trial Court and no issue was framed in this regard that notice under Section 106 Transfer of Property Act was defective or invalid. Learned First Appellate Court has not set aside other findings recorded by the trial Court. It has only considered the nature of notice under Section 106 Transfer of Property Act sent by the plaintiff/appellant. **Therefore, other findings recorded by trial Court on other issues shall be deemed by implication affirmed and concurrent findings.**

32. Learned trial Court has evaluated and appreciated evidence of PW-1, PW-2 and PW-3 and DW-1 and DW-2 and recorded finding that respondents made illegal constructions and altered the original shape and position

of disputed shop without permission of the plaintiff.

33. The respondents/defendant has not taken plea of defective notice or invalid notice in their written statement. Therefore, on the basis of aforesaid exposition of law relied upon by the learned counsel for the appellant it shall be deemed that they have waived plea in this regard, because law is well settled that an objection as to the invalidity or insufficiency of notice under Section 106 of the Transfer of Property Act should be specifically raised in the written statement, failing which, it will be deemed to have been waived by the tenant.

34. They have also not taken plea that the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 is applicable in the area, in which, disputed shop/property is situated, according to provision of Section 1 of the U.P. Act No. 13 of 1972.

35. The finding recorded by the trial Court on Issue No.5 is regarding substantial questions of law "F" and "G" and has been decided in favour of appellant/plaintiff. The notice dated 03.08.1993 fulfills the requirement of Section 106 Transfer of Property Act, therefore, substantial question of law "F" is hereby decided in favour of the appellant/plaintiff.

Substantial Question of Law E and G ;-

36. Learned First Appellate Court has considered provisions of section 2 (1) (bb) inserted by Act 13 of 1972 by U.P. Act No. 5 of 1995 vide impugned judgment dated 27.03.2001, by which, buildings belonging to or vested in a public Charitable or public religious institution were taken out of the purview of Act 13 of 1972. In para 15 it has been observed as follows:

"15. It is apparent from the record that Civil suit no. 17 of 1994 was filed much before the insertion of the aforesaid provision in Act 13 of 1972. It is still not settled as to whether the operation of the aforesaid amendment in Act 13 of 1972 is retrospective or not, but for the sake of argument, even if, this argument is accepted that Act 13 of 1972 is not applicable to the present case, even then it has to be seen as to whether the notice under section 106 of Transfer of Property Act was required to terminate the tenancy or not the appellants have vehemently argue that the notice which was given to terminate the tenancy is invalid and it can not have the effect of terminating the tenancy of the appellants."

Therefore, learned First Appellate Court has not recorded specific finding that Act No. 13 of 1972 is applicable to the disputed property.

The observation of learned appellant court is misconceived by virtue of provision of Section 6(c) of the General Clauses Act and it is not recorded in correct perspectives, because Hon'ble Apex Court in **Ambalal Sarabhai Enterprises Ltd. Vs. Amrit Lal and Company and another, 2001 (8) SCC 397** has held in para 35, 36 and 38 as follows:

"35. In cases where Section 6 is not applicable, the courts have to scrutinise and find whether a person under a repealed statute had any vested right. In case he had, then pending

proceedings would be saved. However, in cases where Section 6 is applicable, it is not merely a vested right but all those covered under various clauses from (a) to (e) of Section 6. We have already clarified that right and privilege under it is limited to that which is "acquired" and "accrued". In such cases pending proceedings is to be continued as if the statute has not been repealed.

36. In view of the aforesaid legal principle emerging, we come to the conclusion that since proceeding for the eviction of the tenant was pending when the repealing Act came into operation, Section 6 of the General Clauses Act would be applicable in the present case, as it is the landlord's accrued right in terms of Section 6. Clause (c) of Section 6 refers to "any right" which may not be limited as a vested right but is limited to be an accrued right. The words "any right accrued" in Section 6(c) are wide enough to include the landlord's right to evict a tenant in case proceeding was pending when repeal came in. Thus a pending proceeding before the Rent Controller for the eviction of a tenant on the date when the repealing Act came into force would not be affected by the repealing statute and will be continued and concluded in accordance with the law as existed under the repealed statute.

38. In view of these findings we hold that the landlord has a right under the repealed Rent Act by virtue of Section 6(c) of the General Clauses Act, which would save the pending proceedings before the Rent Controller, which may continue to be proceeded with as if the repealed Act is still in force."

A Division Bench of this Court in **Champa Devi (Smt) and another Vs. Rent Control and Eviction Officer (1st) Allahabad and another, 2002 (1) AWC page 673** in para 2, 3 and 4 of its judgment reference made by the Larger Bench was answered as follows:

"2. Following question of law, on reference by a learned Single Judge, is up for consideration before this Bench:

"Whether clause (g) to Section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as U.P. Act No. 13 of 1972) which has been inserted in the Principal Act by Section 2 of U.P. Act No. 5 of 1995 will affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995."

3. The learned counsels appearing for the parties agree and submit that the question referred by the learned Single Judge has been conclusively answered by the decision of the Hon'ble Supreme Court of India rendered in *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal and Co.,* [2001 (45) ALR 476 (SC).] and in the light of this decision, the answer to the question has to be in negative.

4. Accordingly, the answer to the question referred would be that Clause (g) of Section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972, inserted in the Act by Section 2 of U.P. Act No. 5 of 1995, will not affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995."

The same view was taken by this Court in **Thakur Rang ji Maharaj and another Vs. Om Prakash Agarwal and another,** reported in 2012 SCC OnLine All 1923 in para 12, 13, 14 and 15 of its judgment, which is as follows:

"12. The U.P. Amendment Act of 1995 by virtue of section 1 sub-section 2 came into force on 26.9.1994. By

section 2 thereof Clause (bb) was inserted in sub-section 1 of section 2 of Act 13 of 1972. It is a small Amendment Act, containing only four sections. It has not said anything about the proceedings already pending in respect of the buildings which otherwise were within the ambit of Act 13 of 1972 but after amendment in section 2 of Act 13 of 1972 would be entitled to claim exemption from the application of Act 13 of 1972. Learned Counsel for the petitioner admitted that there is no provision in the Amendment Act or under Act 13 of 1972 stating that pending proceedings shall stand abated or rendered without jurisdiction.

13. Moreover the aforesaid issue, I find stand already settled by Apex Court as well as by a larger Bench i.e., Division Bench of this Court. In *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal and Company* [2001 (45) ALR 476 (SC).] the Court has held that insertion of certain provision in the principal Act, taking away application of the Act, would not affect pending proceedings, if on the date when proceedings were initiated, the same were well within its jurisdiction.

14. The said principle has been followed by a Division Bench in *Champa Devi (Smt.) v. Rent Control and Eviction Officer (Ist), Allahabad* [2002 (1) ARC 192 : 2002 (46) ALR 430.] and in Para 4 of the judgment, the reference made to the larger Bench was answered as under:

"Accordingly, the answer to the question referred would be that Clause (g) to section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, inserted in the Act by section 2 of U.P. Act No. 5 of 1995, will not affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995."

15. In view of the above authority of Apex Court and the Division Bench judgment of this Court, the submission that the Amendment Act of 1995 would result in abating the pending proceedings is clearly misconceived and is rejected."

The same view was also taken by this Court in **Hazi Mohammad Rashid (D) through LRs Vs. XIIth Additional District Judge, Agra and others, 2013 (3) AWC 2274** in para 14 to 18 of its judgment, which is as follows:

"**14.** During pendency of revision, Act, 1972 was amended whereby property, vested or possessed by a public religious or charitable institution was exempted from application of Act, 1972 and also those properties where monthly rent is Rs. 2,000/- were taken outside the purview of the Act, 1972.

15. The submission of petitioner that shop in question is owned by a trust and in view of section 2(1)(bb), Act, 1972 is not applicable and therefore revision was liable to be dismissed, is thoroughly misconceived, inasmuch as, the aforesaid amendment came into force w.e.f. 26.9.1994 by U.P. Act No. 5 of 1995. The proceedings, which were pending prior thereto remained unaffected thereby. This issue, I find stand already settled by Apex Court as well as by a larger Bench i.e., Division Bench of this Court. In *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Company* [2001 (45) ALR 476 (SC).] , the Court has held that insertion of certain provision in the principal Act, taking away application of the Act, would not affect pending proceedings, if on the date when proceedings were initiated, the same were well within its jurisdiction.

16. The said principle has been followed by a Division Bench in *Champa Devi (Smt.) v. Rent Control and Eviction*

Officer (Ist), Allahabad [2002 (46) ALR 430.] and in para 4 of the judgment, the reference made to the larger Bench was answered as under:

"Accordingly, the answer to the question referred would be that Clause (g) to section 2 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, inserted in the Act by section 2 of U.P. Act No. 5 of 1995, will not affect the proceedings pending on the date of enforcement of U.P. Act No. 5 of 1995."

17. The same view has also been taken by this Court in Writ Petition No. 53119 of 2002, *Thakur Rang Ji Maharaj v. Om Prakash Agarwal*, decided on 14.8.2012.

18. In view of the above authority of Apex Court and the Division Bench judgment as well as Single Judge of this Court, the submission that the Amendment Act of 1995 would result in abating the pending proceedings is clearly misconceived and is rejected."

Therefore, observation recorded by learned First Appellate Court is misconceived, in as much as the aforesaid amendment came into force w.e.f. 26.09.1994 by U. P. Act 5 of 1995. The proceedings which were pending prior their to remained unaffected thereby.

37. Learned First Appellate court has specifically mentioned that for the sake of argument, even if this argument is accepted that Act 13 of 1972 is not applicable to the present case, even then it has to be seen as to whether the notice under Section 106 of Transfer of Property Act was required to terminate the tenancy or not ?

38. Learned Appellate court has recorded finding in para 19 of the impugned judgment that, *"the lease in the present case was not from year to year or from any term exceeding one year or reserving a yearly rent hence no registered instrument was required to create such a lease. When the lease in the present case did not require registration hence it cannot be said that it was a tenancy at will and no notice was required under Section 106 of the Transfer of Property Act to terminate the tenancy"*.

In para 20 it has been held that, *"the defendant no.1 cannot be said to be a tenant at will and it cannot be said to be a tenancy at will"*.

In para 23, learned First Appellate Court has recorded specific finding that, *"thus, in my opinion, the tenancy in the present case was not a tenancy at will and it could be terminated only by a notice as required under Section 106 of the Transfer of Property Act"*.

39. Section 1 of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P.Act no. 13 of 1972) provides as follows, which is reproduced as under:

"1. Short title, extent, application and commencement.- (1) This Act may be called the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

(2) It extends to the whole of Uttar Pradesh.

(3) It shall apply to-

(a) every city as defined in the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 (U.P. Act no. II of 1959)

(b) every municipality as defined in the United Provinces

Municipalities Act, 1916 (U.P. Act no. II of 1916)

(c) every notified area constituted under the United Provinces Municipalities Act, 1916 ; (U.P. Act no. II of 1916)

(d) every town area constituted under the United Provinces Town Areas Act, 1914: (U.P. Act no. II of 1914)

Provided that the State Government, if it is satisfied that it is necessary or expedient so to do in the interest of the general public, residing in any other local area, may by notification in the Gazette declare that this Act or any part thereof shall apply to such area, and thereupon this Act or part shall apply to such area :

Provided further that the State Government, if it is satisfied that it is necessary or expedient so to do in the interest of general public, may by notification in Gazette-

(i) cancel or amend any notification issued under the preceding proviso; or

(ii) declare that the Act or any part thereof, as the case may be, shall cease to apply to any such city, municipality, notified area, town area or other local area as may be specified and thereupon this Act or part shall cease to apply to that city, municipality, notified area, town area or other local area and may in the like manner cancel or amend such declaration.

(4) It shall come into force on such date as the State Government may by notification in the Gazette appoint."

40. It is relevant to mention here that disputed shop is situated in Village Kamlapur, Mazra Maholi (village), Pergana Peer Nagar (village), Tehsil Sidhauli, District Sitapur. Therefore, it does not fall within urban limits of city Sitapur or other municipalities or area specifically notified under Section 1 of Act No. 13 of 1972. According to record available on Bhoolekh site of State of U.P., Kamlapur, Maholi and Peer Nagar all are villages and part of Gram Panchayat.

Therefore, the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972 is not applicable to the disputed property/shop. Since disputed shop/property is not situated in urban area of the city Sitapur or any municipality or notified area, therefore, Act No. 13 of 1972 is not applicable to the disputed property of this Suit No. 17 of 1994.

41. The respondents during trial during trial before learned trial Court has not filed any Notification regarding declaration of area of village Kamlapur, Mazra Maholi, Pergana Peer Nagar for the purposes of application of Act No. 13 of 1972 or notified area or part of any municipality or town area.

42. The First Appellate Court has also not recording any finding that U.P. Act No. 13 of 1972 was applicable to the disputed property.

The substantial question of law at Serial No. "E" is hereby accordingly answered and decided in favour of the appellant.

Consequently, substantial question of law at Serial No. "G" is answered in terms that notice under Section 106 Transfer of Property Act, 1882 was required for termination of tenancy of the respondent no.1 and decided accordingly.

Substantial Question of Law H:

43. As far as substantial question of law at Serial No. "H" is concerned, learned trial court has recorded finding regarding Issue No. 1 and 2 that, *"respondent no.1/defendant Ganesh Prasad was tenant of disputed shop owned by plaintiff's Trust at the rate of Rs. 7/- per month"*. The respondents were not successful to adduce evidence regarding the fact that representative of plaintiff Cashier Late Sri Ramendra Kumar Saxena gave oral permission for construction on deposition of amount of Rs. 5000/-.

44. Learned trial Court has recorded finding on appreciation of evidence of both parties that there was no dispute between plaintiff and defendant no.1 regarding payment of rent. The respondents made illegal constructions and altered original shape of disputed property/shop and they were liable to be evicted from the disputed property. Therefore, learned First Appellate court has recorded concurrent finding, regarding period of lease, as recorded by the trial Court. Therefore, registration of lease in favour of defendant/ respondents in accordance with Section 17 of Registration Act was not compulsorily required to be registered.

The substantial question law Serial No. "H" is hereby accordingly answered and decided.

45. In the case of **Thulasidhara v. Narayanappa, (2019) 6 SCC 409** the Hon'ble Supreme Court has held as under:

"**7.1.** At the outset, it is required to be noted that by the impugned judgment and order [*Narayanappa v. Rangamma*, 2007 SCC OnLine Kar 737] , in a second appeal and in exercise of the powers under Section 100 CPC, the High Court has set aside the findings of facts recorded by both the courts below. The learned trial court dismissed the suit and the same came to be confirmed by the learned first appellate court. While allowing the second appeal, the High Court framed only one substantial question of law which reads as under:

"Whether the appellant is the owner and in possession of the suit land as he purchased it in the year 1973, that is, subsequent to the date 23-4-1971 when Ext. D-1, partition deed, Palupatti is alleged to have come into existence?"

No other substantial question of law was framed. We are afraid that the aforesaid can be said to be a substantial question of law at all. It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only with the second appeal involving a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC.

7.2. As observed and held by this Court in **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722]**, in the second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;
or

(ii) Contrary to the law as pronounced by the Apex Court;
or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in the second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.

7.3. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in *Ishwar Dass Jain v. Sohan Lal* ***[Ishwar Dass Jain v. Sohan Lal,* (2000) 1 SCC 434]** . In the aforesaid decision, this Court has specifically observed and held: (SCC pp. 441-42, paras 10-13)

"10. Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. ...

12. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. ...

13. In either of the above situations, a substantial question of law can arise."

In the case of **Gurnam Singh v. Lehna Singh, (2019) 7 SCC 641** the Hon'ble Supreme Court has held as under:

"**13.1.**The suspicious circumstances which were considered by the learned trial court are narrated/stated hereinabove. On reappreciation of evidence on record and after dealing with each alleged suspicious circumstance, which was dealt with by the learned trial court, the first appellate court by giving cogent reasons held the will genuine and consequently did not agree with the findings recorded by the learned trial court. However, in second appeal under Section 100 CPC, the High Court, by the impugned judgment and order has interfered with the judgment and decree passed by the first appellate court. While interfering with the judgment and order passed by the first appellate court, it appears that while upsetting the judgment and decree passed by the first appellate court, the High Court has again appreciated the entire evidence on record, which in exercise of powers under Section 100 CPC is not permissible. While passing the impugned judgment and order, it appears that the High Court has not at all appreciated the fact that the High Court was deciding the second appeal under Section 100 CPC and not first appeal under Section 96 CPC. As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction

under Section 100 CPC. As observed and held by this Court in ***Kondiba Dagadu Kadam [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722]*** , in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Supreme Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal."

46. Hon'ble Supreme Court in **State of M.P. v. Dungaji, (2019) 7 SCC 465** has propounded regarding interference by High Courts in exercising of power under Section 100 C.P.C. as follows:

"10. Now, so far as the impugned judgment and order [*Dungaji v. State of M.P.*, Second Appeal No. 580 of 2003, order dated 29-10-2010 (MP)] passed by the High Court declaring and holding that the marriage between Dungaji and Kaveribai had been dissolved by way of customary divorce, much prior to the coming into force the provisions of the 1960 Act and therefore after divorce, the property inherited by Kaveribai from her mother cannot be treated to be holding of the family property of Dungaji for the purposes of determination of surplus area is concerned, at the outset, it is required to be noted that as such there were concurrent findings of facts recorded by both the courts below specifically disbelieving the dissolution of marriage between Dungaji and Kaveribai by way of customary divorce as claimed by Dungaji, original plaintiff. There were concurrent findings of facts recorded by both the courts below that the original plaintiff has failed to prove and establish that the divorce had already taken place between Dungaji and Kaveribai according to the prevalent custom of the society. Both the courts below specifically disbelieved the divorce deed at Ext. P-5. The aforesaid findings were recorded by both the courts below on appreciation of evidence on record. Therefore, as such, in exercise of powers under Section 100 CPC, the High Court was not justified in interfering with the aforesaid findings of facts recorded by both the courts below. Cogent reasons were given by both the courts below while arriving at the aforesaid findings and that too after appreciation of evidence on record. Therefore, the High Court has exceeded in its jurisdiction while passing the impugned judgment and order in the second appeal under Section 100 CPC.

11. Even on merits also both the courts below were right in holding that Dungaji failed to prove the customary divorce as claimed. It is required to be noted that at no point of time earlier either Dungaji or Kaveribai claimed customary divorce on the basis of divorce deed at Ext. P-5. At no point of time earlier it was the case on behalf of the Dungaji and/or

Kaveribai that there was a divorce in the year 1962 between Dungaji and Kaveribai. In the year 1971, Kaveribai executed a sale deed in favour of Padam Singh in which Kaveribai is stated to be the wife of Dungaji. Before the competent authority neither Dungaji nor Kaveribai claimed the customary divorce. Even in the revenue records also the name of Kaveribai being wife of Dungaji was mutated. In the circumstances and on appreciation of evidence on record, the trial court rightly held that the plaintiff has failed to prove the divorce between Dungaji and Kaveribai as per the custom.

12. At this stage, it is required to be noted that before the competent authority, Kaveribai submitted the objections. Before the competent authority, she only stated that she is living separately from Dungaji and Ramesh Chandra, son of Padam Singh, has been adopted by her. However, before the competent authority neither Dungaji nor Kaveribai specifically pleaded and/or stated that they have already taken divorce as per the custom much prior to coming into force the 1960 Act. Therefore, as rightly observed by the learned trial court and the first appellate court only with a view to get out of the provisions of the Ceiling Act, 1960, subsequently and much belatedly, Dungaji came out with a case of customary divorce. As rightly observed by the learned trial court that the divorce deed at Ext. P-5 was got up and concocted document with a view to get out of the provisions of the Ceiling Act, 1960. As observed hereinabove, the High Court has clearly erred in interfering with the findings of facts recorded by the courts below which were on appreciation of evidence on record."

47. In **S.V.R.Mudaliar (Dead) by Lrs. and Ors. Vs. Rajabu F.Buhari (Mrs) (Dead) by Lrs. and Ors. AIR 1995 SC 1607,** the Court in paras 14 and 15 of the judgment has upheld the contention that though the appellate court is within its right to take a different view on the question of fact, but that should be done after adverting to the reasons given by trial court in arriving at the findings in question. Appellate Court before reversing a finding of fact has to bear in mind the reasons ascribed by Trial Court. Court relied and followed earlier decision of Privy Council in **Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, 10 CWN 630** and in para 15 of the judgment said:

"There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, (1906) 10 Cal.W.N. 630, wherein, while regarding the appellate judgment of the High Court of judicature at Fort William as "careful and able", it was stated that it did not "come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge."

Following the above decision Hon'ble B.L.Yadav, J in **Smt. Sona Devi Vs. Nagina Singh and Ors. AIR 1997 Patna 67** observed that whenever judgment of Appellate Court is a judgment of reversal, it is the primary duty of Appellate Court while reversing the findings of Trial Court to consider the

reasons given by Trial Court and those reasons must also be reversed. Unless that is done, judgment of lower Appellate Court cannot be held to be consistent with the requirement of Order XLI, Rule 31, which is a mandatory provision.

48. The above view has also been followed recently in **Jaideo Yadav Vs. Raghunath Yadav & Anr., 2009(3) PLJR 529** wherein the Court said that Trial Court recorded its findings but lower Appellate Court had not reversed the said findings and rather on the basis of some findings of its own, title appeal was allowed by lower Appellate Court without appreciating findings of Trial Court on the concerned issue. The court then said :

"The law is well settled in this regard that where the judgment of the lower appellate court is a judgment of reversal it is primary duty of the appellate court to consider the reasons given by the trial court and those reasons must also be reversed."

49. This court has also followed the same view in **Doodhnath and another Vs. Deonandan AIR 2006 Allahabad 3.** Recently this view has also been followed in **Second Appeal No. 47 of 2015, Awadh Narayan Singh Vs. Harinarayan, decided on 22.1.2015.**

50. On the basis of above discussions and exposition of law of Hon'ble Supreme Court and this Court, impugned judgement dated 27.03.2001 can not sustain. Learned First Appellate court has recorded misconceived and perverse finding regarding notice dated 03.08.1993 sent under Section 106 Transfer of Property Act, 1882 by the plaintiff to the respondents that it was defective and invalid.

51. The impugned judgment and order dated 27.03.2001 passed in Civil Appeal No. 6 of 2001: Ganesh Prasad Mishra and others Vs. Radha Krishna Ji Mandir, Kamlapur, is hereby set aside and the judgment and order dated 19.12.2000 delivered by the learned Court of Civil Judge (Junior Division), Biswan, Sitapur in Civil Suit No. 17 of 1994 (Radha Krishnaji Virajman Mandir, Kamlapur Vs. Ganesh Prasad Master and another) is hereby upheld and affirmed and restored.

52. The second appeal is accordingly **allowed**.

53. The record of trial court and First Appellate Court be sent back.

54. The copy of judgment be sent to the trial Court for compliance.

(2019)11ILR A730

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 323 of 1999

Ganga Prasad Rai ...Defendant/Appellant
Versus
Kedar Nath Rai & Anr.
...Plaintiffs/Respondents

Counsel for the Appellant:
Sri S.K. Chaturvedi, Sri R.N. Tripathi, Sri Anant Kishor

Counsel for the Respondents:
Sri R.K. Chitragupta, Sri A.N. Srivastava, Sri Pradeep Narain Pandey, Sri Ramanand Pandey, Sri S.N. Srivastava

A. Civil Law- Civil Procedure Code, 1908 - Order 6 - Pleadings - Courts cannot travel beyond pleadings and cannot grant relief which is not sought - Court cannot receive evidence of facts which are not stated in the pleadings.

Held: - Appellate court erred in law by going beyond pleadings and in excess of relief sought and partitioning the entire property which were not subject matters of dispute in the plaint. (Para 41, 49)

B. Civil Law-Civil Procedure Code, 1908 - Order 7 Rule 14 - Documents relied on in plaint - Documents not mentioned in the list of documents appended to the plaint under Order 7 Rule 14 CPC nor marked as exhibits by the court - could not be relied upon.

Held:- Appellate court erred in relying on Consolidation Form 41 (Paper No. 95C), since it could not have been received in evidence, in absence of pleadings - Said document was not admissible in evidence because it was not mentioned in the list of documents submitted with the plaint nor marked as an Exhibit by the learned trial court to be admitted in evidence. (Para 51)

C. Property - Partition by family settlement/arrangement - are accepted by the courts

Held:- Courts have vested sanctity in family partition, by according finality to family partitions. A bonafide partition once effected between the parties is final and irrevocable. The parties cannot renege from the same. The partition cannot be undone subsequently on the ground of mere inequality of shares. (Para 55)

Appellate court erred by making a fresh partition of the property, since the property ceased to be partible and the jointness did not exist after the partition was given effect to. (Para 64)

D. Practice and Procedure - Appellate Court - Appellate court redrawing the boundaries of the plots of land and recreating a map of disputed properties - illegal.

Held:- Appellate court traced a fresh map of the entire inherited property of the parties and redrew the boundaries of the plots itself, without physical inspection of the site - Parties not complicit in the process of redrawing the map and recasting the respective shares of the parties. No objections called by the court during the entire procedure – Map and the partition basis of its judgment and forms part of the decree - Procedure adopted by appellate court in creating the map of the property not known to law. (Para 65)

E. Practice and Procedure - Issue of Jurisdiction - should be pleaded - Ouster of jurisdiction of the civil court not to be readily presumed.

Held:- Issue of jurisdiction is not a pure question of law being a mixed question of law and fact, the same should have been pleaded and an issue was required to be framed before the learned trial court - Defendant cannot surprise the plaintiff raising the issue of jurisdiction second appeal stage – Ouster of jurisdiction of the civil court shall not be readily presumed. (Para 74, 75)

Second Appeal allowed (E-5)

List of Cases Cited: -

1. Sri Venkataramana Devaru & ors. Vs The St. of Mysore & ors. AIR 1958 SC 255.
2. Ram Sarup Gupta Vs Bishun Narain Inter College (1987) 2 SCC 555.

3. SBI Vs S.N. Goyal (2008) 8 SCC 92.

4. Maria Margarida Sequeira Fernandes Vs Erasmo Jack de Sequeira (2012) 5 SCC 370.

5. Union of India Vs Ibrahim Uddin (2012) 8 SCC 148.

6. Ranganayakamma Vs K.S. Prakash (2008) 15 SCC 673.

7. Hari Shankar Singhania Vs Gaur Hari Singhania (2006) 4 SCC 658.

8. Devarajan Vs Janaki Ammal (Civil Appeal No. 2298 of 1966).

9. Ratnam Chettiar Vs S.M. Kuppuswami Chettiar (1976) 1 SCC 214.

10. Shub Karan Bubna Vs Sita Saran Bubna (2009) 9 SCC 689.

11. Santosh Hazari Vs Purushotam Tiwari (2001) 3 SCC 179

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This second appeal arises out of the judgment and decree dated 19.01.1999 and 25.01.1999 respectively, entered by learned District Judge, Siddharth Nagar, in Civil Appeal No. 40 of 1998, Kedarnath Vs. Ganga Prasad Rai & another, which partly modifies and largely upsets the judgment and decree dated 26.03.1998 and 07.04.1998 respectively rendered by the learned II-Additional Civil Judge (Junior Division), Bansi, Siddharth Nagar in Original Suit No. 295 of 1980, Kedar Nath Vs. Ganga Prasad Rai and another.

2. This second appeal has been instituted by Ganga Prasad Rai, who is arrayed as defendant no. 1 in the suit.

3. Civil action was brought by the plaintiff-respondent no.1, against the defendant no.1-appellant and defendant no.2-respondent no.2, by instituting Original Suit No. 295 of 1980, Kedar Nath Vs. Ganga Prasad and others, before the IInd Additional Civil Judge (Junior Division), Bansi, District Basti (Siddharth Nagar). The genealogical table set out in the plaint which describes the respective positions of the parties to the suit is extracted below.

Vishwanath Rai

Kedar Nath Ganga Prasad Rai Parmatma Prasad Rai

4. The plaintiff-respondent no.1, defendant no.1-appellant and defendant no.2-respondent no. 2 are real brothers. The plaint asserts that the property in dispute devolved upon the parties by inheritance was partitioned in three equal parts. The parties came in possession of their respective shares pursuant to the said family settlement. The land situated in Plot Nos. 2913 and 2914 marked as ABCD in the map at the foot of the plaint, constitutes the disputed property in the suit. According to the plaint, the plaintiff-respondent no. 1 is the sole owner of the said property as it was apportioned to him in the partition.

5. The defendant no. 1-appellant threatened to force himself on the disputed land, made encroachments and raised constructions thereon, which are marked as K L M N and X Y P Q R in the map attached at the foot of the plaint.

6. On this cause of action, the suit was instituted by the plaintiff -respondent no.1 seeking various reliefs. The plaintiff-respondent no.1 prays that the defendant no. 1- appellant, be permanently injuncted from interfering in the peaceful possession of the plaintiff-respondent no.1, over the disputed plot of land marked as ABCD in the map at the foot of the plaint.

7. A mandatory injunction against defendant no. 1-appellant is sought, after demolition of the constructions marked as K L M N and X Y P Q R made by defendant no. 1-appellant over the disputed plot. Finally, the relief clause prays that the possession of the parts of

the land on which the disputed constructions have been raised by the defendant no. 1-appellant, be made over to the plaintiff-respondent no. 1.

8. The alternative prayer is to partition the disputed property i.e. the plots' numbers' 2913 and 2914.

9. The defendant no. 1-appellant entered his opposition to the plaint in the written statement. In the written statement, the defendant no. 1- appellant categorically denies all allegations of encroachment of land and asserts that the disputed plot of land A B C D fell to the share of the defendant no. 1-appellant in the partition. True status of the shares of respective parties after the partition is provided in the map at the foot of the written statement.

10. The written statement references the the judgement of the consolidation officer dated 20.03.1986 rejecting the claim of the plaintiff-respondent no. 1, on the disputed property, on the foot that the family partition had already taken place between the parties.

11. The additional written statement, states that the plaintiff-respondent no.1 had not referenced the ancestral house in plots nos. 2911 and 2912 in the plaint which was also part of the partitioned ancestral property.

12. The following issues (which are relevant at this stage) were framed by the learned trial court:

"1. Whether the plaintiff is the sole owner of the area depicted as A B C D in the map at the foot of the plaint and is entitled to a permanent injunction?

2. Whether the defendant no. 1 made the disputed constructions marked as X Y P Q R and K LM N in the map at the foot of the plaint were made by the defendant no. 1 in the land belonging to the plaintiff and the same were liable to be demolished?

3. Whether as an alternative relief, the plaintiff was entitled for 1/3 part Plot Nos. 2913 and 2914 (current Plot No. 1418 and 1419 respectively), after a fresh partition?"

13. The learned trial court records that the total property bequeathed by inheritance upon the plaintiff-respondent no.1 as well as defendant no.1-appellant & defendant no.2-respondent no.2, was constituted in plots' nos,. 2911/0-5-2, 2912/8-0, 2913/0-8-1 and 2914/0-5-2 Dhur. The total area comprised in all four plots was 26 Biswa 05 Dhur. The parties are real brothers. A family partition divided the property into equal three parts. The parties came into possession over their respective shares after the partition.

14. Employing simple mathematics, the learned trial court concluded that an area of 8 Biswa and 15 Dhur, devolved upon each brother by inheritance and partition. Appreciation of documentary evidence and admissions of the parties established that Plots No. 2911 and 2912 were Abadi lands, while plots no. 2913 and 2914 were recorded as Bhumidhari lands.

15. The learned trial court then enquired into the critical issue whether the disputed plot marked as ABCD in the map at the foot of the plaint, fell to the share of the plaintiff-respondent no. 1 in the partition and the alleged

encroachment by the defendant no.1-appellant.

16. Partition of ancestral house situated in plot nos. 2911 and 2912 was confirmed by the learned trial court. With the aid of the commissioner report and the oral evidence in the record, the learned trial court found that the area to the extent of 8 Biswa was apportioned to the plaintiff-respondent no.1 in plots' nos'. 2911 and 2912 in the family partition. The defendant no. 1-appellant was allotted 1 Biswa 2 Dhur in the plots' nos'. 2911 and 2912. While an area of 3 Biswa 6 Dhur in plots' nos'. 2911 and 2912 fell to the share of defendant no. 2-respondent no. 2.

17. The learned trial court also held that the parties are in settled possession over their respective parts in plots' nos'. 2911 and 2912.

18. There was a difference in the areas apportioned to the parties in the ancestral house in plots' nos'. 2911 and 2912 in the partition. Consequently, the parties, had to adjust their respective shares in plots' nos'. 2914 and 2913 to make the distribution equitable. The entitlement of each party being 8 Biswa 15 Dhur.

19. The plaintiff-defendant no. 1, was only entitled to 9 Dhur in plots' nos'. 2914 and 2913, since he got a lion's share of the area in plots' nos'. 2911 and 2912. Additional area, was given to defendant no. 1-appellant and defendant no. 2-respondent no.2 in plots' nos'. 2913 and 2914 to cater to the shortfall which arose as a result of the major share being allotted to the plaintiff-respondent no.1 in plots' nos'. 2911 and 2912. The allotment to the defendant no. 1-appellant in plots' nos'. 2913 and 2914 was 7 Biswa 12 Dhur which was his entitlement.

20. The learned trial court also found that the parties were in possession of their respective parts in plots' nos'. 2913 and 2914.

21. The share to which the plaintiff-respondent no. 1, was entitled in plot no. 2913 was deficient by 9 Dhur. Learned trial court accordingly held that the plaintiff-respondent no.1 was entitled to an area of 9 Dhur in plot no. 2913 on the western side and was the sole owner thereof consequent to the partition. Accordingly, permanent injunction in favour of the plaintiff-respondent no. 1 in respect of and area of 9 Dhur on the western side in plot no. 2913 was granted by the learned trial court.

22. The learned trial court noticed Section 176 of the Uttar Pradesh Zamidari Abolition and Land Reforms Act (hereinafter referred to as the UPZA&LR Act), which states that the partition of Bhumidhari land lies in the exclusive jurisdiction of the Revenue Courts. The learned court consequently held that it did not possess the jurisdiction to partition the plot nos. 2913 and 2914. Moreover, the plots had already been partitioned. Hence, the alternative relief was denied to the plaintiff-respondent no. 1.

23. In the wake of the aforesaid reasoning, the learned trial court refused the relief of demolition of the offending constructions made by the defendant no. 1-appellant and declined to grant the relief of mandatory injunction to the plaintiff-respondent no. 1 in regard to the disputed property.

24. In this manner, the learned trial court decided the suit by its judgment and decree dated 26.03.1998 and 07.04.1998, respectively.

25. The defendant no.1- appellant as well as respondent no. 2-defendant no.2, did not challenge the judgement and decree passed by the learned trial court.

26. The judgment and decree dated 26.03.1998 and 07.04.1998 respectively, rendered by the learned II-Additional Civil Judge (Junior Division), Bansi, Siddharth Nagar in Original Suit No. 295 of 1980, Kedar Nath Vs. Ganga Prasad Rai and another was carried in appeal by the plaintiff-respondent no.1.

27. The appeal was registered as Civil Appeal No. 40 of 1998, Kedarnath Vs. Ganga Prasad Rai & another.

28. Learned appellate court framed the following issue for determination:

"Whether the partition took place as alleged by the appellant or as set up by the defendant no. 1"?

29. The learned appellate court in its judgment dated 19.01.1999 found that the total area of the disputed property increased after consolidation operations. The appellate court accepted entries of the consolidation Form 41, (Paper No. 95C1), to support this finding and also to record that all 4 plots namely plots nos. 2911, 2912, 2913 and 2914 are Abadi on the spot. The learned appellate court with the "help" of Civil Court Amin created a fresh map of the property from the Commissioner report Paper No. 52-C2. The new map traced by the Civil Court Amin was consistent with the measurements recorded in consolidation Form 41 (Paper No. 95C1). The appellate court then made a fresh partition of the entire property constituted in the four plots, (plots' nos'. 2911, 2912, 2913 & 2914). The respective shares to which the each party was entitled were marked in the newly created map. The appellate court accepted the total area of the four plots, given in the consolidation proceedings as 27 Bishwa 18 Dhur. Share of each party in area terms, was 9 Biswa 6 Dhur. The share of the plaintiff-respondent no.1 was marked out in read letters ABCH in the map so created by the appellate court.

30. In light of the above exercise and findings, the appellate court allowed the appeal and modified the judgment and decree passed by the learned trial court accordingly. The appellate court decreed the suit of the plaintiff-respondent no.1 for possession of the disputed property after demolition of the disputed constructions thereon. The defendant no.1-appellant and defendant no. 2-respondent no.2, were permanently restrained from interfering in the possession of the plaintiff-respondent no.1 over the land shown in letters ABCH in the map drawn by the learned appellate court. The newly created map by the learned appellate court was made part of the decree.

31. Sri S.K. Chaturvedi, learned counsel for the defendant no.1-appellant assailing the judgment and decree entered by the learned appellate court submits that the judgment exceeds the pleadings and goes beyond the relief sought by partitioning all four plots and granting an injunction after such partition in regard to all the four plots namely plots no. 2913,

2914, 2911 and 2912. No pleadings with respect to increase of area during consolidation proceedings were taken in the plaint. No documents in regard to the increased in area during consolidation proceedings were submitted along with list appended to the plaint which is relatable to Order 7 Rule 14 CPC nor marked as exhibits by the learned trial court. By relying on such documents and finding an increase in the area the learned first appellate court has erred in law. The procedure adopted by the learned appellate court to create a fresh map and for repartitioning the four plots of land was illegal. The findings of the learned appellate court that all plots were Abadi lands, was perverse particularly in view of the admission of the parties, judgment in consolidation proceedings and the findings of the learned trial court. A fresh partition was not called for.

32. It was finally contended that the jurisdiction to partition the agricultural property vests exclusively with the revenue courts by virtue of powers conferred under Section 331 of the UPZA&LR Act. The jurisdiction of the civil court is consequently ousted in this regard. Both the courts acted in excess of jurisdiction conferred by law.

33. Sri Ramanand Pandey, learned counsel for the respondents submits that the learned appellate court was justified in considering the area of the property which stood enhanced after the consolidation operations. He relied upon Consolidation Form 41, which are part of the paper book and marked as Paper No. 95Ga, in the record. The papers are also part of the record.

34. At this stage, a reference may be made to the Original Suit No 424 of 1981, Ganga Prasad Vs. Kedar Nath and another, instituted by the defendant no. 1-appellant, before the learned trial court. The suit was in regard to the ancestral house. The suit was dismissed by the learned trial court by judgment and decree dated 26.03.1998. The judgment of learned trial court dated 26.03.1998 is not taken in appeal by any party. In light of the preceding narrative in this judgment, the said judgment has no relevance to the controversy at hand. It is being noticed since the same was mentioned by Sri Ramanand Pandey, learned counsel for the plaintiff-respondent no.1.

35. The parties agreed during the arguments, that the following substantial questions of law arise for determination in this second appeal:

I. Whether the learned appellate court erred in law by going beyond the pleadings made in the plaint and granting relief in excess of relief sought, by partitioning the entire property including plots' nos'. 2911 and 2912 which were not subject matters of dispute in the suit?

II. Whether the learned appellate court erred in law by finding that the area of the plots had increased in the consolidation proceedings, even though no such pleading was taken in the plaint and no documents in regard to increase in area of the plots during consolidation proceedings were mentioned in the list of documents appended to the plaint under Order 7 Rule 14 CPC nor marked as exhibits by the court? And whether the Consolidation Form 41 (Paper No. 95Ga), could be relied upon to support the finding of increase in area in the consolidation proceedings?

III. Whether the property remained partible, after the partition was

duly made and given effect to many years prior to the institution of the proceedings?

IV. Whether the procedure adopted by the learned appellate court in redrawing the boundaries of the plots of land and recreating a map of disputed properties which formed the basis of its judgment and was made part of the decree was lawful and valid and the consequences thereof?

V. Whether the learned appellate court erred in law by reversing the findings of the learned trial court regarding the nature of all the four disputed plots of lands?

VI. Whether the learned appellate court exceeded its jurisdiction by partitioning the agricultural plots of land even though exclusive jurisdiction in the matter is vested in the revenue court by virtue of Section 331 of the Uttar Pradesh Zamidari Abolition and Land Reforms Act ?

36. Brief facts relevant for deciding the substantial questions of law so framed shall be reprised from the preceding factual narrative.

37. The appellate court in its judgment partitioned the entire property which devolved upon the parties including the plots no. 2911 and 2912. There was no pleading in regard to the plots no. 2911 and 2912 in the plaint. No issues were framed in regard to the aforesaid plots. It is equally noteworthy that no relief for partitioning the plots no. 2911 and 2912 was sought in the plaint. When the parties went to trial, the status of the aforesaid plots was not in issue. The appellate court went beyond the pleadings and granted relief in excess of the relief sought by the plaintiff-respondent no. 1, by partitioning the entire property including plots no. 2911 and 2912.

38. The plaint does not state that area of the plots in dispute was enlarged during consolidation proceedings. No documents to establish increase in area of the plots during consolidation proceedings were mentioned in the list of documents appended to the plaint as contemplated under Order 7 Rule 14, nor marked as Exhibits by the learned trial court.

39. Learned appellate court once again went beyond the pleadings of the parties, to find that the area of the plots in dispute was increased during consolidation proceedings. This finding was made on the foot of Consolidation Form 41(Paper No. 95 C). Consolidation Form 41 (Paper No. 95C) could not have been received in evidence, in absence of pleadings.

40. Further, Consolidation Form 41 (Paper No. 95C) was not admissible in evidence, since the said document was not mentioned in the list of documents appended to the plaint under Order 7 Rule 14 and was not marked as an Exhibit by the learned trial court to be admitted in evidence.

41. The rules relating to pleadings are set out in Order 6 C.P.C. under the heading "Pleadings Generally". The case of a party is set forth in the pleadings in the plaint. The plaint must conform to the provisions of Order 6 C.P.C. The law relating to the pleadings is stated with clarity in the C.P.C. and settled with finality in various judgments of the courts. The party has to state its case in a concise form in the plaint/written

statement by pleading all material facts. The pleadings should not be vague. However, while construing the pleadings, the courts do not adopt a hypertechincal approach. The purpose of the pleadings is also to alert the adversary to the case of the party. This will enable the adversary/opposite party to assert its defence and or refutal in its pleadings and tender its evidence in regard thereto. The law of pleadings ensures that no party can spring a surprise upon its adversary and render the latter without opportunity to defend itself. The law of pleadings poses certain limitations on parties as well as the courts. The courts cannot travel beyond pleadings and cannot grant relief which is not sought. Similarly, the court cannot receive evidence of facts which are not stated in the pleadings.

42. It would be apposite to reinforce the narrative with authority in point.

43. The purpose of pleadings was examined and delineated by Hon'ble Supreme Court in the case of ***Sri Venkataramana Devaru and others v. The State of Mysore*** and others, reported at ***AIR 1958 SC 255,*** in the following terms:

"14. Mr. M. K. Nambiar invited our attention to Exhibit A-2, which is a copy of an award dated November 28, 1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Saraswath Brahmins. He also referred us to Exhibit A-6, the decree in the scheme suit, O.S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials, and that, notwithstanding that the point was not taken in the pleadings, it could be allowed to be raised as a pure question of law. We are unable to agree with this submission. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. We have accordingly declined to entertain this contention. We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Moolky is a public temple, and that it is within the operation of Act V of 1947."

44. The Hon'ble Supreme Court in the case of ***Ram Sarup Gupta v. Bishun Narain Inter College,*** reported at ***(1987) 2 SCC 555*** considered in depth the responsibility of a party while pleading its case and the approach of the courts construing the pleadings. The court precluded a party from relying on evidence in the absence of pleadings. The Hon'ble Supreme Court in the case of ***Ram Sarup Gupta(supra)*** held thus:

6. *The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of*

pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

45. In ***SBI v. S.N. Goyal,*** reported at ***(2008) 8 SCC 92*** the Hon'ble Supreme Court set its face against adjudication of an issue which was not pleaded and distinguished the adjudication of a civil dispute from exercise of powers of judicial review, by stating:

*"**21.** In the absence of appropriate pleading on a particular issue, there can be no adjudication of such issue. Adjudication of a dispute by a civil court is significantly different from the exercise of power of judicial review in a writ proceedings by the High Court. In a writ proceedings, the High Court can call for the record of the order challenged, examine the same and pass appropriate orders after giving an opportunity to the State or the statutory authority to explain any particular act or omission. In a civil suit parties are governed by rules of pleadings and there can be no adjudication of an issue in the absence of necessary pleadings."*

46. The importance of pleadings was reprised by the Hon'ble Supreme Court in the case of ***Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira,*** reported at ***(2012) 5 SCC 370.*** The Hon'ble Supreme Court in ***Maria Margarida Sequeira Fernandes (supra)*** construing the importance of pleadings opined thus:

"Pleadings:

53. *Pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America.*

68. *In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it*

is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

71. *Apart from these pleadings, the court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the court must carefully and critically examine the pleadings and documents.*

72. *The court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.*

74. *If the pleadings do not give sufficient details, they will not raise an issue, and the court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.*

77. *The court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case."*

47. Similarly, the Hon'ble Supreme Court in the case of ***Union of India v. Ibrahim Uddin,*** reported at ***(2012) 8 SCC 148,*** after considering ample authority in point ruled as follows:

77. *This Court while dealing with an issue in Kalyan Singh Chouhan v. C.P. Joshi[(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR 2011 SC 1127] , after placing reliance on a very large number of its earlier judgments including Trojan & Co. v.Nagappa Chettiar [AIR 1953 SC 235] , Om Prakash Gupta v. Ranbir B. Goyal [(2002) 2 SCC 256 : AIR 2002 SC 665] , Ishwar Dutt v. Collector (LA) [(2005) 7 SCC 190 : AIR 2005 SC 3165] and State of Maharashtra v. Hindustan Construction Co. Ltd.[(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 : AIR 2010 SC 1299], held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.*

78. *In Bachhaj Nahar v. Nilima Mandal [(2008) 17 SCC 491 : (2009) 5 SCC (Civ) 927 : AIR 2009 SC 1103] this Court held that a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. In the absence of pleadings, the court cannot make out a case not pleaded, suo motu.*

48. In light of the discussion in the preceding paragraphs, the substantial questions of law no. 1 and 2 are respectively answered as follows:

Answer to substantial question of law No. I:

49. The appellate court erred in law by going beyond pleadings and in excess of relief sought and partitioning the entire property including plots no. 2911 and 2912 which were not subject matters of dispute in the plaint.

Answer to substantial question of law No.II :

50. The appellate court also misdirected itself in law and travelled beyond the pleadings by finding that the area of the plots was enhanced during consolidation proceedings.

51. The appellate court also erred by relying on Consolidation Form 41 (Paper No. 95C), since it could not have been received in evidence, in absence of pleadings. Further the said document was not admissible in evidence because it was not mentioned in the list of documents submitted with the plaint nor marked as an Exhibit by the learned trial court to be admitted in evidence.

52. The learned appellate court repartitioned the entire property. The legality of this action shall now be examined.

53. Partition of property by family settlement is a long established alternative dispute resolution method which is accepted by the courts. The parties to a family settlement, partition a joint property on mutually accepted terms.

54. The practice of accepting the family settlements is long, and the rationale behind it is sound. Family settlements are created by mutual consent of parties. Such family settlements ensure amicable resolution of property issues. The family settlements preclude any future disputes and resolve existing disputes in an amicable fashion. Such settlements preempt litigation and prevent bad blood in the family. The courts have consistently upheld the family settlements and set their face against reopening of family settlements which have been given effect.

55. Courts have vested sanctity in family partition, by according finality to family partitions. A bonafide partition once effected between the parties is final and irrevocable. The parties cannot renege from the same. The partition cannot be undone subsequently on the ground of mere inequality of shares.

56. It would be apposite to fortify these propositions by good authority.

57. The Hon'ble Supreme Court in the case of ***Ranganayakamma v. K.S. Prakash,*** reported at ***(2008) 15 SCC 673*** stated the purpose and attributes of family settlements:

*"**30.** It may be true that although the properties were described as coparcenary property and both the branches were granted equal share but it must be remembered that the decree was passed on the basis of the settlement arrived at. It was in the nature of a family settlement. Some "give and take" was necessary for the purpose of arriving at a settlement. A partition by metes and bounds may not always be possible. A*

family settlement is entered into for achieving a larger purpose viz. achieving peace and harmony in the family."

58. A similar statement of law on family partition was made by the Hon'ble Supreme Court in the case of ***Hari Shankar Singhania v. Gaur Hari Singhania,*** reported at ***(2006) 4 SCC 658,*** by holding:

*"**43.** The concept of "family arrangement or settlement' and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation, etc. should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into to allay disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in Ram Charan Das v. Girja Nandini Devi, AIR 1966 SC 323.*

59. Stating the conditions when partition can be reopened, the Hon'ble Supreme Court in the case of ***Devarajan v. Janaki Ammal in Civil Appeal No. 2298 of 1966*** observed as under:

"Generally speaking, a partition once effected is final and cannot be reopened on the ground of mere inequality of shares, though it can be reopened in case of fraud or mistake or subsequent recovery of family property: (see Moro Vishvanath v. Ganesh Vithal [(1873) 10 Bom HCR 444]). Further an allotment bona fide made in the course of a partition by common consent of the coparceners is not open to attack when the shares are not absolutely equal or are not strictly in accordance with those settled by law. It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even so, so long as there is no fraud, unfair dealing or over-reaching by one member as against another, Hindu Law requires that a bona fide partition made on the basis of the common consent of coparceners must be respected and is irrevocable:"

60. After consideration of authority in point, the Hon'ble Supreme Court in the case of ***Ratnam Chettiar v. S.M. Kuppuswami Chettiar,*** reported at ***(1976) 1 SCC 214*** distilled the law on the subject of reopening of partition thus:

*"**19.** Thus on a consideration of the authorities discussed above and the law on the subject, the following propositions emerge:*

"(1) A partition effected between the members of the Hindu undivided family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu undivided family which consists of minor coparceners it is binding on the minors also if it is done in good faith and

in bona fide manner keeping into account the interests of the minors.

(3) Where, however, a partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and moveable properties but the two transactions are distinct and separable or have taken place at different times, if it is found that only one of these transactions is unjust and unfair it is open to the Court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

The facts of the present case, in our opinion, fall squarely within propositions Nos. (3) and (4) indicated above."

61. While dealing with consequences of partition, the Hon'ble Supreme Court in the case of ***Shub Karan Bubna v. Sita Saran Bubna,*** reported at ***(2009) 9 SCC 689*** observed as follows:

"The issue:

5. *"Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.*

6. *A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.*

62. Family partition between the parties in this case, satisfies the tests of a bonafide partition laid down by the courts. The plaintiff-respondent no. 1, had earlier filed a suit for partition before the consolidation authority, which had been dismissed on the foot that the property had already been partitioned. The partition of the entire property was given effect to. The ingredients for reopening the partition are not made out in the established facts of the case.

63. It is established that the parties entered into possession over their respective shares in the property, pursuant to the partition. After the partition the sole ownership of the partitioned shares came to be vested in the respective parties. The partition could not have been undone.

In view of the preceding discussion, the substantial question of law no. III is answered hereunder:

64. The learned appellate court erred in law by making a fresh partition of the property, since the property ceased to be partible and the jointness did not exist after the partition was given effect to.

65. The appellate court traced a fresh map of the entire inherited property of the parties and redrew the boundaries of the plots. The appellate court took it upon itself to redraw the boundaries of the plots by creating a fresh map with the assistance of the Court Amin. The appellate court traced the map without physical inspection of the site. The exercise of reconstruction of the map of the plots of land and drawing of the lines of partition was undertaken by the learned court using the map tendered in the Commissioner report. The parties were not complicit in this process of redrawing the map and recasting the respective shares of the parties. No objections were called by the court during the entire procedure. The map and the partition so finalized by the learned appellate court was the basis of its judgment and forms part of the decree. The procedure adopted by the learned appellate court in creating the map of the property is not known to law.

The substantial question of law No. IV is hence answered as follows:

66. The procedure adopted by the learned appellate court in redrawing the map of the entire property is contrary to law, and the partition and the judgment and decree of the learned appellate court on the foot of the said map are illegal and vitiated.

67. The learned trial court had found the nature of the plots of land, on the foot of the pleadings, admission of the parties and documentary evidences. The learned trial court opined that the plot nos. 2911 and 2912 were Abadi lands while plots nos. 2913 and 2914 were Bhumidhari lands. The learned appellate court upset the findings of learned trial court and recorded that all the plots were Abadi lands.

68. The learned appellate court did not assign any reasons for reversing the well reasoned and well founded findings of the learned trial court. The learned appellate court made its findings on the foot of consolidation forms which were not admissible in evidence (for good reasons cited in the earlier part of the judgment). The finding of the learned appellate court is perverse and unsustainable in law.

69. The power of the learned appellate court to reverse the findings made by the learned trial court is undisputed, but the manner of exercise of this power is guided by judicial authority in point.

70. In the case of ***Santosh Hazari v. Purushotam Tiwari,*** reported at ***2001 (3) SCC 179,*** the Hon'ble Supreme Court while considering the manner in which the finding of learned trial court can be reversed by the learned appellate court held so:

"15.....while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it"

71. Admittedly, in this case, the learned appellate court did not come to "close quarters with the findings of the learned trial court" in regard to the nature of the land.

Answer to substantial question No. V is as follows:

72. The learned appellate court erred in law by finding that all plots are Bhumidhari lands and reversing the finding of the learned trial court regarding the nature of the land, and the opinion of the former to the extent it is at variance with the latter on the point of the nature of land is unsustainable in law.

73. The jurisdiction of civil courts in regard to the agricultural properties ousted by virtue of Section 331 of the UPZA&LR Act. The issue of jurisdiction in the facts of this case is mixed question of fact and law. Ouster of jurisdiction was not pleaded by the defendant no.1-appellant. No jurisdictional issue was framed by the learned trial court. Though it must be added that the learned trial court found that the civil courts do not have jurisdiction to entertain the suit for partition, in view of the bar under the UPZA&LR Act. However, it is noteworthy that the point of jurisdiction was neither raised for determination before the appellate court nor pressed by the defendant no. 1-appellant at that stage.

74. I see merit in the submission of Sri Ramanand Pandey, learned counsel for the respondent that the issue of jurisdiction in the instant case could not be traversed by the plaintiff-respondent no. 1 in absence of pleadings by the defendant no. 1-appellant. The issue of jurisdiction is not a pure question of law in this case. Being a mixed question of law and fact, the same should have been pleaded and an issue was required to be framed before the learned trial court.

75. The defendant no.1-appellant cannot surprise the plaintiff-respondent no.1 by raising the issue of jurisdiction at this stage. It is well settled law that the ouster of jurisdiction of the civil court shall not be readily presumed.

76. The jurisdiction of the civil court did not stand ousted in the facts of the case. The substantial question of law no. VI is answered in the negative and against the defendant no. 1-appellant. The finding of the learned trial court in regard to jurisdiction is reversed.

77. In the wake of the preceding discussions and answers to the substantial questions of law, the judgment and decree dated 19.01.1999 and 25.01.1999 respectively, entered by learned District Judge, Siddharth Nagar, in Civil Appeal No. 40 of 1998, Kedarnath Vs. Ganga Prasad Rai and another, are illegal and cannot stand.

78. The judgment and decree dated 19.01.1999 and 25.01.1999 respectively, rendered by learned District Judge, Siddharth Nagar, in Civil Appeal No. 40 of 1998, Kedarnath Vs. Ganga Prasad Rai and another, are set aside.

79. Apart from the finding on the issue of jurisdiction, there is no infirmity in the judgment and decree dated 26.03.1998 and 07.04.1998 rendered by the learned II-Additional Civil Judge (Junior Division), Bansi, Siddharth Nagar in Original Suit No. 295 of 1980, Kedar Nath Vs. Ganga Prasad Rai and another.

80. The judgment and decree dated 26.03.1998 and 07.04.1998 rendered by the learned II-Additional Civil Judge (Junior Division), Bansi, Siddharth Nagar in Original Suit No. 295 of 1980, Kedar Nath Vs. Ganga Prasad Rai and another, are affirmed to the extent indicated in this judgment.

81. The second appeal is allowed.

(2019)11ILR A746

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 365 of 2019

Janki Devi ...Defendant/Appellant
Versus
Subhash Chandra & Ors. ...Plaintiffs/Respondents

Counsel for the Appellant:
Sri Ram Milan Mishra

Counsel for the Respondents:
Sri V.K. Baranwal

A. Civil Law-Specific Relief Act, 1963 - Section 19(c) - Subsequent purchaser could not raise challenge to the findings regarding the readiness and willingness.

Held: - Defendant no. 2 - the appellant, who was a purchaser during the subsistence of the agreement to sell, could not raise the issue about the fact as to whether the findings regarding the readiness and willingness were correct as she was not required to execute the sale deed but was a purchaser of the property after the agreement between the plaintiff and the defendant had been entered into. When the agreement to sell was a registered agreement to sell then the there was a presumption that the defendant no. 2 always knew about the agreement to sell.

Second Appeal dismissed (E-5)

List of Cases Cited: -

1.N.P. Thirugnanam (dead) by Lrs. Vs Dr. R. Jagan Mohan Rao & ors. 1995 (5) SCC 115.

2. Jugraj Singh & anr. Vs Labh Singh & ors. AIR 1995 SC 945

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

1. A suit for specific performance was filed by the respondent no. 1 against one Buddhiram with a prayer that the defendant Buddhiram be directed to execute a sale deed and to handover possession of the property regarding which an agreement to sell was entered into between the defendant Buddhiram and the plaintiff on 21.4.1992. The plaint allegations were that the defendant had taken Rs. 35,000/- as an advance on 21.4.1992 and had also entered into an agreement that he would after taking the remaining Rs. 5,000/- execute a sale deed within a year in favour of the plaintiff. When the defendant did not execute the sale deed and the year was coming to an end on 30.3.1993 a notice was sent by the plaintiff to the defendant Buddhiram that he may appear on 15.4.1993 before the Office of Registrar to execute the sale deed. The defendant filed his written submission and stated that, in fact, no agreement to sell was entered into and the defendant had only taken Rs. 5,000/- from the plaintiff by way of a loan. He did not ever enter into any agreement to sell his property.

2. It appears that when the plaintiff came to know about some sale deed

having been there in existence dated 21.10.1993 by which the defendant no. 1 had allegedly sold the property in question to the defendant no. 2 then he amended the plaint and stated that the defendant no. 2 and her husband were always in the know about the registered agreement dated 21.4.1993 and, therefore, the plaintiff's right would not get affected.

3. The Trial Court framed as many as 7 issues and decreed the suit and directed the defendants to execute the sale deed in favour of the plaintiff within thirty days. The defendant filed a First Appeal which was when dismissed on 10.12.2018, the instant Second Appeal was filed by the defendant no. 2.

4. The plaintiff was represented by his counsel Sri V.K. Baranwal before this Court. The appellant who was the defendant no. 2 in the Suit and had alleged a purchase from the defendant no. 1 by a sale deed dated 21.10.1993 has vehemently argued that there was no specific finding of readiness and willingness as was mandatory under Section 19(c) of the Specific Relief Act and has relied upon judgements reported in **1995 (5) SCC 115 (N.P. Thirugnanam (dead) by Lrs. vs. Dr. R. Jagan Mohan Rao and others)** and **AIR 1995 SC 945(Jugraj Singh and another v. Labh Singh and others).**

5. Learned counsel for the appellant further made his submissions with regard to the other substantial questions of which he had framed and submitted that the agreement was not proved properly. He further submitted that any admission made in the reply to the notice could not be treated as an admission and took recourse to Section 31 of the Indian Evidence Act. He also denied any presumption of notice under the explanation I of Section 3 of the Transfer of Property Act.

6. Learned counsel for the caveator, however, submitted that there were enough findings to reveal that the plaintiff was always ready and willing. What is more, he submitted that it did not lie in the mouth of the defendant no. 2 (the appellant here) to question the readiness and willingness of the appellant as she was not the defendant who was required to execute the sale deed but was a purchaser of the property after the agreement between the plaintiff and the defendant had been entered into. She had also no right to raise the issue with regard to the finding regarding the admission of the defendant no. 1. The counsel for the caveator / plaintiff submitted that no interference be made with regard to the findings as had been arrived at by the two courts of law.

7. Learned counsel for the plaintiff-caveator also submitted that when the agreement to sell dated 21.4.1992 was a registered agreement to sell then the there was a presumption that the defendant no. 2 and her husband always knew about the agreement to sell.

8. Having heard the learned counsel for the appellant/respondent no.2 and learned counsel for the caveator/the plaintiff, this Court is of the view that no substantial question of law is involved in this case. What is more, the defendant no. 2 the appellant who was a purchaser during the subsistence of the agreement to sell could not raise the issue about the fact as to whether the findings regarding the readiness and willingness were correct.

9. In this view of the matter, the Second Appeal which is concluded by findings of fact requires no interference. The Second Appeal is, accordingly, dismissed.

(2019)11ILR A748

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Second Appeal No. 520 of 2017

Ram Babu ...Defendant/Appellant
Versus
Raj Bahadur & Anr.
...Plaintiffs/Respondents

Counsel for the Appellant:
Sri Pravesh Kumar

Counsel for the Respondents:
Sri Nigamendra Shukla

A. Civil Law-Code of Civil Procedure, 1908 - Order 7 Rule 11 (d) CPC - Rejection of plaint as barred by limitation - Only plaint averments have to be seen.

Held:- Rejection of plaint under Order 7 Rule 11 (d) C.P.C is a drastic power conferred in the court to terminate a civil action at the threshold. While considering Order 7 Rule 11 (d) C.P.C, only plaint averments have to be seen. It is the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. The stand of the defendant in the written statement or in the application for rejection of plaint is wholly immaterial at that stage. Document filed by defendant at pre-trial stage is not at all relevant for the purpose of deciding, the issue regarding rejection of plaint under Order 7 Rule 11 (d) C.P.C. (Para 19, 20)

B. Practice and Procedure - Maintainability - Dismissal of a suit at Pre-trial stage on the ground of maintainability - Court may even look into those documents furnished by the defendants.

Held:- For dismissal of the suit on a preliminary issue regarding maintainability of the suit, the court is entitled and liable to look into all documents including those furnished by the defendants. (Para 21)

Second Appeal dismissed (E-5)

List of Cases Cited: -

1.Central Provident Fund Commissioner, New Delhi & ors. Vs Lala J.R. Education Society & ors. 2012 (121) ALR.

2. P.V. Guru Reddy Vs Neeradha Reddy (2015) 8 SCC 331

(Delivered by Hon'ble Rajiv Joshi, J.)

1. This is defendant's second appeal under Section 100 Code of Civil Procedure against the judgment and decree dated 28.2.2017 passed by the additional District Judge Court No.14, Allahabad in First Appeal No. 301 of 2013 (Raj Bahadur Vs. Rama Bai Trust and Others) whereby the appeal was allowed. The lower appellate court by the impugned judgment and decree has set aside the judgment and decree dated 4.3.2013 passed by the trial judge in Original Suit No.722 of 2009 (Raj Bahadur Vs. Ramabai Trust); decided Issue no. 7 in favour of the plaintiffs and held that the plaint cannot be rejected under Order 7 Rule 11 (d) of C.P.C.

2. The relevant facts for consideration in the present appeal are that one Smt. Latifanbai @ Rama Bai had

created a Trust on 7th August, 1949 namely Rama Bai Trust with regard to the property House Nos. 49,50,51 and 52 situated at Mohalla Meerganj including other properties situated at Alopibagh District- Allahabad for public purposes (Dharmsala). Since, several tenants were residing in the aforesaid houses and the purpose for creating the trust was not being fulfilled, therefore, all the trustees after the death of Smt. Latifanbai @ Rama Bai decided to sell the property and accordingly filed an application before the District Judge, Allahabad seeking permission to sell the property as mentioned above.

3. The District Judge Allahabad vide order dated 14.5.1968 granted permission to sell the aforesaid property belonging to the Trust. On 21.5.1975, this Court appointed official trustee of the aforesaid trust who has full authority and power to sell the aforesaid property.

4. Subsequently, a sale-deed was executed by the Trustee in respect of house no. 49 situated at Meerganj, Allahabad for the sale consideration of Rs. 70,000/-. The said sale-deed was registered on 15.1.1985 in the office of Sub-Registrar, Allahabad. Subsequently, the plaintiff-respondent no. 1 Ram Bahadur filed original Suit No. 722 of 2009 by impleading the Rama Bai Trust as the defendant no.1 and the appellant as defendant no. 2 for declaration to the effect that the sale-deed dated 12.10.1984 (registered on 15.1.1985) is null and void.

5. In the plaint, it was specifically stated that the plaintiff-respondent had no knowledge about the sale-deed dated 12.10.1984 registered on 15.1.1985 and he acquired the knowledge of the same in April, 2009 and the suit was filed on 30.5.2009.

6. The defendant-appellant contested the matter and filed his written statement on the ground that the suit is barred by limitation as the plaintiffs had the knowledge about the execution of the sale-deed in question and even earlier he had filed Original Suit No. 969 of 1996 for permanent injunction in which the defendant-appellant was the defendant no.2 and therefore, the plaint is liable to be rejected under Order 7 Rule 11 (d) of C.P.C.

7. The trial court on the basis of the pleadings of the parties framed following 9 issues on 15.5.2012:

1– क्या वादपत्र के कथनानुसार प्रश्नगत बैनामा शून्य व निष्प्रभावी घोषित किये जाने योग्य है ?

2– क्या वादी प्रश्नगत सम्पत्ति की सार्वजनिक नीलामी कराये जाने हेतु आफीसियल ट्रस्टीज को हिदायत दिलवाने का उपशम प्राप्त करने का अधिकारी है ?

3– क्या वाद का मूल्यांकन उचित है ?

4– क्या प्रदत्त न्याय शुल्क पर्याप्त है ?

5– क्या इस न्यायालय को वाद की सुनवाई का क्षेत्राधिकार प्राप्त है?

6– क्या वाद धारा 34, 38, एवं 41 विशिष्ट अनुतोष अधिनियम के प्राविधानो से बाधित है ?

7– क्या वादी आदेश – 7 नियम – 11 सी0 पी0 सी0 से बाधित है?

8– क्या वादी उपमति एवं निबन्धन के सिद्धान्तों से बाधित है ?

9– वादी किस उपशम को पाने का अधिकारी है ?

8. One of the issues i.e. Issue no. 7 regarding rejection of plaint under Order 7 Rule 11 (d) of C.P.C. was decided by the trial judge against the plaintiffs and accordingly the plaint was rejected considering the averments made in the written statement, vide judgment and

decree dated 4.3.2013. Against the decree of the trial court, the plaintiff filed appeal No. 301 of 2013 which was allowed by the lower appellate court vide impugned judgment and decree dated 28.2.2017, setting aside the judgment and decree passed by the trial judge; holding that the plaint cannot be rejected under Order 7 Rule 11 (d) of C.P.C and directing the trial court to decide the suit on merits.

9. The decree passed by the lower appellate court is impugned in the present second appeal.

10. I have heard Sri Pravesh Kumar, learned counsel for the appellant and Sri Nigamendra Shukla, learned counsel for the respondents.

11. Contention of learned counsel for the appellant is that the lower appellate court had committed illegality while setting aside the judgment and decree passed by the trial court whereby the suit was dismissed under Order 7 Rule 11 (d) of C.P.C. as barred by limitation and the averment made in the written statement ought to have been considered at the pre trial stage. In support of his contention, he has placed reliance upon the judgment of Hon'ble Apex Court in the Case of **Central Provident Fund Commissioner, New Delhi & Ors Vs. Lala J.R. Education Society & Ors reported in 2012 (121) ALR.**

12. On the other hand learned counsel for the plaintiff-respondent submits that while considering the provisions of Order 7 Rule 11 (d) C.P.C., only the plaint averments are to be seen and the averment made in the written statement for rejection of plaint are irrelevant. In support of his contention he has relied upon the judgment of Hon'ble Apex Court in the Case of **P.V. Guru Reddy Vs. Neeradha Reddy reported in (2015) 8 SCC 331.**

13. This Court on 2.5.2017 has admitted the present appeal on the following substantial questions of law:-

(1) Whether the lower appellate court was correct in setting aside the judgment of the trial court on the ground that at the pre-trial stage the documents filed by the defendant were not relevant.

(2) Whether the document in Original Suit No. 969 of 1996 filed by the plaintiff herein describing his parentage was not a relevant material and could not have been relied upon by the trial court.

14. I have considered the arguments raised by the counsel for the parties and as well as substantial questions of law framed by the this Court while admitting the appeal.

15. The preliminary issue framed by the trial court was as to whether suit is barred under Order 7 Rule 11 C.P.C., meaning thereby as to whether the plaint is liable to be rejected under Order 7 Rule 11 (d) C.P.C., as barred by limitation. The suit filed by the plaintiff- respondent was for a declaration to the effect that the sale-deed executed by the Trustee- defendant no. 2 in favour of the defendant-appellant be declared as null and void. Specific averments had been made in the plaint that the sale-deed in question was not in the knowledge of the plaintiff-respondent and the plaintiffs acquired the knowledge of the said sale-deed in April, 2009 and therefore, the suit was filed within time on 3.5.2009. The objection raised by defendant was that the suit is barred by

limitation as the plaintiffs and the defendant were brother and their father was one Fekhu Lal. However, in the plaint, the plaintiff described his father as one Vishambharnath, but, on the basis of Paper No. 117-Ga/1 and 17-Ga/4 the trial court has recorded a finding that the father of the plaintiff also is Feku Lal and the plaintiff has full knowledge of the sale-deed executed on 12.10.1984 which was registered on 15.1.1985 and therefore, the suit filed by the plaintiff is barred by limitation.

16. The appellate court reversed the decree of the trial court on the ground the under Order 7 Rule 11 (d) C.P.C. the plaint can be rejected only on the basis of averments made in the plaint and averment made in the written statement cannot be considered.

17. Now the question is as to whether the plaint can be rejected under Order 7 Rule 11 (d) C.P.C. on consideration of the documents of the earlier suit filed by the plaintiff and on the basis of taking into consideration averments in the written statement. For this purpose, it is necessary to have a glance on the provisions of Order 7 Rule 11 (d) C.P.C which reads as under:-

11.Rejection of plaint.- The plaint shall be rejected in the following cases:-

(a) .....

(b) .....

(c) .....

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e).....

(f).....

18. From the language used in Order 7 Rule 11 (d) C.P.C., it is apparent that where the suit appears from the statement in the plaint to be barred by any law, the plaint is liable to be rejected.

19. The Hon'ble Apex Court in the Case of **P.V. Guru Reddy** (supra) has taken a view that rejection of plaint under Order 7 Rule 11 (d) C.P.C is a drastic power conferred in the court to terminate a civil action at the threshold. It is the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. The stand of the defendant in the written statement or in the application for rejection of plaint is wholly immaterial at that stage in this regard, paragraph no. 5 and 6 of the decision in **P.V. Guru Reddy** (supra) are quoted hereinunder:-

"5. Rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

6. In the present case, reading the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex facie discloses that the suit is barred by limitation or is barred under any other provision of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the stage of consideration of the application under Order VII rule 11 the stand of the defendants in the written statement would be altogether irrelevant."

20. It is settled proposition of law as taken by this Court as well as Hon'ble Apex Court that while considering Order 7 Rule 11 (d) C.P.C, only plaint averments have to be seen and therefore, the document filed by defendant at pre trial stage is not at all relevant, even the documents relied upon by the trial court is not relevant material for the purpose of deciding, the issue regarding rejection of plaint under Order 7 Rule 11 (d) C.P.C. The judgment cited by learned counsel for the respondents in the case **Central Provident Fund Commissioner, New Delhi** (supra) is not attracted at all in the present case, as the Hon'ble Apex Court in the said case has held that the rejection of plaint on institutional ground is different from the dismissal of a suit at pre trial stage on the ground of maintainability. The paragraph no. 7 of the decision in **Central Provident Fund Commissioner, New Delhi** (supra) is relevant which reads as under:-

"7. Accordingly to the appellants, the respondents have suppressed crucial facts in the plaint, which if seen, the suit is only to be dismissed at the threshold. Rejection of a plaint on institutional grounds is different from dismissal of a suit at per-trial stage on the ground of maintainability. For dismissal on a preliminary issue, the Court is entitled and liable to look into the entire documents including those furnished by the defendant."

21. A bare reading of the paragraph no. 7 quoted above, makes it clear that for dismissal of the suit on a preliminary issue regarding maintainability of the suit, the court is entitled and liable to look into all documents including those furnished by the defendants.

22. Here in the present case, the question involved is regarding the rejection of plaint under Order 7 Rule 11 (d) CPC and the ratio as law laid down in the decision of **P.V. Guru Reddy** (supra), applies with full force in the facts and circumstances of this case.

23. As a result of the above discussion, both the substantial questions of law as formulated in this case are answered in the affirmative and decided accordingly.

24. I do not find any illegality or infirmity in the order impugned passed by the lower appellate court.

25. The present second appeal lacks merit and is accordingly dismissed.

26. No order as to costs.

(2019)11ILR A753

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2019

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 564 of 2000

Thakur Bankatesh Ji Maharaj Birajman Radha Niwas Brindaban & Anr.
...Plaintiffs/Appellants
Versus
Sri Suresh Chandra Sharma
...Defendant/Respondent

Counsel for the Appellants:
Sri K.S. Tiwari, Sri Rahul Dwivedi

Counsel for the Respondent:
Sri D.K.Tripathi, Sri Manish Goyal, Sri Archit Mehrotra

A. Civil Law-Code of Civil Procedure,1908 - Order VII Rule 14 C.P.C. - when the plaintiff sues upon a document - he should produce the said document when the plaint is presented. Order VII Rule 14 C.P.C. - mandate that a document upon which a plaintiff sues i.e. basis of the suit, shall enter such document/documents in a list and shall produce it in Court when the plaint is presented by him - Plaintiff also obliged to deliver the document and a copy thereof to be filed along with the plaint - Document on which a suit is based, being part of the cause of action, has been considered by way of strict compliance. In the absence of such document the cause of action would be lost. (Para 10, 11)

Held: - Suit filed by the deity through his Sarvarakar, Mahant Naryan Dutt, with the second plaintiff claiming himself to be the holder of a power of attorney from Mahant Narayan Dutt. Power of attorney that was set up as the foundation of the second plaintiff's right to sue on behalf of the deity was not filed - plaint read with the requirements of Order VII Rule 14, does not disclose a cause of action worth trial and rightly rejected under Order VII Rule 11 C.P.C

Second Appeal dismissed (E-5)

List of cases cited: -

1. Church of Christ Charitable Trust & Educational Charitable Society represented by its Chairman Vs Ponniamman Educational Trust represented by its Chairperson/Managing Trustee (2012) 8 SCC 706

(Delivered by Hon'ble J.J. Munir, J.)

1. This appeal is directed against an appellate decree of Sri Bhagwati Prasad, the then Vth Additional District Judge, Mathura, dated 21.02.1999, passed in Civil Appeal No. 10 of 1999, dismissing the appeal and affirming an original decree of Sri M.P. Srivastava, the then IV Additional Civil Judge, (Senior Division), Mathura, dated 23.11.1998 allowing an application by the defendant under Order VII Rule 11 C.P.C. and rejecting the plaint in Original Suit No. 67 of 1998, being a suit for permanent prohibitory injunction, sought in terms to be detailed hereinafter.

2. Heard Sri K.S. Tiwari, learned counsel for the appellant and Sri Manish Goyal, learned counsel appearing on behalf of sole defendant-respondent.

3. The first plaintiff is Thakur Banketeshji Maharaj Virajman Radha Niwas Vrindawan, Tehsil and District Mathura, who is the ruling deity of the temple of Thakur Banketeshji Maharaj Virajman, Radha Niwas Vrindawan. The first plaintiff is shown to be represented through His Mohtamim Mutwalli, Mahant Narayan Dutt, disciple of the Late Acharya Keshri Dutt, through his general power of attorney holder, Gopal Gaur S/o Sri Nand Kishore Sharma. Thus, the first plaintiff who is none other than the ruling

deity of the temple of Thakur Banketeshji Maharaj Virajman has been shown to be represented, through Mahant Narayan Dutt acting through the holder of a general power of attorney from him, that is Gopal Gaur.

4. The second plaintiff is again Gopal Gaur S/o Sri Nand Kishore Sharma. While suing as the second plaintiff, the assertions in the plaint show that the Appellant No. 2 has asserted a right in his favour to bring the suit on the strength of the power of attorney, executed in his favour by Mahant Narayan Dutt. This power of attorney is a registered document dated 01.09.1997, according to the plaintiff, by which Mahant Narayan Dutt has constituted the second plaintiff-appellant his attorney to look after the property of Thakur Banketeshji Maharaj Virajman, Radha Niwas Vrindawan (hereinafter referred to as 'Thakur ji') and further conferred upon him ecclesiastical duties relating to Thakur Ji, that involve *Seva*, *Pooja*, *Bhog*, *Rag* etc. It is asserted that back to mundane matters, Mahant Narayan Dutt has authorised the second appellant to prosecute and defend pending cases relating to the property of Thakur Ji, as also those that may arise in future.

5. It has been asserted further that the power of attorney dated 01.09.1997 has not been cancelled and is still in force. It is also an assertion that by the power under reference, Mahant Narayan Dutt has entrusted to the care and custody of the second appellant, various movables of Thakur Ji, which continue to be in his custody. It is also asserted that in keeping with the aforesaid obligations, the second appellant has been undertaking all along regular *Seva*, *Pooja* of Thakur Ji, without any interruption, and according to custom. He has further been taking good care of the property of Thakur Ji, maintaining it and realizing rents from tenants, in occupation of property that is debutter. It is asserted that the defendant-respondent no. 1 has no right in the suit property. But the said defendant-respondent has an evil eye on Thakur Ji's property that he wants to usurp and take illegal possession of.

6. It is also claimed in the plaint that defendant-respondent has proclaimed, that he would dispossess the second appellant from the suit property, and would not allow the said appellant to undertake his routine religious service. It is then averred that on 26.01.1998, the defendant-respondent made a determined effort to oust the second appellant from possession of the suit property by force but he was not successful at it. It has been in the last averred that in case the defendant-respondent succeeds in dispossessing the second appellant, he would suffer irreparable loss and injury. On foot of these facts, a permanent prohibitory injunction has been claimed by the second appellant, suing as plaintiff No. 2 and purporting to sue as Plaintiff No. 1, in the name of Thakur Ji represented through him, to the effect that the defendant-respondent be restrained from interfering with his management of the affairs and property of Thakur Ji.

7. The defendant-respondent filed an application dated 18.02.1998, under Order VII Rule 11 C.P.C., duly supported by affidavit with a case in brief to the effect that the power of attorney dated 01.09.1997, that is basis of the second appellant's right, claimed in the suit has been cancelled by Mahant Narayan Dutt

through a registered document dated 13.10.1997, and, he has further sent information in regard to such cancellation to the second appellant, which the latter has received. It is also said in that application that the original power of attorney dated 01.09.1997 has been taken back by Mahant Narayan Dutt from the second appellant. It is, therefore, said in the motion to reject the plaint that on the date when the suit was instituted, Appellant No. 2 did not hold any power of attorney entitling him to represent either Thakur Ji, or otherwise, to sue for the protection of Thakur Ji's properties or any other right, the suit being instituted on 28.01.1998. It is thus said that the second appellant has no cause of action to institute a suit either in the name of Thakur Ji, or in his own name to protect and safeguard the interests of Thakur Ji. A reply to the motion under Order VII Rule 11 has been filed on behalf of the second appellant saying that the power of attorney in his favour has not been cancelled by Mahant Narayan Dutt or has he received any information in that behalf. It is further said that at the time of instituting the suit, the plaintiff-appellant No. 2 was the lawful attorney of Narayan Dutt, and continues to be so entitling him to sue. He, therefore, demanded that the motion under Order VII Rule 11 be rejected and the suit allowed to proceed.

8. Both courts below by the orders impugned in this appeal, that bear the force of a decree, have sustained the defendant-respondent's motion under Order VII Rule 11, and rejected the plaint. The Court's below found that the suit was filed by the deity through his Sarvarakar, Mahant Naryan Dutt, with the second plaintiff claiming himself to be the holder of a power of attorney from Mahant Narayan Dutt. It is not in issue that the power of attorney dated 01.09.1997 that was set up as the foundation of the second appellant's right to sue on behalf of the deity was not filed as basis of the suit. In fact, it was never filed at all, before both the court's below. The said power of attorney dated 01.09.1997, which appears to be a registered document was cancelled by the Mahant on 13.10.1997, also by a registered document that was filed by the defendant as paper no. 25 Ga. This document cancelling the power dated 01.09.1997, has not been disputed or denied by the second appellant. Apparently, when the suit was filed on 28th January, 1998 on behalf of Thakur Ji, represented through the second appellant, and in his own name also, on the basis of the power of attorney of 1st September, 1997, the second appellant did not have that power surviving, owing to its cancellation on 13.10.1997 by the Mahant through a supervening instrument, revoking the power.

9. Here, the Court must pause and and remark that a perusal of the plaint shows that Mahant Narayan Dutt through whom Thakur Ji has been represented, has been described as "Mohatimim Mutawalli". Mohatimim Mutawalli is the closest equivalent known to English Law as a trustee but the same is a legal concept native to Mohammedan Law relating to Wakhf. It has absolutely no place or relevance in the context of a Mahant, entitled to represent a deity under the Hindu Law. Though not of much consequence to the determination of the issue here, this manner of a most callous description of parties betrays, to say the least, culpable ignorance on the part of the draftsman who has drawn up pleadings in this case. This Court wishes to say no more about this issue.

10. Before the Appellate Court it appears that finding the situation uneasy, the plaintiff-appellant No. 2 took a plea that assuming without prejudice that he held no power of attorney on the day he instituted the suit, he had a right to sue in his individual capacity. This plea never found place in the plaint and was, therefore, rightly discarded by the Appellate Court on reasoning that the second appellant had alone claimed a right to sue on behalf of the Mahant, derived through a power of attorney to represent Thakur Ji. Most certainly, the length and breadth of the plaint does not disclose, by as much as a hint, a personal right to sue in the second appellant. Even if such a right were set up, on a plain reading of the plaint, there is absolutely no place for a personal right, and consequently no cause of action to sue on the basis of it. It must be noticed here that provisions of Order VII Rule 14 C.P.C. mandate that a document upon which a plaintiff sues, popularly referred as a basis of the suit, shall enter such document/documents in a list and shall produce it in Court when the plaint is presented by him. He is also obliged to deliver the document and a copy thereof to be filed along with the plaint. In this connection, the provisions of Order VII Rule 14 may be quoted with profit:

[14. Production of document on which plaintiff sues or relies. - (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

[(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.]

11. In this regard the document on which a suit is based, being part of the cause of action, has been considered and answered in favour of strict compliance, in the absence of which the cause of action would be lost, in ***Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee,*** where it has been held thus by their Lordships:-

*"**17.** In the case on hand, the respondent-plaintiff to get a decree for specific performance has to prove that there is a subsisting agreement in his favour and the second defendant has the necessary authority under the power of attorney. Order 7 Rule 14 mandates that the plaintiff has to produce the documents on which the cause of action is based, therefore, he has to produce the power of attorney when the plaint is presented by him and if he is not in possession of the same, he has to state as to in whose*

possession it is. In the case on hand, only the agreement between the plaintiff and the second defendant has been filed along with the plaint under Order 7 Rule 14(1). As rightly pointed out by the learned Senior Counsel for the appellant, if he is not in possession of the power of attorney, it being a registered document, he should have filed a registration copy of the same. There is no such explanation even for not filing the registration copy of the power of attorney. Under Order 7 Rule 14(2) instead of explaining in whose custody the power of attorney is, the plaintiff has simply stated "nil". It clearly shows non-compliance with Order 7 Rule 14(2).

18. *In the light of the controversy, we have gone through all the averments in the plaint. In Para 4 of the plaint, it is alleged that the second defendant as agreement-holder of the first defendant and also as the registered power-of-attorney holder of the first defendant executed the agreement of sale. In spite of our best efforts, we could not find any particulars showing as to the documents which are referred to as "agreement-holder". We are satisfied that neither the documents were filed along with the plaint nor the terms thereof have been set out in the plaint. The abovementioned two documents were to be treated as part of the plaint as being the part of the cause of action. It is settled law that where a document is sued upon and its terms are not set out in the plaint but referred to in the plaint, the said document gets incorporated by reference in the plaint. This position has been reiterated in U.S. Sasidharan v. K. Karunakaran [(1989) 4 SCC 482] and Manohar Joshi v. Nitin Bhaurao Patil [(1996) 1 SCC 169]."*

12. In the present case, it is apparent on the face of the record that when the suit was filed on 28.01.1998, there existed no power of attorney in favour of plaintiff-appellant no. 2. There is also nothing on record to show that plaintiff No. 1 represented by the Mahant, had come forward to verify the plaint and its contents, or had instituted the suit. The Courts below have recorded a categorical finding that the power of attorney was not produced by plaintiff-appellant No. 2, either before the Trial Court or before the Appellate Court. The power of attorney has not been produced, even before this Court. The feeble attempt on pleading a personal right to sue before the lower Appellate Court has already been dealt with in the earlier part of this order and found to be utterly derided of substance. Under circumstances, the plaint here taken as a whole, in particular, read with the requirements of Order VII Rule 14, does not disclose a cause of action worth trial. In the considered opinion of this Court, the plaint has been rightly rejected under Order VII Rule 11 C.P.C.

13. In the result, this appeal is **dismissed** under Order XLI Rule 11 C.P.C.

(2019)11ILR A757

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 594 of 1991

State of U.P. ...Defendant/Appellant
Versus
Sri Pooran Chand ...Plaintiff/Respondent

Counsel for the Appellant:

Sri A.P. Singh, Sri Sudhir Solanki, S.C.

Counsel for the Respondent:
Sri A.K. Banerji

A. Civil Law-Code of Civil Procedure,1908 - Section 80(2) - Waiver of Notice

Held: - Section 80(2) provides provides of exemption by Legislature from service of notice under Section 80(1) in cases to obtain an urgent and immediate relief where due to urgency purpose of suit will frustrate in serving the notice *Held* - In this case the only Rasta of plaintiff was allegedly obstructed by defendant so in such case the service of notice under Section 80(1) C.P.C. was not mandatory under law. (Para 9)

Second Appeal dismissed (E-5)

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

1. List revised. No one is present for respondent.

2. The instant appeal has been filed against impugned judgment and decree dated 20.12.1990 passed in Civil Appeal No.86 of 1990 "State of U.P. Vs. Shri Pooran Chandra and another".

3. Heard Sri Sudhir Solanki, learned Standing Counsel for appellant-State of U.P. and perused the record.

4. The brief facts relating to the instant appeal are that plaintiff-respondent no.1 filed Civil Suit No.938 of 1987 for prohibitory as well as mandatory injunction against appellant which was decreed by trial court vide judgment and decree dated 29.5.1990. Against the judgment and decree passed by trial court, the appellant preferred Civil Appeal No.86 of 1990 before the District Judge, Agra which was dismissed vide impugned judgment and decree dated 20.12.1990.

5. The plaintiff's case in brief is that a piece of land was leased out to him by Railways/Union of India (which was impleaded as defendant no.2 but did not contest and has been impleaded as respondent no.2) over which he raised boundary wall and affixed a gate but the employees of the appellant harassed him and used to put drums, bricks and woods over his gate to obstruct his passage and also raised a wall during pendency of suit to obstruct his Rasta. Learned trial court in its findings on issue nos.1, 4 & 5 held that property leased to plaintiff is part of land/plot no.289 and not of plot no.316 of appellant. The appellate court in the impugned judgment and decree has clearly observed that from the report of Commissioner 16-C it is clearly evident that there is no other way available to the plaintiff for approaching to and fro the land leased out to him by Railways respondent no.2 and since plot no.316 is alleged to be PWD road so the plaintiff-respondent has every right of egress and ingress from the gate of his property.

6. Learned counsel for appellant challenging the findings of two courts below contended that plaintiff-respondent has raised constructions over the land leased to him by Railways and has put a gate; that he has no right to open the gate towards the land of defendant-appellant and has no right to encroach over the land of defendant-appellant by raising constructions or otherwise.

7. From perusal of record, I find that there is no case of defendant-appellant that plaintiff-respondent has raised any constructions over the land of defendant or has encroached over it in any manner. Since the plaintiff has no other way to and fro his land, he cannot be stopped from

using the land leased out to him and there appears no illegality in the judgments and decree passed by two courts below.

8. Learned counsel for appellant contends that the judgments of two courts below are wrong on facts and law and as many as 10 substantial questions of law are involved in the appeal as mentioned in page 5 & 6 of the memo of appeal. He pointed out that suit was also barred by provisions of Section 80 of C.P.C.

9. Upon hearing learned counsel for appellant and perusal of record, I find that Section 80(2) provides of exemption by Legislature from service of notice under Section 80(1) in cases to obtain an urgent and immediate relief where due to urgency purpose of suit will frustrate in serving the notice. In this case the only Rasta of plaintiff was allegedly obstructed by defendant-appellant so in such case the service of notice under Section 80(1) C.P.C. was not mandatory under law as also pleaded by plaintiff. The findings of two courts below are concurrent findings of fact based on cogent reasonings and no illegality or perversity in above findings could be pointed out by learned counsel for appellant.

10. In view of discussions made above, I find that appeal is devoid of merits and for want of any substantial question of law is liable to be dismissed in limine.

11. The appeal is dismissed in limine.

12. Interim order, if any, stands vacated.

13. Let lower court record be sent back to court below along with a copy of this order.

(2019)11ILR A759

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 942 of 2016

Chandra Shekhar (Dead) & Ors.
...Plaintiffs/Appellants
Versus
Shiv Prasad & Ors.
...Defendants/Respondents

Counsel for the Appellants:
Sri Ram Chandra Yadav, Sri Jagdish Lal Srivastava

Counsel for the Respondents:
Sri Rahul Mishra

A. Land Law-U.P. Zamindari Abolition and Land Reforms Act, 1951 - Abolition of *zamindari* - Joint property - After the abolition of *zamindari*, Joint Hindu family disintegrated and every individual member of the joint hindu family became a tenure-holder in his own right and had to be considered a separate unit for the exercise of the right of transfer & could transfer only his share of the property.

Held:- Father of the plaintiffs namely Lalsa, alongwith his three sons i.e. the plaintiffs, was alive on the date when the U.P. Zamindari Abolition and Land Reforms Act was notified then as per law, the joint Hindu family disintegrated after the abolition of zamindari and every individual became a tenure-holder in his own right. Therefore, an individual humidhar could have transferred only his share of the property. (Para 12)

Second Appeal allowed (E-5)

List of Cases Cited:-

1. Ram Awalamb Vs Jata Shankar 1968 RD 470.

2. Mahavir Singh & ors. Vs Shri Pal & ors. 1986 RD 161.

3. Ram Padarath & ors. Vs 2nd Additional District Judge, Sultanpur & ors. 1989 RD 21.

4. Nasiruddin & ors. Vs Ch. Ram Swarup & ors. 1978 AWC 636.

5. Ram Charan Vs Balchand & ors. 2017 (136) RD 498.

6. Deokinandan & ors. Vs Surajpal & ors. 1995 (Supp.4) SCC 671.

7. Sarwan Kumar Vs Madan Lal Aggarwal (2003) 4 SCC 147.

8. Sushil Kumar Mehta Vs Gobind Ram Bohra (1990) 1 SCC 193.

9. Chandrika Misir Vs Bhaiya Lal (1973) 2 SCC 474.

10. Srimathi Kaushalya Devi Vs K.L. Bansal (1969) 1 SCC 59

11. Kiran Singh Vs Chaman Paswan 1954 AIR (SC) 340

12. Ram Padarath & ors. Vs 2nd Additional District Judge, Sultanpur & ors 1989 RD 21.

13. Tara Chand & anr. Vs 12th ADJ, Ghaziabad & ors. 2010 (7) ADJ 383

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

1. This Second Appeal has been filed against the judgment and decree of the First Appellate Court by which the First Appeal filed by the respondent nos.1, 2, 3, 4, 5, 6, 7, 8/1 and 8/2 was allowed and the judgment and decree of the Trial Court passed in Suit No.282 of 2000 was set-aside and the suit was dismissed in toto after holding that the Civil Court had no right to entertain the suit.

2. The brief facts of the case are that when the father of the plaintiffs-appellant nos.1, 2 and 3 late Lalsa began to sell off certain properties beyond his share then the plaintiffs-appellants filed a suit being Original Suit No.282 of 2000. The plaint allegations were that the plaintiffs who were the sons of Lalsa were born prior to abolition of zamindari and, therefore, they had 3/4th share in the total property owned by their father and since it was alleged that the father had only 1/4th share in the property, the other brothers namely respondent nos.3, 4, 5, 6 and 7 were, though the sons of their father Lalsa, (from a different mother) could claim only the share of their father. The name of the mother of the plaintiffs was Reshma whereas the name of the mother of respondent nos.3 to 7 was Alaina. The further case taken by the plaintiffs in the plaint was that when their father had tried to sell off certain properties, then they had filed a suit in the Court of Munsif, Muhammadabad, Azamgarh being Suit No.630 of 1993 which was decreed on 21.1.1995 and it was held therein that the plaintiffs were the share-holders of the 3/4 of the entire property. The father of the plaintiffs had tried to get this decree recalled but the recall application under Order IX Rule 13 C.P.C. was dismissed on 11.7.2001 on the ground that it was barred by limitation. The appeal filed against the order dated 11.7.2001 was also dismissed on 10.8.2001. The contesting respondents filed a writ petition being Writ Petition No.35724 of 2001 against the judgment dated 10.8.2001 but this writ petition was also dismissed on 9.9.2003 by the High Court and since the contesting respondents had not challenged the judgment and order of the writ Court dated 9.9.2003, the decree passed in the Suit on 21.1.1995

continued. The further case taken in the plaint was that the plaintiffs were living, along with their father, in a joint hindu family and when zamindari was abolished in the State of Uttar Pradesh, since the plaintiffs had already taken birth before the abolition of zamindari, they became owners of 3/4th share of the property in dispute. The suit essentially was, therefore, filed with a prayer that the sale deeds dated 18.4.2000, 22.4.2000 and 24.4.2000 executed by the father of the plaintiffs in excess of his share be set-aside and the plaintiffs be allowed to continue to enjoy the 3/4th share of the property in question and that their possession be not disturbed. The defendants i.e. the purchasers of the properties and the father of the plaintiffs contested the suit and stated that the written statement which had been filed in the earlier suit which was alleged to have been filed by the father was in fact never filed by the father and, therefore, there was no admission in the Suit No.630 of 1993 of the respondent-father. The further case taken in the written statement by the father was that since the decree was an ex-parte one, it was not binding either on him or on his purchasers.

3. The defendants' case was that when the plaintiffs were not entered in the revenue records at the time when zamindari was abolished, it was essential that they took a declaration of their rights under section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, 1951. It was also the case of the defendants that the plaintiffs had not objected to the entry of the name of the father namely Lalsa in the consolidation operation also and, therefore, the suit was also barred by the provisions of section 49 of the U.P. Consolidation of Holdings Act. The suit was, after striking of issues, decreed on 31.8.2012 and thereafter the respondents who were the buyers of the property along with the Lalsa filed a First Appeal being First Appeal No.203 of 2012. The First Appellate Court upon finding that the father alone was entered at the time when zamindari was abolished, the plaintiffs ought to have filed a suit for declaration before getting the sale deeds cancelled. The appellants also took a ground in the appeal that since the plaintiffs were not entered and since they had not filed any suit for declaration, the suit itself was not maintainable before the Civil Court. The First Appellate Court agreed with the grounds taken by the defendants and allowed the First Appeal and held that the Trial Court had exceeded its jurisdiction in entertaining the suit and after allowing the First Appeal dismissed the suit.

4. The instant Second Appeal was admitted on 9.1.2017 and the following questions of law were framed :

"i) Whether the judgement of the Appellate Court is based on the misreading and mis-appreciation of the evidence and perverse?

ii) Whether father of the plaintiff has a right to execute the sale deed in respect of the ancestral property ignoring the injunction granted by the Trial Court in suit no. 630 of 1993?

iii) Whether injunction issued in the suit no. 630 of 1993 could have been ignored by the defendant, Lalsa in respect respondent nos. 1 to 7 being a nullity."

5. A further question of law which was framed and argued at the time of hearing was "whether the trial Court was right in coming to a conclusion that the

suit as was filed before the Civil Court was barred".

6. Learned counsel for the appellants and the respondents had filed their written arguments.

7. Learned counsel appearing for the plaintiff-appellants chiefly relied upon the Full Bench decision of this Court in **Ram Awalamb vs. Jata Shankar** reported in **1968 RD 470** and relying upon paragraph 44 submitted that, though the property in question was a joint property between the plaintiffs and their father before the U.P. Zamindari Abolition and Land Reforms Act, 1951 was notified, after the abolition of zamindari every member of the joint hindu family had to be considered a separate unit for the exercise of the right of transfer and also for the purposes of devolution of the bhumidhari interest of any deceased member. Since, learned counsel for the appellants referred to paragraph 44 of the judgment in **Ram Awalamb (supra)**, the same is being reproduced here as under :-

"44. Our conclusions can, therefore, be briefly summarised as follows:--

(1) Where members of a joint Hindu family hold bhumidhari rights in any holding, they hold the same as tenants in common and not as joint tenants. **The notions of Hindu law cannot be invoked to determine that status.**

(2) Where in certain class of tenancies, such as permanent tenure holders, the interest of a tenant was both heritable and transferable in a limited sense and such a tenancy could, prior to the enforcement of the Act, be described as joint family property or coparcenary property, the position changed after Act I of 1951 came into force. Thereafter the interest of each bhumidhar, being heritable only according to the order of succession provided in the Act and transferable without any restriction other than mentioned in the Act itself, must be deemed to be a separate unit.

(3) **Each member of a joint Hindu family must be considered to be a separate unit for the exercise of the right of transfer and also for the purposes of devolution of bhumidhari interest of the deceased member.**

(4) The right of transfer of each member of the joint Hindu family of his interest in bhumidhari land is controlled only by Section 152 of the Act and by no other restriction. The provisions of Hindu law relating to restriction on transfer of coparcenary land, e. g., existence of legal necessity, do not apply."

(emphasis supplied)

8. Learned counsel for the appellants also relied upon a judgment of this Court in **Mahavir Singh & Ors. vs. Shri Pal & Ors.** reported in **1986 RD 161** and submitted that the respondents' father namely Lalsa could not have had more than 1/4th share in the property and, therefore, he could not sell the 3/4th share of the complete property. Learned counsel for the appellants also relied upon a Full Bench decision of this Court in **Ram Padarath & Ors. vs. 2nd Additional District Judge, Sultanpur & Ors.** reported in **1989 RD 21** and submitted that for the cancellation of a sale deed whereby regarding the share no declaration was required, a suit would lie in a Civil Court alone.

9. Learned counsel for the appellants further relying upon a decision

of this Court in **Nasiruddin & Ors. Vs. Ch. Ram Swarup & Ors.** reported in **1978 AWC 636** submitted that even if the question of jurisdiction was raised at the first instance, though the defendant could raise the same before the appellate Court if the plea was rejected by the Trial Court but the appellant had to show before the Court that the Trial Court had no jurisdiction to try the suit and the wrong decision on the question of jurisdiction had also occasioned in the failure of justice. Learned counsel further submitted that when before the First Appellate Court no ground was taken as to what failure of justice had occurred if the Trial Court had entertained the suit even if it had no jurisdiction to try the suit, then it cannot be said that the decree was bad in law. Since learned counsel for the appellants has referred to paragraph nos.20, 21 and 22 of the judgment in the case of **Nasiruddin (supra)**, the same are reproduced here as under :-

"20. We are accordingly of opinion that notwithstanding the fact that the suit giving rise to the appeal was filed and decided before coming into force of U.P. Act No. 19 of 1969 it is open to a Respondent in a second appeal coming up for hearing after the coming into force of the aforesaid amendment Act, to raise a plea on the basis of Sub-section (1-A) as introduced in Section 331 of U.P. Zamindari Abolition and Land Reforms Act.

21. As stated earlier, Sub-section (1-A) of Section 331 merely inhibits the Appellant from contending before the appellate or the revisional court that the trial court had no jurisdiction to try the suit unless he can show that such a plea was raised before the court of first instance at the earliest stage and in any case prior to the framing of the issues **and that the wrong decision on the question of jurisdiction had occasioned a failure of justice.** Before the inhibition contained in the notion with regard to entertainment of an objection on the question of trial court's jurisdiction to try the suit is removed, the objector has to show that both the conditions mentioned above i.e. the objection was raised at the earliest and that the trial by the court of first instance has resulted in failure of justice, co-exist. In the instant case, in view of the fact that an issue had been framed by the trial court on the question of its jurisdiction to try the suit, it may be taken that the Appellant has succeeded in establishing that he had raised the objection with regard to trial court's jurisdiction to try the suit before framing of issues and that the first condition, enabling him to raise such an objection before the appellate and revisional court has been made out. However, before the Appellant can be heard on the point he has still to show that the other condition viz. that a wrong decision by the trial court on the question of jurisdiction has occasioned a failure of justice.

22. Apart from contending that a failure of justice has been occasioned because the suit was in fact not triable by the civil court, learned counsel for the Appellant was not able to bring anything to our notice to show that trial of the suit by the civil court has resulted in injustice. It is significant that the Appellant who was also an Appellant in the lower appellate court did not press his objection with regard to trial court's jurisdiction to try the suit. When the Appellant himself did not press this plea before the lower appellate court, it meant that he was not aggrieved by the decision of the trial court on that point and that the trial of the

suit by the civil court has not occasioned any injustice to him. As the Appellant has failed to show that one of the necessary conditions for removing the inhibition contained in Sub-section (1-A) of Section 331 of the U.P. Zamindari Abolition and Land Reforms Act exists, he cannot be permitted to press the second appeal on the ground that the suit giving rise to this appeal was wrongly instituted before the trial court."

10. Learned counsel for the appellants further submitted that the judgment and decree passed in Suit No.630 of 1993, definitely was in favour of the plaintiffs and, therefore, nothing further was required to be decided by any court, be it the Civil Court or the Revenue Court.

11. Learned counsel for the respondents, however, in reply submitted that when the plaintiffs were not entered in the revenue records at the time when zamindari was abolished, then before filing the suit for the cancellation of sale deeds the plaintiffs had to file a suit for declaration in the Revenue Court. In the absence of a declaratory decree, the suit for the cancellation of the sale deeds was not maintainable. Learned counsel for the respondents submitted that when there was a definite submission of the respondents that their father Lalsa had never filed a written statement then an issue ought to have been struck between the parties as to whether Lalsa had in fact filed the written statement or not. Learned counsel to bolster his submissions with regard to the fact that the jurisdiction of the Civil Court was not there, relied upon :

i. **2017 (136) RD 498 :** Ram Charan vs. Balchand & Ors.

ii. **1995 (Supp.4) SCC 671 :** Deokinandan & Ors. vs. Surajpal & Ors.

iii. **2003 (4) SCC 147 :** Sarwan Kumar vs. Madan Lal Aggarwal

iv. **1990 (1) SCC 193 :** Sushil Kumar Mehta vs. Gobind Ram Bohra

v. **1973 (2) SCC 474 :** Chandrika Misir vs. Bhaiya Lal

vi. **1969 (1) SCC 59 :** Srimathi Kaushalya Devi vs. K.L. Bansal

vii. **1954 AIR (SC) 340 :** Kiran Singh vs. Chaman Paswan

viii. **1989 RD 21 :** Ram Padarath & Ors. vs. 2nd Additional District Judge, Sultanpur & Ors.

ix. **2010 (7) ADJ 383 :** Tara Chand & Anr. Vs. 12th ADJ, Ghaziabad & Ors.

12. Having heard learned counsel for the parties, this Court is of the view that the Trial Court had rightly entertained the suit and when it was of the view that as per law the defendant Lalsa, the father, had sold more property than was there in his share, then a further declaration was not required and it had a right to cancel the sale deeds. The jurisdiction with the Civil Court was definitely available. A suit for cancellation for the sale deeds, therefore, was definitely maintainable before the Civil Court. The substantial question of law as had been framed at the time of hearing the instant Second Appeal, therefore, gets answered. With regard to the substantial questions of law no.1, 2 and 3, however, it is stated that since it was evident that the father of the plaintiffs namely Lalsa, alongwith his three sons i.e. the plaintiffs, was alive on the date when the U.P. Zamindari Abolition and Land Reforms Act was notified then as per law, the joint Hindu family disintegrated after the abolition of zamindari and every individual became a

tenure-holder in his own right. Therefore, an individual bhumidhar could have transferred only his share of the property. The question of there being any joint Hindu family did not arise.

13. The question of law which had been framed at the time of hearing of this case which was "whether the trial Court was right in coming to a conclusion that the suit as was filed before the Civil Court was barred" is also answered by holding that the Civil Court definitely had the jurisdiction to entertain the suit and, therefore, the Trial Court rightly entertained the suit and thereafter decreed the same.

14. Under such circumstances, the judgment and decree dated 12.8.2016 passed by the First Appellate Court is set-aside and the suit is decreed in toto.

15. The Second Appeal stands allowed.

(2019)11ILR A765

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 943 of 2017

M/s Laxmi Bricks Ujrai, Agra & Ors.
...Defendants/Appellants
Versus
Sri Dariyab Singh ...Plaintiff/Respondent

Counsel for the Appellants:
Sri Ajay Kumar Mishra, Sri Sanjay Agarwal

Counsel for the Respondent:
Sri Tripathi B.G. Bhai, Sri Anil Kumar Pandey, Anita Tripathi

A. Land Law-U.P. Zamindari Abolition and Land Reforms Act, 1950 - an agricultural land upon the enactment of the U.P. Zamindari Abolition and Land Reforms Act, 1951 vested in the State of Uttar Pradesh and thereafter individually all tenure holders became bhumidhars in their own rights.

B. Land Law-U.P. Zamindari Abolition and Land Reforms Act, 1950 - Concept of personal law had not been adopted by the Zamindari Abolition Act - Concept of Hindu Undivided Family (HUF) do not govern the inheritance or ownership under the Zamindari Abolition Act.

C. Civil Law-Hindu Minority and Guardianship Act, 1956 - Section 12 - Sale of the property of a minor - a guardian ought to be appointed - Since no guardian had been appointed, the sale of the portion of the property belonging to the plaintiff was bad in law.

Second Appeal dismissed (E-5)

List of Cases Cited: -

1 Smt. Ramwati & ors. Vs Dharmdas 2013 RD (120) 842.

2 Ram Awalamb & ors. Vs Jata Shankar & ors. 1968 RD 470

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

1. A suit being Original Suit No.1064 of 1993 was filed by the plaintiff-appellant for the relief of cancellation of a sale deed dated 27.6.1984. Alongwith the prayer for cancellation of the sale deed, a permanent injunction for restraining the defendants from interfering with the plaintiff's possession over the suit property and also

for putting the plaintiff into possession if he was found to be out of it was also prayed for.

2. The case of the plaintiff was that while the plaintiff was the son of one Shiv Charan, he was adopted by his uncle namely Natthi Lal and while he was still a minor, his date of birth being 17.3.1973 as per his High School certificate and 15.9.1974 as per the school leaving certificate, the properties which belonged to him in plot no.686 were illegally sold off by Shiv Charan after giving out that he was the plaintiff's guardian. Further case taken up in the plaint was that after Natthi Lal had died, the plaintiff was looked after by the daughters of Natthi Lal and Shiv Charan had absolutely no concern with either him or his property. The suit was filed on 14.9.1994 within three years of the plaintiff reaching 18 years of age as per the date of birth given in the High School certificate.

3. The plaintiff had stated that the property contained in plot no.686 was around 27 bighas and 17 biswas and half of this property belonged to the plaintiff. Even though only 5 and half bigha was sold by the sale deed which was under challenge, it was averred in the sale deed that Shiv Charan who was selling his property was also selling a portion of the property of the plaintiff. The property was sold by Shiv Charan vide sale deed dated 27.6.1984 to the defendant no.1 namely Laxmi Bricks through its Proprietor the defendant no.2-Brij Mohan. Since, the defendant nos.1 and 2 had sold the property further to defendant nos.3 and 4 on 3.5.2001, they were also arrayed as defendants in the suit. The defendant nos.1 and 2 contested the suit and stated that the plaintiff though was the adopted son of Natthi Lal, after the death of Natthi Lal, was under the guardianship of his de-facto father Shiv Charan and since the properties were joint, the natural father Shiv Charan had the authority to sell the land and, therefore, no fault could be found by the plaintiff in the sale deed.

4. While the suit was being contested, there were eight issues framed and the Trial Court, while deciding the suit, gave a finding of fact that the suit was bad for non-joinder, Shiv Charan having not been made a defendant. It also held that as the property was joint between the plaintiff and his natural father Shiv Charan and as no partition was there, there was no requirement under section 12 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the 'Act') for the appointment of a guardian by the Court. It also held that the properties were of the Hindu Undivided Family (HUF). The Trial Court also held that since the property was not divided, it could also be held that the land measuring 5 bighas and 10 biswas which was sold was only from the property of Shiv Charan and nothing was sold from the property of the plaintiff. With these observations, the suit was dismissed.

5. The First Appellate Court formulated a definite question for determination which was as to whether the sale deed dated 27.6.1984 by Shiv Charan, the natural father of the plaintiff was rightly executed or not. The First Appellate Court came to a definite conclusion that the suit was filed within the limitation provided by the Limitation Act. It also held that since the sale deed had mentioned that the plaintiff's share was also being sold, then half of the

property sold i.e. half of 5 bighas and 10 biswas was that of the plaintiff. Further it held that since the plaintiff-appellant had been adopted by Natthi Lal, the property which devolved upon him was the property of Natthi Lal and it had nothing to do with the share of the property of Shiv Charan. There was in fact nothing which was joint and thereafter the First Appellate Court having setting aside the finding as had been arrived at by the Trial Court that there was no requirement of a guardian under section 12 of the Act, allowed the First Appeal and held that since no guardian had been appointed, the sale of the portion of the property belonging to the plaintiff was bad in law.

6. The instant Second Appeal was filed by the defendant-appellants before this Court. The following substantial questions of law were formulated :

"1. Whether the lower appellate court has illegally allowed the civil appeal without meeting out the reasoning and setting aside the findings recorded by the trial court and as such the judgement and decree dated 11.8.2017 passed by lower appellate court is vitiated in law ?

2. Whether no permission of District Judge was required for transfer of minor's undivided share in the joint family property made by manager (Karta) of the family when admittedly the land in suit is HUF property under section 12 of Hindu Minority and Guardianship Act 1956 which was not denied by the plaintiff in his replication nor any evidence was led and as such the suit was liable to be dismissed on this ground alone ?"

7. So far as the first question of law is concerned, this Court feels that a bare reading of the two judgments clearly shows that the First Appellate Court had allowed the First Appeal after reversing all the findings recorded by the Trial Court. The most important finding that the property was a joint one and that no guardian was required, was definitely set aside by the First Appellate Court by saying that the property was not joint and if the sale-deed had to be held valid then a definite requirement of a guardian was there.

8. So far as the second substantial question of law is concerned, learned counsel for the appellants stated that the plaintiff had not been able to prove that there was any division between himself and his natural father. He, therefore, submits that no requirement of the appointment of a guardian by the Court, as per section 12 of the Act, was required. In this regard, learned counsel for the appellants relied upon a decision of this Court reported in **2013 RD (120) 842 : Smt. Ramwati & Ors. vs. Dharmdas.**

9. Learned counsel for the plaintiff-respondent, however, stated that under the U.P. Zamindari Abolition and Land Reforms Act, 1950, an agricultural land upon the enactment of the U.P. Zamindari Abolition and Land Reforms Act, 1951 vested in the State of Uttar Pradesh and thereafter individually all tenure-holders became bhumidhars in their own rights. Natthi Lal and Shiv Charan became bhumidhars under the U.P. Zamindari Abolition and Land Reforms Act in their own rights. Even if there was no partition by metes and bounds, the shares of the two namely Natthi Lal and Shiv Charan were separate. One could not have dealt with the property of the other. When Natthi Lal died, his share was inherited by

his son - the plaintiff. Shiv Charan who was a separate identity (a separate bhumidhar) could not have dealt with the properties of either Natthi Lal or of his son, the plaintiff. If Shiv Charan wanted to sell a share of his property he was free to do so, but under no circumstance could he have sold the properties of Natthi Lal or his successor, the plaintiff. Since the concept of personal law had not been adopted by the Zamindari Abolition Act, the concept of Hindu Undivided Family (HUF) also could not be said to be governing the inheritance or ownership under the Zamindari Abolition Act. Learned counsel, therefore, submitted that the decision reported in **2013 RD (120) 842 : Smt. Ramawati & Ors. vs. Dharmdas** since had not taken into consideration the provisions of Zamindari Abolition Act, could not be said to be a decision which could be relied upon in the instance case. He, therefore, submitted that the First Appellate Court correctly decided the case. Learned counsel submitted that the Full Bench decision of **Ram Awalamb & Ors. vs. Jata Shankar & Ors.** reported in **1968 RD 470** was not considered in **2013 RD (120) 842** in its right perspective and, therefore, the decision reported in **2013 RD (120) 842** could not be relied upon in this case. Learned counsel referred to para 44 of the Full Bench decision of Ram Awalamb (supra) and, therefore, the same is being reproduced here as under :

"44. Our conclusions can, therefore, be briefly summarised as follows:--

(1) Where members of a joint Hindu family hold bhumidhari rights in any holding, they hold the same as tenants in common and not as joint tenants. The notions of Hindu law cannot be invoked to determine that status.

(2) Where in certain class of tenancies, such as permanent tenure holders, the interest of a tenant was both heritable and transferable in a limited sense and such a tenancy could, prior to the enforcement of the Act, be described as joint family property or coparcenary property, the position changed after Act I of 1951 came into force. Thereafter the interest of each bhumidhar, being heritable only according to the order of succession provided in the Act and transferable without any restriction other than mentioned in the Act itself, must be deemed to be a separate unit.

(3) **Each member of a joint Hindu family must be considered to be a separate unit for the exercise of the right of transfer and also for the purposes of devolution of bhumidhari interest of the deceased member.**

(4) **The right of transfer of each member of the joint Hindu family of his interest in bhumidhari land is controlled only by Section 152 of the Act and by no other restriction. The provisions of Hindu law relating to restriction on transfer of coparcenary land, e. g., existence of legal necessity, do not apply.**"

(emphasis supplied)

10 Having heard learned counsel fort the appellants and the learned counsel for the plaintiff, this Court is of the view that the First Appellate Court correctly reversed the findings therein and held that there was no joint ownership and, therefore, correctly came to a conclusion that if any sale of the property of a minor had to take place, then a guardian ought to have been appointed. In the instant

case, since there was no jointness of the properties of the successor of Natthi Lal i.e. the plaintiff and of Shiv Charan, the latter could not have dealt with the properties of the successor of Natthi Lal at all as a Karta. The second substantial question of law is also, accordingly, answered.

11. Under such circumstances, the substantial questions of law, as have been framed, are answered.

12. The Second Appeal is, accordingly, dismissed.

(2019)11ILR A769

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 971 of 1992

Ram Janam ...Defendant/Appellant
Versus
Ram Din ...Plaintiffs/Respondent

Counsel for the Appellant:
Sri P.K.S. Paliwal

Counsel for the Respondent:
Sri V.V. Misra, Sri Devendra Pratap Yadav, Sri Rajesh Kumar

A. Evidence Law-Evidence Indian Evidence Act, 1872 - Section 45 - Civil Suit for cancellation of sale deed - Opinions of finger print and handwriting expert - Conflicting opinions - Court may itself compare the thumb impression, ignoring the expert opinion - Report of finger print and handwriting expert is relevant but its evidentiary value is that of an opinion of an expert. It is not binding upon the Courts.

Held:– In civil cases when two conflicting opinions are brought before the Court in the shape of reports of two different finger print and handwriting experts, produced each by plaintiff and defendant, favouring each of them respectively, it becomes the pious duty of Court to examine and compare itself the disputed thumb impressions/signatures/ writings etc. with admitted or specimen thumb impressions etc. as well as enlarged photographs thereof, so as to determine the correctness of expert opinion/report given by any of the two handwriting and finger print experts, and deciding the truth of the fact. In civil cases courts may not be justified in resiling from its duty of such examination/comparison by itself by leaving the issue of proof of thumb impressions over any document (which may be basis of case) undecided. In a suit for cancellation of sale deed where there is specific denial of execution of impugned sale deed and specific averment that impugned sale deed having been obtained by impersonating some other person in place of plaintiff, the Court may not be justified in proceeding with disposal of case, either by decreeing or dismissing the case, without recording any specific finding regarding thumb impressions impugned sale deed bears signature/thumb impressions of plaintiff, if it rules out possibility of execution by imposter and in case it does not bear signature/thumb impressions of plaintiff, (confirming execution by imposter in place of plaintiff). (Para 18, 19)

Reports of two experts favouring plaintiff and defendant respectively being contradictory to each other in such circumstances the trial court ought to have examined the disputed thumb impressions over the impugned sale deed/Register Form No.8 and the specimen thumb impressions of plaintiff on record, at its own – Lower appellate Court did not commit any illegality or mistake in comparing the disputed thumb impressions with specimen, thumb impressions of plaintiff at its own. (Para 35)

B. Evidence Law-Indian Evidence Act, 1872 - Section 71 - Burden of Proof - Cancellation of Sale deed - Plaintiff denying execution of sale deed - Burden

to prove execution of sale deed by plaintiff upon the defendant by producing marginal witness of sale deed or by some other evidence - there can be no burden to prove something negative or to disprove any fact or allegation

Held:- The "Burden of Proof" means burden to prove some positive allegations and there can be no burden to prove something negative or to disprove any fact or allegation – Provisions of Section 71 of Indian Evidence Act nowhere required the plaintiff to produce marginal witness of sale deed for disproving the same rather since burden to prove execution of impugned sale deed by plaintiff was on defendant, in view of provisions of Section 71 of Indian Evidence, the defendant had to produce marginal witness of sale deed or to produce some other evidence to which he failed and adverse inference was required to be drawn against him to the effect that had the marginal witnesses been produced to witness box they would have denied execution of impugned sale deed as well as payment of consideration. Defendant could have adduced other evidence to prove impugned sale deed, in view of provisions of Section 71 of Indian Evidence Act which has not been done by him. (Para 30, 31)

C. Property - Entry in revenue Record - Entries in revenue records are not proof of title and possession - Mere mutation of name in revenue records does not create any right, title or interest in absence of any real transaction

Held:- Plaintiff has stated on oath that he is in actual physical possession over the land in suit. Hence merely on account of mutation entries obtained by defendant in revenue records, in absence of any other cogent evidence of his being in actual physical possession over land in suit, the suit may not be considered to be bad for not seeking relief of possession, without there being any conclusive proof of possession of defendant over the land in suit. (Para 32, 33)

Second appeal dismissed (E-5)

List of Cases Cited: -

1.St. of Mah. Vs Sukhdev Singh & anr. AIR 1992 SC Page 2100.

2. Dayal Singh Vs St. of Uttaranchal (2012) 8 SCC 263.

3. Ram Lal Vs Phagna 2006 (1) SCC 168

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

1. The instant second appeal has been filed against judgment and decree dated 8.4.1992 passed by Civil Judge Balia in Civil Appeal No. 181 of 1989 by which appeal was allowed and judgment and decree passed by trial court i.e., Additional Munsif-VI, Ballia in Civil Suit No.575 of 1985 dismissing suit on 15.4.1989 was set aside and plaintiff's suit for cancellation of sale deed was decreed. Feeling aggrieved the defendant has preferred this second appeal which has been admitted vide order dated 10.12.2003 on following two substantial questions of law :-

E. Whether the lower Appellate Court who himself compared the thumb impression, ignoring the expert opinion is justified?

G. Whether the provisions of Section 71 of Indian Evidence Act, 1872 have been followed by the lower Appellate Court, if not, its effect?

2. The brief facts relating to the case are that plaintiff respondent Ram Din filed Civil Suit No.575 of 1985 in the Court of Munsif Ballia (West) seeking relief for cancellation of sale deed dated 20.5.1985, allegedly executed by Ram Din in favour of Ram Janam, in respect of the land, detailed at the foot of plaint viz., plot no.500A area 0.14 acre, 500B area 0.46 acre and 491 area 0.34 acre, total three plots area 0.94 acres, which is

registered in Bahi No.Ist Zild 945 page 60 at Sl.N.2066 on 3.6.1985. It was contended that land in question situate in village Chachia Pargana Sikardarpur Garwi district Ballia of which plaintiff is *bhumidar* in possession with transferable rights and defendant has no right, title or possession, over the same but when the plaintiff was sowing paddy in his fields, defendant Ram Janam disclosed that he has obtained from him a sale deed of his land, which appears to have been obtained by impersonation of someone else in place of plaintiff as plaintiff never visited office of Sub-Registrar for execution of deed. That plaintiff Ram Din neither executed the impugned sale deed nor presented the same for registration before Sub-Registrar nor received any sale consideration of Rs.16,000/- which is shown to have been paid under the impugned sale deed and is inadequate also; that plaintiff is still in possession over the land in suit.

3. The defendant filed written statement denying the allegations of plaint and contended that it is wrong to say that sale deed has been obtained through impostor rather the same was executed on payment of valuable, valid and adequate sale consideration and has been executed in good faith.

4. On parties pleadings trial court framed as many as four issues viz.,

(1) Whether sale deed in question is liable to be cancelled for the reasons given in plaint?

(2) Whether suit is barred by provisions of Section 41 of Transfer of Property Act?

(3) Whether suit is barred by provisions of estoppel and acquiescence?

(4) Relief.

5. The plaintiff filed copy of impugned sale deed and extract of Khatauni as well as enlarged photographs, negatives of disputed & specimen thumb impressions of plaintiff Ram Din and report of handwriting and finger print expert and produced himself as P.W.-1, one Ram Janam son of Hira as P.W.-2, finger print & hand writing expert Niranjan Lal Srivastava as P.W.-3 and Jagat Kumar Srivastava, photographer as P.W.-4. The defendant filed enlarged photographs, negatives of disputed & specimen thumb impressions of plaintiff Ram Din, report of finger print and handwriting expert and copy of question answer seeking information and produced Rajeev Ranjan Srivastava finger print and handwriting expert as DW-1, Ram Janam defendant himself as D.W.-2, Jagat Kumar Srivastava, photographer as D.W.-3 and Ram Badan/Bachan as D.W.-4.

6. The trial court in its discussions on issue no.1 observed that finger print and handwriting experts of plaintiff and defendant have given report respectively favouring them and since experts engaged by each party usually gives report in favour of the same party, hence considering other aspects it held that (i) contention of sale consideration being inadequate may not be accepted (ii) since according to paper no.54(c), the requirement of affixing photo of vendor on sale deed came into effect w.e.f. 21.5.1985, so for not affixing photo on sale deed dated 20.5.1985 the same may not be cancelled (iii) since name of defendant has been mutated in revenue records and the plaintiff has not sought any relief of possession so suit is not maintainable and (iv) Jang Bahadur

marginal witness of sale deed was not produced so adverse inference had to be drawn against plaintiff. Consequnently issue no.1 was decided against the plaintiff and deciding other two issues in negative, the suit was dismissed with costs.

7. Against the judgment and decree of trial court plaintiff filed Civil Appeal No.181 of 1989 before District Judge, Ballia which was transferred to the court of Civil Judge for disposal and the lower appellate court vide impugned judgment and decree allowed the appeal with costs, setting aside the judgment and decree passed by trial court and decreed the suit of plaintiff for cancellation of sale deed with costs.

8. The lower appellate court in agreement with the findings of trial Court that reports of two experts favouring plaintiff and defendant respectively, are contradictory to each other held that in the circumstances the trial court ought to have examined the disputed thumb impressions over the impugned sale deed/Register Form No.8 and the specimen thumb impressions of plaintiff on record, at its own but has committed error in not doing so. The appellate court has himself considered the two reports of handwriting and finger print experts and also examined and compared two thumb impressions (disputed & specimen) and upon such examination reached to the conclusion that both thumb impressions are different and are not the thumb impressions of one and the same person. Consequently it came to the conclusion that thumb impressions over the impugned sale deed do not belong to plaintiff Ram Din and allowed appeal setting aside impugned judgment and decree and and restoring the judgment and decree passed by trial Court.

9. Heard Shri P.K.S. Paliwal learned counsel for defendant-appellant (hereinafter referred as defendant) and Shri Devendra Pratap Yadav learned counsel for plaintiff-respondents (hereinafter referred to as plaintiffs) and perused the record as well as lower court record summoned in the appeal.

10. The learned counsel for defendant submits that learned lower appellate Court acted wrongly and illegally in examining and comparing the disputed thumb impressions over impugned sale deed with the specimen thumb impressions of plaintiff on record. Relying on the law laid down by Apex Court in the case of **State of Maharashtra vs. Sukhdev Singh and another AIR 1992 SC Page 2100** he referred to para No.32 of above judgment wherein the Apex Court has given a caution against venturing an opinion on mere comparison of specimen/admitted writings is being reproduced as under :-

"32. It was then submitted, relying on section 73 of the Evidence Act, that we should compare the disputed material with the specimen/admitted material on record and reach our own conclusion. There is no doubt that the said provision empowers the court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance of the expert opinion that the disputed writings are in the handwriting of the accused as alleged. For this purpose we were shown the enlarged copies of the two sets of writings but we are afraid we did not consider it advisable to venture a

conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the accused Nos.1 and 2. Although the section specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of ***mere comparison,*** *more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. We have already pointed out the state of evidence as regards the specimen/admitted writings earlier and we think it would be dangerous to stake any opinion on the basis of* ***mere comparison.*** *We have, therefore, refrained from basing our conclusion by comparing the disputed writings with the specimen/admitted writings."*

11. The learned counsel for appellant further contended that the lower Appellate Court was not justified in examining and comparing the two thumb impressions and in displacing the decision given by trial court, mere on the basis of such comparison without setting aside findings of trial Court on issue no.1; that appeal is liable to be allowed and setting aside judgment & decree of lower appellate Court, judgment and decree passed by trial Court are liable to be restored dismissing suit of plaintiff with costs.

12. Per contra learned counsel for plaintiff-respondent supported the impugned judgment and decree and contended that the plaintiff never executed the impugned sale deed and since it does not bear his thumb impression and has been obtained through impersonation, the same is null and void and is liable to be cancelled; that report of finger print and handwriting expert is relevant but its evidenciary value is of an opinion and the opinion of expert is not binding upon the Courts; that Niranjan Lal Srivastava was the senior finger and handwriting expert and his report is based on correct analysation of disputed thumb impressions of plaintiff over the impugned sale deed and his specimen thumb impressions taken in Court, while the report of Rajeev Ranjan Srivastava was based on incorrect analysis of enlarged photographs, so in the circumstances the lower appellate Court acted rightly in accordance with law in comparing the two thumb impressions at its own and it has given detailed reasons of analysis in respect of Delta, pattern, core, intervening ridges etc; that the comparison of handwriting and signatures involves more complications as to characteristics of writer viz., pen pressure, speed, pen pause, position of hand and finger etc. unlike the comparison of thumb impressions which is scientific in nature; that the signatures or writings by two persons may have same pictorial effect and it is difficult to analyze the forgery, if any, but in case of thumb impressions, since thumb impressions of two persons may not be same with regard to Delta with gap and number of ridges upto core etc there are less chances of mistake; that since the sale deed in question was not executed by plaintiff so other aspects as discussed by trial Court were not relevant; that plaintiff had only mentioned that there was no reason for executing sale deed by him for inadequate consideration of mere Rs.16,000/- but if above ground may not be good for cancellation of sale deed it may not be

inferred that execution of sale deed was admitted to plaintiff; that plaintiff was not required to produce Jang Bahadur, the alleged marginal witness of sale deed rather for not producing him, adverse inference ought to have been drawn against defendant; that the appeal has been filed with absolutely false and baseless allegations without any substantial question of law involved for consideration and is liable to be dismissed with costs throughout.

13. It is pertinent to mention that documents of "C' category viz., copies of sale deed, extract of khatauni, photos and reports of experts etc. are not on lower Court record and are reported to have been weeded out after stipulated period and decision in first appeal.

14. The plaintiff has filed Civil Suit for cancellation of sale deed dated 20.5.1985 seeking its cancellation on the grounds (i) he did neither visit office of Sub-Registrar nor executed impugned sale deed, which has been obtained by impersonation of some other person in his place, (ii) Jang Bahadur did not sign impugned sale deed as marginal witness (iii) no consideration was paid to plaintiff by defendant and in any case sale consideration of Rs.16,000/- was inadequate (iv) as per rules affixation of photo of vendor was necessary and the same was not affixed as it was obtained by impersonation and (v) plaintiff is in actual physical possession over the property in suit.

15. The trial court finding that the reports of two fingerprint and handwriting experts in contradiction with each other, each one in favour of plaintiff and defendant respectively, left to decide this point in issue about existence of thumb impressions of plaintiff over impugned sale deed, though it was main point of dispute to be decided for just and appropriate decision of the suit. The other grounds were ancillary in nature, rather were circumstances belying execution of impugned sale deed and trial court acted wrongly, illegally and perversely in deciding issue no.1 in negative upon consideration of other aspects of (i) affixation of photo being not required under rules (ii) inadequacy of consideration (of just Rs.16,000/- for purchasing huge land of 0.94 acres) being not valid ground for cancellation of sale deed (iii) for not seeking relief of possession and (iv) for not producing Jang Bahadur the marginal witness of sale deed, by plaintiff.

16. For consideration of substantial question of law no.1 provisions+ of Section 45 of Indian Evidence Act are being reproduced hereunder for ready reference:-

"Section 45. ***Opinions of experts.--****When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.*

Such persons are called experts. Illustrations."

17. The standard of proof in criminal cases is different to some extent from that required in civil cases. In criminal cases entire evidence is to be looked into with the presumption of

innocence of accused and Courts are required to be cautious in relying or not over the expert opinion including medical expert report, if it is in contradiction with ocular or other evidence of facts. In criminal cases since liberty of a person (who is presumed to be innocent) is involved and Courts are required to go slow, in relying on mere comparison and may safely be advised to decide case, ignoring such expert opinion, so as to avoid possibility of conviction of an innocent person/accused, as there is requirement of proof of guilt of accused to the hilt, beyond any shadow of doubt and in case of any shadow of doubt accused is entitled to be acquitted giving him benefit of doubt. The decision of case reported in AIR 1992 SC 2100 (supra) relates to criminal trial and has no application to this case.

18. With a difference, in civil cases there is no concept of benefit of doubt to either party and each party is required to prove its case. In such cases proof or disproof of a document may be decided upon evidence adduced with the aid of expert opinion of handwriting and finger print expert (based on expert knowledge of the science of finger and handwriting expert) upon examination of disputed signature, writing or thumb impressions of a person, having been compared with his specimen or admitted signature, writing or thumb impressions. In such cases when two conflicting opinions are brought before the Court in the shape of reports of two different finger print and handwriting experts, produced each by plaintiff and defendant, favouring each of them respectively, it becomes the pious duty of Court to examine and compare itself the disputed thumb impressions/signatures/ writings etc. with admitted or specimen thumb impressions etc. as well as enlarged photographs thereof, so as to determine the correctness of expert opinion/report given by any of the two handwriting and finger print experts, and deciding the truth of the fact.

19. In civil cases courts may not be justified in resiling from its duty of such examination/comparison by itself by leaving the issue of proof of thumb impressions over any document (which may be basis of case) undecided. In a suit for cancellation of sale deed where there is specific denial of execution of impugned sale deed and specific averment that impugned sale deed having been obtained by impersonating some other person in place of plaintiff, the Court may not be justified in proceeding with disposal of case, either by decreeing or dismissing the case, without recording any specific finding regarding thumb impressions impugned sale deed bears signature/thumb impressions of plaintiff, if it rules out possibility of execution by imposter and in case it does not bear signature/thumb impressions of plaintiff, (confirming execution by imposter in place of plaintiff).

20. In the case of Dayal Singh Vs. State of Uttaranchal (2012) 8 SCC 263, the Apex Court held that :-

"The purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. ***Such report is not binding upon the Court.*** *If eye-witnesses' evidence and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion.*

The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the Courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. ***The Court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence."***

21. In paragraph 40 of judgment the Apex Court has observed:-

"We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. ***The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.*** *Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned.* ***In such case, the Court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court.*** *The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable."*

22. As per rule the office of Sub-Registrar maintain several registers in ordinary course of its business/day to day working and at the time of execution and registration of only sale deed, apart from signatures office also use to obtain left thumb impressions of excutants on documents as well as on a register known as "Register Form No.8 or NAMOONA No.8" kept in the office.

It is noteworthy that :-

(i) The original of impugned sale deed was not filed by defendant in Courts below and no reason was assigned for not producing the same.

(ii) Out of two reports of finger print & handwriting experts on record, one by Sri Niranjan Lal Srivastava for plaintiff states that two thumb impressions (disputed and specimen) are not identical and do not tally with each other and may not be of one and the same person, but to the contrary, another report by Sri Rajiv Ranjan Srivastava for defendant with contrary opinion states that both thumb impressions are identical and tally with each other.

(iii) None of the above two experts are qualified experts of the "science of finger prints and handwriting" and none of them is alleged to have acquired special knowledge of subject, by obtaining any degree or diploma in the course of "science of handwriting and finger prints" rather both the experts have stated that they acquired knowledge under training with some other finger print and handwriting expert and are working independently as finger print and handwriting expert, (a) Niranjan Lal Srivastava expert of plaintiff since 1972

and (b) Rajiv Ranjan Srivastava expert of defendant since 1977.

(iv) The photos of disputed and specimen thumb impressions (D-1 & S-1) were not taken by any of above two experts, rather each of them prepared reports upon examination of photos taken, prepared and provided to each of them by one Jagat Prasad photographer, who has been produced one, as P.W.-4 and again as D.W.-3.

(v) The trial court finding two reports of experts unworthy of reliance, ignored them and without deciding the main issue, as to whether impugned sale deed bears thumb impressions of plaintiff or not, decided issue no.1, in negative is absolutely wrong, illegal, incorrect and perverse manner.

23. It is pertinent to mention that main ground for cancellation of sale deed was that it is null and void as was not executed by plaintiff and has been obtained by impersonation of some other person in his place and other grounds of inadequacy of sale consideration (of just Rs.16,000/- for huge land of 0.94 acres), non affixation of photo etc. were mentioned as ancillary circumstances to rule out possibility of execution of sale deed by him. In such a suit for cancellation of sale deed on ground of denial of execution with specific plea that plaintiff never visited office of Sub-Registrar for execution, never executed impugned sale deed and that it has been obtained by impersonation of some other person in place of plaintiff, if the Court comes to the conclusion that impugned sale deed bears thumb impression or signatures of vendor i.e. plaintiff, the sale deed may not be cancelled and suit is bound to be dismissed and on the other hand if the Court comes to the conclusion that impugned sale deed does not bear signatures/thumb impressions of vendor i.e. plaintiff, it will be suffice to hold that the same has been obtained through impostor in which case sale deed may not stand irrespective of the fact that other circumstances/ grounds are proved or not (as they loose their relevancy) and suit is bound to be decreed as such a sale deed is null and void-ab-intio. In such a case the Court if finds that impugned sale deed does not bear thumb impressions/ signatures of plaintiff, the alleged vendor, it may not be justified in refusing to pass a decree for cancellation of sale deed under any imagination even if other ancillary grounds/circumstances of inadequacy of consideration etc. were not proved. The trial Court acted wrongly, illegally & perversely in deciding issue no.1 in negative and dismissing the suit without deciding the issue of thumb impressions of plaintiff over the impugned sale deed and without holding that impugned sale deed bears thumb impressions of plaintiff.

24. The lower appellate Court has examined and compared the disputed left thumb impression of plaintiff over Register NAMOONA (Form) No.8 (hereinafter referred to as D-1)and his specimen LTI taken in Court (hereinafter referred as S-1) and upon analysation of various characteristics has narrated in detail the several points of differences between the two thumb impressions (D-1 and S-1) in more than two pages of impugned judgment with respect to position of Delta, pattern of loop, space between ridges, direction of ridges, gap between Delta, core and ridges etc. and upon such detailed comparison upon finding the opinion given in report of finger print and handwriting expert Shri

Nirnjan Lal Srivastava P.W.-3 to be based on correct and cogent reasonings has found it reliable and accepted it, while finding the opinion given in report submitted by Rajiv Ranjan Srivastava expert of defendant to be incorrect and unreliable has discarded the same. Admittedly the disputed thumb impression marked by D-1 do also not tally with specimen right thumb impression of plaintiff marked by S-2.

25. The lower appellate Court has very rightly discussed the entire evidence on record and the opinion given in reports of two fingerprint and handwriting experts and compared the two thumb impressions analyzing the characteristics as mentioned earlier. Since the lower appellate Court upon examination of two thumb impressions has come to a definite conclusion that disputed thumb impression D-1 of vendor of impugned sale deed on Register NAMOONA (Form) No.8, relating to impugned sale deed, mentioned above did not tally with specimen left thumb impression S-1 of plaintiff, so under any imagination the impugned sale deed may not be considered to be either bearing his thumb impressions or to having been executed by plaintiff, rather clearly indicates/proves that it was obtained by impersonating some other person in place of plaintiff as per plaintiff's specific case in plaint.

26. It is pertinent to mention that since the impugned sale deed was found to be not bearing thumb impression of plaintiff over it, the other ancillary grounds/circumstances, loose their relevancy. It is also pertinent to mention that appellant has failed to show any incorrectness in the comparison so made with regard to various characteristics of two thumb impressions by lower appellate Court.

27. The lower appellate Court has committed no mistake in disagreeing with findings of trial Court on issue no.1 and in allowing appeal by setting aside the wrong, illegal and perverse judgment and decree passed by the trial Court.

28. The substantial question of law No.1 is accordingly decided in affirmative against the appellant in favour of respondent.

29. As far as substantial question of law no.2 is concerned, Section 71 of Evidence Act is being reproduced hereunder :-

"Section 71. Proof when attesting witness denies the execution *- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."*

30. The *"Burden of Proof"* means burden to prove some positive allegations and there can be no burden to prove something negative or to disprove any fact or allegation. The learned counsel for appellant has failed to place any legal provision under which marginal witness of impugned sale deed (in favour of defendant) could be required to be produced by plaintiff in order to disprove the same and adverse inference if at all may be drawn against him for not producing marginal witness Jang Bahadur. To the contrary "Burden of Proof" to prove impugned sale deed, in his favour lies on defendant. He was required to prove it by producing

marginal witnesses and since he has failed to produce any of the 2 marginal witnesses of impugned sale deed, adverse inference was required to be drawn against him to the effect that had the marginal witnesses been produced to witness box they would have denied execution of impugned sale deed as well as payment of consideration. In any case he could have adduced other evidence to prove impugned sale deed, in view of provisions of Section 71 of Indian Evidence Act which has not been done by him.

31. The trial Court acted wrongly, illegally and perversely in drawing adverse inference against plaintiff for not producing Jang Bahadur, marginal witness of impugned sale deed. The appellate Court has very rightly held that defendant has neither produced original sale deed nor produced any of the two marginal witness, nor produced any other evidence in order to prove execution of impugned sale deed as well as to prove payment of sale consideration, so adverse inference ought to have been drawn against defendant and not the plaintiff. The provisions of Section 71 of Indian Evidence Act nowhere required the plaintiff to produce marginal witness of sale deed for disproving the same rather since burden to prove execution of impugned sale deed by plaintiff was on defendant, in view of provisions of Section 71 of Indian Evidence, the defendant had to produce marginal witness of sale deed or to produce some other evidence to which he failed.

32. It is settled principle of law that entries in revenue records are not proof of title and possession and the possession goes with title. In the case of **"Ram Lal Vs. Phagna, 2006 (1) SCC 168"** the Apex Court held.

"Mere mutation of name in revenue records does not create any right, title or interest in absence of any real transaction".

33. The plaintiff claims that he never visited office of Sub-Registrar and never transferred the suit land by executing impugned sale deed, which has been obtained through impostor and has denied delivery of possession to defendant. He has stated on oath that he is in actual physical possession over the land in suit. Hence merely on account of mutation entries obtained by defendant in revenue records, in absence of any other cogent evidence of his being in actual physical possession over land in suit, the suit may not be considered to be bad for not seeking relief of possession. The trial Court was wrong and incorrect in holding the suit not maintainable merely in view of mutation entries of defendant and perverse findings on issue no.1, without there being any conclusive proof of possession of defendant over the land in suit.

34. Substantial question of law no.2 is accordingly decided in affirmative against the appellant in favour of plaintiff-respondent.

35. In view of the discussions made above, I have come to the conclusion that lower appellate Court did not commit any illegality or mistake in comparing the disputed thumb impressions with specimen, thumb impressions of plaintiff at its own. The findings of lower appellate Court are not based on mere comparison rather it has followed the provisions of

Indian Evidence Act, it has found the opinion given in report of expert Niranjan Lal Srivastava P.W.-3 to be correct and conflicting opinion given in report of expert Rajeev Ranjan Srivastava D.W.-1 to be incorrect. The lower appellate Court has not committed any error of law in reference with following the provisions of Section 71 of Indian Evidence Act.

36. The two substantial questions of law framed in this appeal are, therefore, decided in affirmative against defendant-appellant and in favour of plaintiff-respondent. No other substantial question of law was raised or arises in the appeal. The appeal is devoid of merits and there is no sufficient ground for setting aside the impugned judgment and decree passed by lower appellate Court or for restoring the judgment and decree passed by the trial Court.

37. The appeal is liable to be dismissed with costs.

38. The appeal is accordingly dismissed with costs throughout, the impugned judgment and decree are affirmed.

39. Let the lower court record be sent back to the court below along with copy of this judgment for necessary compliance after preparation of decree.

(2019)11ILR A780

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Income Tax Appeal No. 52 of 2014
with
Income Tax Appeal No. 55 OF 2014

M/s Meeraj Estate & Developers ...Appellant

Versus

Commissioner of Income Tax, Agra ...Respondent

Counsel for the Appellant:
Sri Rahul Agarwal

Counsel for the Respondent:
C.S.C.

A. Income Tax Law- Income Tax Act, 1961: Sections 2(13), 9, 142(1), 143(2), 143(3), 145 - Whether the property acquired by the assessee and subsequently entered into an agreement with GAIL and receipts at the hand of assessee pursuant to the agreements is assessable under the head 'income from business or income from house property or income from other sources.' (Para 17)

B. Income Tax Law- Income Tax Act, 1961: Principal of *res-judicata* does not apply to tax matters for different assessment years - Res - judicata applies to debar courts from entertaining issues on the same cause of action, whereas cause of action for each assessment year is distinct. (Para 18 to 22)

Where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other, and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in subsequent year, unless there was a material change justifying the revenue to take different view. In the present case AO found sufficient materials and changes. (Para 22, 23)

C. Income Tax Law- Income Tax Act, 1961: Words & Phrases - "business activity" - Merely by providing in the object clause to conduct activity with respect to

acquiring land and building, as well as furnishing and maintaining it and also by leasing the same, would not amount to carrying on such "business activity". (Para 26)

Mere incorporation of company or firm with an object or carrying on business of real estate, letting and sub-letting of property would not automatically mean that assessee was having business income from the property let out through agreement. (Para 28)

D. Income Tax- Income Tax Act, 1961: Words & Phrases -'business': Word 'business' is used in the sense of an occupation, or profession which occupies time, attention and labour of a person, normally with the object of making profit. To record an activity as a business there must be course of dealing, which is continued or contemplated to be continued with profit motive and not for sport or pleasure. (Para 29, 30)

To be a business income, volume, frequency, continuity, regularity and the intention of the assessee to carry on has to be seen, and where business itself has not come into existence, it cannot be considered to be a business income. (Para 32, 33, 34)

Appeal Dismissed (E-4)

Precedent followed: -

1. Bharat Sanchar Nigam Ltd. & anr. Vs U.O.I. & ors., [2006] 3 SCC 1 (Para 19, 21, 22)

2. C.K. Gangadharan & anr. Vs C.I.T., Cochin [2008] SCC 739 (Para 20)

3. C.I.T. Vs British Paints India Ltd., (*Citation not given)* (Para 21, 22)

4. Radhasaomi Satsang Vs C.I.T., 193 ITR 321 (SC) (Para 3, 20, 21, 22)

5. Sultan Brothers Pvt. Ltd. Vs C.I.T. (1964) 51 ITR 353 (SC) (Para 3, 9, 12, 26, 28, 34)

6. Universal Plast Vs C.I.T., [1999] 237 ITR 454 (SC) (Para 9, 27, 28, 34)

7. C.I.T. Vs Shambhu Investment (Pvt.) Ltd. [2001] 116 Taxman 795 (Calcutta) (Para 12, 28)

8. Hotel Arti Delux (Pvt.) Ltd. Vs Assistant C.I.T. [2014] 227 Taxman 119 (All.) (Para 11, 28)

9. St. of Gujarat Vs Raipur Manufacturing Co. Ltd. [1967] 19 HTC 1 (SC) (Para 30)

10. Sole Trustee, Loka Shikshana Trust Vs C.I.T. [1975] 101 ITR 234 (Para 30)

11. C.I.T. Vs National Storage Pvt. Ltd. [1963] 48 ITR 577 (Bom.) (Para 31)

12. Mangla Homes Pvt. Ltd. Vs Income Tax Officer, 325 ITR 281 (Bom.) (Para 35)

13. East India Housing & Land Development Trust Ltd., Vs CIT, [1961] 42 ITR 49 (SC) (Para 35)

Precedent cited: -

1. C.I.T. Vs Goel Builders, 331 ITR 344 (All.) (Para 3, 8)

2. A.C.I.T. Vs D.M. Brothers, (2010) 44 DTR 13 (All.) (Para 3)

3. Karnani Properties Ltd. Vs C.I.T., [1971] 82 ITR 547 (SC) (Para 9)

4. Karanpura Development Co. Ltd. Vs C.I.T., [1962] 44 ITR 362 (SC) (Para 9)

5. Chennai Properties and Investment Ltd. Vs C.I.T., [2015] 373 ITR 673 (SC) (Para 10)

6. Raj Dadarkar and Associates Vs Assistant C.I.T., [2017] 81 Taxmann.com 193 (SC) (Para 13)

Appeal against and judgment and order dated 14.08.2013 passed by ITAT, Agra Bench, Agra for assessment years 2006-07 and 2008-09.

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. These two appeals filed under Section 260A of the Income Tax Act, 1961 arise out of judgment and order dated 14.08.2013 passed by Income Tax Appellate Tribunal, Agra Bench (hereinafter called as 'ITAT') in Income Tax Appeal No. 182 and 292/ Agra/ 2012 for assessment years 2006-07 and 2008-09.

2. As the issues in question are same in both the appeals, as such they are being heard and decided together by a common order.

3. These appeals were admitted on 25.10.2017 on the following question of law:-

"(a) Whether in view of the facts of the case particularly the source of funding for acquiring the property, the inter-relationship between the agreements entered into by the appellant and the Constitution Bench of the Hon'ble Supreme Court in Sultan Brothers Pvt. Ltd. Vs. C.I.T. (1964) 51 ITR 353 (S.C.) and the Division Bench judgment of this Hon'ble Court passed in CIT v. Goel Builders 331 ITR 344 (All.), the Tribunal below was justified in holding that the receipts of the appellant were income from house property/ other sources and not business income?

(b) Whether, in view of the decisions In Radhasaomi Satsang v. CIT 193 ITR 321 (SC) and in ACIT Vs. D.M. Brothers (2010) 44 DTR 13 (All.), the decision of the Tribunal below in discarding the treatment of the receipts of the appellant as business income for Assessment Year 2005-06 and in all subsequent assessment year's till A.Y. 2013-2014 (except assessment year's under appeals) is legally justified?"

4. The assessee is a partnership firm, which was constituted w.e.f. 01.07.2004, while the deed forming partnership is dated 01.11.2004. According to the deed, the object of the assessee firm is to venture into real estate business and allied activities such as leasing/ sub leasing, maintaining properties on maintenance contract etc. It was subsequent to formation of partnership firm, that assessee acquired leasehold rights over a commercial property measuring 6925 square feet at third floor of Block No. G10/ 8, Padam Deep Tower, Sanjay Place, Agra. The said rights were acquired by the assessee from one M/s Pee Cee Soap and Chemicals Pvt. Ltd. through a deed of assigning of lease executed on 17.11.2004. The money for acquiring the leasehold right by the assessee was arranged by taking loan of Rs.1,31,04,107/- from Indian Overseas Bank and also loans of Rs.16,94,107/- from M/s Meeraj Industries and Rs.5,03,385 from M/s Accurate Ferro Casting. Thereafter, the assessee entered into an agreement with Gas Authority of India Ltd. (hereinafter called as 'GAIL') on 30.11.2004 to lease the said property to GAIL for a period of 10 years. Second agreement was executed by the assessee with GAIL on 14.12.2004 for furnishing of the leased area of 6925 square feet to ensure the furniture and fitting etc. and also to undertake major repairs. Thereafter, on 16.12.2004 third agreement was executed between the assessee and GAIL for maintaining the leased out area.

5. The assessee filed a return for assessment year 2005-06 at a loss of Rs.20,13.100/-. The said return was processed under Section 143(3) of the Income Tax Act (hereinafter called as

'Act') and reply filed by the assessee was accepted by assessing authority, which passed an order under Section 143(3) of the Act on 28.12.2007.

6. Return for the assessment year 2006-07 was filed by assessee on 12.06.2006 showing a loss of Rs.10,95,190/-. The case was picked under scrutiny, and notice under Section 143(2) of the Act was issued on 18.06.2007. As no compliance was made by the assessee, again notice under Section 143(2) along with notice under Section 142(1) with questionnaires dated 08.07.2008 was sent to the assessee. The assessee appeared and replied to the various queries. The AO after considering the three agreements as well as examining the statement of one of partners of the firm found that assessee was not involved in any kind of recurring activity to treat the receipt as business receipt and the income of the assessee was calculated at Rs.10,94,460/- as against loss of Rs.10,95,190/- and the setoff of brought forward loss of assessment year 2005-06 amounting to Rs.20,13,103/- was rejected on 14.11.2008. An appeal was filed before Commissioner of Income Tax (Appeals) challenging the said order but the said appeal was rejected by order dated 23.01.2012 by CIT (A), aggrieved by the said order a Second Appeal was preferred before the ITAT which was also rejected by order dated 14.08.2013, which is impugned before this Court. Pursuant to the order of this Court, assessee filed copies of the partnership deed, as well as the three agreements executed between the assessee -appellant and GAIL.

7. Sri Rahul Agarwal, learned counsel appearing for the assessee submitted that the assessee firm is in the business of real estate and allied activities such as leasing and sub-letting, maintaining properties on contracts. He further submitted that the three agreements executed between the appellant and GAIL indicates that they were supplemental/ incidental to each other and were part of one composite transaction and should not be read in isolation as done by the taxing authorities. He further submitted that GAIL being a Government organisation does not enter into tenancy agreement with private parties without protracted negotiations and usually does not conclude a transaction within a space of a week or 10 days, as in the present case the property was obtained by assessee on 17.11.2004 and was let out on 30.11.2004, which indicates the fact that the property was acquired in view of the ongoing discussions with GAIL to fulfill their office requirements. It was also contended that the entire receipts received under the three contracts with GAIL was claimed under the head 'business income' and depreciation thereon was claimed and the assessee for assessment year 2005-06 filed a return of loss of Rs.20,13,100/- which was accepted by the Additional Commissioner of Income Tax on 28.12.2007, as such there was no occasion for the assessing authority to treat the entire receipts of the appellant-assessee from the three agreements executed with GAIL as income from house property and from other sources and not as business income for assessment year 2006-07.

8. Sri Rahul Agarwal, learned counsel for the assessee also contended that even a solitary instance/ transaction could constitute business so long as it was established that intention of the assessee

was to earn profit while undertaking the transaction and not with an object of making an investment for keeping the money safe or earning from that investment. He relied upon a Division Bench judgment of this Court in Case of ***CIT vs. Goel Builders 331 ITR 334 (All.),*** and which had considered the distinction between income from house property and income from business or profession.

9. It was also contended that assessee-appellant had acquired the asset out of borrowed funds, which normally would indicate an intention to carry on business and not profit from an investment. Counsel for the assessee relied upon the decision of the Constitution Bench of the Supreme Court in case of ***Sultan Brothers Pvt. Ltd. Vs. CIT [1964] 51 ITR 353 (SC),*** and also judgments of the Apex Court in ***Universal Plast Ltd. vs. Commissioner of Income Tax [1999] 237 ITR 454 (SC), Karnani Properties Ltd. vs. Commissioner of Income Tax [1971] 82 ITR 547 (SC), Karanpura Development Co. Ltd. vs. Commissioner of Income Tax [1962] 44 ITR 362 (SC).***

10. Counsel for the assessee also relied upon the decision of the Supreme Court in ***Chennai Properties and Investment Ltd. Vs. CIT [2015] 373 ITR 673 (SC).*** Relevant Para 11 is extracted hereasunder:-

*"**11.** We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee, therefore, rightly disclosed the income under the head "Income from business". It cannot be treated as "Income from the house property". We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the Income Tax Appellate Tribunal. No orders as to costs."*

11. Reliance has also been placed on a judgment of the Division Bench of this Court in case of ***Hotel Arti Delux (Pvt.) Ltd. vs. Assistant Commissioner of Income Tax [2014] 227 Taxman 119 (All.)*** wherein this Court held as under:-

*"**15.** From the recital of the lease deed it is evident that only the building was leased out along with a lift, tubewell and electrical fittings. These cannot be treated as plant and machinery but would be treated as amenities, which are necessary for the use of any building. We find that the appellant had not placed any material on record to show that the building had peculiar amenities with which the building could be treated as a "plant" and not a building simplicitor. No material has been brought on record to indicate that the building had peculiar amenities, which could be commercially exploited such as facilities of sterilization of surgical instruments and bandages or an operation theatre. The Tribunal has given a categorical finding of fact that the building which was leased out by the appellant was nothing else but a building simplicitor and was not a building, which was equipped with specialized plant and machinery. This being a finding of fact, we are not inclined to interfere in such findings, especially when nothing has been brought on record to indicate that the said finding was perverse.*

***16.** We also find that the appellant is not running the business of a hospital and has only let out the building.*

We are of the opinion that the income derived by the appellant was from the ownership of the building and not from the personal exertion, which is necessary to treat the income as a business income."

12. Further, in case of ***Commissioner of Income Tax vs. Shambhu Investment (Pvt.) Ltd. [2001] 116 Taxman 795 (Calcutta)*** it was held as under:-

*"**7.** Let us approach the problem from another angle by applying the lest suggested by the five judges' Bench in the case of **Sultan Brothers Pvt. Ltd.** (supra). The three questions framed by the apex court are applied in the instant case as follows:*

(A) Was it the intention in making the lease-and it matters not whether there is one lease or two, i.e., separate leases in respect of the furniture and the building-that the two should be enjoyed together ?

In the instant case there is no separate agreement for furniture and fixtures or for providing security and other amenities. The only intention, in our view, was to let out the portion of the premises to the respective occupants. Hence, the intention in making such agreement is to allow the occupants to enjoy the table space together with the furniture and fixtures. Hence, this question should be answered in the affirmative.

(B) Was it the intention to make the letting of the two practically one letting?

From a plain reading of the agreement it appears that the intention of the parties to the said agreement is clear and unambiguous by which the first party has allowed the second party to enjoy the said table space upon payment of the comprehensive monthly rent. Hence, this question should be answered in the affirmative.

(C) Would one have been let alone, and a lease of it accepted, without the other ?

As we have discussed hereinbefore that it is composite table space let out to various occupants, the amenities granted to those occupants including the user of the furniture and fixtures are attached to such letting out and the last question, in view of the same, must be answered in the negative.

Applying the said test we hold that by the said agreement the parties have intended that such letting out would be an inseparable one.

***8.** Hence, we hold that the prime object of the assessee under the said agreement was to let out the portion of the said property to various occupants by giving them additional right of using the furniture and fixtures and other common facilities for which rent was being paid month by month in addition to the security free advance covering the entire cost of the said immovable property.*

In view of the facts and law discussed above we hold that the income derived from the said property is an income from property and should be assessed as such."

13. In case of ***Raj Dadarkar and Associates Vs. Assistant Commissioner of Income Tax, [2017] 81 Taxmann.com 193 (SC),*** the Supreme Court held that object clause contained in partnership deed would not be conclusive factor in determining whether the assessee carried on business activity, and liable to be

assessed under the head 'income from business.

14. Per contra, Sri Gaurav Mahajan, learned counsel appearing for the Department submitted that assessee had let out vacant floor to GAIL and the receipts from the same cannot be treated as business income, as business is a continuous and systematic activity carried on by a person with a view to earn profit. As per the first agreement the assessee was not required to provide any day-to-day service or incur any day to day expenses to receive the leased rent receipt, which establishes the fact that receipts are to be taxed income from 'house property' and not as income from business or profession. Second agreement was executed between the assessee and GAIL to furnish the third floor of the building as per requirement of GAIL, meaning thereby that vacant floor which was leased out was furnished and finished and converted into office by the assessee. This agreement was consequence of the first agreement and was executed 14 days later. The third agreement executed between assessee and GAIL was in regard to maintenance and upkeeping of building/ floor, furniture and fittings and other equipments installed and set up in said premises, and further, only one person was deputed to look after premises and the income from the said agreement should be treated as income under head 'income from other sources'.

15. He further submitted that in income tax, each year is independent year and in each year correct income is to be assessed under the correct head, and any mistake if committed cannot be allowed to continue. Sri Mahajan vehemently argued that mere statement of each of the deed would not be determinative factor to arrive at a conclusion that income is to be treated from business and in present case as there was no business activity being carried out by the assessee and having failed to produce any evidence, the assessing authority as well as the Tribunal rightly rejected the claim treating the income as income from house property and other sources and not from business or profession.

16. We have heard learned counsel for the parties and perused the material on record.

17. The question which arises for consideration is whether the property acquired by the assessee and subsequently entered into an agreement with GAIL and the receipts at the hand of assessee pursuant to the agreements is assessable under the head 'income from business or income from house property or income from other sources'.

18. The contention of the assessee hinges around two facts, firstly that AO has already taken a view while making assessment for the assessment year 2005-06 that income is assessable under the head 'income from business' and therefore maintaining consistency the Assessing Officer should have not taken a different view for the subsequent assessment year, and the second ground of attack being that the assessee firm is in the business of real estate and allied activities and the three agreements executed were supplemental and incidental to each other and are part of one composite transaction and should not be read in isolation, further the property acquired by the assessee was for letting, as such the same being income from business and cannot

be assessed under the heading 'income from house property or income from other sources'.

19. The first question raised by the appellant-assessee regarding the maintenance of consistency by the assessing authority, the Tribunal had recorded categorical finding in view of the judgment of the Apex Court in case of ***Bhart Sanchar Nigam Nigam Ltd. and another vs. Union of India and others [2006] 3 SCC 1,*** wherein the Court held that res-judicata does not apply to tax matters for different assessment years, the relevant Paragraphs 20, 21, 22 are extracted hereasunder:-

*"**20.** The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason whey the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.*

***21.** In our opinion, the preliminary objection raised by the State of U.P. therefore, rests on a faulty premise. The contention of the appellant-petitioners in these matters is not that the decision in **State of U.P. v. Union of India, (2003) 3 SCC 239** for that assessment year should be set aside, but that it should be overruled as an authority or precedent. Therefore, the decisions in **Devilal Modi v. STO, (1965) 1 SCR 686** and in **Hurra v. Hurra (2002) 4 SCC 388** are not germane.*

***22.** A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra. As we have said, overruling of a decision takes place in a subsequent lis where the prcedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in State of U.P. v. Union of India related to the year 1988. Admittedly, the present dispute relates to*

a subsequent period. Here a coordinate Bench has referred the matter to a large Bench. This Bench being of superior strength, we can, if we so find, declare that that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."

20. The said decision was followed by the Apex Court again in case of **C.K. Gangadharan and another vs. Commissioner of Income Tax, Cochin [2008] SCC 739,** while the counsel for the appellant placed reliance upon the decision of the Apex Court in case of **Radhasaomi Satsang vs. Commissioner of Income Tax [1992] 1 SCC 659.** Relevant Paras 13 and 16 are extracted hereasunder:-

*"**13.** One of the contentions which the learned senior counsel for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A full Bench of the Madras High Court considered this question in T.M.M Sankaralinga Nadar & Bros. & Ors, v. CIT, 4 ITC 226 (Mad) (FB). After dealing with the contention the Full Bench expressed the following opinion:*

"The principle to be deducted from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be res judicata in that the same question cannot be subsequentiy agitated."

***16.** We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

21. From the reading of the judgment of the Apex Court, it is clear that the judgment relied by the assessee in case of ***Radhasaomi Satsang*** (supra) was dealt by the Apex Court in the case of ***BSNL*** (supra) and Supreme Court held that principal of res-judicata does not apply in matter pertaining to tax for different assessment years, because res-judicata applies to debar courts from entertaining issues on the same cause of action, whereas cause of action for each assessment year is distinct. In the case in hand, the AO for assessment year 2005-06 had accepted claim of the assessee without examining relevant records, as well as without recording any finding on the issue in question. Thus, for subsequent year, the claim of assessee cannot be accepted without examining records and material, and AO after examining the records came to conclusion

and took a view that receipts at the hand of assessee was to be assessed under income from house property and income from other sources and not business income. In ***Commissioner of Income Tax vs. British Paints India Ltd.,*** Supreme Court while interpreting Section 145 of the Act held that even if the assessee had adopted a regular system of accounting, it was the duty of the Assessing Officer to consider whether correct profits and gains would be deduced from the account so maintained. Relevant portion are extracted hereasunder:-

"Section 145 of the Income Tax Act, 1961 confers sufficient power upon the officer-nay it imposes a duty upon him-to make such computation in such manner as he determines for deducing the correct profits and gains. This means that where accounts are prepared without disclosing the real cost of the stock-in-trade, albeit on sound expert advice in the interest of efficient administration of the company, it is the duty of the Income Tax Officer to determine the taxable income by making such computation as he thinks fit.

Any system of accounting which excludes, for the valuation of the stock-in-trade, all costs other than the cost of raw materials for the goods-in-process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee has been found to be such that the income cannot properly be deduced therefrom. It is, therefore, not only the right but the duty of the Assessing Officer to act in exercise of his statutory power, as he has done in the instant case, for determining what, in his opinion, is the correct taxable income."

22. Thus, a conspicuous glance of judgments of the Apex Court in case of ***Radhasaomi Satsang*** (supra), ***BSNL*** (supra) as well as ***British Paints India Ltd.*** (supra) it has been constant view that question of res-judicata does not apply in tax proceedings, while each assessment year being a unit, what is decided in one year may not apply in following years, but where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other, and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in subsequent year, unless there was a material change justifying the revenue to take different view.

23. In the present case, the AO found sufficient materials and changes in the year under consideration, as he after examining the relevant clauses of agreements formed an opinion that the property was taken on lease for giving it on rent to GAIL. Further, Section 2(13)

defines business, which includes any trade, commerce or manufacture or adventure or concerned in the nature of trade, commerce or manufacture. In the present case no business activity was being carried out by the assessee as business is a continuous and systematic activity carried on with a view to earn profit.

24. Further, the records of the assessee revealed that only one person was employed, which cannot go on to establish the fact that any business activity was being carried out by the appellant, and the premises was only let out to GAIL pursuant to the agreement and was thus rightly assessed by the Assessing Officer under the heading 'income from house property and income from other sources'.

25. Now adverting to the second question, whether the assessing authority was justified in treating the receipt of the appellant-assessee as income from house property and income from other sources other than income from business on the basis of partnership deed which defines object of the firm as to the business activity of real estate, letting and sub-letting of the properties and further, upon the agreement so entered by it with GAIL.

26. The constitution Bench of the Apex Court in case of ***Sultan Brothers Pvt. Ltd. vs. CIT, [1964] 51 ITR 353 (SC)*** had the occasion to consider whether the letting of a building fitted with furniture and fixtures and income derived from lease, would be income from business or income from property as well as income from other sources. The Apex Court held that merely by providing in the object clause that any activity was in regard to acquiring the land and building, as well as furnishing and maintaining it and also by leasing the same, would not be assumed as carrying on business activity. Relevant portion are extracted hereasunder:-

"A very large number of cases was referred to in support of this contention but it does not seem to us that much assistance can be derived from them. Whether a particular letting is business has to be decided in the circumstances of each case. We do not think that the cases cited lay down a test for deciding when a letting amounts to a business. We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature.

The object of the appellant company no doubt was to acquire land and buildings and to turn the same into account by construction and reconstruction, decoration, furnishing and maintenance of them and by leasing and selling the same. The activity contemplated in the aforesaid object of the company, assuming it to be a business activity, would not by itself turn the lease in the present case into a business deal. That would follow from the decision of

this Court in East India Housing and Land Development Trust Ltd. v. Commissioner of Income-tax where it was observed that "the income derived by the company from shops and stalls is income received from property and falls under the specific head described in Section 9. The character of that income is not altered because it is received by a company formed with the object of developing and setting up markets."

Now the cases on which learned counsel for the appellant specially relied were cases of the letting out of plant and machinery, in some instances along with the factory buildings in which they had been housed. In all of them, except one, which we will presently mention, the assessee had previously been operating the factory or mill as a business and had only temporarily let it out as it was not convenient for him at the time to carry on the business of running the mill or factory. In these circumstances, it was held that by letting out the plant, machinery and building the assessee was still conducting a business though not the business of running the mill or factory.

Learned counsel for the appellant also relied on certain clauses in the lease and a clause in the memorandum of the appellant company to show that the lease amounted to the carrying on of a business. We shall now turn to these provisions. Clause 3(b) of the memorandum gave power to the appellant to manage land, buildings, and other property and to supply the tenants and occupiers thereof refreshment, attendants, messengers, light, waiting-room, reading room, meeting, room, libraries, laundry convenience, electric conveniences, lifts, stables and other advantages. The contention was that this cause in the memorandum gave the appellant a power to carry on a business of the nature of running a hotel. We do not think, it did. But in any case, by the lease none of the objects mentioned in this clause was sought to be achieved. We find nothing in the lessor's covenants to some of which we were referred to bring the matter within clause 3(b) of the memorandum. None of these clauses support the contention that by granting the lease, the appellant did anything like carrying on the business of running a hotel. Thus clause (a) is a covenant for quiet enjoyment. Clause (b) provides for a renewal of the lease of the demised premises being granted to the lessee for a further term of six years at his request. Clause (c) deals with payment of municipal bills and similar charges and ground rent. Clause (d) provides that the lessor shall during the continuance of the lease and on its renewal provide various things which included furniture, pillows, mattresses, gas-stoves, bottle coolers, refrigerators, lift, electric fittings and the like and also paint the outside of the building with oil once in five years and keep the building insured. These are ordinary covenants in a lease of a furnished building. These do not at all show that the lessor was rendering any service in the hotel business carried on by the lessee or in fact doing any business at all. On the facts of this case we are unable to agree that the letting of the building amounted to the doing of a business. The income under the lease cannot, therefore be assessed under section 10 of the Act as the income of a business."

27. In case of ***Universal Plast Ltd. vs. Commissioner of Income Tax [1999] 237 ITR 454 (SC),*** the Apex Court considering the question of leasing out of

asset of the business would be income from business or not, the Court held as under:-

"The question whether the amount earned by an assessee by leasing out the assets of the business would be income from business carried on by it, has been the subject-matter of consideration by this Court as well as by various High Courts and it would be useful to refer to the judgments of this Court bearing on the issue. In Commissioner of Excess Profits Tax v.. Shri Lakshmi Silk Mills Limited [1951] 20 ITR 451 (SC), the assessee-company was carrying on the business of manufacturing silk cloth and dyeing silk yarn. Due to lack of supply of silk yarn during the relevant period while keeping idle other plant and machinery, it let out dyeing plant for five months. The question which came up for consideration before this Court was whether the rent received from letting out the dyeing plant would fall under the head "Income from business" or "Income from other sources". If it was "Income from business", it would have been chargeable to excess profits tax; if not, the liability would not arise. Mahajan,J., speaking for the Court, observed that no general principle could be laid down which was applicable to all cases and each case had to be decided on its own circumstances. It was held that it was part of the normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it and for that reason the dyeing plant had not ceased to be a commercial asset of the assessee, so the sum representing the rent for five months received from the lessee by the assessee was income from business and was chargeable to excess profits tax. In Narain Swadeshi Weaving Mills CEPT [1954] 26 ITR 765, a Constitution Bench of this Court considered a similar question which also arose under the Excess Profits Tax Act, 1940. In that case, the assessee-firm was carrying on manufacturing business. A Public Limited Company was incorporated to take over the business from the assessee-firm. The company purchased the building of the assessee-firm and took over from it the plant and machinery on lease at an annual rent. One of the questions that fell for consideration there was whether the lease money obtained by the assessee from the company could be legally treated as business profit liable to excess profit tax. Distinguishing Shri Lakshmi Silk Mills' case [1951] 20 ITR 451 (SC), it was pointed out that only a part of the business of the assessee therein, namely dyeing silk yarn, was temporarily stopped owing to difficulty in obtaining silk yarn on account of war so that part of the assets did not cease to be commercial asset of that business and accordingly, the income from the assets would be the profit of the business irrespective of the manner in which that asset was exploited by the company. Noticing the facts in the case before the Court that the assessee had already sold land and building to the Company; it was not having any manufacturing, trading or commercial activity; and let out the plant and machinery on an annual rent of Rupees forty thousand and applying the common sense principle to the facts, this Court found that the transaction of lease was quite apart from the ordinary business activity of the company, so it was impossible to hold that the letting out of

the plant and machinery etc. was at all a business operation when its normal business activity had come to a close.

In CIT v. Calcutta National Bank Limited [1959] 37 ITR 171 (SC), the case arose under the Excess Profits Tax Act. The assessee was a banking company. It owned a six-storeyed building of which only a part was under its occupation and the rest was let out to tenants. The question was whether the rent received from the tenants of the building was the business income of the company. The majority opinion was that realisation of rental income of the assessee was in the course of its business being in prosecution of one of its objects in its memorandum and was liable to be included in its business profits and was assessable to excess profits tax. That conclusion was reached on the premise that the term `business' as defined in that Act was wider than the definition of that term under the Income Tax Act. The minority, however, took a contrary view.

In Sultan Brothers Private Ltd. vs. CIT, [1964] 51 ITR 353 (SC), the assessee constructed a building, fitted it up with furniture and fixtures and let it out on lease fully equipped and furnished for the purpose of running a hotel. The lease amount provided separately for running of the building and hire charges for furniture and fixtures. The question that fell for consideration was whether the rent income was business income taxable under the Income Tax Act, 1922? It was held that as the assessee never carried on any business of a hotel in the premises let out or otherwise at all and there was nothing to show that it intended to carry on a hotel business itself in the same building, the letting of the building did not amount to the carrying on of a business, so the income under the lease could not be assessed as income from business.

The Constitution Bench formulated the principle thus (headnote) :

"Whether a particular letting is business, has to be decided in the circumstances of each case. Each case has to be looked at from the businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner....".

In New Sevan Sugar and Gur Refining Co. Ltd. v. CIT [1969] 74 ITR 7 (SC), the appellant-company was carrying on business of crushing sugarcane and gur refining. The building, machinery and plant of the factory mill were leased out initially for a period of five years with three options to renew for similar periods on the part of the lessee. The assessee had, however, the option to terminate the lease after first two years which option was not exercised. The question was whether the income which arose to the assessee for the Assessment Year 1955-56 from the lease was assessable as income from business or income from other sources? It was held, on interpretation of the terms of the lease deed, that the intention of the appellant-assessee was to part with the machinery of the factory and the premises with the obvious purpose of earning rental income and not to treat the factory and the machinery as commercial asset during the subsistence of the lease; the intention of the appellant was found to go out of business altogether, therefore the income was not assessable as business income.

CIT v. Vikram Cotton Mills Ltd. [1988] 169 ITR 597 (SC) is again a case arising under the Income Tax Act, 1922. One of the creditors filed a petition in the High Court for winding up. The Industrial

Financial Corporation took possession of fixed assets under an English mortgage of those assets. The assessee company had gone into losses and had stopped its manufacturing activity. Under the scheme evolved by the High Court under the Companies Act, the business assets were let out for ten years with an option for renewal for another ten years. The management of the company was transferred to a Board of Trustees approved by the High Court. The question which fell for determination was whether the rental income was assessable in the relevant assessment years as business income? The findings of the Tribunal were that on account of financial crisis, the company found it advantageous to let out the machinery on hire for a temporary period and the company was able to liquidate its liability at the end of the lease period and regained possession of its assets; the company did not sell or otherwise dispose of its assets; there was nothing on record to show that the company was formed to let out plant and machinery on hire. The Tribunal came to the conclusion that the maintenance of the assets meant that the Company had an intention to re-start the business and that the intention of the Company in letting out its assets was to exploit the commercial assets for the purpose of its business and therefore the rental income was assessable as business income. On reference, that conclusion was upheld by the High Court. On appeal to this Court, while affirming the decision of the High Court, it was noted that all relevant facts were correctly considered from the standpoint of an ordinary prudent businessman by the Tribunal and it was also pointed out that the stoppage of the business by the company was a temporary suspension of business for a temporary period with the object of tiding over the crisis condition and there was never any act indicating that the company intended to carry on the business in future.

In the light of the above discussion, the propositions may be summarised as follows:

(1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rents licence fee) received by an assessee from leasing or letting out of assets would fall under the head `Profits and Gains of business or profession';

(2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case including true interpretation of the agreement under which the assets are let out;

(3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same.

(4) if only or a few of the business assets are let out temporarily while the assessee is carrying out his other business activities then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets.

Now adverting to the facts of UPL case, the High Court referred to the

findings of the Tribunal that the leasing out of the factory was not a sequel to the assesee's decision to go out of the business in respect of the subject factory and that it was just a make-shift transient alternative means of commercial exploitation of the commercial assets, so income from such letting could not be treated as the fruits of ownership simplicitor of the asset. The High Court also referred to various clauses in the Agreement, particularly Clauses 1, 2, 4, 7, 19, 20, 21 and 22 and concluded that "licensee exercising its vested right of option to purchase the licenced premises, the assessee stands completely out in the cold". The High Court recorded the following findings (page 11):

"Therefore, it can very well be presumed that at the time the licence agreement was entered into, the intention of the ultimate outright sell out was already there. The assessee was already committed to the licensee for such a sell-out at licensee's pleasure and there is no means of the assessee falling back from that commitment. Therefore, it can very reasonably be inferred that the assessee in the case decided to go out of business as far as this particular factory was concerned..

The lease agreement is in fact a veiled agreement for lease-cum-sale....We are of the opinion that the licensing is not meant to be a temporary stop gap exploitation of commercial assets. It could not be in the contemplation of the assessee at the time it entered into the licence agreement, to retain the assets any more as a commercial asset."

28. Thus, after having a close glance of the law laid down by the Apex Court in relation to the receipts at hands of assessee from letting out of any property pursuant to an agreement, whether amount to income from business or income from house property and income from other sources, in case of ***Sultan Brothers*** (supra), ***Universal Plast Ltd.*** (supra), ***Shambhu Investment Pvt. Ltd.*** (supra) and ***Hotel Arti Delux (Pvt.) Ltd.*** (supra) the Court was of the view that mere incorporation of the company or firm with an object of carrying on business of real estate, letting and sub-letting of property would not automatically mean that assessee was having business income from the property let out through agreement, but only upon qualifying certain test as laid down that any conclusion can be reached.

29. Business as defined in Section 2(13) of the Act postulates expenses of certain elements in the activity of an assessee which would invest it with character of business. In each case the question whether or not the assessee carried on business must necessarily be approached in the light of intention of the assessee, having regard to the legal requirements which are associated with the concept of business. Word 'business' is used in the sense of an occupation, or profession which occupies time, attention and labour of a person, normally with the object of making profit. To record an activity as a business there must be course of dealing, which is continued or contemplated to be continued with profit motive and not for sport or pleasure. In the present case, the assessee had deposed and also from perusal of his records it is reflected that only one staff was engaged in the upkeeping and maintenance of the premises let out to GAIL, meaning thereby that no regular or continuous activity was carried out for deeming it to

be a business activity for being assessed under the heading income from business.

30. In case of ***State of Gujarat v. Raipur Manufacturing Company Ltd. [1967] 19 HTC 1 (SC)*** the Apex Court observed that in taxing statutes, the word "business" is used in sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. Whether or not a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transaction, or purchase and sale in class of goods and transaction must necessarily be entered into with a profit motive. The said decision was rendered in the context of sales tax law, and was relied upon and referred in the context of Income Tax law in judgment of Apex Court in case of ***Sole Trustee, Loka Shikshana Trust vs. Commissioner of Income Tax [1975] 101 ITR 234.***

31. As in case of hiring out of a property along with other articles, rights asserts etc. question which arises is whether the income derived is from house property, business or other sources. This was exclusively dealt by Bombay High Court in case of ***CIT vs. National Storage Pvt. Ltd. [1963] 48 ITR 577 (Bom.).*** This case was confirmed in 1967, ***66 ITR 596 (SC).***

32. For the purpose of income to be revenue in nature it must arise from the various sources as envisaged under the Act. One of such sources is business income, but to be a business income, volume, frequency, continuity, regularity and the intention of the assessee to carry on has to be seen, and where business itself has not come into existence, it cannot be considered to be a business income and therefore, cannot be a revenue receipt, as in the present case the agreement executed between the assessee and the GAIL was for leasing out the premises, secondly for furnishing of the area leased out and thirdly for maintaining the leased out area.

33. Only one staff was kept for the said purpose by the assessee, meaning thereby that no business activity as mandated was carried out by the assessee so as to bring the said exercise within the ambit of business income, and the taxing authorities rightly assessing the assessee under the head 'income from house property and income from other sources'.

34. The guidelines laid down by the Apex Court in case of ***Universal Plast Ltd.*** (supra) considering the Constitution Bench judgment in the case of ***Sultan Brothers Pvt. Ltd.*** (supra), the leasing out of the assets by assessee simplicitor would not constitute business income. Further, the partner of the assessee firm had admitted that the property was purchased to let out on rent to GAIL. The assessing authority had also come to the conclusion that no systematic set up was established for doing business activity and assessee having failed to point out the volume, frequency, continuity and regularity of the transactions.

35. In a similar set of fact, the Bombay High Court in case of ***Mangla Homes Pvt. Ltd. vs. Income Tax Officer, 325 ITR 281 (Bom.)*** following the decision of the Apex Court in case of ***East India Housing and Land Development Trust Ltd. v. CIT [1961] 42 ITR 49 (SC)*** held that income derived by

the company from shops and stalls is income received from property and falls under the specific head described in Section 9 being income from property.

36. Thus, the finding recorded by the Assessing Officer after examining all the three agreements found that the assessee did not indulge in any kind of recurring, systematic and in organized manner, business activity and having only one employee rightly assessed the receipts under the heading 'income from house property and income from other sources'.

37. Having considered the case in depth and the findings recorded by the authorities below, we are of the considered opinion that as the appellant-assessee did not carry out any systematic, recurring and in organised manner, any business activity nor there was any volume, frequency, continuity and regularity of transactions, and only one person was employed by him for the management and look after of the leased property, the taxing authorities had rightly held the receipts to be income from house property and income from other sources and not business income.

38. In our considered view the appeal lacks merit and is hereby **dismissed**.

39. The question of law as framed are hereby answered in favour of the Revenue and against the assessee.

(2019)11ILR A797

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2019
BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Trade Tax Revision No. 236 of 2006

Hyundai Engineering & Construction Ltd. ...Revisionist/Petitioner
Versus
Commissioner of Trade Taxes, U.P., Lucknow ...Respondent

Counsel for the Revisionist:
Sri K.N. Kumar, Sri Vishnu Kesarwani

Counsel for the Respondent:
C.S.C.

A. Tax Law-Entry Tax - U.P. Tax on Entry of Goods Act, 2001- Section 4 - Whether import of machinery into a local area from outside India is liable to payment of entry tax? Held: Yes in the light of SC judgment in Civil Appeal Nos. 3381-3340 of 1998, decided on 09.10.2017. (Para 11)

B. Tax Law-Entry Tax - U.P. Tax on Entry of Goods Act, 2007 – Assessment - Sections 4(1), 4(3) and 4(6) – Each Assessment Year is a separate and independent unit of assessment. Unless specifically provided by the legislature or necessarily implied, subsequent facts or events arising in preceding or succeeding assessment years, have no bearing on either the taxable event or the consequent tax liability that may arise during any assessment unit/year. The subsequent event of sale or re-sale of the machinery by way of export sale was unconnected to the taxing event.

Question: Whether resale of goods in the course of exports out of the territory of India in Assessment Year 2004-05 would make an assessee not liable to pay Entry Tax on that machinery imported into India in Assessment Year 2000-01 and whether the benefit of section 4(6)(ii) of the U.P. Tax on Entry of Goods Act, 2007 can be availed by the assessee? (Para 13, 14, 15, 18)

C. Tax Law-Entry Tax - U.P. Tax on Entry of Goods Act, 2007 – Reversal of Tax - Section 5 does not provide for reversal of

entry tax liability for a belated export of goods on which the liability of payment of entry tax had already arisen. (Para 16)

Revision dismissed (E-4)

Precedent followed: -

1. St. of Kerala & ors. Vs Fr. William Fernandez, Civil Appeal Nos. 3381-3400 of 1998, decided on 09.10.2017 (SC) (Para 11)

2. P.M. Mohd. Meerakhan Vs CIT, (1969) 2 SCC 25 (Para 13)

Precedent cited:

1. Polestar Electronic (Pvt.) Ltd. Vs Additional Commissioner, Sales Tax & ors., (1978) 1 SCC 636 (Para 6)

2. Director of Entry Tax & ors.s Vs Mahindra & Mahindra & anr., J.T. 2001 (5) S.C. 544 (Para 8)

Trade Tax Revision against the judgment and order dated 07.12.2005 passed by Trade Tax Tribunal in Second Appeal No. 192 of 2003 for Assessment Year 2000-01.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri K.N. Kumar and Sri Vishnu Kesarwani, learned counsel for the assessee-revisionist and Sri B.K. Pandey, learned counsel for the State-respondent.

2. The present revision filed by the assessee arises from the order passed by the Trade Tax Tribunal, Allahabad dated 07.12.2005 in Second Appeal No.192 of 2003 for A.Y.2000-01 (Entry Tax). By that order, the Tribunal dismissed the appeal filed by the assessee and affirmed the assessment and demand of entry tax on machinery imported by the assessee during the A.Y. 2000-2001, but exported outside the country in the year 2004-2005.

3. Undisputed facts of the case are that the assessee is an engineering concern. It was awarded contract to construct a stay wired bridge over the river Yamuna, at Allahabad. For the purposes of executing that contract, the assessee imported into the country and the local area, Allahabad, machineries of value Rs.1,30,30,000/-, during the A.Y. 2000-01. The machinery thus imported were amenable to levy on entry tax under the U.P. Tax on Entry of Goods Act 2001 (hereinafter referred to as Old Act). The assessee, at the relevant time, also deposited entry tax on such machinery. Undisputedly, it made use of those machinery in execution of aforesaid contract awarded to it. After its successful completion, the assessee sold those machineries in the course of export trade to a purchaser at South Korea.

4. Though the revision was admitted without reference to any question of law, however, at the time of hearing the following questions of law have been pressed:

"(i) Whether under the facts and circumstances mentioned above, the learned Trade Tax Tribunal Bench, Allahabad was correct in applying Section 4, and read with the Explanation appended thereto (added by amending Act 10 of 2005)?

(ii) Whether machinery imported from outside India during A.Y. 2000-2001 are covered by Section 4 of the Old Act, as amended by the Act No. 10 of 2005?

(iii) Whether under the facts and circumstances mentioned above, the Revisionist is not liable to pay entry tax under Section 4 (6) (ii) of the Entry Tax Act, 2007, since it re-sold the goods in the course of export out of the territory of India?"

5. In such facts, the assessee claimed that the entry of that machinery into the local area Allahabad during the assessment year 2000-01 was non-taxable, since the machineries had not been brought into the local area, Allahabad from within the country but from outside the country. That claim was rejected. During the pendency of the present revision, the U.P. Tax On Entry of Goods Into Local Areas Act, 2007 (hereinafter referred to as a New Act) was enforced. The assessee has thus relied on the provisions of Section 4(6)(ii) of the New Act to contend that in any case, upon export of the disputed machinery, no tax liability survived as sub-section 6 of Section 4 overrides the charging provisions under Section 4(1) and 4(3) of the New Act.

6. Also, it has been submitted, for the purposes of export of machinery, no time limit is prescribed under sub-clause (ii) of sub section 6 of Section 4 of the New Act. Therefore, the fact that the assessee exported the machinery later i.e. during the A.Y. 2004-05, was inconsequential to the claim made by the assessee. Reliance has been placed on a decision of a Supreme Court in the case of ***Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Others (1978) 1 SCC 636*** to submit that in view of the clear language of the statute, effect must be given to it to declare the intention of the law giver. Plain and natural meaning must be given to the words used in Section 4 (6) of the New Act and no other or further meaning is to be discovered. Further, it is not permissible to speculate as to what the legislature may have intended. Nor it is permissible to twist or bend the language of the statute to bring the subject to tax. In other words, it has been submitted, for the charge of tax to arise the transaction must naturally fall within the four corners of the charging section. No other submission was advanced.

7. Opposing the revision, learned Standing Counsel would submit, whether the case is examined, in the context of the language of the Old Act or in the context of the language under the New Act, (that has been enforced with full retrospective effect), the claim made by the assessee is wholly unfounded. With reference to the Old Act, it has been submitted, it was the clear scheme of the Old Act to impose entry tax upon entry being caused of taxable goods, into any local area, for their consumption, use or sale therein. There was neither any exemption granted to goods that had been imported from outside the country and thereafter brought into the local areas for such purpose, nor there was any scheme to grant remission from tax paid on such goods. In the admitted facts of the case, the assessee brought into the local area Allahabad, machinery that fell within the description of taxable goods under the schedule of the Old Act, for its own use. The requirements, for the charge of tax to arise, were thus fulfilled. Tax had been rightly imposed.

8. In the context of the New Act, learned Standing Counsel would submit though under that Act, sub-section 6 of

Section 4, overrides Section 4 (1) and Section 4 (3), yet clearly, tax liability would continue to exist on such goods as may have been consumed, used or sold within the local area where such goods may have been brought from outside. Alternatively, in any case, once the assessee brought inside the local area Allahabad, machinery for use and it actually put to use such machinery during the A.Y.2000-01, the tax liability got crystallized at that point or in time. The fact that the machineries were exported outside the country after close of that assessment year, would have no bearing on the tax liability for the A.Y. 2000-01. He has relied on the decision of the Supreme Court in the case of ***Director of Entry Tax and others Vs. Mahindra and Mahindra and another J.T. 2001 (5) S.C. 544.***

9. Having heard learned counsel for the parties and having perused the record, in the first place, under the Old Act, the charging Section was contained in Section 4. It read as below:

"4. Levy of Tax.- (1) There shall be levied and collected a tax on entry of any goods specified in the Schedule into a local area from any place outside that local area including a place outside the U.P./Uttaranchal for consumption, use or sale therein, at such rates not exceeding five per cent of the value of the goods as may be specified by the State Government by notification and different rates may be specified in respect of different goods or different classes of goods:

Provided that the State Government may by notification amend the schedule and upon issue of any such notification, the schedule shall, subject to the provisions of sub-section (6), be deemed to be amended accordingly.

(2) The tax levied under Sub-Section (1) shall be payable by a dealer who brings or causes to be brought into the local area such goods, whether on his account or on the account of his Principal or takes delivery or is entitled to take delivery of such goods on its entry into a local area.

Explanation- Where the goods are taken delivery of on its entry into a local area or brought into a local area by a person other than a dealer, the dealer who takes delivery of the goods from such person shall be deemed to have brought or caused to have brought the goods into the local area.

(3) No dealer who brings or causes to be brought any goods into a local area shall be liable to tax, if during the assessment year the aggregate value of such goods is less than one lakh rupees in the case of manufacturers and one lakh fifty thousand rupees in case of other dealers or such larger amount as the State Government may be notification, specie in that behalf either in respect of all dealers in any goods or in respect of a particular class of such dealers:

Provided that provisions of this sub-section shall not apply in respect of value of the goods brought into a local area from outside Uttar Pradesh/Uttaranchal.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), no tax shall be levied on and collected from a dealer who brings or causes to be brought into a local area any goods in respect of which tax has been paid any other local area under the said sub-Sections.

(5) No benefit under sub-section (4) shall be given to a dealer unless he

furnishes, to the satisfaction of the assessing authority, such declaration or certificate obtained from the selling dealer in such form and manner and within such period as may be prescribed.

(6) Every notification made under this Section shall, as soon as may be after it is made, be laid before each house of the Stat Legislature/Assembly, while it is in session, for a total period of not less than fourteen days, extending in its one, session or more than one successive sessions and shall unless some later late is appointed take effect from the date of its publication in Gazette subject to such modifications or annulments as the two Houses of the Legislature/Assembly may during the said period agree to make, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder except that any imposition, assessment, levy or collection of tax or penalty shall be subject to the said modification or annulments."

10. Also, under the schedule to that Act, machinery valuing more than 10 lacs was clearly under taxable. Thus, the levy of tax on entry of machinery (valued at more than 10 lacs) arose, no sooner the assessee caused the entry of those goods into the local area Allahabad from outside that local area for use. Under the Old Act, the subsequent Act of export of the machinery out of the country, was wholly irrelevant and had no bearing on the tax liability that had otherwise arisen and got finally attached to the transaction upon causing entry of such machinery inside the local area, for use. For the purposes of clarity, it has to be stated that no provision of the nature contained in Section 4(6) of the Act (New Act) existed under the Old Act.

11. In so far as it has been contended that no liability of entry tax arose, since the machinery had been imported from outside the country, that question stands squarely decided against the assessee, by the Supreme Court in Civil Appeal nos. 3381-3400 of 1998, State of Kerala and others Vs. Fr. William Fernandez decided on 09.10.2017, laying down the following rule:

"144. In view of foregoing discussion, we arrive at the following CONCLUSIONS:

(i) Orissa Entry Tax Act, 1999, Kerala Tax Act, 1994 and Bihar Tax on Entry of Goods in Local Area for Consumption, Use or Sale, 1993 (before its amendment by Bihar Act, 2003 and 2006) do not exclude levy of entry tax on the goods imported from any place outside territories of India into a local area for consumption, use or sale.

(ii) All the Entry Tax Legislations questioned in these appeals are legislations which are within the legislative competence of the State legislatures and do not intrude the legislative domain of Parliament as reserved in Entry 41 & Entry 83 of List I.

(iii) The import of goods from any territory outside India comes to an end when the goods enter into the custom frontiers of India and are released for home consumption.

(iv) After import of goods comes to an end the State legislature has full legislative competence to levy entry tax under Entry 52 List II.

(v) The Original Package Theory as developed by the American Supreme Court in case of Brown vs. State

of Maryland(supra) is not applicable in this country and the imported goods are not exempted from entry tax till it reaches to the factory premises/destination of its consumption, use or sale.

(vi) Non inclusion of custom duty in the definition of purchase value in the statute of entry tax is not an indicator of the fact that legislature never intended to levy entry tax on imported goods.

(vii) Entry tax legislation are fully covered by Entry 52 List II and the submission that essence of Entry 52 is octroi which can be levied only by local authorities and State has no legislative competence to impose entry tax under Entry 52 List II is fallacious.

(viii) A plant imported in knocked out condition is fully covered with the definition of machinery and equipment under Part II of Schedule of the Orissa Act, 1999."

12. In so far as, the New Act is concerned, Section 4 (1), (3) and (6) of that Act read as below:

"Section 4. Levy of tax:

(1) For the purpose of development of trade, commerce and industry in the State, there shall be levied and collected a tax on entry of goods specified in the Schedule into a local area for consumption, use or sale therein, from any place outside that local area, at such rate not exceeding five percent of the value of the goods as may be specified by the State Government by notification and different rates may be specified in respect of different goods or different classes of goods;

Provided that the State Government may by notification amend the schedule and upon issue of any such notification, the Schedule shall, subject to the provisions of sub-section (10), be deemed to be amended accordingly.

(3) The tax levied under sub-section (1) shall be payable by a dealer who brings or causes to be brought into the local area such goods, whether on his account or on the account of his principle or takes delivery or is entitled to take delivery of such goods on its entry into a local area.

Provided that the State Government, may by notification, permit any Power Project Industrial Unit engaged in generation, transmission and distribution, having aggregate capital investment of Rs. One thousand crore or more to own the liability of payment of tax of other dealers on the entry of such goods into a local area from any place outside that local area as are used and consumed by the said unit subject to such conditions as may be specified in the notification.

(6) Notwithstanding anything contained in sub-section (1) or sub-section (3), no tax shall be levied on and collected from a dealer, who brings or causes to be brought into a local area any goods which are,-

(i) Consigned without using them in the local area to any place outside the State; or

(ii) sold or resold either in the course of inter-state trade or commerce or in the course of export out of the territory of India;

Explanation- Section 3, Section 5 and Section 6 A of the Central Sales Tax Act, 1956 shall apply for the purpose of determining whether or not any goods has been sold by a dealer in the course of inter-state trade or commerce or in the course of export out of the territory of India:

Provided that where at the time of entry of goods into a local area, the quantity or value of goods to be sold within such local area for the purpose of being taken outside the State without consumption, use or sale in such local area, is not ascertainable, the dealer shall pay the amount of tax on the value of total quantity of goods and after the goods are consigned or sold outside or in the course of, export, the dealer may claim refund or adjustment of the amount so paid as tax in the month in which such goods are transferred outside the State or sold in the course of inter-State trade or commerce or the course of export, in respect of such goods, in the manner provided in Section 5 of this act."

13. In the context of the New Act, it is seen, each assessment year is a separate and independent unit of assessment of entry tax liability. As principle applicable to taxing statutes it was recognised in the context of the Income Tax Act in ***P.M. Mohd. Meerakhan v. CIT, (1969) 2 SCC 25,*** wherein it was held:

"8 ... Under the Income Tax Act for the purpose of assessment each year is a self-contained unit and in the case of a trading adventure the 14. profits have to be computed in the manner provided by the statute ... "

14. Same principle is applicable in this case case as well. Thus tax liability may arise in each unit/assessment year only with respect to taxable event/transaction completed therein. The same has to be assessed for that assessment year. Also, it has to be discharged or recovered, as the case may be, with reference to that assessment year only.

15. Of its own, neither that taxable event nor the tax liability arising thereon continue, cascade or escape or telescope into the following year. Unless specifically provided by the legislature or necessarily implied, subsequent facts or events arising in preceding or succeeding assessment years, have no bearing on either the taxable event or the consequent tax liability that may arise during any assessment unit/year. Such legislature intent and necessary intendment do not exist. For that reason, the subsequent event of export of machinery during the A.Y. 2004-05 (after it had been made use of during A.Y. 2000-01), would not have any bearing on the taxing event that arose in the year 2000-01 and stood completed in that year itself.

16. Moreover, the scheme of the New Act is very clear. Provisions granting reversal of entry tax liability and exemption from entry tax liability are separately provided for under the New Act. Thus, for any liability that may have arisen and which the statute intended to reverse has been specifically provided for by means of Section 5 of the New Act. At present such claim/s do not exist. Such claim/s, if any, having not been raised before the Tribunal, are not being dealt with here.

17. In so far as sub-section 4 (6) of the Act are concerned, it is true that the legislature provided separate conditions under Section 4(6)(i) and (ii) for the levy of tax in different circumstances. Further, it is also true that the condition of 'non-use' of the goods was not a statutory pre-condition under sub-clause 2 of sub-section 6 of Section 4 of the Act. Yet, that difference in legislative intent would remain extraneous and therefore

irrelevant to the claim made by the assessee, in this case. It is so, because here the taxing event (entry of machinery into the local area Allahabad), took place and stood completed and concluded during the A.Y. 2000-01 itself.

18. The subsequent event of sale or re-sale of the machinery by way of export sale was unconnected to that taxing event. In any case, it took place much after close of the A.Y. 2000-01. Therefore, that separate event/transaction had no bearing on the taxable event that stood irreversibly concluded. Therefore, the consequent tax liability remained unaffected by the subsequent export of the machinery.

19. Thus, the legal basis of the claim raised by the assessee is found non-existent. There is nothing to doubt the existence of the tax liability and its crystallization at the end of the A.Y. 2000-01. It also did not get diluted or wiped out upon occurrence of export of the machinery, in subsequent assessment year.

20. In view of the above, questions of law raised by the assessee are answered thus: the factual and legal basis of the claim raised by the assessee having arisen more than three years after the close of the assessment year 2000-01, the same is wholly unfounded. The taxable event occurred in and tax liability arose upon the assessee having caused the entry of machinery for use in the local area Allahabad, during the A.Y. 2000-01. It got crystallized on 31st March, 2001. The event of subsequent export of machinery outside the country during the A.Y. 2004-05, had no bearing on the unit of assessment being the A.Y. 2000-01.

21. In view of the above, there is no merit in the revision. It is accordingly, **dismissed.** Costs easy.

(2019)11ILR A804

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Income Tax Appeal No. 251 of 2013
connected with
Income Tax Appeal Cases No. 268 of 2013, 269 of 2013, 221 of 2016, 242 of 2016 and 243 of 2016

Commissioner of Income Tax, Varanasi ...Appellant

Versus

M/s Poorvanchal Vidyut Vitaran Nigam Ltd., Varanasi ...Respondent

Counsel for the Appellant:
S.S.C.I.T., Sri Manish Goyal, Sri R.K. Upadhyay

Counsel for the Respondent:
Sri Ashish Bansal, Sri S.K. Garg

A. Income Tax Law-Income Tax Act, 1961 - Section 32, 260A - Whether the ITAT is justified in law and facts in holding that the assessee was entitled to claim depreciation on the fixed assets acquired on transfer scheme 2003 which was not yet finalized/ascertained on the fact that the actual assets are not identifiable and not being used as well as their full title have not been transferred to the assessee?

U.P. Transfer of Distribution Undertaking Scheme, 2003 provided for transfer of all the assets and liabilities to four distribution companies made after division of UPPCL. Though the task of determination of item wise

opening balance of assets and liabilities could only be completed in 2015. The depreciation claimed has been disallowed by the AO as the assets were not identifiable at the relevant point of time. Matter remitted back for fresh consideration in the light of auditor's report. (Para 7, 17, 19, 20, 21, 22)

Matter Remitted (E-4)

Appeals arise out of orders dated 01.05.2013, passed by ITAT, Allahabad Bench, Allahabad and orders dated 21.03.2016 passed by ITAT, Allahabad.

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. All these appeals filed under Section 260-A of the Income Tax Act arise out of orders dated 1.5.2013, passed by the Income Tax Appellate Tribunal (hereinafter called as "ITAT"), Allahabad Bench, Allahabad in Income Tax Appeal Nos.228/Alld/2011, 229/Alld/2011, 272/Alld/2012, for the assessment years 2007-08, 2008-09, 2009-10 and orders dated 21.3.2016 passed by the Income Tax Appellate Tribunal, Allahabad (Circuit Bench at Varanasi) in Income Tax Appeal Nos.356/Alld/2014, 498/Alld/2015 and 499/Alld/2015 for the assessment years 2010-11, 2011-12 and 2012-13.

2. Issue in all these appeals under challenge are same, hence are being decided by a common order, treating appeal no.251 of 2013, for the assessment year 2007-08, as the leading appeal.

3. All the appeals are filed on the same question of law, which read as under:

"Whether the Income Tax Appellate Tribunal is justified in law and facts in holding that the assessee was entitled to claim depreciation on the fixed assets acquired on transfer scheme 2003 which was not yet finalized/ascertained on the fact that the actual assets are not identifiable and not being used as well as their full title have not been transferred to the assessee ?"

4. Brief facts of the case are, that U.P. Electricity Regulatory Commission (in short "UPERC") was formed under the provisions of U.P. Electricity Reforms Act, 1999 by Government of U.P., as a first step for reforming and restructuring the power sector in the State.

5. The erstwhile U.P. State Electricity Board (in short "UPSEB") was unbundled into three distinct legal and separate entities through the First Reforms Transfer Scheme, dated 14.1.2000, which are as under:

(i) U.P. Power Corporation Ltd. (in short "UPPCL"), vested with the function of transmission and distribution of power within the State.

(ii) U.P.Rajya Vidyut Utpadan Nigam Ltd. (in short "UPRVUNL"), vested with the function of Thermal generation within the State.

(iii) U.P.Jal Vidyut Nigam Ltd. (in short "UPJVNL"), vested with the function of Hydro generation within the State.

6. By another Transfer Scheme dated 15.1.2000, the assets liabilities and personnel of Kanpur Electricity Supply Authority (in short "KESA") under UPSEB were transferred to Kanpur Electricity Supply Company Ltd. (in short "KESCO"), a Company registered under the Companies Act, 1956.

7. After the enactment of Electricity Act, 2003, UPPCL, which was responsible for transmission and distribution of electricity was further divided and four new distribution Companies (hereinafter collectively referred to as "distribution licensees") were created under the U.P. Transfer of Distribution Undertaking Scheme,2003 (in short called as "Transfer Scheme, 2003"), vide notification no.2740-PA-1-2003-24-14P-2003, dated 12.8.2003, issued by the State Government to undertake distribution and supply of electricity in the areas under their respective Zones specified in the Scheme:

(i) Dakshinanchal Vidyut Vitran Nigam Ltd. (Agra Discom or DVVNL)

(ii) Madhanchal Vidyut Vitran Nigam Ltd. (Lucknow Discom or MVVNL)

(iii) Paschimanchal Vidyut Vitran Nigam Ltd. (Meerut Discom or PVVNL)

(iv) Purvanchal Vidyut Vitran Nigam Ltd. (Varanasi Discom or PVVNL)

8. The said notification was issued in pursuance of Section 131(4) of Electricity Act, 2003 and Section 23(4) of the U.P. Electricity Reforms Act, 1999.

9. Pursuant to the formation of the said four Companies, all the assets and liability as per the Scheme was transferred, which included the fixed assets. After transfer of assets and liabilities, these Companies started utilizing the same in power generation and revenue generated was disclosed in the return filed by it in regular course. However, as break up of assets value and itemwise was not provided in the Scheme, as such for PUVNL, one Ms Batliboy & Co. was entrusted with task for physical verification of assets and determination of the same.

10. As the report was awaited and the returned had fallen due, assessee had charged depreciation at a common rate of 7.84% on the method prescribed by the Government under Electricity Supply Act, 1948 on the gross fixed assets transferred to the Company as per the Transfer Scheme, 2003.

11. While making the assessment for the assessment year 2004-05 the assessing officer disallowed the depreciation claimed by the respondent-assessee on the assets transferred to it under the U.P. Transfer of Distribution Undertaking Scheme, 2003.

12. CIT(A), however, considering the fact allowed the appeal of the respondent-assessee, which was affirmed by the Tribunal. The order of the Tribunal was challenged by the Department before this Court.

13. Present dispute relates to the assessment years 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13. In all these years the assessing authority had disallowed the depreciation claimed by the assessee on the assets transferred to it pursuant to the Scheme of 2003.

14. Sri Gaurav Mahajan, learned counsel appearing for the Department submitted that Section 32 of the Income Tax Act provides for depreciation in respect of building, machinery, plant or furniture, being tangible assets. He relied upon sub-section 1(ii) of Section 32 of the Act, which provides that depreciation

shall be granted only when the assessee owned, wholly or partly and used for the purpose of business or profession that the deduction shall be allowed. According to the appellant the respondent-assessee came into effect from 12.8.2003 and claimed depreciation to the tune of Rs.87,01,38,609/- out of which Rs.17,45,76,911/- has been claimed for assets acquired after the Transfer Scheme, 2003 as mentioned in the depreciation schedule.

15. While remaining depreciation of Rs.69,55,61,698/- has been claimed on the balance assets acquired on the Transfer Scheme, 2003. He further submitted that A.O. had rightly allowed the claim of depreciation on the assets acquired after the Transfer Scheme, 2003 came into force while it disallowed the claim of the respondent-assessee on the assets transferred under the Scheme as the same was not yet finalized and identifiable and, therefore, not being used as well. He also submitted that the assessing officer had also disallowed the claim of depreciation claimed by the assessee for the previous assessment years also.

16. Lastly, it was contended that the assets acquired under the Transfer Scheme, 2003 came to be identifiable in the assessment year 2016-17, as such, the matter needs to be remitted back to the assessing authority to look into the claim of depreciation in respect of assets so acquired.

17. Per contra, Sri Ashsih Bansal, learned counsel appearing for the respondent-assessee submitted that the A.O. had wrongly disallowed the claim of depreciation, as the C.I.T. (Appeal) and Tribunal had granted the claim of depreciation to the assessee for the relevant years in question as well as for the previous assessment years, as such the arguments of the Department has no legs to stand. However, he candidly admitted the fact, that the task for determination of itemwise opening balance of assets and liabilities had been completed and the reports had been submitted by auditor/agency to the assessee, the same have been brought by the counsel for the assessee before the Court in his written submission, which is dated 4.12.2015. The relevant extract of the letter dated 4.12.2015 are extracted here as under :

" उत्तर प्रदेश पावर कारपोरेशन लिमिटेड
(उ0 प्र0 सरकार का उपक्रम)
U.P. Power Corporation Limited
(U.P. Govrnment Undertaking)
कारपोरेट लेखा अनुभाग CORPORATE ACCOUNTS

_____

शक्ति भवन विस्तार 14–अशोक मार्ग, लखनऊ–226001 Shakti Bhawan Ext., 14-Ashok Marg Lucknow -226001

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पत्रांक
354 / पी0सी0एल0 / सी0ए0–बी0एस0 / लेखा समीक्षा बैठक दिनांक 04–12–2015
निदेशक (वित्त),
पूर्वान्चल वि0वि0 नि0लि0,
वाराणसी।

बिषयः– डिस्कामस् अन्तरण स्कीम के अन्तिमीकरण के फलस्वरूप सम्बन्धित खण्डवार अवशेष व उन पर प्रतिवेदन प्रदान किये जाने के सम्बन्ध में।

कृपया इस कार्यालय के पत्र संख्या 338 / पी0सी0एल0 / सी0ए0–ए0एस0 / 35 / ओ0बी0आर0 दिनांक 16–11–2015 का संदर्भ ग्रहण करें। उक्त सम्बन्ध में डिस्काम अन्तरण स्कीम के अन्तिमीकरण के परिणामस्वरूप मेसर्स प्रूडेन्शियल प्रोजेक्ट सिंडीकेट द्वारा प्रदत्त " Opening

Balances of Acoounting Units vested in Purvanchal Vidyut Vitran Nigam Limited, Varanasi as on 12.08.2003" की मूल प्रति (पृष्ठ सं0 1 से 256 तक) एवं " Explanatory note on the computation on unit wise balances finally proposed to be tranaferred by the U.P. Power Corporeation Limited to Discoms as on 11.08.2003" की मूल प्रति (पृष्ठ सं0 1 से 192 तक) सूचनार्थ एवं आवश्यक कार्यवाही हेतु संलग्न प्रेषित है।

संलग्नकः–यथोपरि।

(ए0के0 गुप्ता)

मुख्य महाप्रबन्धक (लेखा)"

18. Sri Bansal lastly submitted that in case the court is of different view, then the matter be remanded to A.O. for limited purpose, only for verification of the said record for allowing depreciation to the assessee as per law.

19. Having heard learned counsel for the parties and from perusal of the records, it is not in dispute that the UPPCL was divided into four new distribution Companies under the Transfer Scheme, 2003 by Government notification dated 12.8.2003. The respondent-assessee is one of the four distribution Companies. It is further not in dispute that the Transfer Scheme, 2003 provided for the assets, which included the fixed assets, but no break up of assets values and itemwise was provided in the Transfer Scheme, 2003, as such the respondent-assessee had appointed an auditor to make itemwise opening balance of the assets and liabilities, which according to the respondent-assessee themselves was submitted by the auditors to them on 4.12.2015.

20. The contention of the counsel for the Department regarding the depreciation, which has been disallowed by the assessing officer on the balance assets acquired on the date of Transfer Scheme, 2003, as the assets was was not identifiable at the relevant point of time, needs consideration.

21. In the light of the fact that the auditors themselves had submitted report to the respondent-assessee on 4.12.2015 and the assets so acquired under the Transfer Scheme, 2003 came to be identifiable only in the assessment year 2016-17. The said fact has also not been denied by the counsel for the respondent-assessee.

22. In view of the above, we are of the considered opinion that the matter needs to be examined afresh for the claim of depreciation by the assessing officer, in the light of the auditor's report providing itemwise accounting of assets and liabilities on 4.12.2015. Thus, the matter is remitted back to the assessing authority to reconsider and verify the records and pass fresh order, as far as claim of depreciation on the assets claimed by the respondent-assessee, pursuant to the Scheme of 2003.

23. We hope and trust that the aforesaid exercise will be carried out by the assessing officer within three months from the date of production of a certified copy of this order, with the aforesaid directions all the appeal stands disposed off.

(2019)11ILR A808

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Commercial Tax Revision No. 1068 of 2008
And
Sales/Trade Tax Revision Cases No. 188 of 2008, 1051 of 2008, 1052 of 2008, 1067 of 2008, 1064 of 2008, 1059 of 2008, 1070 of 2008, 1056 of 2008, 1069 of 2008, 1066 of 2008, 1060 of 2008, 1057 of 2008, 1062 of 2008, 1065 of 2008, 1058 of 2008, 1071 of 2008, 1061 of 2008, 1063 of 2008, 178 of 2010, 179 of 2010, 180 of 2010, 189 of 2010, 190 of 2010, 191 of 2010, 192 of 2010, 242 of 2010, 243 of 2010, 244 of 2010 & 245 of 2010

M/s Jubilant Organosys Ltd. ...Applicant
Versus
The Commissioner, Commercial Taxes, U.P., Lucknow ...Opposite Party

Counsel for the Applicant:
Sri Nikhil Agrawal, Sri Bharat Ji Agrawal, Sri Rahul Agarwal

Counsel for the Opposite Party:
C.S.C.

A. Tax Law-Sales Tax - U.P. Trade Tax Act, 1948 – In absence of any specific taxing entry permitting the levy of tax on sulphur content in Gypsum, the revenue cannot be permitted to ignore the exemption provided to Gypsum (by notification no. 784 dated 31.03.1995), with a view to tax the sulphur content in Gypsum – Composition of SSP as a commodity cannot be broken down to permit taxation of the value of Gypsum, a non-phosphatic element of SSP. It is also not permissible for the revenue authority to break the identity of Gypsum to determine the percentage value of Sulphur in Gypsum with the object of imposing tax on the value of sulphur. (Para 33, 34, 35, 37, 38)

The commodity SSP has no use other than the agricultural use as a fertilizer, reading the exemption notification No. 440 dated 12.02.2001 and the exemption notification No. 784 dated 31.03.1995 together, it is clear that they were issued to grant exemption to various fertilizers in agriculture. Thus, all the contents of SSP remained generally exempt. (Para 36)

B. Tax Law-Sales Tax – U.P. Trade Tax Act, 1948 - Exemption Notification (No. 440 dated 12.02.2001) - **The terms of exemption notification have to be strictly construed**.

Exemption Notification stipulates that Guidelines issued by the Department of Agriculture, State of U.P. shall be used to specify the percentage of phosphatic content in SSP. In absence of such guidelines issued by the Department of Agriculture, State of U.P., no reliance can be placed in the administrative order issued by the Union of India. In any case, it does not provide for determination of Phosphatic components in SSP, it only specifies the percentage of various contents of SSP. (Para 30, 31, 32)

Revision allowed (E-4)

Precedent followed: -

1. Govind Saran Ganga Saran Vs. Commissioner of Sales Tax & ors., 1985 (Supp) SCC 205 (Para 6, 21)

Precedent cited: -

1. C.I.T. Bangalore Vs B.C. Srinivasa Setty, (1981) 2 SCC 460 (Para 22)

2. St. of M.P. Vs Marico Industries Ltd., 2016 (338) ELT 335 (SC) (Para 23)

Notifications/Administrative Orders referred: -

1. Notification No. 1938 dated 02.05.2002 (Para 3)

2. Notification No. KA.Ni.-2-440/XI-9(113)/99-U.P. Act 15-48-Order-(13)-2001 dated 12.02.2001 (Para 8)

3. Notification No. TT-2-784/XI-9(51)/91-U.P. Act-15/48-Order-95, dated 31.03.1995 (Para 9)

4. U.O.I. S.O. No. 540(E) dated 12.05.2003 (Para 24)

Commercial Tax Revision against the order dated 02.08.2008 passed by Commercial Tax Tribunal, Moradabad Bench, Moradabad.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. The present batch of revisions have been filed by the assessee, who is aggrieved by the orders passed by the Tribunal arising both from the provisional assessment proceedings for A.Y. 2007-08 (for the months April to December, 2007) both under the provisions of U.P. Trade Tax Act, 1948 and the Central Sales Tax Act, 1956 and also from final assessment orders for A.Ys. 2002-03 to 2007-08 (U.P. and Central).

2. Since the points involved in all revisions are common or inter-related, the present revisions are being decided by a common order wherein facts of Sales/Trade Tax Revision No. 1068 of 2008 [arising from provisional assessment proceedings for October, 2007 (U.P.)] and Sales/Trade Tax Revision No. 188 of 2010 [arising from final assessment proceedings for A.Y. 2005-06 (U.P.)] are being taken note of. Also, the revisions filed against provisional assessment orders are being considered since the findings recorded and material relied overlap in the two proceedings of provisional and final assessment.

3. **Sales/Trade Tax Revision No. 1068 of 2008** has been filed by the assessee against the order of the Commercial Tax Tribunal, Moradabad dated 02.08.2008 passed in Second Appeal No.256 of 2008. By that order, the Tribunal has dismissed the appeal filed by the assessee and held that the Department of Agriculture, Government of U.P. had not issued any guidelines whether tax may be imposed on the contents of Sulphur in Single Super Phosphate (SSP) under the exemption notification No. 1938 dated 02.05.2002. Also, it has been held that the Sulphur content in Single Super Phosphate (SSP) was 11%, according to an order issued by the Central Government. Relying on a communication issued by the Department of Agriculture, Government of U.P. dated 17.05.2008, it was further held, Single Super Phosphate (SSP) is obtained as a result of following chemical reaction :

$$Ca_3(PO_4)_2 + 2H_2SO_4 + 4H_2O = CaH_4(PO_4)_2 + 2CaSO_4.2H_2O$$

Tri Calcium Phosphate Sulphuric Acid Water Mono Calcium Phosphate Gypsum

4. Undisputedly, Single Super Phosphate (SSP) is a compound of Mono Calcium Phosphate [$CaH_4(PO_4)_2$] and Gypsum ($CaSO_4.2H_2O$). Though, it is undisputed that Gypsum ($CaSO_4.2H_2O$) sold for agricultural use had been separately made exempt from tax, however, Sulphur contents in Gypsum ($CaSO_4.2H_2O$) have been held to be taxable, in absence of any information being given by the Department of Agriculture, Government of U.P. In the appeal proceedings arising from the final assessment order, the Tribunal has reasoned, only the Phosphatic component in Single Super Phosphate (SSP) was exempt under notification No. 440 dated 12.02.2001. The other components of the Single Super Phosphate (SSP) were not exempt and therefore taxable.

5. The contention of the assessee that Sulphur was present in Single Super Phosphate (SSP), only in the form of Gypsum ($CaSO_4.2H_2O$) (that was

separately made exempt by the notification No. 784 dated 31.03.1995), and not in its elementary form has been negated by the Tribunal on the reasoning that the assessee never sold Gypsum ($CaSO_4.2H_2O$) for agricultural use. Similar orders have been passed by the Tribunal in all other cases.

6. While the revisions arising from the provisional assessment orders were admitted without reference to any question of law, however, formal order of admission never came to be passed in the revisions arising from the final assessment orders. Normally, the revisions arising from the provisional assessment orders would be rendered infructuous upon the final assessment orders coming into existence. However, in view of the fact that the revenue seeks to rely on the reasoning given both in the provisional assessment order as also final assessment order; the assessee seeks to rely on the documents accompanying revisions arising both from provisional and also final assessment proceedings and; the question involved is purely legal with respect to the taxability and availability of exemption under the relevant notifications, the revisions arising from final assessment proceedings have been heard on merits on the followings questions of law:-

"(i) Whether, there being no prescribed percentage of Sulphur (as S) as mentioned in the Control Order being present in SSP and the Phosphatic component of the Single Super Phosphate being exempt under notification No.440 dated 12.2.2001 and the other constituent Gypsum (for agriculture use) being exempt from payment of tax under notification No.784 dated 31.3.1995, the order of the Commercial Tax Tribunal upholding the taxability on estimated percentage of Sulphur is legally sustainable?

(ii) Whether, in view of the letter of the Directorate of Agriculture, having specified that Sulphur is present in the form of Gypsum in Single Super Phosphate manufactured by the applicant, and Gypsum for agricultural use being exempt under the notification No.784 dated 31.03.1995, the Commercial Tax Tribunal was legally justified in upholding the levy of tax on assumed percentage of Sulphur components?

(iii) Whether, there being no guidelines issued by the Department of Agriculture, Uttar Pradesh as required under the notification No.440 dated 12.02.2001 regarding percentage of taxable component in respect of Single Super Phosphate and thus the Sulphur component present in Single Super Phosphate being indeterminate, the Commercial Tax Tribunal was legally justified in upholding the taxability of Sulphur component in Single Super Phosphate contrary to law laid down by Hon'ble Supreme Court of India in the case of Govind Saran Ganga Saran (supra)?"

7. Heard Sri Nikhil Agarwal, learned counsel for the applicant-assessee and Sri B.K. Pandey, learned Standing Counsel for the revenue.

8. Giving the genesis of the present revisions, learned counsel for the assessee has first referred to the exemption notification No. KA.Ni.-2-440/XI-9(113)/99-U.P. Act 15-48-Order-(13)-2001 dated 12.2.2001. It reads as below:

"Whereas, the State Government is satisfied that it is necessary so to do in the public interest;

Now, therefore, in exercise of the powers under Clause (a) of Section 4 read with Section 25 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), the Governor is pleased to direct that no tax under the said Act shall be payable on the sale of Zinc Sulphate Fertilizer and micro nutrient mixtures and on the sale of Potash and Phosphatic component of the following Chemical fertilizers from 1st January, 2001 :

(1) D.A.P.	*18 : 46 : 0*
(2) M.O.P.	
(3) S.S.P.	
(4) N.P.K.	*12 : 32 : 16*
(5) N.P.K.	*20 : 20 : 0*
(6) N.P.K.	*15 : 15 : 15*
(7) N.P.K.	*23 : 23 : 0*
(8) N.P.K.	*14 : 35 : 14*
(9) N.P.K.	*20 : 20 : 10*
(10) N.P.K.	*15 : 15 : 7.5*
(11) N.P.K.	*10 : 10 : 10*
(12) N.P.K.	*12 : 6 : 0*
(13) N.P.K.	*16 : 9 : 0*

The percentage of different components of the chemical fertilizers shall be determined according to the guidelines issued by the Department of Agriculture, Uttar Pradesh from time to time."

9. Then reference has been made to the other exemption notification No. TT-2-784/XI-9(51)/91-U.P. Act-15/48-Order-95, dated 31.3.1995. It reads as below:-

"In exercise of the powers under clause (a) of Section 4 of Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) and in supersession of Government notification No. ST-2-1419/XI-9(51)/91-U.P. Act-XV/48-Order-91, dated August 30, 1991, the Governor is pleased to direct that, with effect from April 1, 1995, no tax under the said Act No. XV of 1948 shall be payable on sale of Gypsum (IS Code 6046) and Pyrite for agricultural use."

10. Next reference has been made to a letter dated 17.05.2008 issued by the Director of Agriculture, Uttar Pradesh to the assessee stating that the presence of Sulphur in Single Super Phosphate (SSP) occurs as a result of following chemical reaction :

$$Ca_3(PO_4)_2 + 2H_2SO_4 + 4H_2O = CaH_4(PO_4)_2 + 2CaSO_4.2H_2O$$

Tri Calcium Phosphate Sulphuric Acid Water Mono Calcium Phosphate Gypsum

11. It has been further specified in that letter that the chemical formula for Gypsum is $CaSO_4.2H_2O$.

12. Reference has also been made to a letter dated 15.02.2008 written by the Assessing Authority of the assessee to the District Agriculture Officer making enquiries whether in the computation of the control price of Single Super Phosphate (SSP) there was any component of any commodity other than

Single Super Phosphate (SSP). It appears the Department of Agriculture, Uttar Pradesh vide letter dated 22.12.2008 stated (with reference to the letter dated 25.11.2008 issued by the Director of Agriculture) that Sulphur was present in the form of Gypsum ($CaSO_4.2H_2O$) in Single Super Phosphate (SSP) and therefore it should not be taxed.

13. All these materials were placed before the assessing authority at the stage of final assessment proceedings. However, at the stage of provisional assessment proceedings, the assessing authority reasoned that according to an order issued by the Central Government 11% Sulphur was present in Single Super Phosphate (SSP) and therefore, the same was not exempt but liable to tax. According to the assessing officer, Sulphur was more valuable component of the Single Super Phosphate (SSP) and therefore further assuming its value @ 20% of the total value of Single Super Phosphate (SSP), he taxed the same at the highest rate treating it to be an unclassified item.

14. Challenge raised by the assessee, was partially accepted by the first appellate authority to the extent it was held, there was no basis to estimate the 20% value of the Single Super Phosphate (SSP) as non exempt. However, that was left to be determined at the stage of final assessment proceedings. As to the primary question, in view of the control order specifying contents of Sulphur in the Single Super Phosphate (SSP) at 11% it was reasoned that the same was taxable.

15. Learned counsel for the assessee would submit, in the first place, exemption notification No. 440 dated 12.02.2001 grants full exemption on sale of Potash and Phosphatic component of Single Super Phosphate (SSP). Though no guidelines had been issued by the Department of Agriculture, Uttar Pradesh to specify the percentage of the Phosphatic component in the Single Super Phosphate (SSP), however, there is no material to doubt the correctness of the chemical reaction and the certification made by the Agriculture Department, vide its communications dated 17.05.2008 and 22.12.2008 read with communication dated 25.11.2008.

16. Thus, it is his submission that the Single Super Phosphate (SSP) being a chemical compound of Mono Calcium Phosphate [$CaH_4(PO_4)_2$] and Gypsum ($CaSO_4.2H_2O$) is exempt. Insofar as exemption notification No. 440 dated 12.02.2001 is concerned, the value of entire quantity of Mono Calcium Phosphate [$CaH_4(PO_4)_2$] would remain exempt and there is no quarrel with respect to the same inasmuch as undisputedly, there is no Sulphur content in the same. Then, referring to Gypsum ($CaSO_4.2H_2O$), it has been submitted that in any case, Gypsum ($CaSO_4.2H_2O$) for agriculture use was clearly exempt under the pre-existing exemption notification No. 784 dated 31.03.1995. Therefore, the fact that the Sulphur was contained in Gypsum ($CaSO_4.2H_2O$) would be wholly irrelevant and extraneous to the issue.

17. In any case, it has been submitted, in absence of any percentage being specified by the Department of Agriculture, Uttar Pradesh, as to the component of the Single Super Phosphate (SSP), that may be treated to be exempt, it was not open to the revenue authorities to

carry out an independent exercise to discover what part of Single Super Phosphate (SSP) contained Sulphur. In absence of guidelines being issued by the Department of Agriculture, Uttar Pradesh, which was only an expert body recognized under the notification No. 440 dated 12.2.2001, the entire quantity of Single Super Phosphate (SSP) would remain exempt and no artificial process or reasoning could be adopted to declare any part of value of that commodity to be not exempt or taxable.

18. In that context, it has also been submitted, in any case, it was never open to the revenue authorities to look out for the percentage of Sulphur and to bring the same to tax only because certain amount of Sulphur had been specified to be necessary part of Single Super Phosphate (SSP) under the control order issued by the Central Government. In fact, if that control order were to be treated as relevant, it had to be inferred that Sulphur was a necessary component of Single Super Phosphate (SSP) and therefore it could not be read to defeat the exemption granted. However, in view of the other undisputed material existing on record that such Sulphur was part of Gypsum ($CaSO_4.2H_2O$), which was otherwise exempt, the entire reasoning adopted by the revenue authorities would remain revenue neutral and would not give rise to any taxability.

19. Reliance has also been placed on the dictionary meaning of the term Calcium Sulphate as given in the Penguin Dictionary of Chemistry, Third Edition, 2003 wherein Calcium Sulphate ($_4$) has been defined thus:- *"occurs naturally as anhydrite, and as $CaSO_4.2H_2O$ as Gypsum, selenite, satin-spar, alabaster. Natural anhydrite and CaSO4 prepared by dehydrating the dihydrate above 650ºC is only slowly soluble in water and is used as a filter for paper and other materials (see also Satin White)". Again, Sulphur has been defined as:- "Non-metal, atomic No. 16, atomic mass 32.066, m.p. 119.6ºC, b.p. 444.6ºC, density p 2070, crustal abundance 260 p.p.m., electronic configuration [Ne] 3s23p2. Yellow non-metallic element of Group 16".*

20. Relying on those meanings given to the two terms of science of Chemistry, it has been submitted, plainly, Sulphur and Calcium Sulphate have two different chemical identities. Sulphur is an element in its elementary form while the Calcium Sulphate is a compound being a Sulphate of Calcium. Therefore, even if the reasoning pursued by the revenue authorities were to be accepted to any extent, it may never lead to the conclusion reached by the revenue authorities that Single Super Phosphate (SSP) comprised of Sulphur, inasmuch as the Sulphur in its elementary form was not found present to any extent in the Single Super Phosphate (SSP), manufactured by the assessee.

21. Reliance has also been placed on the decision of the Supreme Court in the case of **Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others., 1985 (Supp) SCC 205,** to submit that the four components of tax imposed must be found existing before a valid levy may arise. Any uncertainty or vagueness, either as to the character of the imposition, or to the person on whom the levy has been imposed or as to the rate on which the tax has been imposed or as to the measure or the value on which the rate is to be applied, would be fatal to the

levy. In the instant case, besides other, there is no measure or value specified under the statutory scheme that may permit the revenue authorities to carry out any independent exercise to determine the value of content of Sulphur in the Single Super Phosphate (SSP), manufactured and sold by the assessee. Therefore, the exercise carried out by the revenue authorities in that regard, is without jurisdiction, presumptuous and in any case, wholly impermissible for the context of the taxing statute.

22. Reliance has also been placed on the decision of the Supreme Court in the case of **C.I.T. Bangalore Vs. B.C. Srinivasa Setty, 1981 2 SCC 460,** wherein it has been held that the charging section and computation provisions together constitute an integrated code and thus in absence of charging section providing or allowing the revenue authorities to search out the contents and value of Sulphur in Single Super Phosphate (SSP) sold by the assessee, there was no room for such an exercise to be carried out at an inferential process.

23. Last, reliance has been placed on another decision of the Supreme Court in the **State of Madhya Pradesh Vs. Marico Industries Ltd, 2016 (338) ELT 335 (SC)** to submit that the burden to establish that the assessee had sold Sulphur was solely on the revenue. No evidence having been led by the revenue to establish such fact, it was never permissible for those authorities to impose tax on the sale of Sulphur by the assessee.

24. Responding to the above, learned Standing Counsel has relied on the administrative order issued by the Central Government vide S.O. No. 540(E) dated 12.5.2003 wherein the composition of Single Super Phosphate has been given as below:

1(b). STRAIGHT Phosphatic FERTILIZERS

1. Single Super Phosphate (16% P2O5 Powdered)

(i) Moisture, per cent by weight, maximum 12.0

(ii) Free phosphoric acid (as P_2O_5), per cent by weight, minimum

(iii) Water soluble Phosphates (as P_2O_5), per cent by weight, minimum 16.0

(iv) Sulphur (as S), per cent by weight, minimum 11.0

2. Single Super Phosphate (14% P2O5 Powdered)

(i) Moisture, per cent by weight, maximum 12.0

(ii) Free phosphoric acid (as P_2O_5), per cent by weight, minimum

(iii) Water soluble Phosphates (as P_2O_5), per cent by weight, minimum 14.0

(iv) Sulphur (as S), per cent by weight, minimum 11.0

25. Since the assessee had manufactured and sold Single Super Phosphate (SSP) in terms of the prescriptions made by the Central Government, it has been submitted, undisputedly, the commodity sold by the assessee contained minimum Sulphur (11%) by weight. Thus, it has been submitted, there is no dispute as to the Sulphur contents in the commodity sold by the assessee. Then, referring to the exemption notification, learned Standing Counsel would submit, only such percentage of Phosphatic component and Potash in Single Super Phosphate (SSP)

would remain exempt as may be determined in accordance with the guidelines issued by the Department of Agriculture. Inasmuch as the aforesaid order issued by the Central Government itself stated that Single Super Phosphate (SSP) contained 11% Sulphur, the same was clearly non-exempt and, therefore, taxable.

26. Reference has also been made to the communication issued by the Department of Agriculture, (as has also been referred to by learned counsel for the applicant-assessee), to submit that the prescription made by the Central Government is wholly corroborated by the communication issued by the Department of Agriculture, Uttar Pradesh, inasmuch as the Sulphur is clearly mentioned as an ingredient of Single Super Phosphate (SSP) manufactured by the assessee.

27. Further, learned Standing Counsel would submit, there is no case set up by the assessee that it sold Gypsum ($CaSO_4.2H_2O$) and, therefore, the Tribunal has not erred in rejecting the claim set up by the assessee.

28. Having heard learned counsel for the parties and having perused the record, in the first place, it is to be seen whether the commodity Single Super Phosphate (SSP) was granted exemption. Second, it would have to be examined if such exemption existed whether any exception was created by law so as to exclude from exemption and thus subject to tax any part of the value of such Single Super Phosphate (SSP). If such exception is found to be existing in law, it would have to be further seen whether any tax liability existed on such excepted component of Single Super Phosphate (SSP). It is in that last context that the presence of Sulphur in Single Super Phosphate (SSP) would require consideration.

29. On fact, there is no dispute that Calcium Sulphate is present in Single Super Phosphate (SSP). At the same time, it has not been resisted by the revenue that the presence of Sulphur in Single Super Phosphate (SSP) is only in the shape of Gypsum ($CaSO_4.2H_2O$) and not in it's elementary form.

30. Coming to the exemption notification No. 440 dated 12.2.2001, it is clear that amongst others, Phosphatic component of Single Super Phosphate (SSP) and not Single Super Phosphate (SSP) as a commodity was exempt. As to the percentage of Phosphatic component in Single Super Phosphate (SSP), the legislature clearly provided that the guidelines issued by the Department of Agriculture, Uttar Pradesh, would be binding. Admittedly, no guidelines were ever issued by the Department of Agriculture, Uttar Pradesh to specify the percentage of Phosphatic contents in Single Super Phosphate (SSP).

31. Reliance placed by learned Standing Counsel on the administrative order issued by the Central Government does not satisfy the condition contained in exemption notification No. 440 dated 12.2.2001. First, the Central Government was clearly not the authority specified in the exemption notification for that purpose. Only the Department of Agriculture, Uttar Pradesh was recognized to prescribe the percentage of Phosphatic component in Single Super Phosphate (SSP). Therefore, it is wholly

erroneous on part of the Tribunal and the revenue authorities to have relied on that administrative order issued by the Central Government for the purpose of determining the percentage of exemption granted to Single Super Phosphate (SSP).

32. Second, that order does not seek to specify the percentage of Phosphatic component in Single Super Phosphate (SSP). There is no evidence to that effect. The fact that that order specifies the percentage of various contents of Single Super Phosphate (SSP) does not and it cannot in any way lead to the conclusion either by necessary or other implication that it provides for determination of Phosphatic components in Single Super Phosphate (SSP). In fact, a plain reading of that order only brings out that it specifies the contents of (maximum) Moisture, (minimum) free phosphoric acid, (minimum) water soluble phosphates and (minimum) Sulphur that may be present in Single Super Phosphate (SSP). It does not satisfy the requirement of the exemption notification No. 440 dated 12.2.2001 and it does not bring out the total percentage of Phosphatic component in Single Super Phosphate. It does not even attempt to identify the Phosphatic component in Single Super Phosphate as an ingredient.

33. Even otherwise if the argument advanced by learned Standing Counsel were to be accepted to any extent, it may have no impact as in face of other undisputed evidence in the shape of certification letters issued by the Department of Agriculture, Uttar Pradesh, Sulphur is present in Single Super Phosphate (SSP) only as Calcium Sulphate i.e. Gypsum ($CaSO_4.2H_2O$) and not as Sulphur in its elementary form. Though no percentage of the Phosphatic component in Single Super Phosphate (SSP) had been identified yet, it was made plain that other than Phosphatic component, Single Super Phosphate (SSP) contained Gypsum. Undisputedly, Gypsum ($CaSO_4.2H_2O$) by itself was made exempt by the State legislature under a separate notification No. 784 dated 31.3.1995. Gypsum having been identified as an item by the taxing statute, reading the exemption notification no. 440 dated 12.2.2001 strictly, it is the taxability or otherwise of Gypsum that was required to be examined and not the ingredient thereof. To allow the department to do so would be to allow it to ignore the taxing/exemption entry that the goods clearly satisfy in favour of what lies within it. That rule if applied would lead to alarming if not plainly disastrous results. In any case in absence of any specific/special taxing entry to tax Sulphur contents in Gypsum ($CaSO_4.2H_2O$), it is not possible to allow the revenue to ignore the specific exemption notification No. 784 dated 31.3.1995 to tax Sulphur allegedly present in Gypsum ($CaSO_4.2H_2O$).

34. Thus, to the Department of Agriculture, Uttar Pradesh, the Single Super Phosphate (SSP) is a compound comprised of two parts, the first being the Phosphatic component i.e. Mono Calcium Phosphate [$CaH_4(PO_4)_2$] and the other is Gypsum ($CaSO_4.2H_2O$). With respect to the Mono Calcium Phosphate [$CaH_4(PO_4)_2$], there is no dispute between the parties that the same was wholly exempt under notification No. 440 dated 12.2.2001.

35. Then, in the context of tax sought to be imposed on Sulphur, it is

seen that Sulphur is present in Single Super Phosphate (SSP) as Calcium Phosphate in Gypsum ($CaSO_4.2H_2O$). The state legislature had already identified Gypsum ($CaSO_4.2H_2O$) for agriculture use as a commodity exempt from tax under notification No. 784 dated 31.3.1995.

36. Insofar as the commodity Single Super Phosphate (SSP) has no use other than the agricultural use as a fertilizer, reading exemption notification No. 440 dated 12.2.2001 and the exemption notification No. 784 dated 31.3.1995 together, it is clear that they were issued to grant exemption to various fertilizers used in agriculture. Thus, all contents of Single Super Phosphate (SSP) i.e. Mono Calcium Phosphate [$CaH_4(PO_4)_2$] and Gypsum ($CaSO_4.2H_2O$), remained generally exempt.

37. Also, inasmuch as the exemption notification nos. 784 dated 31.3.1995 does not restrict the exemption on Gypsum ($CaSO_4.2H_2O$) to its content excluding Sulphur, it is not possible to allow the revenue authorities to ignore the composite identity of compound Single Super Phosphate (SSP) or to allow them to ignore the identity of Gypsum ($CaSO_4.2H_2O$) as a constituent of that compound for the purpose of bringing to tax the value of Sulphur in Gypsum ($CaSO_4.2H_2O$).

38. The clear legal position that emerges is, de hors notification No. 784 dated 31.3.1995, it may have been permissible to the revenue authorities to tax the value of Gypsum ($CaSO_4.2H_2O$) [as Gypsum is a non-Phosphatic component of Single Super Phosphate (SSP)] if such guidelines had been found existing. However, in absence of such exclusionary clause in that notification, it is not permissible for the revenue authorities to break the identity of Gypsum ($CaSO_4.2H_2O$) so as to determine the percentage value of Sulphur in Gypsum ($CaSO_4.2H_2O$) only with the object of imposing tax on the value of Sulphur.

33. In view and in terms of the above, the questions of law (as framed above), are answered in the negative i.e. in favour of the applicant-assessee and against the revenue, in Sales/Trade Tax Revision Nos. 178 of 2010, 179 of 2010, 180 of 2010, 188 of 2010, 189 of 2010, 190 of 2010, 191 of 2010, 192 of 2010, 242 of 2010, 243 of 2010, 244 of 2010 & 245 of 2010. Those revisions are accordingly **allowed**. The other revisions being Sales/Trade Tax Revision Nos. 1051 of 2008, 1052 of 2008, 1067 of 2008, 1064 of 2008, 1059 of 2008, 1070 of 2008, 1056 of 2008, 1069 of 2008, 1066 of 2008, 1060 of 2008, 1057 of 2008, 1062 of 2008, 1068 of 2008, 1065 of 2008, 1058 of 2008, 1071 of 2008, 1061 of 2008 & 1063 of 2008 stand disposed of accordingly.

(2019)11ILR A818

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Transfer Application No. 81 of 2019

Rakesh Kumar Mishra @ Laddu Baba
...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Nitesh Kumar Singh, Sri Ashutosh Sharma

Counsel for the Opposite Parties:
G.A., Sri Gyan Prakash

A. Criminal Law-Prevention of Money Laundering Act,2002 - Section 45 - Code of Criminal Procedure-Section 407- a case can be transferred from one criminal court to some other criminal court in case if it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto-however, in the instant case no such allegations has been made against the Designated Court, under the PMLA Act, at Allahabad, to attract this provision. (Para 2,3,8,9,10,11,12,13)

Transfer application rejected (E-6)

(Delivered by Hon,ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicant over this Transfer Application, moved under Section 407 of Code of Criminal Procedure, 1973 (hereinafter, in short, referred to as the 'Cr.P.C.'), by the applicant, Rakesh Kumar Mishra @ Laddu Baba, with a prayer for transferring Criminal Complaint Case No. 1/2016 (Assistant Director, Director of Enforcement Govt. of India, Allahabad Zone vs. Rakesh Mishra & Ors.), under Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter, in short, referred to as the 'PML Act'), for offence, under Section 3 and, punishable, under Section 4 of the PML Act, arising out of Enforcement Case Information Report No. ECIR/02/VSI/2010, from the court of Sessions/District Judge, Allahabad, designated as Special PML Act Court to the Court of Special Judge, Antic Corruption (Central), C.B.I. Cases at Lucknow or to the Court of Sessions Judge, Lucknow, designated as Special Court, under the PML Act.

2. Learned counsel for the applicant argued that entire transaction of alleged withdrawal of cash by way of fraud and fraudulent cheques has been accused to have occurred at Lucknow and the Sessions Judge is a Designated Special Court, for conducting trial, under the above Act for such type of offences. Besides this, case arising out of same transaction, is pending before the court of CBI Judge, at Lucknow and the accused-applicant, being behind the bar since last three years, and two cases are running at two different places, one at Lucknow and the other at Allahabad, hence, is not in a position to get a fair trial, under above circumstances. Therefore, this case be also transferred to Lucknow in the court of Special Judge, Anti Corruption (Central), CBI Cases, Lucknow, where Case No. 3 of 2009, (State by C.B.I. vs. Paras Nath Verma & others), is pending or to the Court of learned Sessions Judge/District Judge (Special Designated Court, under PML Act), at Lucknow or to pass any further order, which this Court deems fit and proper in the facts and circumstances of the case.

3. Learned counsel for the respondent-Directorate of Enforcement, Government of India, has vehemently opposed the Transfer Application on the pretext that this Court is not having jurisdiction to entertain this Transfer Application because the matter is arising out of Anti Corruption Cases of Enforcement Directorate and for this Court No. 65 is competent Court where this case may be taken up. His next argument was that the CBI is a Police

Organisation, which conducts criminal investigation in criminal cases, arising out of criminal activities of accused persons for which Special Court of CBI at Lucknow is conducting trial for the chargesheet, filed by the CBI, over which cognizance was taken, whereas, Enforcement Directorate is concerned with financial irregularities and money laundering cases for which complaint cases by the Enforcement Directorate has been filed, which is pending before the Special Designated court, under the Prevention of Money Laundering Act, at Allahabad, which happens to be the Court of Sessions Judge, Allahabad, having jurisdiction over the matter. This Application has been moved, with a prayer for transferring present case, pending at Allahabd to CBI court at Lucknow, just to intermingle facts and hamper the trial because the CBI court, at Lucknow, is having no concern with the present matter, under Prevention of Money Laundering Act, though alternate relief is for transferring this case to the court of Sessions Judge, Lucknow, which is a designated court, under the Prevention of Money Laundering Act, whereas, the territorial jurisdiction regarding offence, alleged to have been reported by North Eastern Railway, Gorakhpur, from whom complaint was initiated of fraud, coupled with money laundering, was committed, was of Special Designated Court, under the Prevention of Money Laundering Act, at Allahabad, over the matter and as such the case cannot be transferred to Lucknow. Thus, this Transfer Application, being without any ground, be rejected.

4. Heard, learned counsel for both sides and gone through materials placed on record, it is apparent that the jurisdiction for entertaining Application, moved under Section 407 of the Cr.P.C., has been assigned to this Court only. So far as jurisdiction of Court No.65 is concerned, it has not been assigned jurisdiction for entertaining Applications, under Section 407 of Cr.P.C.

5. Perusal of the jurisdiction, as shown in the Daily Cause List of the Court, makes it clear that following jurisdiction has been assigned to Court No.65:

"(Court No.65)

Fresh: i. Application under Section 482 Cr.P.C./Criminal Writ/Criminal Writ/Criminal Revision/Matters under Art.227 of the Constitution of India-State cases pertaining to section 376 I.P.C. (Sole or with any other offence) (includes listed matters of 2019); ii. Matters pertaining to Prevention of Corruption Act and/or matters investigated by C.B.I. (except criminal appeal); iii. Matters arising out of investigation by Enforcement Directorate; iv. NRHM and Ghaziabad GPF scam; v. Criminal appeal pertaining to Members of Parliament, Members of Legislative Assembly and Members of Legislative Council; Listed: (Order, Admission & Hearing) i. Application under Section 482 Cr.P.C. from the year 2013 to 2015, ii. Matters pertaining to Prevention of Corruption Act and/or matters investigated by C.B.I. (except criminal appeal); iii. NRHM and Ghaziabad GPF scam; iv. All matters arising out of investigation by Enforcement Directorate; v. Criminal appeal pertaining to Members of Parliament, Members of Legislative Assembly and Members of Legislative Council:"

6. Whereas jurisdiction to entertain Applications, moved, under Section 407 of Cr.P.C., has been assigned to this Court. The jurisdiction, assigned to this Court, as shown in the Daily Cause List of the Court, is as follows:

"(Court No. 79)

Fresh: i. Criminal appeal under Section 372, 378 Cr.P.C. & Government Appeal; ii. Application under Sections 378, 372, 389(2) and 407 Cr.P.C. Listed: (Order, Admission & Hearing) i. Application under Sections 378, 372, 389(2) and 407 Cr.P.C.; ii. Criminal appeal, under Section 372, 378 Cr.P.C. & Government Appeal; iii. Criminal appeal/Jail appeal/Government appeal from the year 2011 to 2018."

7. Thus, from perusal of jurisdiction, assigned to this Court, as shown in the Daily Cause List of the Court, it is clear that jurisdiction to entertain Application, moved, under Section 407 of Cr.P.C. lies with this Court. The instant Transfer Application, moved under Section 407 of the Cr.P.C., is for considering the grounds taken in the Application for exercising jurisdiction for getting the case transferred from one Court to another Court and it is not having any concern with the merits of the case. Hence, as specific jurisdiction to entertain Applications, moved, under Section 407 of the Cr.P.C., has been assigned to this Court, as such, this Court is competent to decide this Transfer Application.

8. From very perusal of the complaint, annexed with the Transfer Application, it is apparent that a complaint was made by the Office of FA & CAO (Construction), Broad Gauge, North Eastern Railway (NER), Gorakhpur, regarding syphoning off Rs.1,84,68,500/-, fraudulently through cheques from the Account of above Railway concern. Subsequently, it was found to be a case of money laundering. Hence, a complaint was filed before the court of Special Judge/Sessions Judge, Allahabad, Designated court, under the Prevention of Money Laundering Act, 2002, and the same was taken into cognisance by the above Court and the same is pending thereat.

9. The main relief, prayed for by the applicant, as has been specified in the rejoinder affidavit, is for transferring of this case from the court of Special Designated Court, under the Prevention of Money Laundering Act, Allahabad to the Special Designated Court at Lucknow. But, admittedly, offence was committed with the office of the FA & CAO (Construction), Broad Gauge, North Eastern Railway, Gorakhpur, which was the first complainant and subsequently sequence of offence was detected and since the jurisdiction, regarding above offence, having been committed with above office at Gorakhpur, is vested with the designated court, under the Prevention of Money Laundering Act, at Allahabad, hence, territorial jurisdiction was with the Special Designated Court at Allahabad, whereas, Special Designated Court, at Lucknow, is not having jurisdiction for above territory.

10. Since this Court is deciding the Transfer Application, moved under Section 407 of Cr.P.C., it will be pertinent to refer, Section 407 of the Code of Criminal Procedure, 1973, which reads as follows:

"407. Power of High Court to transfer cases and appeals.-*(1) Whenever it is made to appear to the High Court-*

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court' s power of remand under section 309.

(7) Where an application for an order under sub- section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay, by way of compensation, to any person, who has opposed the application, such sum, not exceeding one thousand rupees, as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197."

11. Thus, from perusal of provisions of Section 407 of Cr.P.C., it is clear that a case can be transferred from one criminal court to some other criminal court in case if it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto-, however, in the case in hand, no such allegations has been laid or made or caused to appear before this Court against above Designated Court, under the PMLA Act, at Allahabad, to attract this provision.

12. Secondly, a case can be transferred by the High Court in the eventuality that some question of law of unusual difficulty is likely to arise, but unfortunately, no such recital is there in the instant Transfer Application, nor having been pressed or advanced by learned counsel for the applicant, while arguing the case and as such in the absence of any such ground or argument, question of exercising of power under this provision does not arise.

13. Lastly, a case can be transferred by the High Court, in case an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, whereas, no such circumstances arisen here in the instant case for entertaining an Application, moved, under Section 407 of the Cr.P.C. for transfer of the case on this ground because territorial jurisdiction is of Special Designated Court, under the Prevention of Money Laundering Act, at Allahabad, where the trial has proceeded and mere desire of an applicant for getting the case transferred to Lucknow and nothing else is there and, therefore, there is no ground to attract this provision, under Section 407 of Cr.P.C.

14. In view of what has been discussed above, the Transfer Application, being devoid of merits, and without any ground, stands rejected.

(2019)11ILR A823

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Transfer Application No. 171 of 2019
(U/s 407 Cr.P.C.)

Sanjay Verma & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Nitin Srivastava

Counsel for the Opposite Parties:
G.A., Sri Rahul Dubey

A. Criminal Law-Code of Criminal Procedure,1973 - Section 407 - transfer application supported with an affidavit and the contention of the affidavit regarding application u/s 407 Cr.P.C. is that counsel for Opposite Party extended threat-no evidence of this threat is there nor any report was lodged-telephonic call threat was being extended, this ground for transfer of case can never be a sufficient ground-if there was any threat, the same would have been lodged with concerned police officer or high ups-no such steps taken by the applicant-the allegations levelled against

the complainant and his counsel are not of noticeable substance.(Para 5)

Transfer application rejected (E-6)

(Delivered by Hon,ble Ram Krishna Gautam, J.)

1. This application u/s 407 Cr.P.C. has been filed by accused-applicants Sanjay Verma and Rakhi Verma against State of U.P. and Neeraj Singh with a prayer for transferring Criminal Case No. 676 of 2017, Neeraj Singh Vs. Sanjay Kumar and another, u/s 138 of N.I. Act, pending before the court of C.J.M., District Jhansi, to some other court of other district with a further prayer for staying proceeding of above criminal case till disposal of this application.

2. Learned counsel for applicants argued that the applicants are accused in above Complaint Case No. 676 of 2017, wherein they have been summoned for offence punishable u/s 138 of N.I. Act. They appeared and applied for bail, which was granted. Subsequently, an application was moved by them, which was rejected. On 4.8.2018 counsel for opposite party gave threat for which an application was moved before the Magistrate immediately, which is Annexure no. 5 to the affidavit. The applicant no. 1, being patient of cardiac disease and under treatment of doctors, was being threatened by O.P. No. 2 and his family members. Hence applicants suspected threat to their lives, for which an application was moved before the Court on 16.8.2018, over which order for sending the same to S.S.P., Jhansi, was passed. But till now neither security measure was given nor any order by S.S.P., Jhansi, was passed. Looking to conduct and behaviour of O.P. No. 2 and his counsel there is suspicion of untoward by O.P. No. 2. Hence this application, with above prayer, has been moved. Besides this, there remained persistent threat on telephonic call by O.P. No. 2 creating panic in security feeling of applicants. Hence this application be allowed.

3. Learned counsel for O.P. No. 2 argued that the case is pending at the stage of recording of statement u/s 313 Cr.P.C. and with a view to linger the trial, this application for transfer has been moved. Neither any report of any threat was got lodged at Ghaziabad nor at Jhansi by applicants. Whereas merely an application for providing security at his expenses was moved, which was referred to S.S.P., Jhansi, and this can never be a ground for transfer of this case. No threat was ever extended nor there is any insecurity to the applicants. This application be rejected.

4. Learned AGA has vehemently opposed this application.

5. This application is supported with an affidavit and the contention of this affidavit regarding this application u/s 407 Cr.P.C. is that counsel for O.P. No. 2 extended threat on 4.8.2018. No evidence of this extension of threat is there nor any report was got lodged at any police station. The next allegation is that 8-9 persons from complainant side remained present nearby Court and threatened. Through telephonic call threat was being persistently extended by O.P. No. 2/ complainant. If this contention is being made this threat may remain, wherever case is being transferred. This can never be a sufficient ground for transfer of case, pending at Jhansi. Moreso, if there was

any threat, the same would have been lodged with concerned police officer or high ups. So far as providing of security is concerned, application was moved before the court and by a judicial order, it was referred to S.S.P., Jhansi, and in case of non compliance of same, appropriate proceeding before the concerned court would have been taken. But no such step was taken by the applicants. This complaint case, u/s 138 N.I. Act, is pending before the Court of Magistrate in Jhansi Sessions Division. Territorial jurisdiction is with above court and the same is at advance stage of recording of statement u/s 313 Cr.P.C. By moving this application, trial has been held up. Whereas no allegation against Presiding Officer is there. The allegations levelled against the complainant and his counsel are not of noticeable substance. Hence application merits its rejection.

6. **Rejected** accordingly.

7. However, the Court of Magistrate concerned may take appropriate steps in case of any judicial proceeding against police personnel regarding non-compliance of its order is made.

8. Interim order got vacated.

9. Both sides to appear before the trial court at an expedient and the trial shall be concluded at the expedient.

(2019)11ILR A825

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Transfer Application No. 443 of 2019 (U/s 407 Cr.P.C.)

Surendra Kumar Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Suresh Kumar Gupta

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Code of Criminal Procedure,1973 - Section 407 & Indian Penal Code,1860-Sections 147,342,377,323,392,504,120-B-condition precedent for entertaining an application u/s 407 Cr.P.C. that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same Session Division, unless an application for such transfer has been made to the Sessions Judge and rejected by him-No Sessions Judge is expected to pressurize any applicant or his counsel for not pressing a transfer application,moved before it, or any criminal or civil proceeding,pending before it. Applicant may move transfer application before the Session Judge,Kanpur Nagar where it shall be heard and decided on merit only then after applicant may be at liberty to approach the court under section 407 Cr.P.C. (Para 5,6,7)

Transfer application disposed off (E-6)

(Delivered by Hon,ble Ram Krishna Gautam, J.)

1. This Transfer Application has been filed by Surendra Kumar Mishra, with a prayer for transferring Criminal Revision No. 192 of 2017, arising out of Complaint Case No. 6477 of 2016-111679 of 2017, Surendra Kumar Mishra vs. Ram Kumar Bajpayee and others, under Sections 147, 342, 377, 323, 392, 504 and 120-B of Indian Penal Code, of

Police Station Collectorganj, District Kanpur Nagar, pending in the court of Additional Sessions Judge, Court No. 13, Kanpur Nagar, to any other court in Kanpur Nagar.

2. Learned counsel for the applicant argued that the Transfer Application was moved before the court of Sessions Judge, Kanpur Nagar, where applicant and his counsel was compelled to not press Transfer Application, owing to it, Transfer Application was not pressed and as a result of which Transfer Application was rejected as not pressed by the learned Sessions Judge, Kanpur Nagar. Applicant was compelled to not press his Transfer Application because of rejection of another Transfer Application, moved by Sunil Sahgal, for the same Criminal Revision from the same court to some other court, before the court of Sessions Judge, Kanpur Nagar, which was rejected by above court and applicant was directed for not pressing above Transfer Application. Hence, under above circumstances, Transfer Application No. 1726 of 2019, Surendra Kumar Mishra vs. State of U.P. and another, was not pressed and was rejected on 26.8.2019.

3. For deciding this Transfer Application, perusal of Section 407 of the Code of Criminal Procedure, 1973, would be necessary.

4. Proviso to Section 407 of the Code of Criminal Procedure says that "Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same Sessions Division, unless an application for such transfer has been made to the Sessions Judge and rejected by him."

5. Hence, condition precedent for entertaining an Application, under Section 407 of Cr.P.C. by the High Court, with a prayer for transferring a criminal case from one Criminal Court to another Criminal Court, in the same Sessions Division, is that Transfer Application, must be firstly moved before the Court of Sessions Judge and the same must be rejected by that court.

6. Rejection of such Transfer Application means rejection on merits by assigning reasons and not rejection as not pressed. In the present case, Transfer Application has been rejected on the ground of not pressing the same, i.e., Transfer Application has not been rejected on merits. Hence, this Transfer Application, presented before the High Court, with a prayer for transfer of a Criminal Case from one Criminal Court to another Criminal Court, in the same Sessions Division, is not maintainable, at this stage, in view of proviso to Section 407 of Cr.P.C.

7. However, it will not be out of place to mention that no Sessions Judge is expected to pressurise any applicant or his counsel for not pressing a Transfer Application, moved before it, or any criminal or civil proceeding, pending before it. Applicant may move Transfer Application before the Sessions Judge, Kanpur Nagar where it shall be heard and decided on merit only thenafter, applicant may be at liberty to approach this Court, under Section 407 of Cr.P.C.

8. With aforesaid observations, this Transfer Application stands disposed of.

(2019)11ILR A827

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.11.2019

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.
THE HON'BLE RAJEEV SINGH, J.

Misc. Bench No. 20867 of 2018

Bhawani Pher Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Karunakar Srivastava

Counsel for the Respondents:
Govt. Advocate, Sri Rajendra Kumar Dwivedi

A. Criminal Law -Indian Penal Code, 1860 –Sections 307, 325, 323, 504 r/w Section 152 Railways Act-cross case-transfer of investigation-father of accused(T.T.E.) made a request for transferring the investigation to CBCID just to save him.

B. when statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. (Para 7,8,19,20,22)

Petition allowed (E-6)

List of cases cited:-

1. Mohinder Singh Gill and another Vs. Chief Election Commissioner, New Delhi and Ors, (1978) 1 SCC 405

2. Commr. Of Police, Bombay Vs. Gordhandas Bhanji, AIR 1952 SC 16

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

1. Heard Shri Karunakar Srivastava, learned counsel for the petitioner, Shri Rajendra Kumar Dwivedi, learned counsel for the respondent No.6 and Shri S.P. Singh, learned counsel for the State.

2. The petition seeks issuance of a writ in the nature of certiorari quashing order dated 19.06.2018 passed by Special Secretary, Home, Government of U.P. Lucknow for transferring the investigation of Case Crime No.208 A of 2015 Police Station G.R.P. Gonda on the choice of accused side.

3. Learned counsel for the petitioner has submitted that the son of petitioner was working in Prism Cement Ltd. as Assistant Manager (Sales) and due to some official work, he was going to Faizabad from Mankapur by Train namely Gorakhpur-Yashwan Nagar Express Train No.15023 and at the place of Tikri. In the meantime, respondent No.6 who is T.T.E. (Train Ticket Examiner) in the Railways, came and asked for the ticket and the son of the petitioner has shown the ticket of General Class. As a result, the respondent No.6 asked to pay the penalty to the ticket and demanded Rs.1000/- and the son of petitioner gave the same but neither the ticket was made nor any receipt of payment was given to the son of petitioner. Therefore, his son requested to make his ticket and also provide the receipt of penalty but the opposite party No.6 denied and started abusing by showing his own pistol but when his son raised objection, then he was thrown out from the running train, as a result, he received serious injuries and thereafter, with the help of others, he was

immediately brought to the Community Health Centre, Mankapur, District Gonda and on the advise of doctor therein he was referred to District Hospital, Gonda, but due to serious condition and head injury, his son was admitted in Raj Rajeshwari Hospital, Faizabad.

4. Learned counsel for the petitioner has further submitted that one FIR was lodged as Case Crime No.Nil/29 of 2015 under Sections 332, 353, 392 I.P.C., Police Station G.R.P. Faizabad, District Faizabad by the respondent No.6 with intention to save him, which was subsequently converted into the Case Crime No.208 of 2015, under Sections 332, 353,392 I.P.C. Police Station G.R.P. District Gonda in which under influence of opposite party No.6, the chargesheet under Sections 332 and 353 I.P.C. dated 16.08.2015 was filed by the Investigating Agency and the ACJM, Railway Gonda took cognizance and registered the case as Case No.2833 of 2015.

5. Learned counsel for the petitioner has further submitted that the FIR of petitioner was transferred to the Police Station G.R.P., District Gonda and registered as Case Crime No.208A of 2015, under Sections 307, 325, 323, 504 I.P.C. read with Section 152 Railways Act, Police Station G.R.P., District Gonda.

6. Being aggrieved with the aforesaid FIR of the petitioner, the respondent No.6 filed a writ petition bearing Writ Petition No.10596 (M/B) of 2015 (Anil Kumar Singh Vs. State of U.P.), the said writ petition was dismissed vide order dated 03.02.2016, after considering the counter affidavit filed by the Prosecuting Agency.

7. Learned counsel for the applicant further submitted that under the influence of respondent No.6, the investigation of Case Crime No.208A of 2015 was going on but it has been transferred from Gonda to Deoria and again the matter was transferred to G.R.P. Gonda. As respondent No.6 was searching the suitability, as a result, being aggrieved with the aforesaid action for transferring the investigation, the petitioner filed a Writ Petition No.2435 (M/B) of 2017 before this Court in which vide order dated 03.02.2017, this Hon'ble Court directed the learned counsel for Government Railway Police (GRP), Gonda to produce the original record by which the investigation of Case Crime No.208A of 2015(supra) was transferred from G.R.P. Gonda to G.R.P. Charbagh, District Lucknow. On several dates, the time was sought by the learned A.G.A. but the record was not produced. In the meantime, final report was filed on 24.03.2017. As it was found by this Court that Investigating Agency does not appear to be fair. Therefore, this Hon'ble Court directed vider order dated 10.05.2017 for re-investigation by an officer not below the Rank of Circle Officer and also directed that the Re-Investigation would be supervised by Superintendent of Police G.R.P. The order dated 10.05.2017 passed in the Writ Petition No.2435 of 2017 is being reproduced as under:-

"1. Order dated 10.5.2017 reads as under:-

"1. The petitioner is complainant of Case Crime No.208-A of 2015, under Sections 323, 325, 307 and 504 IPC read with Section 152 Railway Act, Police Station GRP, District Gonda.

2. Short counter affidavit of Shri Santosh Kumar Rai, Sub-Inspector, GRP,

Charbagh, Lucknow has been filed in Court, which is taken on record. In para-5 of the affidavit, it has been stated that there was skirmish between TTE (Train Ticket Examiner) and other persons. Scuffle took place. The injured fled from the spot. No injuries were received by him (Saurabhdhar Dubey). Medical examination report does not find support from the statement of the eye-witnesses.

3. We have referred to the injury report placed on record as Annexure-4 with the main petition. Apparently, as many as nine stitched wound have been found on the person of Saurabhdhar Dubey. There are other contusions and abrasions also, large in number. The stand of the investigating agency does not appear to be fair and prima facie justified.

4. Considering the medical evidence and the vague reply filed by the investigating agency, we hereby direct that reinvestigation would be undertaken by an officer not below the rank of Circle Officer.

5. Reinvestigation would be supervised by Superintendent of Police, GRP.

6. Superintendent of Police, GRP shall file his affidavit in Court after conclusion of reinvestigation.

7. List on 31.7.2017.

8. Let a copy of this order be conveyed to Inspector General of Police, Railway, Lucknow, who shall depute the investigating officer as directed above."

8. In pursuance of the aforesaid Court's order nothing was done. Therefore, vide order dated 16.11.2017 this Court directed the Authority for submitting the explanation. In pursuance of the order passed by this Court dated 10.05.2017 and 16.11.2017 in Writ Petition No.2435 (M/B) of 2017, fair and proper investigation was conducted under the Supervision of Superintendent of Police, GRP, Gorakhpur and investigating officer submitted an affidavit in respect of conclusion of investigation. Therefore, vide order dated 20.12.2017 the aforesaid writ petition was disposed of. The order dated 20.12.2017 passed in Writ Petition No.2435 of 2017 is being reproduced as under:-

1. The petition seeks issuance of a writ in the nature of certiorari quashing order dated 30.12.2016 passed by Superintendent of Police, Railway, Gorakhpur Annexure-1 and order dated 26.12.2016 passed by Inspector General of Police, Railway, Lucknow.

The petition also seeks issuance of a writ in the nature of mandamus directing the respondents to conduct fair and proper investigation in Case Crime No.208-A of 2015, under Sections 323, 325, 307, 504 I.P.C. and Section 152 Railway Act.

2. Perusal of impugned order Annexure-1 indicates that investigation was transferred.

3. From the order-sheet, it appears that considering various facts and circumstances of the case emerging from the documents, and discrepancies in the investigation, this Court passed order dated 10.05.2017 in the following terms:-

"1. The petitioner is complainant of Case Crime No.208-A of 2015, under Sections 323, 325, 307 and 504 IPC read with Section 152 Railway Act, Police Station GRP, District Gonda.

2. Short counter affidavit of Shri Santosh Kumar Rai, Sub-Inspector, GRP, Charbagh, Lucknow has been filed in Court, which is taken on record. In para-5 of the affidavit, it has been stated that

there was skirmish between TTE (Train Ticket Examiner) and other persons. Scuffle took place. The injured fled from the spot. No injuries were received by him (Saurabhdhar Dubey). Medical examination report does not find support from the statement of the eye-witnesses.

3. We have referred to the injury report placed on record as Annexure-4 with the main petition. Apparently, as many as nine stitched wound have been found on the person of Saurabhdhar Dubey. There are other contusions and abrasions also, large in number. The stand of the investigating agency does not appear to be fair and prima facie justified.

4. Considering the medical evidence and the vague reply filed by the investigating agency, we hereby direct that reinvestigation would be undertaken by an officer not below the rank of Circle Officer.

5. Reinvestigation would be supervised by Superintendent of Police, GRP.

6. Superintendent of Police, GRP shall file his affidavit in Court after conclusion of reinvestigation.

7. List on 31.7.2017.

8. Let a copy of this order be conveyed to Inspector General of Police, Railway, Lucknow, who shall depute the investigating officer as directed above. "

4. From the above, it is evident that re-investigation was ordered by this Court. The re-investigation was to be supervised by Sri Abhishek Yadav, posted as Superintendent of Police, GRP Gorakhpur. Short affidavit has been filed by Shri Abhishek Yadav in Court today which is taken on record. In para 14 of the affidavit conclusion after re-investigation has been given. The following needs to be considered:-

"14. That from the above facts and circumstances of the case and after going through the entire investigation, on the basis of Case Diary the deponent who is also monitoring the investigation has arrived at conclusion that the accused TTE Sri Anil Kumar Singh had pushed Saurabhdhar Dubey by showing him his Pistol from a running train or by his action the victim was so terrified that he after leaving all his belonging ran and slipped from the train therefor, in view of the above two conditions it can be ascertained that commission of crime was committed due to criminal action of TTE Sri Anil Kumar Singh/ Apart from above after going through the statement of the witnesses and considering the entire material evidences which is available on record the offences under Sections 307, 323, 504, 325 IPC and Section 152 Railway Act prima facie found to be committed by TTE Sri Anil Kumar Singh.

15. That till date the accused TTE Sri Anil Kumar Singh has not joined the investigation and never appeared before the Investigating Officer for recording his statement therefore, the Prosecuting Agency has invoked Section 82 Cr.P.C. against him after order passed by the concerned Court below."

5. The conclusion drawn by the investigating officer appears to be that TTE, Sri Anil Kumar committed the offence.

6. While we understand the anxiety of Shri Ravi Singh appearing for respondent no.7 Anil Kumar on various counts, however this Court in exercise of writ jurisdiction will not ordinarily direct the investigating officer to declare a person to be innocent, or guilty. The investigation as conducted is required to be accepted, in peculiar facts and circumstances of this case. We however,

record that reinvestigation has been conducted under supervision of Shri Abhishek Yadav, IPS officer posted as S.P. GRP, Gorakhpur who is a senior officer. In such circumstances, we find no reason to pass any order to the contrary.

7.The petition is disposed of.

8.We further direct that investigation be concluded at the earliest.

9. The necessary consequences would follow in regard to the cross case. State counsel shall ensure compliance.

9. Learned counsel for the petitioner has further submitted that although the investigation was concluded under the supervision of Superintendent of Police, G.R.P. Gorakhpur in compliance of the aforesaid directions of this Hon'ble Court, the chargesheet was filed against the opposite party No.6 and court below has taken cognizance, the respondent No.6 was summoned but under the influence of respondent No.6 and on the recommendation of Shri Raghvendra Pratap Singh (Member of Legislative Assembly), the investigation of Case No.208A of 2015 (supra) was transferred to CBCID without any rhyme and reason vide order dated 19.06.2018. Learned counsel for the petitioner has further submitted that at the time of passing of impugned order, the fact was not considered by the State Government that in pursuance of directions passed by this Court in Writ Petition No.2435 (MB) of 2017, the investigation of Case Crime No.208A of 2015 (supra) was conducted under the supervision of Mr. Abhishek Yadav (Superintendent of Police), GRP Gorakhpur and chargesheet was filed . Therefore, the impugned order dated 19.06.2018 is arbitrary and illegal.

10. At the admission stage, this Hon'ble Court passed an interim order, vide order dated 23.07.2018 staying the operation of impugned order dated 19.06.2018.

11. Learned counsel for the petitioner has further submitted that court below took cognizance on the chargesheet filed by the Investigating Officer in Case Crime No.208A of 2015 (supra) which was registered as Case No.98 of 2018 and the petitioner filed a application under Section 482 Cr.P.C. bearing Application No.4921 of 2018 (Anil Kumar Singh Vs. State of U.P. and others) on which was dismissed on 13.08.2018.

12. Learned A.G.A. has submitted that there is no illegality in the impugned order and it was passed after following due process of law.

13. The counter affidavit was filed by the Principal Secretary Home, Government of U.P. and submitted that the investigation can be transferred by the State Government and in para-4 of the counter affidavit, he has stated that after considering all the aspects of the matter and following due process, the transfer order has been passed and the investigation of Case Crime No.208A of 2015 (supra) was transferred to CBCID and admitted that Sri Raghvendra Pratap Singh, (MLA) recommended for transfer of investigation. In para-5 it is mentioned that while taking decision for transferring the investigation three grounds were considered i.e. (i) the case crime No.208A of 2015 (supra) was lodged by the petitioner only with intention to make pressure on the TTE for settlement/compromise and also obtained forged medical report (ii) the Statement of

two witnesses under Section 164 Cr.P.C. were recorded but the Investigating Officer fail to consider the same (iii) in the departmental inquiry, the TTE (respondent No.6) was exonerated.

14. Learned counsel for the respondent No.6 has submitted that there is no illegality in the order passed by the State Government for transferring the investigation but he has not denied the fact that the investigation of Case Crime No.208A of 2015 (supra) was conducted under the direction of this Court in Writ Petition No.2435 (M/B) of 2017 and the charesheet was filed and cognizance has been taken by the court below.

15. It is also relevant to mention here that the order dated 20.12.2017 passed by this Court in Writ Petition No.2435 (M/B) of 2017 is available on the original record, which was placed by the learned A.G.A. in relation to the impugned order but this fact was not considered at the time of passing the impugned order.

16. After considering the argument of learned counsel for the parties, pleadings and going through the record, it is found that in compliance of the directions given by this Court in Writ Petition No.2435 (M/B) of 2017, the Case Crime No.208A of 2015 (supra) was re-investigated by Deputy Superintendent of Police and thereafter, chargesheet was filed on 12.02.2018 and cognizance was taken by the court below and it was registered as Case No.98 of 2018.

17. After examining the original record in relation to the impugned order for transferring the investigation of case crime No.208A of 2015 (supra) it is found that father of respondent No.6 made a request for transferring the investigation of aforesaid case to CBCID. The report was asked from the Superintendent of Police Railway Gorakhpur by Deputy Secretary Home Police, U.P. vide letter No.376 (1)MM/6-2-14-2017-70 931 of 2017 dated 11.04.2018 and the report dated 16.04.2018 was sent by S.P. GRP, Gorakhpur and clearly informed that the investigation of aforesaid case was conducted under the direction was given by Hon'ble Court in Writ Petition No.2435 (M/B) of 2017 and the chargesheet has been filed on 12.02.2018 in the court below and further reported that the application for transfer of investigation is given by the father of accused to save him.

18. The impugned order is unreasoned and it was passed without considering the fact that the investigation of case Crime No.208A of 2015 (supra) was conducted by the Deputy Superintendent of Police under the direction of this Hon'ble Court and the report of S.P. GRP, Gorakhpur was also not considered.

19. It is well settled by a Constitution Bench of Hon'ble Supreme Court of India in the case of ***Mohindhr Singh Gill and another Vs. Chief Election Commissioner, New Delhi and others, 1978 (1) SCC 405*** that when statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned in the order, and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

Para 8 (relevant portion) from the judgment is reproduced hereinbelow.

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji[Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16] :

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

20. Attention of the Court has also been drawn towards Circular No. 27 of 2014 dated 10th May, 2014 issued by Director General of Police related to the transfer of investigation. **In para 2(iv) of the said Circular, it is provided that on the request of the accused, investigation should not be transferred in the ordinary circumstances. In para 2(x) of the Circular, it is categorically provided that the order by which investigation of a case has been transferred, must be a speaking order.**

It is apparent from the impugned order that neither it is a reasoned order nor is speaking one.

21. The chargesheet of Case Crime No.208 A of 2015 was challenged before this Court in Criminal Misc. Case No.4921 of 2018 (Anil Kumar Singh Vs. State of U.P. and Ors.) which was dismissed on 13.08.2018 by this Court and the court below has taken cognizance.

22. In view of the aforesaid facts and discussion, the petition is ***allowed*** and the order dated 19.06.2018 passed by Special Secretary, Home, Government of U.P. Lucknow placed on record (Annexure-1) and all consequent proceedings are hereby ***quashed.***

23. The trial court is directed to conclude the trial of Case Crime No.208 A of 2015 under Sections 307, 325, 323, 504 I.P.C. and Section 152 Railways Act, Police Station G.R.P. Gonda, expeditiously without giving any unnecessary adjournment. The Senior Registrar of this Court is directed to send the copy of this order to the court concerned for strict compliance.

24. The Bench Secretary will ensure that the original record in relation to impugned order be handed over to Mr. S.P. Singh, (A.G.A.) forthwith.

(2019)11ILR A833

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.11.2019

BEFORE
THE HON'BLE MANISH MATHUR, J.

Misc. Single No. 40 of 2013 and Misc. Single No. 843 of 2013

Col. (Retd.) Harpal Singh Dhillon & Ors.
...Petitioners

Versus

District Judge, Lucknow & Ors.
...Respondents

Counsel for the Petitioners:
Sri Rama Kant Sharma, Sri Apoorva Tiwari

Counsel for the Respondents:
Sri Manish Kumar, Sri Nishant Verma, Sri Shikhar Anand

A. Service law - Code of Civil Procedure,1908 - Order 6 Rule 17- challenge to-allowing application for amendment of written statement-liberal view cannot be taken after evidence has started-the applicability of due diligence would arise only in case new pleadings are sought to be introduced by way of amendment-it would not to applicable in case amendment sought is only to explain or buttress pleadings already on record. (Para 11)

B. Order XIV Rule 5 of the code grants absolute discretion to court concerned to amend or frame additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining matters in controversy between parties.Although said provisions clearly indicate discretion of court concerned regarding framing of additional issues but the same time such additional issues cannot be framed on whims and fancies of a party concerned without even laying bare foundation for framing of such additional issues particularly when once issues have already been framed and evidence has started.(Para36,38,39)

Petition disposed of (E-6)

List of cases cited:-

1. Ajendraprasadji N. Pandey and Anr. Vs. Swami Keshavprakashdasji N. And Ors (2006) 12 SCC 1

2. J. Samuel and Ors. Vs. Gattu Mahesh and Ors (2012) 2 SCC 300

3. Vidyabai and Ors. Vs. Padmalatha and Anr. (2009) 2 SCC 409

4. State of U.P. and Anr. Vs. Synthetics and Chemicals Ltd. And Anr. (1991) 4 SCC 139

5. Sardar Gurcharan Singh Vs. Ist Additional District Judge,Kanpur and Ors.,1994 (1) ARC 546

6. M. Revanna Vs. Anjananna(Dead) by Legal Representatives and Ors (2019) 4 SCC 332

7. Baldev Singh and Ors Vs. Manmohan Singh and another(2006) 6 SCC 498

8. Sushil Kumar Jai Vs. Manoj Kumar and Anr. 2009 LCD 1096

9. Reevajeetu Builders and Developers Vs. Narayanswamy and sons and Ors.,(2009) 10 SCC 84

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

1. Heard Sri Apoorva Tiwari, learned counsel for plaintiff/lessors and Sri Shikhar Anand, learned counsel appearing on behalf of defendants/lessee, Hindustan Petroleum Corporation Limited.

2. Lis with regard to property and parties being same, both petitions were clubbed earlier by orders of this Court and are therefore being decided by this common judgment.As per admitted facts, plaintiff/lessors filed Regular Suit No.167 of 2009 of property in question along with prayer for recovery of damages for use and occupation against defendants at market rate. Defendants filed their written statement on 30.06.2009 in which pecuniary jurisdiction of court concerned was challenged. Subsequently issues were framed on 15.02.2010 in which issue no.4 pertained to pecuniary jurisdiction of court concerned which was decided as a preliminary issue in favour of plaintiffs vide order dated 29.01.2011, which became final since no challenge to it was

made. Thereafter, evidence of plaintiff-witness 1 started on 15.02.2011. On same date, defendants filed an application for framing of additional issue with regard to jurisdiction of court concerned to hear the suit. Objections dated 01.03.2011 were filed by plaintiff(s) objecting to framing of additional issues on ground that no plea with regard to jurisdiction had been taken in written statement. Said application was rejected by means of order dated 25.10.2011 primarily on the ground that no such pleading regarding jurisdiction of court had been taken in written statement. Civil Revision No.169 of 2012 against order dated 25.10.2011 was dismissed vide order dated 10.07.2012 on the ground that revision against such an order was not maintainable, against which Writ Petition No. 843(M/S) of 2013 has been filed.

3. In the meantime, after rejection of application for framing of additional issues vide order dated 25.10.2011, defendants filed an application dated 30.01.2012 for amendment of written statement, particularly paragraph 4 to indicate that suit was barred in terms of Section 29-A of U.P. Act No.13 of 1972. Objections to said application were filed by plaintiffs on 01.03.2012. Vide order dated 27.08.2012, application for amendment of written statement was allowed and Civil Revision No.270 of 2012 was also rejected by means of order dated 11.10.2012, against which Writ Petition No. 40(M/S) of 2013 has been filed.

Writ Petition No. 40(M/S) of 2013

4. Present petition has been filed by plaintiff/lessors against orders allowing application for amendment of written statement. Learned counsel for petitioner has raised challenge to said orders primarily on the ground that after amendment of Order 6 Rule 17 Code of Civil Procedure, 1908 (hereinafter referred to as the "Code'), since no averment whatsoever has been made in application seeking amendment, with regard to "due diligence' on part of defendants requiring it to indicate reasons why such pleading was not taken prior to start of evidence. It has been submitted that such a liberal approach towards amendment cannot be taken after evidence has started. Learned counsel for petitioner has also submitted that there is no averment in either written statement or in application seeking amendment regarding applicability of U.P. Act No.13 of 1972(hereafter referred to as the "Act') and consequently amendment seeking incorporation of paragraph with regard to Section 29-A of the Act would not be maintainable in such circumstances. It has also been submitted that case law for consideration of applications regarding amendment in written statement enunciated by this Court has been incorrectly applied.

5. Per contra, learned counsel for opposite parties has submitted that there was no question of indicating due diligence on part of defendants since plea with regard to lack of jurisdiction of court concerned had already been taken in paragraph 42 of written statement and such plea was taken separately from plea pertaining to lack of jurisdiction on ground of undervaluation. It has also been submitted that lack of inherent jurisdiction of court concerned goes to very root of matter and can be raised at any stage. It has also been submitted that

even otherwise due diligence on part of defendants has already been indicated in amendment application. Learned counsel has further submitted that amendment sought in written statement has merely substantiated and explained pleadings already taken in written statement and even otherwise no prejudice would be caused to plaintiffs in case such amendment is allowed in view of fact that evidence has barely started. He has further submitted that requirement of amending written statement occurred only after application for framing of additional issues was rejected on the ground that pleadings with regard to same are not available in written statement. Learned counsel for opposite parties has further submitted that pleadings with regard to applicability of Section 29-A of the Act were already on record since plaintiff-lessors themselves had pleaded in the plaint that initially property in question was leased out as an open land whereafter lessee had made permanent constructions with knowledge and consent of lessors thereby granting protection to tenant from eviction in terms of Section 29-A of the Act. He has drawn attention to contents of plaint and written statement to substantiate his arguments with the submission that once such a situation was admitted by plaintiffs, there was no occasion for defendant-lessee to have raised it separately in written statement and had merely admitted the same. As such, he has submitted that framing of additional issue regarding jurisdiction of court in terms of Section 29-A of the Act would be imperative and provision regarding "due diligence' would be inapplicable in present case.

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

7. For proper adjudication of present dispute, it would be relevant that provisions of Order VI Rule 17 of the Code and Section 29-A of the Act be considered. Same (relevant portion) are as follows:-

Order VI Rule 17 of the Code of Civil Procedure, 1908

*"17 - **Amendment of pleadings** : 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:*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that is spite of due diligence, the party could not have raised the matter before the commencement of trial."

Section 29-A of U.P.Act No.13 of 1972

*"**29-A. Protection against eviction to certain classes of tenants of land on which building exists.**-(1) .....*

(2) This section applies only to land let out, either before or after the commencement of this section, where the tenant, with the landlord's consent has erected any permanent structure and incurred expenses in execution thereof.

(3).....
(4) .....
(5) .....
(6)(a) .....
(b) .....
(c) .....
(d) .....
(7) .....

Explanation.-
....."

8. A perusal of order dated 27.08.2012 allowing amendment application makes it clear that amendment application has been allowed primarily on the ground that a legal plea such as is being taken by defendants can be raised at any stage, does not change nature of suit, does not cause any prejudice to plaintiff(s) and can be compensated by costs. Revisional court has also not interfered with order dated 27.08.2012 primarily on the ground that legal pleas can be raised at any stage. For allowing such an application, both the courts below have relied upon a decision rendered by this Court in **Jawahar Singh v. Vedpal** reported in 2012 (2) ARC 179.

9. So far as submission of learned counsel for plaintiff/lessors is concerned regarding pleading of "due diligence' on part of party seeking amendment that it could not have raised the matter before commencement of trial is concerned, a reading of amendment application indicates that plea has been raised that it is admitted fact as pleaded in plaint that permanent construction was raised over disputed property as per lease agreement thereby covering disputed property under Section 29-A of the Act due to which application for framing of additional issues had been filed. It has been further stated that need for filing of amendment application arose in view of fact that application for framing of additional issues regarding jurisdiction of court had been rejected on the ground that defendants had not indicated plea of jurisdiction in detail.

10. A reading of plaint clearly indicates pleadings raised by plaintiff-lessors that they are owners and landlords of Khasra Plot No.103 which was let out on 01.01.1971 to Esso Eastern Incorporated on a yearly rent of Rs.4,000/- by means of a registered lease deed executed between parties on 09.06.1972. It has also been averred that as per agreement of lease, the lessee Esso Eastern Incorporated raised permanent construction over the land to run petrol pump. It has been further stated that Esso Eastern Incorporated was acquired and amalgamated with Hindustan Petroleum Corporation Ltd. and as such the lease and lease rights of Esso Eastern Incorporated vested and continued with Hindustan Petroleum Corporation Ltd on same terms and conditions as per original agreement of lease. Said averments made in plaint were simply admitted in written statement without any further elaboration.

11. So far as submissions of learned counsel for petitioner regarding applicability of term "due diligence' is concerned, a reading of proviso appended to Order VI Rule 17 of the Code makes it evident that court concerned will have to come to a conclusion regarding due diligence of party seeking amendment as to why amendment sought could not have been raised before commencement of trial. **The proviso as such makes it obvious that applicability of due diligence would arise only in case new pleadings are sought to be introduced by way of amendment. Naturally, as a corollary, provisions regarding due diligence would not be applicable in case amendment sought is only to explain or buttress pleadings already on record.**

12. In the present case, a reading of plaint, written statement and provisions of Section 29-A of the Act makes it clear

that pleadings regarding raising of permanent construction over the property with knowledge and consent of lessors were already on record as pleaded in the plaint and admitted in written statement. As such, it is clear that by means of amendment application, no new ground or pleading was sought to be introduced by defendant and nature of amendment was only to buttress pleadings which were already on record. In such circumstances, there was no occasion for court concerned to have come to a conclusion regarding due diligence of defendants in filing amendment application. Similarly, there was no occasion for defendants to have pleaded due diligence while submitting amendment application.

13. A reading of amendment application makes reason for its filing clear that despite such pleadings already on record, filing of amendment application was made necessary owing to rejection of application for framing of additional issues regarding jurisdiction of court concerned in view of Section 29-A of the Act. It was in these circumstances, that filing of amendment application was required merely to buttress pleadings that were already on record. The same was also required to be done in view of order dated 25.10.2011 rejecting application for framing of additional issues only on ground that no such pleadings as envisaged under Section 29-A of the Act have been made by defendants.

14. Learned counsel for petitioner/lessors has relied upon judgment of Hon'ble the Supreme Court rendered in **Ajendraprasadji N.Pandey and another v. Swami Keshavprakeshdasji N. and others** reported in (2006) 12 SCC 1 in which amendment application was rejected on ground that no fact was pleaded nor any ground raised in amendment application to even remotely contend that despite exercise of due diligence the matter could not be raised by appellants. It has also been held that trial is deemed to commence when issues are settled and case is set down for recording of evidence.

15. In respectful opinion of this Court, the said judgment would be inapplicable, since as already seen hereinabove in the present case, pleadings regarding circumstances for filing of amendment applications have already been indicated in amendment application itself that it was required to be filed on account of rejection of application for framing of additional issues on ground that there was no such pleading by defendants, which however were already on record.

16. Learned counsel for petitioner while buttressing his submissions regarding due diligence has also relied upon decisions rendered by Hon'ble the Supreme Court in **J. Samuel and others v. Gattu Mahesh and others** reported in (2012) 2 SCC 300 and **Vidyabai and others** v. **Padmalatha and another** reported in (2009) 2 SCC 409. However, since it has already been held herein above that amendment sought by defendants was only to buttress pleadings already on record, provision regarding due diligence was neither required to be pleaded nor seen by court concerned, aforesaid judgments would also be inapplicable in present case in said circumstances.

17. Learned counsel for petitioners has also relied upon judgment rendered by Hon'ble the Supreme Court in **State of**

U.P. and another v. Synthetics and Chemicals Ltd. and another reported in (1991) 4 SCC 139 to substantiate his submissions that reliance placed on judgment in **Jawahar Singh v. Vedpal**(supra) by both courts below while allowing amendment application was incorrect since said judgment did not lay down any law and was therefore not in the nature of any precedent. In said judgment, Hon'ble the Supreme Court has held that a decision which is not express and is not founded on reasons nor proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as contemplated by Article 141 of Constitution of India. It has been further held that "precedents sub-silentio and without argument are of no moment'.

18. So far as aforesaid judgment in **State of U.P. and another v. Synthetics and Chemicals Ltd. and another**(supra) is concerned, it can be seen that same would not be of any consequence in present case inasmuch as orders of both courts below are based not only on judgment in **Jawahar Singh v. Vedpal**(supra) but are also based on provisions of Order VI Rule 17 of the Code and law pertaining to same that amendments particularly with regard to written statements should be liberally allowed since it does not cause any prejudice to rights of plaintiffs. Further more, amendments sought, have been allowed on payment of cost. Judgment in **State of U.P. and another v. Synthetics and Chemicals Ltd. and another**(supra) would have had grave implications for defendants if orders impugned were based only on judgment in **Jawahar Singh v. Vedpal**(supra). That not being the case, petitioner would not derive any benefit from law laid down in **State of U.P. and another v. Synthetics and Chemicals Ltd. and another**(supra).

19. Learned counsel for petitioners has relied upon judgment rendered by this Court in **Sardar Gurcharan Singh v. Ist Additional District Judge, Kanpur and others** reported in 1994 (1) ARC 546 to buttress his submissions that provisions of Section 29-A of the Act would be inapplicable in present case. In considered opinion of this Court, applicability or otherwise of Section 29-A of the Act is not a material fact to be seen at the time of consideration of amendment application. Such submissions regarding applicability of Section 29-A of the Act can definitely be raised by petitioners, if and when, issues regarding same are framed and considered by trial court. As such, judgment in **Sardar Gurcharan Singh v. Ist Additional District Judge, Kanpur and others**(supra) would be of no consequence in present stage of dispute.

Legal aspects for courts to take into consideration for amendment applications have already been dealt with in detail by Hon'ble the Supreme Court in a number of cases. The said propositions have already been indicated in judgments relied upon by learned counsel for petitioners.

20. In **Vidyabai and others**(supra), Hon'ble the Supreme Court has clearly held that courts should allow amendments that would be necessary to determine real question of controversy between parties but the same indisputably would be subject to the condition that no prejudice is caused to other side. It has been further held that unless jurisdictional fact is found to be existing, courts will have no

jurisdiction at all to allow amendment of plaints. The relevant portions of aforesaid judgment are as follows :

"18. Reliance has also been placed by Ms Suri on Rajesh Kumar Aggarwal v. K.K. Modi [(2006) 4 SCC 385] . No doubt, as has been held by this Court therein that the court should allow amendments that would be necessary to determine the real question of the controversy between the parties but the same indisputably would be subject to the condition that no prejudice is caused to the other side."

"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."

21. In **J. Samuel and others**(supra), Hon'ble the Supreme Court has held that primary aim of courts is to try the case on its merits and ensure that rules of justice prevails. For this the need is for true facts of the case to be placed before a court so that it has access to all relevant information in coming to its decision. It has been held that courts' discretion to grant permission for a party to amend his pleading lies on two conditions : (a) firstly no injustice must be done to the other side; and (b)The amendment must be necessary for the purpose of determining real question in controversy between the parties.

22. Hon'ble the Supreme Court in **M.Revanna v. Anjananna (Dead) by Legal Representatives and others** reported in (2019) 4 SCC 332 has clearly held that leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. It has been further held that though normally amendments are allowed in pleadings to avoid multiplicity of litigation, courts need to take into consideration whether application seeking amendment is bonafide or malafide and whether amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money. Relevant paragraph of the said judgment is as follows:-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all

circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

23. Learned counsel appearing on behalf of opposite party(s)/lessee while substantiating his arguments has relied upon judgment of Hon'ble the Supreme Court of India rendered in **Baldev Singh and others v. Manmohan Singh and another** reported in (2006) 6 SCC 498 whereunder it has been held that *amendment of a plaint and amendment of a written statement* are not necessarily governed by exactly the same principle since 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.

24. Learned counsel has also relied upon judgment rendered in **Sushil Kumar Jai v. Manoj Kumar and another** reported in 2009 LCD 1096 in which Hon'ble the Supreme Court has allowed amendment of written statement with the view that same was permissible since appellant had sought only to elaborate and clarify the earlier inadvertence and confusion made in his written statements. It has been held that even assuming that there was admission made by appellant in his original written statement, then also such admission can be explained by amendment of written statement even by taking inconsistent pleas or substituting or altering his defence.

25. Reliance has also been placed by learned counsel for opposite party/lessee on judgment rendered by Hon'ble the Supreme Court in **Reevajeetu Builders and Developers v. Narayanaswamy and sons and others** reported in (2009) 10 SCC 84 in which points and factors to be taken into consideration while dealing with amendment application has been summarised, which are as follows: -

"Para 63". On critically analyzing 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 VI Rule 17. These are only illustrative and not exhaustive."

26. From a reading of aforesaid judgments of Hon'ble the Supreme Court, the factors clearly discernible for

consideration of amendment in written statement is that :

(a) It is to be seen whether amendment sought is imperative for proper and effective adjudication of case.

(b) the amendment should not cause prejudice to other side which cannot be adequately compensated in terms of money.

(c) amendment to written statements are to be allowed in a much more liberal fashion than amendment made to plaints.

(d) amendments seeking merely to elaborate or clarify earlier pleadings already raised in written statements are to be readily allowed.

(e) concept of "due diligence' would arise only in case new pleadings are sought to be introduced by means of amendment and the same would be inapplicable in case only pleadings made earlier are sought to be elaborated, clarified or substantiated by means of amendment.

(f) amendment sought is imperative for proper and effective adjudication of the case.

27. Upon applicability of aforesaid judgments in present case, following features are quite evident :-

(a) amendment sought to be introduced in written statement pertains to applicability of Section 29-A of the Act,

(b) Section 29-A itself pertains to applicability to land let out where tenant with landlords' consent has erected any permanent structure and incurred expense in execution thereof,

(c) paragraphs 3 and 5 of plaint clearly indicate that land was let out to predecessor in interest of opposite party/lessee over which lessee raised permanent construction. Said paragraphs have been blandly admitted in written statement without any further elaboration, and

(d) amendment application seeks to introduce pleading regarding applicability of Section 29-A of the Act in view of admission of plaintiffs that only land was let out to predecessor in interest of lessee who was permitted to raise permanent construction of petrol pump building incurring huge expenses.

28. Aforesaid facts clearly indicate that foundation of pleadings sought to be incorporated by means of amendment were already available on record in plaint and were admitted in written statement. Hence, it can be clearly seen that amendment sought to be incorporated by opposite party(s)/lessee was only to elaborate and clarify pleadings that were already on record.

29. Upon consideration of factors indicated herein above, it is clear that courts below correctly allowed amendment application since no prejudice was caused to plaintiff/lessors who even otherwise were compensated by grant of cost.

30. In view of aforesaid, petition being devoid of merit is dismissed.

Writ Petition No.843(M/S) of 2013

31. Present petition has been filed against order dated 25.10.2011 rejecting application for framing of additional issues. Revisional order dated 10.07.2012 passed in Civil Revision No.169 of 2012 is also under challenge since it was

dismissed on ground that revision against an interlocutory order is not maintainable.

32. As indicated herein above, petitioner/defendant-lessee had filed application dated 15.02.2011 for framing of additional issues to which objections had been filed by opposite party/plaintiff-lessors that such an application should be rejected on the ground that no such pleading regarding jurisdiction of court concerned has been raised in written statement. It was also stated that issues regarding jurisdiction of court concerned pertaining to court fees had already been decided which had become final and, therefore, there was no occasion for framing of additional issues.

33. Vide order dated 25.10.2011, application for framing of additional issues was thereafter rejected primarily on the ground that no specific pleading regarding lack of jurisdiction of court concerned had been indicated in the application. It was also held that plea regarding jurisdiction of court pertaining to pecuniary aspect such as court fees had already been decided and, therefore, there was neither occasion nor any new substance to frame additional issues regarding jurisdiction of courts.

34. Learned counsel appearing for petitioner/defendant-lessee has submitted that in paragraph 32 of written statement, ground taken was that suit was highly undervalued whereas in paragraph 42 it was not only stated that suit was highly undervalued for purposes of court fee but also that it had been filed in court which lacked jurisdiction to entertain present suit which was therefore liable to be dismissed on that ground alone. Learned counsel for petitioner has therefore submitted that separate pleadings had been raised regarding jurisdiction of court concerned inasmuch as challenge to jurisdiction of pecuniary aspect regarding undervaluation had been made separately from lack of inherent jurisdiction of court concerned which therefore required an additional issue to be framed regarding jurisdiction of court concerned to entertain the suit. It has been submitted that it was in these circumstances that application had been filed regarding framing of additional issues in view of provisions of Order XIV Rule 5 of the Code since such an issue went to the root of matter.

35. Learned counsel appearing for opposite party/plaintiff-lessors, however refuting submissions advanced by learned counsel for petitioner has argued that application for framing of additional evidence was correctly rejected by trial court on account of fact that earlier issue regarding undervaluation of suit had already been decided vide order dated 29.01.2011 which was challenged in revision and thereafter in Writ Petition No.1561(M/S) of 2012 which was subsequently dismissed as withdrawn thereby rendering order dated 29.01.2011 deciding the issue, as final. He has further submitted that in view of said fact, there was no occasion to frame an additional issue regarding jurisdiction of court concerned particularly since no new pleadings had been made in application requiring framing of additional issue of jurisdiction of court concerned. He has further submitted that a reading of paragraph 42 of written statement has to be seen as a whole and not in a segregated manner. Learned counsel has further submitted that the word "and' in paragraph 42 of written statement is

conjunctive thereby requiring the entire paragraph to be seen as a whole. As such, it is submitted that no separate plea of lack of jurisdiction of court concerned to entertain the suit was taken and the only ground for lack of jurisdiction pertained to undervaluation of suit, which having become final was not required to be reopened by framing of additional issue.

36. A perusal of application filed under Order XIV Rule 5 of the Code for framing of additional issues indicates complete lack of pleading regarding requirement of framing of additional issue. The only ground taken is that since in paragraph 42 of written statement, an averment has been made that the court lacks jurisdiction, therefore, such additional issue is required to be framed.

37. A perusal of impugned order dated 25.10.2011 clearly indicates that application for framing of additional issues has been rejected primarily on account of fact that neither any specific pleading nor averment has been made as to why the court lacks inherent jurisdiction to hear the suit. However, trial court has also granted liberty to defendant/lessee to raise such ground in future in case appropriate pleadings are made.

38. Order XIV Rule 5 of the Code grants absolute discretion to court concerned to amend or frame additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining matters in controversy between parties.

39. Although said provisions clearly indicate discretion of court concerned regarding framing of additional issues but at the same time such additional issues cannot be framed on whims and fancies of a party concerned without even laying bare foundation for framing of such additional issues particularly when once issues have already been framed and evidence has started.

40. In the present case, it can be seen from a perusal of application for framing of additional issues that even bare minimum foundation has not been laid for framing of additional issues regarding inherent lack of jurisdiction of court to entertain the suit. Even otherwise trial court has already granted liberty to defendant/lessee to file appropriate application in future for framing of additional issues in case grounds for same have been laid.

41. In view of aforesaid liberty already granted by trial court and also in view of fact that application for amendment of written statement has been allowed, petition is disposed of in terms of the order of trial court granting liberty to petitioner/defendant-lessee to file appropriate application for framing of additional issues in light of amendment being allowed to written statement.

(2019)11ILR A844

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.10.2019

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 178 of 2014 alongwith Misc. Single No. 3270 of 2014

C/M Shrimat Paramhans Vidya Prachariani Sabha & Ors. ...Petitioners

Versus

Deputy Registrar Firms Societies & Chits & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Amrendra Nath Tripathi, Sri Kailash Chandra, Sri Vikesh Ram Tripathi

A. Service law - Societies Registration Act,1860- Section 4,4-B, 25(1),25(2) - The membership list approved by the Deputy Registrar for holding of elections and a direction being given thereafter under purported exercise under Section 25(2) of the Socities Registration Act, are without any basis-Such an order passed by the Deputy Registrar in exercise of power u/s 4-B as well as u/s 25(2) of the Act cannot be upheld-if the list of members was to be approved, though there was a dispute regarding the membership raised by petitioner, then the Agenda Register, the Membership fee book and the Bank Passbook of the Society should have been examined. (Para 34 to 42)

Writ petition allowed (E-6)

List of cases cited:-

1. Vijay Narain Singh Vs. Registrar,Firms, Socities and Chits Registration,U.P., Lucknow and Ors, 1981 UPLBEC 308

2. Committee of Management and Ors Vs. Zila Basic Shiksha Adhikari and Ors,1987 UPLBEC 333

3. Urwa Bazar Educational Society, Urwa Bazar,Gorakhpur and Anr. Vs. Assistant Registrar,Firms, Socities and Units,Division Grorakhpur and Ors,1988 UPLBEC 515

4. All India Council and Anr Vs. Assistant Registrar, Firms,Socities and Chits,Varanasi Region, Varanasi and Anr. AIR 1988 All 236

5. Gram Shiksha Sudhar Samiti,Junior High School,Sikandara,District Kanpur Dehat and Anr Vs. Registrar, Firms,Socities and Chits,U.P., Lucknow and Ors, 2010 (7) ADJ 643 (DB)

6. Committee of Management,Anjuman Kherul Almin Allahganj and Anr. Vs. State of U.P. and Ors,2014 (1) ADJ 44 (DB)

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

1. Heard learned counsel for the petitioners.

2. This matter was taken up yesterday as it was listed in the cause list.

3. Sri Sanjay Mishra, learned counsel for the petitioners had argued at length on the illegality and arbitrariness of the order dated 21.12.2013 passed by the Deputy Registrar, Firms, Societies and Chits, Faizabad (for short 'the Deputy Registrar'). Sri Amrendra Nath Tripathi, was not present yesterday. The matter was posted in the additional cause list and has been taken up today.

4. Sri Amrendra Nath Tripathi has appeared today and stated that he has no instructions as of now from his client, as according to his client, atleast two elections have been held after the impugned order was passed, which later elections, have not been challenged and the writ petition has become infructuous.

5. Sri Sanjay Mishra, on the other hand, has pointed out that if two elections allegedly have been held by the Sri Kundesh Shukla, whose Committee was wrongly recognized by the impugned order passed by the Deputy Registrar, such elections were based on the impugned order and if the impugned order is set aside by this Court, automatically the subsequent elections

would also fall to the ground. If the foundation goes, the whole super structure based thereupon is also demolished.

6. Learned counsel for the petitioners has also pointed out that although there was no interim order in this Writ Petition No.178 (MS) of 2014, in a subsequent Writ Petition No.3270 (MS) of 2014 (which is listed along with the main matter today), the petitioners had challenged the notice of election to be held on the basis of the list of 72 members finalized by the impugned order dated 21.12.2013. This Court had passed an order that the result of the election held shall be subject to final decision in these writ petitions.

7. Sri Sanjay Mishra has pointed out that Shrimat Paramhans Vidya Prachariani Sabha, Uttar Gaon, Amethi is a registered Society, running a Junior High School by the same name i.e. Shrimat Paramhans Junior High School, Uttar Gaon, Amethi. The initial registration of the Society on 24.1.1972 continued to be renewed under the undisputed Managership of Sri Kamlesh Narain Shukla. The last such renewal was made on 10.10.2005 for a period of five years. The undisputed election of the Committee of Management was held on 6.12.2009 and 21 members of the Executive Committee were elected. Sri Rameshwar Prasad Shukla, the petitioner no.1 was elected as President, Sri Kamlesh Narain Shukla was elected as Manager and petitioner no.2 Ram Pher Gautam was elected as Secretary of the Society. On 31.12.2010, the then Manager applied for renewal of the Society and deposited the renewal fee along with year-wise list of the Managing Committee, the Proceedings Register etc. and the original copy of the Registration Certificate and the list of General Body members. A copy of the letter dated 31.12.2010 has been filed as Annexure-4 to the writ petition.

8. Sri Kamlesh Narain Shukla, the undisputed Manager died on 8.4.2012. The Committee of Management met and elected the petitioner no.3 Ram Murti Shukla as Manager on 20.5.2012. One other member of the Executive Committee, the Deputy Secretary Smt. Murli Devi had also died in the meantime and Smt. Chandrakala was elected as Deputy Secretary. The papers were submitted with regard to the elections of the petitioner no.3 as Manager of the Society before the Deputy Registrar but no orders were passed thereon. Also no orders were passed on the renewal application submitted by the erstwhile Manager Sri Kamlesh Narian Shukla.

9. The petitioner no.3 contacted the office of respondent no.1 and found out that Sri Kundesh Shukla, had submitted certain proceedings dated 20.5.2012, wherein it was shown that Sri Kundesh Shukla was elected as Manager on the proposal of Smt. Murli Devi Singh. Smt. Murli Devi Singh had died on 30.7.2011 and, therefore, she could not have made any proposal on which the alleged election of Sri Kundesh Shukla took place on 20.5.2012.

10. It has been submitted that since the respondent nos.2 and 3 had filed proceedings of the same date i.e. 20.5.2012 before the Deputy Registrar, the Deputy Registrar should have referred the matter to the Prescribed Authority as it was a dispute relating to continuance of

office bearers and cognizable under Section 25(1) of the Societies Registration Act. However, this was not done. The petitioners had submitted their objections to the proceedings allegedly held on 20.5.2012, electing Kundesh Shukla as Manager. The respondent no.1 called for an explanation along with evidence from the respondent no.2 by his letter dated 3.10.2012, fixing a date for hearing. Respondent no.2 did not submit any explanation in the office of the Deputy Registrar. When the renewal certificate was not issued for a long time, the petitioner no.3 again deposited the renewal fee along with fine on 19.6.2012. This fact has been mentioned in Paras-16 and 17 of the writ petition and has not been specifically denied by the respondent no.1 in the counter affidavit filed by him.

11. In the objections submitted by the petitioner no.3 to the proceedings dated 20.5.2012 allegedly submitted by respondent no.2 before the respondent no.1, it was specifically stated that a meeting was held on 18.12.2011 under the Managership of Sri Kamlesh Narain Shukla, the father of Kundesh Shukla, wherein it was decided that all ordinary members, who had failed to deposit their annual subscription in time, should be expelled. Sri Kundesh Shukla had not deposited the membership fee in time and his name was also deleted from the list of members of the Society. Sri Kundesh Shukla was not a member of the Society after 18.12.2011 and therefore, he could not have been elected as Manager on the basis of the alleged proceedings on 20.5.2012. However, the renewal certificate was issued by the respondent no.1 to Kundesh Shukla on 28.5.2012.

12. It has also been submitted that the meeting of the Committee of Management allegedly held on 20.5.2012 under the Chairmanship of Sri Rameshwar Prasad Shukla, the then President, was denied by Sri Rameshwar Prasad Shukla by means of filing an affidavit before the respondent no.1 in this regard. A copy of the said affidavit has also been filed along with the rejoinder affidavit by the petitioners before this Court.

13. Sri Sanjay Mishra has also pointed out that the alleged order has been passed on the basis of three proceedings, the papers regarding which, were submitted by Sri Kundesh Shukla and the perusal of the said papers would show that there was no application of mind at all by the respondent no.1.

14. Learned counsel for the petitioners has submitted that in Para-12 of the writ petition, the petitioners have specifically mentioned that respondent no.2 had submitted papers relating to three proceedings before the Deputy Registrar. The certified copies of the three proceedings have been obtained by the petitioners from the office of the Deputy Registrar and these three proceedings have been filed as Annexures-6, 7 and 8 to the writ petition. A perusal of the same would show that these three proceedings were allegedly held on 20.5.2012 and in these proceedings, Sri Rameshwar Prasad Shukla was shown as having Chaired the meeting. Sri Rameshwar Prasad Shukla filed an affidavit before the respondent no.1 that he had never attended any meeting allegedly held on 20.5.2012 in which, respondent no.2 was elected.

15. It has also been submitted that Annexures-6, 7 and 8 of the writ petition would show that they were submitted

without application of mind as they also contained papers relating to Sant Vishal Shiksha Samiti being chaired by one President by the name of Murli Prasad Verma, where a proposal was submitted by Smt. Murli Devi Singh that the election of respondent no.2 on the vacant post of Manager in the meeting held on 28.4.2012 be ratified and the said ratification was made in the meeting held on 20.5.2012.

16. It has been submitted that Sant Vishal Shiksha Samiti, whose name finds place at Page no.40 of the paper book had nothing at all to do with the petitioners-Society i.e. Shrimat Paramhans Vidya Prachariani Sabha, Uttar Gaon, Amethi. The Deputy Secretary Smt. Murli Devi Singh had died on 30.7.2011 and therefore she could not have made any proposal on 20.5.2012 regarding ratification of alleged meeting dated 28.4.2012.

17. Sri Sanjay Mishra has submitted that the petitioners also filed written arguments on 7.11.2013 but the Deputy Registrar in passing the impugned order, completely ignored the written arguments so filed.

18. In passing the impugned order, the respondent no.1 has not indicated any reason with regard to non issuance of renewal certificate, although the fee was deposited by the then Manager on 31.12.2010. The undisputed election of the Society held on 6.12.2009 had 61 members in the General Body. By the impugned order, the Deputy Registrar has recognized a list of 72 members of the General Body submitted by Sri Kundesh Shukla. In accepting the list so submitted by the respondent no.2, the parameters defined in Section 4-B of the Societies Registration Act were not looked into at all. The Proceedings Register, the Agenda Register, the Fee Book and the Bank Passbook were not considered at all and the order has been passed. The respondent no.1 did not verify whether any membership fee was ever deposited by the new members allegedly inducted by the respondent no.2 and in passing the impugned order dated 21.12.2013, the respondent no.1 has also directed the District Basic Education Officer to hold the elections on the basis of the said 72 members' list submitted by respondent no.2.

19. In the counter affidavit filed by respondent no.1, the Deputy Registrar, referred to, by the learned Standing Counsel Sri Anil Chaubey in reply to the submissions made by Sri Sanjay Mishra, has referred to the registration of Society initially made on 8.9.1972 and the amendment of the bye-laws approved thereafter and a dispute relating to the election of office bearers of two different Committees of Management referred to the Prescribed Authority under Section 25(1) of the Act. The Prescribed Authority by its order dated 1.9.1985 had validated the election proceedings dated 20.3.1985 relating to the election of the then Manager Sri Kamlesh Narain Shukla of the Society. Sri Kamlesh Narain Shukla continued to remain as Manager of the Society till his death on 8.4.2012.

20. The respondent no.1 further refers to the election of Sri Kundesh Shukla, respondent no.2 for the remaining term of the Committee of Management in the meeting convened on 28.4.2012. The respondent no.2 thereafter moved an application on 28.5.2012 for renewal of

the new Committee of Management. Before the orders could be passed on such application, Ram Murti Shukla, petitioner no.3 moved an application on 19.6.2012 before respondent no.1, annexing the list of members, who had not deposited their annual membership fee and had, therefore, been removed and new members were inducted and prayed for renewal of the Society, claiming himself to be the Manager of the Society.

21. In the objections filed by petitioner no.3, he had stated that the proceedings submitted by respondent no.2 were forged and illegal. Regarding such proceedings being submitted, objections were also filed by the petitioner no.3 on 16.8.2012. Office of respondent no.1 issued notices thereafter. The respondent no.1 further stated that the last election was conducted on 6.12.2009 and the next elections should have been conducted on or before 5.12.2012. They were not conducted on 5.12.2012 and hence, the Society had become time barred. Therefore, by the order dated 21.12.2013, the respondent no.1 has accepted the list of 72 members of the General Body submitted by the respondent no.2, and authorized the District Basic Education Officer, Amethi to conduct the election of the time barred Committee of Management of the Society in question. Thereafter, the District Basic Education Officer, Amethi had issued agenda on 3.6.2014.

22. In the counter affidavit filed by Sri Kundesh Shukla, it has been submitted that after the death of the undisputed Manager Sri Kamlesh Narain Shukla on 8.4.2012, a General Body meeting was held on 28.4.2012 in which, he had been elected as Manager for the remaining period. Thereafter the private respondent applied for renewal of the Society and submitted the renewal fee on 28.5.2012 and the Society had been renewed by respondent no.1 on 30.5.2012 w.e.f. 10.10.2010 for a period of five years. The petitioner no.3 after renewal of the Society and registration of list of Committee of Management of the Society, alleging himself to be the Manager, submitted documents and fee along with a forged list of members of the Committee on the basis of the alleged proceedings dated 20.5.2012. After notices were issued and matter was heard, the respondent no.1 has passed an appropriate order, recognizing the list of 72 members of the General Body submitted by the private respondent. The District Basic Education Officer, Amethi in compliance of the order dated 21.12.2013, has passed an order dated 10.1.2014, fixing the date for election of time barred Committee of Management on 27.1.2014, which was later shifted to 16.6.2014. The elections were held by the General Body of which, 39 members were present out of 72 members and the proceedings have been submitted before the respondent no.1 on 30.6.2014 for his recognition along with the report of the District Basic Education Officer, Amethi. The impugned order dated 21.12.2013 has been implemented and the election of the Committee of Management of the Society has been held, therefore, the writ petition has become infructuous and is liable to be dismissed on this ground alone.

23. This Court having heard the learned counsel for the petitioners, learned Standing Counsel and also having perused the counter affidavit filed by respondent no.2, has gone through the impugned order dated 21.12.2013. From a

perusal of the same, it is apparent that the said order was passed on the proceedings initiated on objections filed by the petitioners to the renewal certificate being granted to respondent no.2. The Deputy Registrar has mentioned in his order that after the death of undisputed Manager Sri Kamlesh Narain Shukla on 8.4.2012, the General Body of the Society in its meeting dated 28.4.2012 had elected the respondent no.2 as Manager for the remaining term. These proceedings were ratified by the Committee of Management on 20.5.2012. One Hare Lal Mishra was also elected in a vacant post on death of another member of the Committee of Management. The renewal proceedings were submitted on 28.5.2012 by Sri Kundesh Shukla and renewal certificate was granted on 30.5.2012 w.e.f. 10.10.2010 for a period of five years. After the renewal certificate was granted, the petitioner no.3 had filed objections on 19.6.2012. The Annexures filed along with these objections have been mentioned in detail in the order dated 21.12.2013. Mention has also been made of objections filed by petitioner no.3 again on 16.8.2012, challenging the list of Committee of Management for the years 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13 as submitted by Sri Kundesh Shukla. It was also submitted that respondent no.2 was not a member of the Society at all. The affidavits filed by atleast three members including Sri Rameshwar Prasad Shukla, the then President of the Society have also been mentioned by the Deputy Registrar. Mention has also been made of the list of 72 members submitted by the petitioner no.3 but the Deputy Registrar has found that the respondent no.2 had submitted the affidavits of 27 members out of 61 original General Body members in his favour on 30.8.2013, where the members had stated that the petitioner no.3 had submitted forged proceedings relating to meeting held on 28.4.2012, 20.5.2012 and 3.12.2012.

24. The Deputy Registrar has accepted that the renewal certificate was issued on 30.5.2012 to the respondent no.2 for the Society in question. He has disbelieved the papers submitted by petitioner no.3 on the basis of documents available in his record maintained at the office. He has disbelieved the contention of petitioner no.3 that Kundesh Shukla had been removed from the membership of the Society for non-payment of membership fee on the ground that in the list of Committee of Management submitted for the years 2007-08, 2008-09 and 2009-10 in the office, the name of Kundesh Shukla was mentioned at Serial no.16 as member of the Committee of Management and as per Bye-law no.5(2)(B) of the Society, only life member of the Society could have been made a member of the Committee of Management. He has, therefore, found that respondent no.2 was a life member and he could not have been removed as alleged by petitioner no.3 for non payment of annual subscription.

25. The question before this Court in these writ petitions relates to the power of the Registrar under Section 3A of the Societies Registration Act read with Sections 4(1) and 4(2) and Sections 4A and 4B of the Act. Under Section 3A of the Act, the Registrar has the power to grant renewal of registration of a Society. It provides that the certification of registration shall remain in force for a period of five years from the date of its issue.

26. In this case, undusputedly Sri Kamlesh Narain Shukla being the Manager, was being granted such renewal certificates and the last such renewal certificate being due to expire on 10.10.2010, the then undisputed Manager Sri Kamlesh Narain Shukla had submitted a renewal application and deposited the renewal fee along with annual list of Committee of Management and all relevant papers on 31.12.2010. Sri Kamlesh Narain Shukla died on 8.4.2012. Sri Kundesh Shukla submitted the proceedings dated 20.5.2012, alleging that he had been elected at a meeting of the General Body of the members on 28.4.2012 and the said election was ratified by the Committee of Management in its meeting dated 20.5.2012. The Deputy Registrar issued the renewal certificate on 30.5.2012. When the petitioners came to know, the petitioner no.3 filed his objections on 19.6.2012 on which, notices were issued.

27. In the proceedings dated 20.5.2012, it was alleged that they were under the Chairmanship of Sri Rameshwar Prasad Shukla, the President of the Society. However, Sri Rameshwar Prasad Shukla, who is petitioner no.1 before this Court, filed an affidavit before the Deputy Registrar, saying that no elections were held on 28.4.2012 and no proceedings were also held on 20.5.2012. As such, a dispute was raised regarding the election of Sri Kundesh Shukla and also the election of other members of the Committee of Management in the vacancy created on the death of Smt. Murli Devi Singh. It was a dispute relating to continuance of office bearers, which could only have been referred to, under Section 25(1) of the Act to the Prescribed Authority for a decision.

28. Simultaneously, objections were also filed by the petitioner no.3 along with papers relating to the proceedings allegedly held on various dates, electing him as Manager of the Society and removing Sri Kundesh Shukla as member of the Society. With regard to continuance of membership of Sri Kundesh Shukla, no doubt the Deputy Registrar had power under Section 4 of the Act.

29. The relevant extracts of Section 4 of the Societies Registration Act is being quoted hereinbelow:

"4. Annual list of, managing body to be filed.-(1) Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of Joint-Stock Campanies, of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

(2) Together with list mentioned in sub-section (1) there shall be sent to the Registrar a copy of the memorandum of association including any alteration, extension or abridgement of purposes made under Section 12, and of the rules of the society corrected up to date and certified by not less than three of the members of the said governing body to be a correct copy and also a copy of the balance-sheet for the proceeding year of account.

Provided that if the managing body is elected after the last submission of the list, the counter signature of the old

members, shall, as far as possible, be obtained on the list. If the old office-bearers do not counter-sign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period."

30. Under the amendment to the Act by the State Legislature, Section 4-B has also been added, in which, it has been provided thus:

"4-B. (1) At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and Bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, resignation or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with Registrar under this section shall be signed by two office bearers and two executive members of the society."

31. It is apparent that the observations made by the Deputy Registrar regarding continuance of Sri Kundesh Shukla as member of the Society and the proceedings relating to his removal allegedly held on 18.12.2011 being suspect, cannot be said to be without jurisdiction. The Deputy Registrar has considered the Bye-laws of the Society, wherein it was specifically provided that only a life member of the General Body could be a member of the Committee of Management. Sri Kundesh Shukla has been shown by the erstwhile member of the Society Sri Kamlesh Narain Shukla as member of the Committee of Management in the list for the years 2007-08, 2008-09 and 2009-10. Hence, the papers submitted by the petitioner no.3 relating to the alleged meeting held on 18.3.2011, removing Sri Kundesh Shukla from the membership of the General Body due to non payment of annual subscription, were rightly rejected by the Deputy Registrar.

32. The Deputy Registrar having accepted the respondent no.2 as being a valid member of the General Body and, therefore, being elected as member of the Committee of Management for the years 2007-08, 2008-09 and 2009-10, there was no good ground to accept the papers submitted by petitioner no.3 relating to the alleged meeting held on 18.3.2011, removing the respondent no.2 as member of the General Body due to non payment of annual subscription.

33. However, the Deputy Registrar should have stayed his hands and should not have proceeded further in the matter by accepting the list submitted by Sri Kundesh Shukla and at the same time, observing that the elections of the Society having not been held in time, the Committee of Management of the Society had become time barred and, therefore, he

had derived the power as Deputy Registrar to proceed under Section 25(2) of the Act.

34. It has been held by several Division Benches of this Court that the Registrar or the Deputy Registrar has no jurisdiction to hear and decide any dispute in respect of an election or continuance in office by the officer bearers of the Society. The first such decision, which comes to mind is that of ***Vijay Narain Singh vs. Registrar, Firms, Societies and Chits Registration, U.P., Lucknow and others, 1981 UPLBEC 308***. The said decision of this Court was followed by later Division Bench judgments in ***Committee of Management and others vs. Zila Basic Shiksha Adhikari and others, 1987 UPLBEC 333; Urwa Bazar Educational Society, Urwa Bazar, Gorakhpur and another vs. Assistant Registrar, Firms, Societies and Units, Division Gorakhpur and others, 1988 UPLBEC 515; All India Council and another vs. Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and another, AIR 1988 All 236; Gram Shiksha Sudhar Samiti, Junior High School, Sikandra, District Kanpur Dehat and another vs. Registrar, Firms, Societies and Chits, U.P., Lucknow and others, 2010 (7) ADJ 643 (DB) and Committee of Management, Anjuman Kherul Almin Allahganj and another vs. State of U.P. and others, 2014 (1) ADJ 44 (DB).***

35. In the case of ***All India Council*** (supra), this Court had observed in Para-7 as under:

"7. It will, therefore, be seen that insofar as disputes or doubts in respect of the election or continuance in office of the office-bearers of a society registered in Uttar Pradesh are concerned, the Legislature has created a specific forum and laid down an exhaustive procedure for determination of the same under S.25. There is no other provision, express or otherwise, providing for determination of such disputes specifically. It is settled law that where, as here, the Legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the stature, such disputes can be determined only in that forum and in the manner prescribed thereunder and not otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same has to be decided only by the Prescribed Authority under S. 25 (1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit."

36. The Deputy Registrar, however, in this case, rejected the objections raised by the petitioners regarding the alleged election of Sri Kundesh Shukla as Manager of the Society on 28.4.2012 and ratification of the said decision of the General Body of the Committee of Management on 20.5.2012 and accepted the list of 72 members of the General Body submitted by Sri Kundesh Shukla.

37. The membership list approved by the Deputy Registrar for holding of elections and a direction being given thereafter under purported exercise under Section 25(2) of the Societies Registration Act, are without any basis. A direction has been issued for holding of

elections by the District Basic Education Officer, Amethi on the basis of list submitted by Sri Kundesh Shukla dated 22.6.2012.

38. Such an order passed by the Deputy Registrar in exercise of power under Section 4-B as well as under Section 25(2) of the Act cannot be upheld. If the list of members was to be approved, though there was a dispute regarding the membership raised by petitioner no.3, then the Agenda Register, the Proceedings Register, the Membership fee book and the Bank Passbook of the Society should have been examined.

39. Undisputedly, there were only 61 members of the General Body, who had participated in the election held on 6.12.2009. It is not clear as to why the Deputy Registrar discarded the original list of 61 members and approved the list submitted by respondent no.2 and directed for holding of election on the basis thereof.

40. Also, a genuine dispute relating to the continuance of office bearers had been raised and the dispute should have been referred under Section 25(1) of the Act to the Prescribed Authority. The same was not done.

41. The order impugned dated 21.12.2013, therefore, cannot be sustained and is ***set aside.***

42. The Writ Petition No.178 (MS) of 2014 stands ***allowed.***

43. Writ Petition No.3270 (MS) of 2014 has been filed challenging the order dated 03.06.2014 which is in the form of Agenda circulated for holding of elections by the Basic Shiksha Adhikari, Amethi, in pursuance of the order dated 21.12.2013 passed by the Dy. Registrar challenged in Writ Petition No.178 (MS) of 2014. Since Writ Petition No. 178 (MS) of 2014 has been allowed and the order dated 21.12.2013 has been set aside by this Court, the Writ Petition No.3270 (MS) of 2014 also deserves to be allowed.

44. It has been informed by the counsel for the parties that at least one election has been held in pursuance of the order dated 03.06.2014 but this Court finds that while entertaining the writ petition and connecting it with Writ Petition No.178 (MS) of 2014, this Court had passed an order that the result of the election shall be subject to the final result of the writ petition. The result of the elections being made subject to the decision in the aforesaid two writ petitions by this Court, by means of an interim order, the elections held thereafter cannot be set to be legally held as once the foundation goes superstructure automatically falls. The order impugned dated 03.06.2014 is set aside.

45. Since this Court has set aside the order passed by the Dy. Registrar on 21.12.2013 and allowed the Writ Petition No.3270 (MS) of 2014, it cannot be said that the Committee of Management headed by the opposite party no.2 Mr. Kundesh Shukla is regularly elected Committee of Management. The Dy. Registrar is directed to find out as to how many members out of 61 members list which was utilized for holding the undisputed elections on 06.12.2009 are present and alive and thereafter issue a tentative list of members on the basis thereof, inviting objections from all concerned. Such exercise be completed

within a period of three weeks. The objection should be filed within one week. While considering objections, the Dy. Registrar may also examine Agenda Register, Proceedings Register, Membership Fee Register and Bank passbook with regard to the members. The Dy. Registrar shall verify on the basis of parameters mentioned in Section 4 B of the Act alone.

46. The Dy. Registrar shall finalize the list within a further period of two weeks and circulate the Agenda for holding the elections of the Society thereafter within a further period of three weeks.

47. The entire exercise of holding of elections shall be completed by the Dy. Registrar in accordance with the Bye-laws of the Society within a maximum period of three months from the date a certified copy of the order is produced before the Authority concerned.

48. For a period of three months or till the declaration of the result of the election whichever is earlier, the Society shall be put under single hand operation to facilitate the payment of salary of the teaching and non-teaching staff.

49. Accordingly, Writ Petition No.3270 (MS) of 2014 is ***allowed.***

(2019)11ILR A855

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.11.2019

BEFORE
THE HON'BLE PANKAJ BHATIA, J.

Misc. Single No. 2571 of 2016

Bid & Hammer Fine Art Auctioners (P) Ltd.& Anr. ...Petitioners

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Chandra Shekhar Sinha

Counsel for the Respondents:
G.A., Vikas Mishra, Vilas Misra

A. Company Law-Companies Act,1956 - Service law - agreement between company and consultant - termination of service - complaint against company for non-payment of agreed amount-complaint was made under section 406 of IPC,1860-it was held that it is a clear case of civil dispute for recovery of money being given the colour of a criminal proceeding for affecting the recovery by misusing the provisions of IPC.

B. Bare perusal of the complaint, treating the same to be a gospel of truth does not even allege any entrustment of property or any misappropriation of the said property and , thus, no ingredients which are required to attract the rigours of Section 405 IPC are present in the complaint and consequently the order passed by the Magistrate summoning the petitioners for being tried of any offence under Section 406 IPC was wholly unjustified. (Para 11,12,13,14,15,16)

Petition allowed (E-6)

List of cases cited:-

1. Binod Kumar and Ors Vs. State of Bih. And Anr, 2014(8) Supreme 112

2. Sajal Garg & another Vs. State of U.P. And Anr,2012(7) ADJ 529

3. Prof. R.K. Vijayasarthy & Anr. Vs. Sudha Seetharam & Anr.

4. Indian Oil Corporation Vs. NEPC India Ltd. And Ors., (2206) 6 SCC 736

5. Madhavrao Jiwajirao Scindia Vs. Sambhajirao Chandrojirao Angre (1988) 1 SCC 692

6. State of Haryana Vs. Bhajan Lal, (1992) Suppl (1) SCC 335

7. Rupan Deol Bajaj Vs. Kanwar Pal Singh Gill(1995) 6 SCC 194

8. CBI Vs. Duncans Agro Industries Ltd.(1996) 5 SCC 591

9. State of Bih. Vs. Rajendra Agrawalla (1996) 8 SCC 164

10. Rajesh Bajaj Vs. State NCT of Delhi, (1999) 3 SCC 259

11. Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd (2000) 3 SCC 269

12. Hridaya Ranjan Prasad Verma Vs. State of Bih. (2000) 4 SCC 168

13. M. Krishnan Vs. Vijay Singh (2001) 8 SCC 645

14. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque (2005) 1 SCC 122

15. G. Sagar Suri Vs. State of U.P., (2000) 2 SCC 636

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present petition has been filed seeking the quashing of the Complaint Case No.59 of 2011 (Venkateshwar Singh, Venkat Vs. Bid & Hammer Fine Art Auctioners (P) Ltd. & its Chairman/M.D. and another) under Section 406 IPC, Police Station Aliganj, Lucknow, pending in the Court Additional Chief Judicial Magistrate/J.M. (J.D.) Court no.35, Lucknow and also the order dated 8.1.2016 passed by Additional District Judge, Court No.10, Lucknow in Criminal Revision No.47 of 2015 (Annexure No.1 to the writ petition) as well as the summoning order dated 29.4.2011 summoning the petitioners under Section 406 IPC in Complaint Case No.59 of 2011 (Annexure No.3 to the writ petition).

2. The facts leading to the filing of the present petition are as under:-

The respondent no.2 filed a complaint purporting to be under Section 200 Cr.P.C. alleging that the respondent no.2 and his wife Madhavi Singh were appointed as consultant by the petitioners on 18.2.2010 and in the agreement all the conditions were detailed. The order/agreement appointing the respondent no.2 as consultant with effect from 26.2.2010 is on record which shows that the petitioners appointed the respondent no.2 as a consultant for a period of two years with effect form 18.2.2010. The functions to be performed by the respondent no.2 were as under:-

"Your Role and Function in B & H are:-

I) Providing expertise and experience in Indian art for due diligence and valuations of ail types on art objects especially contemporary art,

II) Giving your views on the Provenance Provided by clients,

III) Advice and input on status of paintings and works of art etc.,

IV) Provide assistance and inputs for sourcing art including travel to other cities etc. on a case to case basis subject to your availability and mutual consent,

V) You would offer maximum of 15 days per auction spread over 2-3 visits, wherein you would either visit Bangalore or travel to other cities to meet

customers to view their art objects for valuation and discussions with them. Tentative travel schedule would be intimated one week in advance;

VI) Provided your expertise as and when required on other days over email, telephone."

In lieu of the services to be provided by the Consultant the respondent no.2 was to be compensated by the following benefits arising out of the said agreement:-

"Your Compensation Package would be as follows:

i) You will be provided with return fare by Air or AC II Tire by B & H.

ii) You would be provided boarding and lodging by B & H in Company Guest House, appropriate first class clubs or any Star Hotels.

iii) You would be reimbursed Rs. 15,000/- per day or part of day towards professional charges. With a minimum of 0.2% of the average value of total lot per auction.

iv) Travel time compensation would be Rs. 15,000/- per day or part of day (excluding 8.00 p.m. - 8.00 a.m.). In addition all other boarding and lodging expenses would be met by us as mentioned under items 3 & 4 of terms.

v) You will be paid Rs. 750/- per query through phone or email.

vi) Based upon the performance of the Company and on appraisal of your contributions during the first year of engagement, your compensation package could be structured suitably.

vii) An appropriate incentive structure which will enable you to buy enquiry of the Company at favourable prices or ESOPS will be formulated and implemented during the second year in order to enable a long term relationship between you and the Company.

viii) You would also be eligible to an incentive varying between 1.5% to 3% on value of concluded transactions for introducing vendors or buyers."

In the complaint filed by the respondent no.2 it was stated that in terms of the said agreement the respondents performed their functions, however, the said agreement was terminated vide letter dated 28.9.2010 in exercise of the option available to the petitioners under clause 4(xi) which is as under:-

"Both Bid and Hammer and you can terminate this engagement by providing one month's notice."

3. It was further alleged in the complaint that demands for payment of the consideration of Rs. 56,524/- and Rs. 36,202/- were made, however, out of the said amount only Rs. 56,524/- was paid and the balance amount of Rs. 1,29,134/- has not been paid till date despite requests and reminders. It was further alleged that for the payment of the balance amount a legal notice dated 18.12.2010 was got served through the respondent no.2's Advocate, however, despite the time given in the notice having elapsed no payments have been made as demanded and as payable to the respondent no.2, as such it was alleged that an offence under Section 406 IPC has been committed by the petitioners.

4. The petitioner no.1 is a company duly incorporated under the Companies Act having its registered office at Bangalore and the petitioner no.2 is the Chairman and Managing Director of the

petitioner no.1-Company. The Additional Chief Judicial Magistrate took cognizance of the complaint and passed an order summoning the petitioners under Section 406 IPC vide his order dated 29.4.2011 (Annexure No.3 to the writ petition).

5. The petitioners challenged the said summoning order by filing a Criminal Revision before the Additional District Judge (Court No.10) Lucknow wherein it was argued that the summoning order under Section 406 IPC was without any authority of law and wholly illegal, it was further argued that the civil dispute has been converted into a criminal proceedings and as such the summoning order deserves to be quashed. The said criminal revision was dismissed by merely observing that no error was committed by the Magistrate in taking cognizance and summoning the petitioners and, thus, the revision was dismissed.

6. Sri Chandra Shekhar Sinha, learned counsel for the petitioners has strenuously argued that from the plain reading of the allegations levelled in the complaint, it is a simple case of non payment of agreed amounts under a contract and no ingredients of Section 406, IPC are made out even if the entire allegations levelled in the complaint are accepted to be a gospel truth. He has further argued that for summoning an accused under Section 406 IPC it has to be alleged that there was criminal breach of trust and it was essential to establish that a person was entrusted with property who has dishonestly misappropriated the same and without their being these material allegations in the complaint the summoning order is without any application of mind and is bad in law. He further argues that a simple civil dispute has been given colour of a criminal petition and is nothing but an abuse of process of law.

7. No one has appeared on behalf of the complainant even in the revised call to assist the Court although the counter affidavit filed by the complainant is on record.

8. On the basis of the material on record and the arguments advanced at the bar, what is to be considered is whether the complaint discloses any offence cognizable under Section 406 IPC accepting all the allegations in the complaint to be correct and whether the quashing of the complaint would be necessary to secure the ends of justice.

9. Sri Sinha has relied upon the judgment of the Apex Court in the case of ***Binod Kumar and others Vs. State of Bihar and another, 2014(8) Supreme 112***. He has also relied upon the judgment of this Court in the case of ***Sajal Garg & another Vs. State of U.P. & another, 2012(7) ADJ 529***. He has further relied upon the Judgment of the Apex Court in the case of ***Prof. R.K. Vijayasarathy & another Vs. Sudha Seetharam & another*** decided on 15.2.2019 in Criminal Appeal No.238 of 2019 (Special Leave Petition (Crl.) No.1434 of 2018) to contend that to establish a charge under Section 406 IPC, it is essential that a criminal breach of trust as provided under Section 405 IPC should be made out.

10. A bare perusal of Section 405 IPC makes it clear that to bring a charge of Section 405 IPC, it is essential to plead that the person accused was entrusted with the property and has dishonestly

misappropriated the said property in violation of any direction of law or any legal contract which has been made touching the discharge of such trust.

11. There is no allegation in the complaint that the petitioners were entrusted with any property or dominion over any property, nor is there any allegation that the said property has been misappropriated by the petitioners, the simple allegation in the complaint is that the petitioners have failed to repay the amounts as agreed in between the parties in terms of the appointment letter dated 26.2.2010. A bare reading of the appointment order dated 26.2.2010 and the complaint makes it clear that the genesis of the dispute is non-payment of the agreed amounts under the agreement and nothing more. It is a clear case of a civil dispute for recovery of money being given the colour of a criminal proceeding for affecting the recovery by misusing the provisions of Indian Penal Code.

12. The Hon'ble Apex Court in the case of ***Binod Kumar and others (Supra)*** while dealing with the scope of Section 482 Cr.P.C. for quashing of the proceedings has laid down as under:-

"9. In proceedings instituted on criminal complaint, exercise of the inherent powers to quash the proceedings is called for only in case where the complaint does not disclose any offence or is frivolous. It is well settled that the power under Section 482 Cr.P.C. should be sparingly invoked with circumspection, it should be exercised to see that the process of law is not abused or misused. The settled principle of law is that at the stage of quashing the complaint/FIR, the High Court is not to embark upon an enquiry as to the probability, reliability or the genuineness of the allegations made therein. In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736, this Court enumerated the cases where an order of the Magistrate issuing process against the accused can be quashed or set aside as under:

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complainant does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is a sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects such as, want of sanction, or absence of a complaint by legally competent authority and the like."

The Supreme Court pointed out that the cases mentioned are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash the proceedings.

10.In Indian Oil Corporation vs. NEPC India Ltd. And Ors., (2006) 6 SCC 736, this Court has summarized the

principles relating to exercise of jurisdiction under Section 482 Cr.P.C. to quash complaints and criminal proceedings as under:-

"The principles relating to exercise of jurisdiction underSection 482of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few--Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre(1988) 1 SCC 692,State of Haryana vs. Bhajan Lal, 1992 Supp (1) SCC 335;Rupan Deol Bajaj v. Kanwar Pal Singh Gill(1995) 6 SCC 194,Central Bureau of Investigation v. Duncans Agro Industries Ltd(1996) 5 SCC 591;State of Bihar v. Rajendra Agrawalla(1996) 8 SCC 164,Rajesh Bajaj v. State NCT of Delhi,(1999) 3 SCC 259;Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd(2000) 3 SCC 269 [pic]Hridaya Ranjan Prasad Verma v. State of Bihar(2000) 4 SCC 168,M. Krishnan v. Vijay Singh(2001) 8 SCC 645 andZandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque(2005) 1 SCC 122. The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or

(b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test

is whether the allegations in the complaint disclose a criminal offence or not."

11. Referring to the growing tendency in business circles to convert purely civil disputes into criminal cases, in paragraphs (13) and (14) of the Indian Oil Corporation's case (supra), it was held as under:-

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, [pic]leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.In G. Sagar Suri v. State of U.P., (2000) 2 SCC 636 this Court observed: (SCC p. 643, para 8)

"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction underSection 482of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

13. The Apex Court while dealing with the scope of Section 406 IPC held as under:-

"16. Section 406 IPC prescribes punishment for criminal breach of trust as defined inSection 405IPC. For the offence punishable underSection 406IPC, prosecution must prove:

(i) that the accused was entrusted with property or with dominion over it and

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

The gist of the offence is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created.

……

18. In the present case, looking at the allegations in the complaint on the face of it, we find no allegations are made attracting the ingredients ofSection 405IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilized the

amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal breach of trust."

14. The Apex Court once again in its judgment dated 15.2.2019 in the case of ***Prof. R. K. Vijayasarathy & another*** (Supra) extensively considered the scope of Section 405 IPC as well as the scope of Section 482 Cr.P.C. while dealing with the exercise of jurisdiction for quashing of a complaint, the Hon'ble Court held as under:-

"11 The High Court, in the exercise of its jurisdiction underSection 482of the Code of Criminal Procedure, is required to examine whether the averments in the complaint constitute the ingredients necessary for an offence alleged underthe Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed underSection 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence underthe Penal Code. The complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence underthe Penal Code."

15. The Apex Court while dealing with the scope of Section 405 IPC recorded as under:-

"13. Section 405 of the Penal Code reads thus:

Section 405.- Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

A careful reading ofSection 405shows that the ingredients of a criminal breach of trust are as follows:

i) A person should have been entrusted with property, or entrusted with dominion over property;

ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so; and

iii) That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code."

16. Thus, in view of the law laid down by the Apex Court and as quoted above, what is to be seen is whether there was any allegation of entrustment of property or dominion over the property and whether there was any allegation of dishonest, misappropriation of the said property. A bare perusal of the complaint, treating the same to be a gospel truth does not even allege any entrustment of property or any misappropriation of the said property and, thus, no ingredients which are required to attract the rigours of Section 405 IPC are present in the complaint and consequently the order passed by the Magistrate summoning the petitioners for being tried of any offence under Section 406 IPC was wholly unjustified and perverse. Similarly, the revisional Court also erred in dismissing the revision challenging the summoning order without any application of mind and without even adverting to the scope of Section 405 IPC.

17. In view of the findings recorded above and the law as laid down by the Apex Court, extracted above, the proceedings of Complaint Case No.59 of 2011 (Venkateshwar Singh, Venkat Vs. Bid & Hammer Fine Art Auctioners (P) Ltd. & its Chairman/M.D. and another) under Section 406 IPC, Police Station Aliganj, Lucknow, pending in the Court Additional Chief Judicial Magistrate/J.M. (J.D.) Court no.35, Lucknow are quashed and also the order dated 8.1.2016 passed by Additional District Judge, Court No.10, Lucknow in Criminal Revision No.47 of 2015 (Annexure No.1 to the writ petition) as well as the summoning order dated 29.4.2011, under Section 406 IPC in the said Complaint are also quashed.

18. The writ petition is allowed in terms of the order passed above. There will be no order as to costs.

19. Let a copy of this order be transmitted to the concerned trial Court where the Complaint Case No.59 of 2011 is pending for being taken on record.

(2019)11ILR A863

ORIGINAL JURISDICTION863
CIVIL SIDE
DATED: LUCKNOW 15.10.2019

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 7163 of 2012

Baroda Uttar Pradesh Gramin Bank ...Petitioner

Versus

The Appellate Authority Under Payment Of Gratuity Act & Ors. ...Respondents

Counsel for the Petitioner:
Anupras Singh

Counsel for the Respondenst:
A.S.G., Manish Mohan, Sharad K. Shukla, Vinay Pandey

A. Gratuity Act, 1972 - Section 2(s) - Service law - Baroda Uttar Pradesh Gramin Bank (Officers and Employees) Services Regulations,2008-Regualtion 2(o)-employee of bank-Branch Manager-payment of gratuity after retirement-the

formula that should have been applied would be that of the Regulations of 2008 for calculation of gratuity as given under Regulation 63(3)(ii), and the 'pay' should have been taken as is defined under Regulation 2(o)-Simultaneously,the calculation should have also been made on the basis of 'wages' as defined under secion 2(s) of the Act 1972 on the basis of formula given under Section 4(2) of the Act-this would have resulted in a fair picture as to what the employee was entitled under the Regulations of 2008 and as to what the employee was entitled under the Act of 1972. (Para 7 to25)

B. The Act of 1972 however had put statutory ceiling limit of Rs. 3,50,000/-, therefore, the Bank's calculation as per Regulation of 2008 for the amount of gratuity payable to respondent was indeed the best deal for the employee and the same was given in a bonafide manner by the petitioner-Bank. (Para 26 to 28)

Writ petition allowed (E-6)

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

1. Case called out.

2. Sri Anupras Singh, learned Counsel for the petitioner is present.

3. Sri Sharad Kumar Shukla, learned Counsel for the respondent no.3, has been given repeated opportunities to file the counter affidavit but no counter affidavit has been filed till date by respondent no.3. Today, when the matter is taken up, Sri Sharad Kumar Shukla, learned Counsel for the respondent no.3 is not present.

4. A short counter affidavit has been filed on 23.09.2019 on behalf of the Regional Labour Commissioner (Central), Lucknow by Sri Ajay Kumar Singh, learned Advocate.

5. Learned Counsel for the petitioner states that he does not wish to file any rejoinder affidavit to the short counter affidavit filed by the Regional Labour Commissioner (Central), Lucknow and the matter may be heard and decided on merits.

6. This writ petition has been filed by the petitioner challenging the order dated 28.09.2012, passed by the Appellate Authority under the Payment of Gratuity Act, 1972 (hereinafter to be referred as 'the Act, 1972') in PG Appeal No. 66 of 2011 and also praying for quashing of the order dated 31.05.2011 passed by the Controlling Authority under the Act, 1972 in PG Case No. Lko36(15)/2009.

7. It is the case of the petitioner that the services of its employees and officers are governed by the Baroda Uttar Pradesh Gramin Bank (Officers and Employees) Services Regulations, 2008. Under Regulation 2(o), 'Pay' means basic pay drawn per month by the officer or employee in a pay scale including stagnation increments and any part of the emoluments which may be specifically classified as pay under these Regulations and 'Salary' means the aggregate of pay and dearness allowance. The classification of officers as given under Regulation 3 classifies the Branch Manager as officer.

8. The respondent no.3 was initially engaged as an employee of the Bank on 01.11.1976 but at the time of his retirement on 31.01.2009, he had been promoted as Branch Manager i.e. as an officer of the Bank. For the purposes of

gratuity, Regulation 69 of the said Regulations, 2008 prescribes that the amount of gratuity payable to an officer or employee shall be either as per the provisions of the Act, 1972 or as per the Sub-Regulation 3 of Regulation 69, whichever is higher. The sub-Regulation 3(ii) prescribes that amount of gratuity payable to an officer or employee shall be one month's pay for every completed year of service or part thereof in excess of six months subject to a maximum of 15 months' pay. The proviso to the said sub-Regulation provides that when an officer or employee has completed more than 30 years of service, he shall be eligible by way of gratuity, for an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years. Provided further that in respect of an officer, the gratuity is payable based on the last pay drawn.

9. It has been submitted that under the Act of 1972, Section 2(s), defines 'Wages' to mean all emoluments which are earned by an employee while on duty or on leave, which are payable to him in cash and includes dearness allowance but would not include any bonus, commission and other allowances. The method of calculation is given under Section 4 of the Act of 1972, where under sub-Section 2 the explanation says that in case of monthly rated employee, fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty six and multiplying the quotient by fifteen.

10. At the time of retirement of respondent no.3, Sri Ram Bilas Singh on 31.01.2009, the payment of gratuity had been done and the maximum limit of gratuity that could be paid to an employee under the Act, 1972 was fixed as 3,50,000/- under Section 4 sub-Section 3 of the Act. When the respondent no.3 retired, his gratuity was calculated as per the provisions of Regulation 69(2) and also as per the provisions of Regulation 69 (3) (ii). While calculating the amount of gratuity payable as per the Payment of Gratuity Act, the Bank took into consideration the statutory maximum ceiling limit as per Section 4(3) of the Act, 1972 i.e. Rs.3,50,000/-.

11. In paragraph-10 of the writ petition, the petitioner has stated the details of their calculations regarding the gratuity payable to the respondent no.3. The same are being quoted hereinbelow:-

"10. That the petitioner Bank calculated the amount of gratuity payable to respondent no. 3 under the Payment of Gratuity Act as well as the Regulation 69 (3) (ii)

A- Gratuity calculation as per Service Regulation 69(2) (under Payment of Gratuity Act, 1972)

Gratuity = (Basic + DA+ Spl Allowance if any) x 15 x No. of years of service/ 26

= (22900 + 10429) x 15 x 32 / 26

= Rs. 6,15,305/-

Maximum Gratuity Ceiling as per Act is Rs.3,50,000/- Gratuity payable as per (A) = Rs. 3,50,000/-

B- Gratuity calculation as per Service Regulation 69 (3) (ii):

Gratuity - Last Basic Pay x No. of years of service rendered (32 yrs)

= 22,900 x 16
= Rs. 3,66,400/-

Gratuity payable as per (B) = Rs. 3,66,400/-

Amount of Gratuity whichever is higher among A & B above, in terms of Regulation 69 of the service conditions of the Bank, shall be payable. Since Gratuity as per 'B' above is higher than the Gratuity as per 'A' hence the same has been paid."

It has been submitted that since the gratuity as per calculation 'B' above as given in paragraph-10 of the petition is higher than the gratuity as per 'A' , therefore, the gratuity of Rs. 3,66,400/- was paid as against the maximum statutory limit of Rs.3,50,000/-.

12. It has been submitted that with effect from 01.11.2007, the basic pay of the respondent no. 3 was revised and the gratuity was again calculated both under the Act of 1972 as well as Regulation 69 (3) (ii). The calculation is given in paragraph-12 of the writ petition, which is quoted hereinbelow:-

"(A) Calculation of gratuity as per Payment of Gratuity Act, 1972:-

[32400 + 5638] x 15 x 32 ÷ 26 = Rs.7,02,240/-

Maximum Ceiling Limit at that time was Rs.3,50,000/-

(B) Calculation of gratuity as per Regulation 69 (3) (ii) read with Regulation 2(o) of Baroda Uttar Pradesh Gramin Bank [Officers & Employee] Service Regulations 2008:-

[32400] x 16 month's pay = 5,18,400/-"

13. The Maximum Ceiling Limit being Rs. 3,50,000/-, again the calculation as per the Regulation 69(3)(ii) was preferred which came to about Rs.5,18,400/-. The dues of gratuity amount of Rs.1,52,000/- was also paid to respondent no.3. The respondent no. 3 not being satisfied with the gratuity paid by the Bank preferred the application under Rule 10(i) and under Section 7(4) of the Act, 1972 before the Controlling Authority i.e. Regional Labour Commissioner (Central), Lucknow. The said application was registered as P.G. Case No.Lko36(15)/2009.

14. The claim of the respondent no.3 was based on his Basic Pay + Dearness Allowance as given under the Act of 1972 and not as per the Regulations of the Bank. He also prayed that the Maximum Ceiling Limit of Rs.3,50,000/- be ignored and he may be paid Rs.6,15,305/- as gratuity and not Rs.5,18,400/- as paid by the Bank. The difference in amount of gratuity + interest @ 18% on the additional gratuity amount be also paid to him. The Controlling Authority erroneously calculated the gratuity amount on the basis of wages as defined under Section 2(s) of the Act, 1972 i.e. Basic Pay + Dearness Allowance and completely failed to take into consideration the Regulation 69 (3) (ii), which govern the service conditions of the respondent no.3 and provided that amount of gratuity be calculated on the basis of "pay' as given under Regulation 2

(o) of the Regulations i.e. "Basic Pay drawn per month only by an officer".

15. The Controlling Authority in his letter dated 31.05.2011 erroneously calculated the amount by applying the formula of the Act of 1972 and ordered the Bank to make payment of Rs. 79,754/-. The Controlling Authority while calculating the gratuity payable to respondent no.3 applied the same formula in making both the calculations i.e. calculation as per Regulation 69 (3)(ii) and calculation as per Section 4(2) of the Act of 1972. Whereas he should have applied the formula given under Regulation 69(3) of the Regulations of 2008, i.e. Basic Pay x 16, (after 32 years of service rendered in the Bank by respondent no.3). The Basic Pay of respondent no.3 was however correctly taken as Rs.32,400/-, although the respondent no. 3 has prayed that the same be taken as Rs.32,400 + Rs.5,6,38 i.e. by adding Dearness Allowance also.

As a result of the wrong calculation, the Controlling Authority came to the conclusion that Rs. 5,95,154/- was payable to the respondent no.3 and the Bank had only paid Rs.5,18,400/-. The difference in amount i.e. the additional gratuity was directed to be paid as Rs.79,754/-. The interest on delayed payment however was not given.

16. The respondent no.3 filed an appeal against the order of Controlling Authority but beyond the period of limitation as given under Section 7 and the said appeal was rejected by the Appellate Authority by an order dated 11.09.2010. A copy of the order dated 11.09.2010 as been annexed as annexure-7 to the writ petition.

17. The Bank also preferred an appeal. The said appeal was filed within time and it was considered on its merit and the order impugned filed as annexure-1 to the writ petition has been passed.

18. In the said impugned order, the Appellate Authority calculated the amount of gratuity payable to respondent no.3 on the basis of wages i.e. Basic Pay + Dearness Allowance as defined under the Act of 1972. It completely failed to take into consideration the Regulation 69 (3) (ii). The statutory Ceiling Limit of Rs.3,50,000/- as given under the Act of 1972, was also ignored by the Appellate Authority. The calculation as done by the Appellate Authority is evident from page-25 of the paperbook i.e. operative portion of the impugned order dated 28.09.2012. The relevant extract of the order dated 28.09.2012 is quoted hereinbelow:-

"Further, considering the facts and documents placed on record and the arguments of the parties to the case, I hereby modify the order of the Controlling Authority dated 31.05.2011 and allow submission of the respondent employee accordingly he has become entitled for payment of gratuity on the basis of calculation of Pay+DA i.e. $\frac{Rs.38038 \times 15 \times 32}{2}$ *=*

702240.00 say Rs.702240 - 518400 (already paid) = Rs.183840/- balance gratuity payable plus 10% interest on entire amount of gratuity payable to the employee from the date on which the gratuity become due till actual date of payment."

19. The interest @ 10% as given in the Act was directed to be paid on the additional amount so calculated from the

date the gratuity become payable, till the date of actual payment, and in case of delay in payment by the Bank within 30 days to the employee, the employee was entitled for 18% compound interest therefor.

20. When the writ petition was filed and taken up at the admission stage on 19.12.21012, this Court had passed an order staying the order of the Appellate Authority to the extent of modification enhancing the amount granted by the Controlling Authority. However, this Court had made clear that the amount granted by the Controlling Authority shall be payable to the respondent no.3, which had already been deposited before the Controlling Authority and the same may be released to respondent no.3 on his application subject to the result of this writ petition.

21. Learned Counsel for the petitioner submitted that the Bank is not disputing any payment made on the basis of the impugned order of the Controlling Authority at this stage because it would lead to hardship to respondent no.3, but at the same time the Bank does not wish that the wrong calculation adopted by the Controlling Authority should become a binding precedent and should be utilized to cause loss to the Bank in the future by the other employees.

22. This Court has considered the submissions made by learned Counsel for the petitioner and has also gone through the Regulations of 2008. The Regulations of 2008 classify Branch Manager as officer of the Bank and the amount of gratuity payable to the officer has been given under Regulation 69 (3)(ii), which is to the effect that one month's pay for every completed year of service, subject to a maximum of 15 months' pay, was to be given to the officer but where the officer or employee has completed 30 years of service, he was eligible for gratuity of an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years. Since the respondent no.3 rendered 32 years of service, 16 months' pay was to be given to respondent no.3 as gratuity, on the basis of last pay drawn by such officer. The last pay drawn by the officer at the time of his retirement was Rs.22,900/-, which was later on revised and became Rs.32,400/-. Such an amount came to Rs.5,18,000/- and the same was paid. On the other hand, the calculation was also done as per the Act of 1972 by the Bank to find out whether the respondent no.3 was entitled to a better deal.

The respondent no.3 was indeed entitled to the better deal as per the Act of 1972 on the method of calculation prescribed under sub-Section 2 of Section 4, but due to statutory ceiling limit of Rs.3,50,000/- on the gratuity payable to an employee under the Act of 1972, the best deal for such an employee would again be the calculation as per Regulations 69 (3)(ii) of the Bank's Regulation. Therefore, the best deal was given to the respondent no.3 by the Bank.

23. The Controlling Authority on the other hand while noticing the ceiling limit of Rs.3,50,000/- as given under the Act of 1972 before its amendment, made the calculations wrongly, on the basis of formula applied under the Act of 1972 i.e. "the wages' were multiplied by fifteen into the years of service i.e. 32 years and then dividing the same by 26. As a result of this wrong calculation, the Controlling

Authority found that Rs. 79,754/- had been paid less by the Bank and directed for such payment by its order dated 31.05.2011.

24. When the appeal was being considered by the Appellate Authority, the formula as per the Act of 1972 was again applied and also the "wages' were taken into account and not the "pay' as given under Regulations, 2008 i.e. inclusive of Basic Pay + Dearness Allowance.

25. The formula that should have been applied would be that of the Regulations of 2008 for calculation of gratuity as given under Regulation 63(3)(ii), and the "pay' should have been taken as is defined under Regulation 2(o). Simultaneously, the calculation should have also been made on the basis of "wages' as defined under Section 2(s) of the Act of 1972 on the basis of formula given under Section 4(2) of the Act. This would have resulted in a fair picture as to what the employee was entitled under the Regulations of 2008 and as to what the employee was entitled under the Act of 1972.

26. The Act of 1972 however had put statutory ceiling limit of Rs.3,50,000/- , therefore, the Bank's calculation as per Regulation of 2008 for the amount of gratuity payable to respondent no. 3 was indeed the best deal for the employee and the same was given in a bonafide manner by the petitioner – Bank.

27. This Court finds that the due to some confusion, the formula given under the Act of 1972 and the definition of "wages' as given under the Act of 1972 was also applied in making calculation of gratuity for respondent no.3 by the Controlling Authority and by the Appellate Authority.

28. Also, in case the Controlling Authority and the Appellate Authority was applying the formula as given under the Act of 1972, they should have taken into consideration also the ceiling limit of Rs.3,50,000/- under the Act. The same was not taken into account. Such discretion was not provided under the Act to the Controlling Authority or the Appellate Authority, to ignore altogether the statutory ceiling limit.

29. In view of the above, the impugned orders are set aside. The writ petition is ***allowed.***

30. However, because of the compliance of the order passed by the Controlling Authority certain amount had been deposited before the Appellate Authority by the Bank, which may have been released in favour of respondent no.3 during the pendency of the petition. This Court is not directing the recovery of the same from the employee concerned. However, the logic applied by the Controlling Authority and Appellate Authority having been found to be skewed, it is being disapproved, and it shall not be treated as binding precedent for calculating the amount of gratuity to be paid to Bank employees retiring from Baroda U.P. Gramin Bank.

31. Writ Petitions No. 7164 (M/S) of 2012 and No. 7165 (M/S) of 2012 are de-linked from the present petition, which shall be listed in the next week for orders to be passed thereon.

(2019)11ILR A870

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.10.2019

BEFORE
THE HON'BLE VIVEK CHAUDHARY, J.

Misc. Single No. 20659 of 2019 connected with other cases

M.D./Chairman-Administrative-Committee/ Occupier Lko. & Anr. ...Petitioners
Versus
Shri Krishna Bihari Yadav & Anr. ...Respondents

Counsel for the Petitioners:
Sri Manoj Kumar, Sri Arvind Kumar Pandey, Sri Sridhar Awasthi

Counsel for the Respondents:
C.S.C., Sri A.N. Tripathi, Sri M.K. Sahu

A. - Service law -Payment of Gratuity Act, 1972 - Section 14 - applicability of Gratuity act upon the employees of Pradeshik Co-operative Dairy Federation Ltd. (PCDF) - the provision of section 14 gives an over-riding effect over any other inconsistence provision and any other documents or contract, be it the V.R.S. signed by the parties. (Para 16 to 31)

Writ petition dismissed (E-6)

List of Cases Cited: -

1. Ghaziyabad Zila Sahkari Bank Limited Vs. Additional Labour Commissioner and Ors (2007) 11 SCC 756

2. Brahamvartha Commercial Co-operative Bank Ltd. Vs. Presiding Officer, Industrial Tribunal III, U.P. Kanpur (2012) 134 FLR 574

3. Sikta Mahoogarh Sadhan Sahkari Samiti Ltd. Vs. Prescribed Authority(Payment of Wages Act) and Ors (2015) 144 FLR 23

4. M/S Gangol Sahkari Dugdh Utpadak Sangh Ltd. Through G.M. Vs. Presiding Officer, Labour Court II Meerut and Anr.

5. Sugvir Singh Vs. State of U.P. & Ors.

6. Shobhai Ram and Ors. Vs. State of U.P. and Ors. (2014) 142 FLR 457

7. P. Rajan Sandhi Vs. Union of India (2010) 10 SCC 338

8. Dr. Raj Kumar Singh Vs. Cadere Authority U.P. Coop. Dairy Federation and Milk Union

9. Y. K. Singla Vs. Punjab National Bank and Ors (2013) 136 FLR 1087

10. Municipal Corporation of Delhi Vs. Dharam Prakash Sharma (1999) 81 FLR 867

11. State of Punjab Vs. The Labour Court,Jullundur and Ors(1979) 39 FLR 353

12. Nagar Ayukt Nagar Nigam, Kanpur Vs. Mujib Ullah Khan and Anr. (2019) 161 FLR 503 (S.C.)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. This bunch of writ petitions is filed by petitioner, Pradeshik Co-operative Dairy Federation Ltd. (hereinafter referred to as 'PCDF'), challenging the orders of different dates and notices for payment of gratuity passed and issued by the Controlling Authority/Assistant Labour Commissioner, Lucknow (respondent no.2) under the Payment of Gratuity Act, 1972.

2. The relevant facts are that on 24.09.2015, petitioner PCDF introduced a Voluntary Retirement Scheme (VRS). Amongst other conditions, the VRS scheme in clause-3(kha) provided that the employees adopting the same will be paid gratuity as per the gratuity scheme

applicable in PCDF. On 30.09.2015 a clarification to the VRS scheme was issued, Clause-1 whereof clarified that as per the clause 28-Sa(3) of the gratuity scheme the maximum limit of gratuity amount payable shall be Rs.3.5 Lakhs. All the respondents/employees applied under the aforesaid VRS scheme and in and around February, 2016 they all accepted their VRS amounts, including Rs.3.5 Lakhs as their gratuity. In and around May, 2017, representations were made for payment of gratuity under the Gratuity Act, 1972 which was claimed to be Rs.6.5 Lakhs. Since no action was taken on the representations made, therefore, in December, 2017 applications were filed before the respondent no.2, Controlling Authority under the Gratuity Act, 1972. Objections were taken to the said application by the petitioner-PCDF. All the aforesaid applications stand allowed by the impugned orders and, thereafter notices were also issued for payment of the gratuity amount as per the Gratuity Act, 1972. While allowing the representations the Controlling Authority has also condoned the delay in filing the claim applications. The said orders and notices are under consideration before this Court in the present bunch of petitions

3. The chronology of relevant law is that U.P. Co-operative Societies Act, 1965 (hereinafter referred to as 'Co-operative Societies Act') was enforced in the State of U.P. w.e.f. 26.01.1968 by way of notification dated 30.12.1967 (except Section 135 of the same). The Payment of Gratuity Act, 1972 (hereinafter referred to as 'Gratuity Act') was notified and came into force from 16.09.1972. Section 121 of the Co-operative Societies Act reads:-

"121. Power of Registrar to determine terms of employment of society. - *(1) The Registrar may, from time to time, frame regulation to regulate the emoluments and other conditions of service including the disciplinary control of employees in a co-operative society or a class of co-operative societies and any society to which such terms are applicable, shall comply with those regulations and with any orders of the Registrar, issued to secure such compliance.*

(2) The regulations framed under sub-section (1) shall be published in the Gazette and take effect from the date of such publication."

4. In exercise of power under Section 121 of the Co-operative Societies Act, Registrar framed the U.P. Co-operative Societies Employees Service Regulation, 1975 (hereinafter referred to as 'Regulations of 1975'). The Regulations of 1975 were notified by notification dated 31.12.1975. Regulation 121(2) states "they shall take effect from the date of their publication in the U.P. gazette", thus, they came into force from 06.01.1976, the date of their publication. Again in exercise of power under Section 121(1) of Co-operative Societies Act, U.P. Co-operative Dairy Federation Employees Service Regulations, 2010 were notified and published on 08.09.2010 (hereinafter referred to as 'Regulations of 2010'). Initially the said Regulations of 2010 were shown as issued by the Governor. An objection was raised by the opposite parties that the same were issued by the State Government which has power only under Section 122 of the Co-operative Societies Act, therefore, the same cannot be treated to be issued by the Registrar under Section 121 of the Co-operative Societies Act. It was further argued by the opposite parties that under Section 122 the State

Government only has power to constitute an authority or authorities for recruitment, training and disciplinary control of the employees of co-operative society and not to frame regulations to regulate their emoluments and conditions of service. During pendency of the petition a corrigendum was also issued and notified on 07.08.2019 whereby an amendment was made to the Regulations of 2010 providing them to have been issued by the Registrar.

5. Counsel for the petitioner Sri Sudeep Seth, learned Senior Advocate, assisted by Sri Samanvya Dhar Dwivedi, Sri Manoj Kumar, Sri Pankaj Patel, Sri Anupam Mishra and Sri A.R. Mishra, Advocates, has made strong submissions challenging the validity of the orders passed by the controlling authority. Sri Amarnath Tripathi, Sri Manoj Kumar Sahu and Sri Ashutosh Srivastava, learned counsel for respondents/employees have also argued at great length supporting the impugned orders.

6. During course of the arguments, petitioner also filed four supplementary affidavits bringing on record additional documents, which were not filed by the petitioner before the controlling authority. With the consent of respondents all the said documents were also permitted to be relied upon by the petitioner, to finally decide this long pending controversy with regard to the law applicable for payment of gratuity between the PCDF and its employees.

7. Counsel for the petitioner has disputed the applicability of the Gratuity Act upon the employees of the PCDF. His first submission is that it is the Co-operative Societies Act and the Regulations framed thereunder, being special Act, which will apply with regard to all the service conditions, including payment of gratuity, of the employees of PCDF and, therefore, the Gratuity Act cannot be applied.

8. The second ground of challenge raised by the counsel for petitioner is that the PCDF had, for the purposes of payment of gratuity of its employees, framed a scheme, constituted a trust and also framed rules under the said scheme and had also taken a Master Group Gratuity and Insurance Policy from the Life Insurance Corporation (LIC). Thus, the gratuity could be paid to the employees only under the aforesaid policy and not under the Gratuity Act.

9. Since the second question depends more upon facts, hence, I find it appropriate to consider the same first.

10. The submission of counsel for the petitioner is that in the meeting of the Executive Council dated 01/02.12.1975, under Item no.18, an agenda with regard to payment of gratuity to employees was proposed and a resolution was passed and a scheme framed. Counsel for the petitioner fairly admitted that at present the trust deed, despite their best efforts, is not available. He submits that however, a trust was created as is reflected from the minutes of meeting of the Board of Directors dated 25/26.10.1978, wherein at Item No.17 new trustees were appointed. He also refers to the resolution dated 11.02.1991 of the Administrative Committee of PCDF where at Item No.9 an approval was granted to the aforesaid scheme, applicable in PCDF since 1976, and it was also approved that the gratuity amount shall be paid as per the directions

of the State government issued from time to time. It also approved the rules framed under the gratuity scheme. The said rules are annexed with the aforesaid resolution dated 11.02.1991 and are also referred to by the counsel for the petitioner. Reliance is also placed upon the resolution of the Administrative Committee meeting dated 13.06.1997 wherein under Item No.18, limit on payment of gratuity was extended from Rs.1 lakh to Rs.2.5 Lakhs. The master policy taken with the LIC was also relied upon, filed along with the supplementary affidavit. Large number of documents were also referred to show that newly appointed employees were, from time to time, included in the master insurance policy taken with the LIC.

11. On the basis of the aforesaid documents, counsel for the petitioner submits that PCDF had framed its own scheme for the payment of gratuity to its employees and under the said scheme they had also constituted a trust, framed its rules and taken a master policy from the LIC and the employees can be paid their gratuity only as per the said scheme, rules and the master policy and, therefore, they are not liable and cannot be forced to pay anything more than what is covered by the master policy. Reliance is also placed upon the letter/circular dated 13.09.2002 issued by the Milk Commissioner, lastly enhancing the limit of gratuity payable to employees to Rs.3.50 Lakhs.

12. The aforesaid gratuity scheme in PCDF has come into force on the basis of the resolution no.18 of the executive council of the PCDF in its meeting dated 01/02.02.1975. The said agenda and resolution reads:-

18. ग्रेचुटी अधिनियम के अन्तर्गत कर्मचारियों को ग्रेचुटी योजना की सुविधा प्रदान करने हेतु जिसमें ट्रस्ट का निर्माण होना है तथा ग्रेचुटी की धनराशि जो कर्मचारियों को समय समय पर देय होगी के उत्तरदाइत्व को दृष्टिगत रखते हुए लाइफ इन्सोरेन्स कारपोरेशन द्वारा प्रस्तुत योजना की स्वीकृति पर विचार।	ि पश्चात ग्रेचुटी अधिनियम के अन्तर्गत स्वीकृत जीवन बीमा निगम द्वारा प्रस्तुत योजना को लागू करने हेतु स्वीकृति प्रदान की गई। सचिव ग्रेचुटी अधिनियम के अन्तर्गत प्राविधित ट्रस्ट का गठन भविष्य निधि योजना की भांति परिपूर्ण करें तथा योजना के कार्यान्यवन सम्बन्धी और अन्य आवश्यकीय कार्यवाही करें।

The resolution translates as *'after consideration, the scheme proposed by the Life Insurance Corporation under the Gratuity Act is approved to be applied. The secretary will complete the formalities for creation of the prescribed trust under the Gratuity Act in a similar manner as was done for the provident fund scheme and will also take other required actions for its implementation'.*

13. The said agenda and resolution specifically state that the scheme shall be prepared for enforcing the provisions of the Gratuity Act. The resolution further provides that the trust shall also be constituted as per the provisions of the Gratuity Act. Thus, it is clear that the executive council resolved to enforce the provisions of the Gratuity Act and also directed the scheme to be framed and the trust to be created for giving effect to the provisions of the Gratuity Act. Neither the scheme nor the master policy, filed by the petitioner, anywhere state that they are created under the Co-operative Societies Act or the Regulations of 1975 or the Regulations of 2010.

14. Counsel for the petitioner also could not show from the record that the

resolution dated 01/02.12.1975 of Executive Council was ever modified or withdrawn. He could not show anything at all to prove that ever any decision was taken, at any level whatsoever, to pay gratuity as per the provisions of Co-operative Societies Act or the Regulations of 1975 or the Regulations of 2010. Thus, from the record of PCDF it is proved that Executive Council of the PCDF took a decision to enforce the provisions of the Gratuity Act. The said decision was never modified and, thus, today they cannot turn back and say that the provision of the Gratuity Act are not applicable. Further, the circular dated 13.09.2002 issued by the Milk Commissioner also states that, since by amendment in the Gratuity Act the maximum limit of the gratuity payable is enhanced to Rs.3.50 Lakhs, therefore, the same enhanced limit of Rs.3.50 Lakhs is approved to be applied on the officers/employees of PCDF. The said circular also shows that even in 2002 the modification in the Gratuity Act was made applicable without any reference to any other scheme.

15. There is yet another aspect of the matter. The resolution of Executive Council is dated 01/02.12.1975. The Regulations of 1975 came into force from 06.01.1976 i.e. from the date of publication of notification (even if taken from the date of notification, the same comes to 31.12.1975). Thus, on 01/02.12.1975 there were no service Regulations enforced, and thus, there is no question of a decision being taken for the payment of gratuity under the said Regulations. There is no such decision taken thereafter to pay gratuity under any regulations. For the said reason also, it cannot now be argued by the petitioner that the scheme, rules and the master policy for payment of gratuity is under the Regulations of 1975 and is not for enforcement of the Gratuity Act.

16. Coming back to the first submission of counsel for petitioner, that the Co-operative Societies Act is a special act for the purposes of employees of the co-operative societies and under the same, in exercise of power under Section 121, the Registrar has framed service Regulations, which also provides for the payment of gratuity and, therefore, it is the Co-operative Societies Act and the service Regulations which would be applicable for payment of gratuity on its employees and not the provisions of the Gratuity Act. Strong reliance is placed by the petitioner upon the judgment of the Supreme Court in case ***Ghaziyabad Zila Sahkari Bank Limited Vs. Additional Labour Commissioner and Others (2007) 11 SCC 756*** and upon the Single Judge judgments of this Court in case of ***Brahamvartha Commercial Co-operative Bank Ltd. Vs. Presiding Officer, Industrial Tribunal III, U.P. Kanpur (2012) 134 FLR 574, Sikta Mahoogarh Sadhan Sahkari Samiti Ltd. Vs. Prescribed Authority (Payment of Wages Act) and others (2015) 144 FLR 23,*** unreported judgment of this Court dated 07.04.2017 passed in ***Writ-C No.184 of 1999 M/S Gangol Sahkari Dugdh Utpadak Sangh Ltd. through G.M. Vs. Presiding Officer, Labour Court-Ii Meerut and another,*** unreported judgment of this Court dated 03.08.2016 passed in ***Writ-A No.14364 of 2016; Sugvir Singh Vs. State of U.P. & Others and other connected matters*** and judgment passed in Case of ***Shobhai Ram and others Vs. State of U.P. and others (2014) 142 FLR 457.*** Reliance is also placed upon the judgment in case of ***P.***

Rajan Sandhi Vs. Union of India; (2010) 10 SCC 338, where a comparison was made between the provisions of Working Journalists Act, 1955 and the provisions of Payment of Gratuity Act.

17. Counsels for the opposite parties, disputing the said submission of petitioner, have placed reliance upon the unreported judgment of Division Bench of this Court, dated 09.04.2002 in ***Writ Petition No.1427 of 2000 Dr. Raj Kumar Singh Vs. Cadere Authority U.P. Coop. Dairy Federation and Milk Union, Centralised Services and others*** and other connected matters and judgments of Supreme Court in case of ***Y.K. Singla Vs. Punjab National Bank and Others (2013) 136 FLR 1087, Municipal Corporation of Delhi Vs. Dharam Prakash Sharma (1999) 81 FLR 867, State of Punjab Vs. the Labour Court, Jullundur and Others (1979) 39 FLR 353.***

18. Counsels for the respondents have also strongly disputed the correctness of the judgments of this Court relied upon by the petitioner, based upon the judgment of Supreme Court in case of ***Ghaziyabad Zila Sahkari Bank Limited (Supra)*** on the ground that none of them have considered the Division Bench Judgment of this Court in case of ***Dr. Raj Kumar Singh (Supra)*** and other judgment of Supreme Court. Counsels for the respondents state that the entire compilation of documents with regard to applicability of gratuity i.e. the scheme, the master policy, the rules etc. were never placed before any of the earlier Courts. They, simply going by one line in the judgment of Supreme Court in case of ***Ghaziyabad Zila Sahkari Bank Limited (Supra)***, which says that the Regulations of 1975 would take effect over any other labour laws, without even looking into the issue as to which Act would be the special Act, have passed the judgments. Respondents counsels submit that even the law settled in the ***Ghaziyabad Zila Sahkari Bank Limited case (Supra)*** goes against the petitioners and the other Supreme Court judgments, relied upon by them, settles the issue of the primacy of the Payment of Gratuity Act.

19. So far as the judgments in cases of ***Brahamvartha Commercial Co-operative Bank Ltd. (supra), Sikta Mahoogarh Sadhan Sahkari Samiti Ltd. (supra)***, ***M/S Gangol Sahkari Dugdh Utpadak Sangh Ltd. through G.M. (supra), Sugvir Singh (supra)*** are concerned, they all follow the judgment of the Supreme Court passed in case of ***Ghaziyabad Zila Sahkari Bank Limited (Supra)***. In the aforesaid judgment, proceedings were initiated by the workman under Section 33-C of the U.P. Industrial Disputes Act, 1947. The Supreme Court had occasion to compare provisions of the Industrial Disputes Act, 1947 with the provisions of the Co-operative Societies Act for the purposes of service conditions of the employees of a co-operative society. The relevant portion of paragraph-61, 63, 64 reads as follows:-

"61. The general legal principle in interpretation of statutes is that 'the general Act should lead to the special Act'. Upon this general principle of law, the intention of the U.P legislature is clear, that the special enactment UP Co-operative Societies Act, 1965,, 1965 alone should apply in the matter of employment of Co-operative Societies to the exclusion of all other Labour Laws. It is a complete

code in itself as regards employment in co-operative societies and its machinery and provisions. The general Act the UPID Act, 1947 as a whole has and can have no applicability and stands excluded after the enforcement of the UPCS Act. This is also clear from necessary implication that the legislature could not have intended 'head-on-conflict and collision' between authorities under different Acts.....

63. Also if we refer to the general principles of Statutory Interpretation as discussed by G.P.Singh, in his treatise on 'Principles of Statutory Interpretation', we can observe that, a prior general Act may be affected by a subsequent particular or special Act if the subject-matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases. The distinction may be important at times for determining the applicability of those provisions of the General Clauses Act, 1897, (Interpretation Act, 1889 of U.K. now Interpretation Act, 1978) which apply only in case of repeals.

64. A general Act's operation may be curtailed by a later Special Act even if the general Act will be more readily inferred when the later Special Act also contains an overriding non-obstante provision. Section 446(1) of the Companies Act 1956 (Act 1 of 1956) provides that when the winding up order is passed or the official liquidator is appointed as a provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order shall be proceeded with against the company except by leave of the Court. Under Section 446(2), the company Court, notwithstanding anything contained in any other law for the time being in force is given jurisdiction to entertain any suit, proceeding or claim by or against the company and decide any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up. The Life Insurance Corporation Act, 1956 (Act 31 of 1956) constituted a Tribunal and Section 15 of the Act enabled the Life Insurance Corporation to file a case before the tribunal for recovery of various amounts from the erstwhile Life Insurance Companies in certain respects. Section 41 of the LIC Act conferred exclusive jurisdiction on the tribunal in these matters. On examination of these Acts, it was held that the provisions conferring exclusive jurisdiction on the tribunal being provisions of the Special Act i.e. the LIC Act prevailed over the aforesaid provisions of the general Act, viz., the Companies Act which is an Act relating to Companies in general and, therefore, the tribunal had jurisdiction to entertain and proceed with a claim of the Life Insurance Corporation against a former insurer which had been ordered to be wound up by the Company Court. This case was followed in giving to the provisions of the Recovery of Debts due to Banks and Financial Institutions Act 1993 (RDB Act) overriding effect over the provisions of the Companies Act, 1956. The RDB Act constitutes a tribunal and by sections 17 and 18 confers upon the tribunal exclusive jurisdiction to entertain and decide applications from the banks and financial institutions for recovery of debts (defined to mean any liability which is claimed as due). The Act also lays down

the procedure for recovery of the debt as per the certificate issued by the tribunal. The provisions of the RDB Act, which is a special Act, were held to prevail over sections 442, 446, 537 and other sections of the Companies Act which is a general Act, more so because Section 34 of the RDB Act gives over-riding effect to that Act by providing that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

20. The Division Bench of this Court, in its judgment dated 09.04.2002 in ***Writ Petition No.1427 of 2000 Dr. Raj Kumar Singh Vs. Cadere Authority U.P. Coop. Dairy Federation and Milk Union, Centralised Services and others*** and other connected matters, has held:-

"The payment of gratuity is governed by Payment of Gratuity Act, 1972 as amended from time to time. In view of Section 1(3)(b) of the Act every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State in which ten or more persons are employed, or were employed on any day of the preceding twelve months shall fall under the provisions of the said Act. It is not in dispute, rather it has not been disputed by the learned counsel for the respondents that PCDF is an establishment. Learned counsel for the petitioner has also placed reliance upon a Division Bench judgment of this Court in U.P. Cooperative Union and others Vs. Prabhu Dayal Srivastava and Others, 1988 UPLBEC 391. in which it has been held that the term 'establishment' as used under Section 1(3)(b) or 1(3)(c) of the Payment of Gratuity Act includes a cooperative society also and thus the employees of the cooperative society are entitled for payment of gratuity. We have no reason to take a different view in the present case, as no such argument has been advanced. Once it is established that the petitioners were working in an establishment, the Payment of Gratuity Act becomes applicable to them. The Act itself provides the manner of payment of gratuity. The Payment of Gratuity Act defines "employee" in section 2(e) which means any person (other than an apprentice) employed on wages in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. The payment of gratuity has been provided in section 4 of the Act, which reads as under:-

4.(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease;

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to the heirs.

EXPLANATION.- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned :

Provided that in the case of piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account :

Provided further that in the case of an employee employed in a seasonal establishment, the employer shall pay the gratuity at the rate of seven days' wages for each season.

(3) The amount of gratuity payable to an employee shall not exceed twenty months' wages.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee shall be wholly forfeited,-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

Power to exempt vests in the appropriate Government under Section 5 of the Act, which provides as under:-

5. (1) The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favorable than the benefits conferred under this Act.

(2) The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favorable than the benefits conferred under this Act.(3).....

There is no provision under the Act which vests power in any authority to exempt payment of gratuity to the employees of any establishment, who are otherwise covered by the provisions of this Act other than the appropriate Government. The power to exempt may include the power to exempt an establishment from payment of gratuity in toto or may regulate the payment of gratuity at different scales but this power cannot be exercised either by the Society or by the Registrar, Cooperative Societies. The Registrar cannot be substituted in place of the 'appropriate Government'. The term 'appropriate Government' has also been defined under section 2(a) of the Act; which does not include the Registrar.

The applicability of Regulation 95 Chapter VIII of the Regulations of 1975 can also not be of any assistance to the respondents in view of the over-riding effect given to the provisions of Payment of Gratuity Act under Section 14. *Section 14 of the Act reads as under:-*

"14. The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

Besides this, what should be the amount of gratuity and how much amount should be paid to an employee of an establishment covered by Payment of Gratuity Act has been provided under section 4 and section 7 of the Act. It is obligatory upon the employer of such establishment to make payment of gratuity in accordance with the provisions of the aforesaid Act. ***It is not the case of either of the parties that any exemption has been granted to the PCDF under Section 5 of the Act."*** *(emphasis applied)*

21. So far as the Single Judge judgments of this Court are concerned, the Division Bench judgment of this Court in case of ***Dr. Raj Kumar Singh (Supra)*** was never placed before them, wherein this Court has held that it is the provisions of the Gratuity Act which would be applicable and the provisions of the Co-operative Societies Act would not be applicable for the purpose of payment of gratuity to the employees of PCDF. Counsel for the petitioner submits that the judgment of the Division Bench is of the year 2004 and loses its relevance in view of the judgment of Supreme Court in case of ***Ghaziyabad Zila Sahkari Bank Limited (Supra)***, which is a later judgment dated 17.01.2007. The said judgment is considered in the later part of this judgment, after first referring to judgments of Supreme Court comparing the Gratuity Act with other legislations.

22. The first such instance was in case of ***State of Punjab Vs. The Labour Court, Jullundur and Others (1979) 39 FLR 353 (S.C.).*** In the said case the comparison was between the Gratuity Act and the Industrial Disputes Act, 1947 and the question was whether an employee can have recourse to Section 33-C(2) of the I.D. Act, 1947 for recovery of gratuity amount. The Court found that:-

"It is urged that the Payment of Gratuity Act is a self-contained code incorporating all the essential provisions relating to payment of gratuity which can be claimed under that Act, and its provisions impliedly exclude recourse to any other statute for that purpose. The contention has force and must be accepted. A careful perusal of the relevant provisions of the Payment of Gratuity Act shows that Parliament has enacted a closely knit scheme providing for payment of gratuity. A controlling authority is appointed by the appropriate Government under section 3. and Parliament has made him responsible for the administration of the entire Act. In what event gratuity will become payable and how it will be quantified are detailed in section 4. Section 7(1) entitled a person eligible for payment of gratuity to apply in that behalf to the employer. Under section 7(2), the employer is obliged, as soon as gratuity becomes payable and whether an application has or has not been made for payment of gratuity, to determine the amount of gratuity and inform the person to whom the gratuity is payable specifying the amount of gratuity so determined. He is obliged, by virtue of the same provision, to inform the controlling authority also, thus ensuring that the controlling authority is seized at all times of information in regard to gratuity as it becomes payable. If a dispute is raised in regard to the amount of gratuity payable or as to the admissibility of any claim to gratuity, or as to the person entitled to receive the gratuity, section 7(4)(a) requires the employer to deposit with the controlling authority such amount as he admits to be payable by him as gratuity. The controlling authority is empowered. under section 7(4)(b), to enter upon an adjudication of the dispute, and after due inquiry, and after giving the parties to the dispute a reasonable opportunity of being heard, he is required to determine the amount of gratuity payable. In this regard, the controlling authority has all the powers as are vested in a court while trying a suit under the Code of Civil Procedure, 1908 in respect of obtaining evidentiary material and the recording of evidence. The amount deposited by the employer with the controlling authority as the admitted amount of gratuity will be paid over by the controlling authority to the employee or his nominee or heir. Section 7(7) provides an appeal against the order of the controlling authority under section 7(4)to the appropriate Government or such other authority as may be specified by the appropriate Government in that behalf. The appropriate Government or the appellate authority is empowered under section 7(8), after giving the parties to the appeal a reasonable opportunity of being heard, to confirm, modify or reverse the decision of the controlling authority. Where the amount of gratuity payable is not paid by the employer with in the prescribed time, the controlling authority is required by Section 8, on application made to it by the aggrieved person, to issue a certificate for that amount to the Collector. The Collector, thereupon, is empowered to

recover the amount of gratuity, together with compound interest thereon at the rate of nine per cent per annum from the date of expiry of the prescribed time, as arrears of land revenue, and pay the same to the person entitled thereto.

It is apparent that the Payment of Gratuity Act enacts a complete code containing detailed provisions covering all the essential features of a scheme for payment of gratuity. It creates the right to payment of gratuity, indicates when the right will accrue, and lays down the principles for quantification of the gratuity. It provides further for recovery of the amount, and contains an especial provision that compound interest at nine per cent per annum will be payable on delayed payment. For the enforcement of its provisions, the Act provides for the appointment of a controlling authority, who is entrusted with the task of administering the Act. The fulfilment of the rights and obligations of the parties are made his responsibility, and he has been invested with an amplitude of power for the full discharge of that responsibility. Any error committed by him can be corrected in appeal by the appropriate Government or an appellate authority particularly constituted under the Act.

Upon all these considerations, the conclusion is inescapable that Parliament intended that proceedings for payment of gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other. That being so, it must be held that the applications filed by the employee respondents under section 33-C(2)of the Industrial Disputes Act did not lie, and the Labour Court had no jurisdiction to entertain and dispose of them. On that ground, this appeal must succeed."

23. Thus, after taking into consideration the provisions of the Gratuity Act, the Supreme Court found it to be a self contained court having effect over all other laws for the purposes of payment of gratuity to the employees. The next judgment is ***Municipal Corporation of Delhi Vs. Dharam Prakash Sharma (1999) 81 FLR 867 (S.C.).*** The same is a short judgment and paragraph-2 thereof reads:-

"2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which

excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules."

Thus, above clearly shows that despite the MCD adopting the provisions of CCS (Pension) Rules, 1972, the Court found, in view of overriding provisions contained in Section 14 of the Gratuity Act for the purposes of gratuity the Pension Rules will not apply. It also noted that MCD had not taken any steps to invoke power of the Central Government under Section 5 of the Gratuity Act for grant of exemption to it from the provisions of the said Act. In the present case also, counsel for the petitioner fairly admitted that there is no exemption sought by the PCDF or granted by the appropriate Government to it under Section 5 of the Gratuity Act.

24. Again the Gratuity Act came up for comparison in case of ***Y.K. Singla Vs. Punjab National Bank and Others (2013) 136 FLR 1087 (S.C.).*** One of the issues in the said case was as to whether the Gratuity Act or the 1995 Regulations of the bank would be applicable for determining the claim of gratuity. Paragraph-19 and 20 of the said judgment read:-

"19..... .....

A perusal of Section 14 leaves no room for any doubt, that a superior status has been vested in the provisions of the Gratuity Act, vis-à-vis, any other enactment (including any other instrument or contract) inconsistent therewith. Therefore, insofar as the entitlement of an employee to gratuity is concerned, it is apparent that in cases where gratuity of an employee is not regulated under the provisions of the Gratuity Act, the legislature having vested superiority to the provisions of the Gratuity Act over all other provisions/enactments (including any instrument or contract having the force of law), the provisions of the Gratuity Act cannot be ignored. The term "instrument" and the phrase "instrument or contract having the force of law" shall most definitely be deemed to include the 1995

Regulations, which regulate the payment of gratuity to the appellant.

20. Based on the conclusions drawn hereinabove, we shall endeavour to determine the present controversy. First and foremost, we have concluded on the basis of Section 4 of the Gratuity Act, that an employee has the right to make a choice of being governed by some alternative provision/instrument, other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection, namely, that the concerned employee would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his entitlement under the Gratuity Act. Gratuity Act. This protection has been provided through Section 4(5) of the Gratuity Act. Furthermore, from the mandate of Section 14 of the Gratuity Act, it is imperative to further conclude, that the provisions of the Gratuity Act would have overriding effect, with reference to any inconsistency therewith in any other provision or instrument. Thus viewed, even if the provisions of the 1995, Regulations, had debarred payment of interest on account of delayed payment of gratuity, the same would have been inconsequential. The benefit of interest enuring to an employee, as has been contemplated under section 7(3A) of the Gratuity Act, cannot be denied to an employee, whose gratuity is regulated by some provision/instrument other than the Gratuity Act. This is so because, the terms of payment of gratuity under the alternative instrument has to ensure better terms, than the ones provided under the Gratuity Act. The effect would be the same, when the concerned provision is silent on the issue. This is so, because the instant situation is not worse than the one discussed above, where there is a provision expressly debarring payment of interest in the manner contemplated under Section 7(3A) of the Gratuity Act. Therefore, even though the 1995, Regulations, are silent on the issue of payment of interest, the appellant would still be entitled to the benefit of Section 7(3A) of the Gratuity Act. If such benefit is not extended to the appellant, the protection contemplated under section 4(5) of the Gratuity Act would stand defeated. Likewise, even the mandate contained in section 14 of the Gratuity Act, deliberated in detail hereinabove, would stand negated. We, therefore, have no hesitation in concluding, that even though the provisions of the 1995, Regulations, are silent on the issue of payment of interest, the least that the appellant would be entitled to, are terms equal to the benefits envisaged under the Gratuity Act. Under the Gratuity Act, the appellant would be entitled to interest, on account of delayed payment of gratuity (as has already been concluded above). We therefore hold, that the appellant herein is entitled to interest on account of delayed payment, in consonance with sub-Section (3A) of Section 7 of the Gratuity Act. We, accordingly, direct the PNB to pay to the appellant, interest at "...the rate notified by the Central Government for repayment of long term deposits...". In case no such notification has been issued, we are of the view, that the appellant would be entitled to interest, as was awarded to him by the learned Single Judge of the High Court vide order dated 4.5.2011, i.e., interest at the rate of 8%. The PNB is directed, to pay the aforesaid interest to the appellant, within one month of the appellant's furnishing to the PNB a certified copy of the instant order. The appellant shall also be entitled to costs

quantified at Rs.50,000/-, for having had to incur expenses before the Writ Court, before the Division Bench, and finally before this Court. The aforesaid costs shall also be disbursed to the appellant within the time indicated hereinabove."

25. After taking into consideration Section 14 of the Gratuity Act, the Supreme Court again came to the conclusion that provisions of the Gratuity Act would have an over-riding effect over any other provisions of law. Again the matter came up for consideration before the Supreme Court in case of ***Nagar Ayukt Nagar Nigam, Kanpur Vs. Mujib Ullah Khan and another (2019) 161 FLR 503 (S.C.)***. In the said case, the issue as to whether U.P. Municipal Corporation Rules, 1962 would be applicable for payment of Gratuity vis-a-vis the Gratuity Act. The Supreme Court in paragraph-11 and 14, finding that Section 14 of the Act gives an over-riding effect over any other inconsistence provision and any other documents, concluded that the provision of the Gratuity Act would be applicable to the local bodies also. Paragraph-14 of the said judgment reads as follows:-

14. The entire argument of the appellant is that the State Act confers restrictive benefit of gratuity than what is conferred under the Central Act. Such argument is not tenable in view of Section 14 of the Act and that liberal payment of gratuity is in fact in the interest of the employees. Thus, the gratuity would be payable under the Act. Such is the view taken by the Controlling Authority."

26. From all the aforesaid judgments of the Supreme Court it is clear that whenever an issue came before the Supreme Court with regard to applicability of the Gratuity Act vis-a-vis any other law, finding the Gratuity Act to be a special Act having over-riding effect on other laws, the Supreme Court held that the provisions of the Gratuity Act would over-ride any other law.

27. Now coming to the two judgments of the Supreme Court, namely, ***Ghaziyabad Zila Sahkari Bank Limited (Supra)*** and ***P. Rajan Sandhi Vs. Union of India (supra).*** So far as the judgment of the ***Ghaziyabad Zila Sahkari Bank Limited (Supra)*** is concerned, in the said case, the conflict was between the Industrial Disputes Act, 1947 and Co-operative Societies Act. U.P. Industrial Disputes Act, 1947 is a general Act with regard to conditions of services of employees of all the industrial establishments,whereas Co-operative Societies Act is a special Act with regard to one type of such industrial establishments, i.e., Co-operative Societies. But Co-operative Societies Act (1965) deals with all the service conditions of its employees. Well aware of the same, with regard to one of the service conditions, that is payment of gratuity, the legislature thereafter came out with the Gratuity Act in 1972. Therefore, for the subject of payment of gratuity, it is the Gratuity Act which is a special Act. Section 14 read with Section 5 of the Gratuity Act settles that supremacy finally. Further, so far as the judgment in case of ***P. Rajan Sandhi Vs. Union of India (supra)*** is concerned, the reading of the said judgment shows that while considering the same, counsels failed to place Section 14 of the Gratuity Act and the earlier afore-referred judgments of the Supreme Court, on the basis of which all the above judgments are given by the Supreme Court, holding the Gratuity Act to be a special Act.

28. So far as the present case is concerned, the Co-operative Societies Act is an earlier enactment of the year 1965.

Well aware of the provisions of the same, the legislature came out with the Payment of Gratuity Act in the year 1972. Section 14 of the Gratuity Act provides that *"the provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistence therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."* Section 14 is a very widely worded provision. It over-rides all the earlier enactments or instruments/contracts created under them. The only exemption available could be under Section 5 of the Gratuity Act, where power is given to the appropriate Government to grant exemption by way of a notification. Admittedly, no such exemption under Section 5 of the Gratuity Act is notified by the State Government. Thus, it is the provisions of the Gratuity Act which will have an over-riding effect over and above the provisions of Co-operative Societies Act. Similarly, no document or contract, be it the V.R.S. signed by the parties, would come in way of application of the Gratuity Act in view of Section 14 of the same.

29. Lastly a feeble attempt was made to argue that the PCDF is not in financial position to pay the gratuity amount as directed by the competent authority. The payment of gratuity is a statutory responsibility of the petitioner. They cannot simply say that they are not in a financial position to pay the same. It was their statutory duty to make provisions for the same and, hence, this Court cannot interfere with regard to a statutory liability merely on the ground that the petitioner is financially not in a position to pay the same.

30. In view thereof, it is held that it is the Payment of Gratuity Act, 1972 and not the U.P. Co-operative Societies Act, 1965 or Regulations framed thereunder which would be applicable. Any contract, i.e., the signing of the voluntarily retirement scheme or any other instrument would also not come in way, in view of Section 14 of the Gratuity Act, for the purposes of payment of gratuity by the petitioner to the respondent-employees. Hence, no case for interference with the impugned orders and notices is made out.

31. Thus, all these writ petitions having no force, are ***dismissed.***

(2019)11ILR A885

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 79 of 1988

Chhatar Pal & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri N.I. Jafri, Sri Ahmad Saeed, Sri Mohd. Islam.

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A.

A. Evidence Law-Indian Evidence Act, 1872, Indian Penal Code,1860 - Sections 302 & 201 of IPC- homicidal death – Circumstantial evidence – Absence of conclusive and clinching evidence to establish involvement of the appellant in committing the murder of the deceased - While scrutinizing the circumstantial evidence, the Court has to evaluate it to ensure the chain of events is established

clearly and completely to rule out any reasonable doubt as to the innocence of the accused. Suspicion howsoever grave it is, it cannot take place of evidence.

Whether the chain is complete or not, would depend on the facts of each case emanating from the evidence. The evidence adduced by the prosecution is not clinching and conclusive- The accused appellant is entitled to get the benefit of doubt. (Para 2,6,18,21,23)

Appeal allowed. (E-7)

List of cases cited: -

1. Sattatiya @ Satish Rajanna Kartalla Vs St. of Mah.(2008) 3 SCC 210

2. Devi Lal Vs St. of Raj. Criminal Appeal No.148 of 2010

3. Sujit Biswas Vs St. of Assam (2013) 12 SCC 406

4. Raja @ Rajinder Vs St. of Har. (2015) 11 SCC 43

5. Devi Lal Vs St. of Raj. AIR (2019) SC 688

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of the impugned judgement and order dated 07.01.1988 passed by Ist Additional Sessions Judge, Rampur in Sessions Trial No. 194 of 1986 (State Vs. Chhatar Pal and Others), convicting the accused-appellant no. 1 Chhatar Pal under Sections 302 & 201 of IPC, and sentencing him to undergo imprisonment for life under Section 302 and three years rigorous imprisonment under Section 201 of IPC.

2. In the present case, name of the deceased is Kaushalya, wife of appellant no. 1 Chhatar Pal. Their marriage was solemnized about four years prior to the incident and the deceased died homicidal death on 09.05.1986. According to prosecution, accused-appellant Chhatar Pal was having illicit relation with his sister-in-law Jamunia (acquitted accused) and that is why he, with the help of other accused persons, eliminated her. On 09.05.1986, written report Ex.Ka.1 was lodged by PW-1 Gannu Singh, father of the deceased, alleging in it that after about three years of marriage, her daughter was subjected to cruelty by the accused-appellants for demand of dowry, and on 09.05.1986, when he had gone to meet his daughter, she was not there and no satisfactory answer could be given by the appellant and his other family members. Based on this report, offence under Section 364 of I.P.C. was registered against the appellant Chhatar Pal, his father Harkaran, mother Khillo, and sister-in-law Jamunia. Later, on 12.05.1986, dead body of the deceased was found in a sugar cane field of one Mindhai Jatav.

3. Inquest on the dead body of deceased was conducted vide Ex.Ka.4 on 12.05.1986 and the body was sent for postmortem, which was conducted on the same day vide Ex.Ka.2 by Dr. A.K. Garg. However, the autopsy surgeon has not been examined.

4. In the postmortem report, following eight injuries have been found on the body of the deceased:

"1.Incised wound 8cm x 3cm bone deep on the back of right hand.

2. Abrasion 2cm x 1/3cm on middle of upper lip.

3. Abrasion 1cm x ½ cm on left angle of mouth.

4. Abrasion ½ cm x 1/3cm just outer to left nostril of nose.

5. Lacerated wound 1cm x ½ cm x muscle deep on middle of inner side of lower lip.

6. Nose is flattered and fractured.

7. Abrasion on right cheek 1cm x ½ cm.

8.Abrasion 1cm x ½ cm on the inner aspect of right ankle."

Cause of death of the deceased was due to asphyxia as a result of suffocation.

5. While framing charge, the trial Judge has framed charge against Chhatar Pal, Khilloo, Laxmi, Jamuniya and Harkaran under Sections 141/143, 302/149, 201 and 498A of IPC. In addition, separate charge under Section 302 of I.P.C. was also framed against the appellant.

6. So as to hold accused-persons guilty, prosecution has examined seven witnesses. Statements of the accused-persons were also recorded under Section 313 Cr.P.C. in which, they pleaded their innocence and false implication.

7. By the impugned judgment, the trial Judge has convicted accused-appellant Chhatar Pal and his father Harkaran under Sections 302 and 201 of I.P.C. but has acquitted the appellants of all the other offences. The trial judge has further acquitted the other accused persons of all the offences. Hence this appeal.

8. During the pendency of present appeal, accused Harkaran has expired and, therefore, appeal in his respect is dismissed as having become abated. Now, the present appeal confines only in respect of accused-appellant Chhatar Pal.

9. Learned counsel for the appellant submits:

(i) that appellant has been convicted solely on the basis of circumstantial evidence, but the nature of circumstantial evidence is so weak, which cannot be made basis for his conviction.

(ii) that on the basis of same set of evidence, other accused persons have been acquitted and therefore, same treatment ought to have been given to the accused appellant also.

(iii) that there is no evidence on record connecting the appellant in any manner with the murder of the deceased. Likewise, there is no evidence bringing home the offence under Section 201 of I.P.C.

(iv) that the main evidence against the appellant is statement of PW-3 Gajram, but the diary statement of the said witness was recorded after 15-16 days of the incident and, therefore, it creates a doubt as to whether he is a reliable witness or not.

(v) that postmortem report of the deceased has not been proved in accordance with law as the Autopsy Surgeon has not been examined. In absence of examination and cross-examination of Autopsy Surgeon, it cannot be held that the deceased died homicidal death.

10. On the other hand supporting the impugned judgment, it has been argued by the State counsel that the conviction of the appellant is in accordance with law and there is no infirmity in the same. He further submits that as the postmortem report has been admitted by the defence,

therefore, the Autopsy Surgeon was not examined.

11. We have heard counsel for the parties and perused the record.

12. PW-1 Gannu Singh is a father of the deceased, states that accused persons were residing in a joint family and after marriage, whenever he used to visit her daughter, she used to make complaint against the accused persons of harassing her for demand of dowry. He further states that on the date of incident when he had gone to the house of his daughter, she was not there nor any satisfactory answer could be given by the accused persons. After returning home, he lodged a report against the accused persons, based on which, FIR was registered against them. On the 3rd day of lodging the report, dead body of the deceased was found in the sugar cane field.

13. PW-2 Dilbar Singh is a witness of Panchayatnama and he is also the scribe of FIR. He states that he was informed by the deceased that appellant and his family members used to beat her and that they were demanding a Cow.

14. PW-3 Gajram is a neighbour of the appellant, states that on the date of occurrence, when he was in his house, after hearing the cries from the house of his neighbour Harkaran, from his roof top, he saw accused persons beating the deceased Kaushalya and thereafter, she become unconscious. Accused-appellant Chhatar Pal pressed her by a quilt. Here, it is relevant to mention that in Section 161 of Cr.P.C. statement, he has stated that it is the accused Jamuniya, who pressed her. In the cross-examination, he failed to offer any explanation regarding his delayed diary statement and has merely stated that he never informed the Investigating Officer that the incident occurred 15-16 days back.

15. PW-4 Tikaram is a witness of so called extra judicial confession made by deceased-accused Harkaran.

16. PW-5 Babu Ram has stated that after hearing the cries, he asked his nephew to see as to what is happening and then his nephew informed him whatever he saw from his roof top. Thus, he becomes a hearsay witness. His 161 Cr.P.C. statement was also recorded after about 15 days of the incident.

17. PW-6 Shivendra Singh Negi is a first Investigating Officer. PW-7 S.P. Jain is a second Investigating Officer, who filed charge sheet.

18. Close scrutiny of the evidence makes it clear that the marriage of the deceased was solemnized about 4-5 years prior to the incident and she died an unnatural death on 09.05.1986. From the evidence, it also reflects that the deceased was subjected to harassment by all the accused persons. However, there is no conclusive and clinching evidence showing the involvement of the appellant in committing the murder of the deceased.

19. Law in respect of circumstantial evidence is very clear:

In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra1,** the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952

SC 343], which is one of the earliest decisions on the subject, this court observed as under:

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

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

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

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

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

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

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

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

20. Recently, in **Devi Lal vs. State of Rajasthan2** the Supreme Court, while dealing with circumstantial evidence, observed as under:

14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra* 1984 (4) SCC 116.

The relevant excerpts from para 153 of the decision is assuredly apposite:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra* [(1973) 2 SCC 793 where the observations were made:

"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."

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

21. It has further been considered by Apex Court in ***Sujit Biswas Vs. State of Assam 2013(12) SCC 406 and Raja alias Rajinder Vs. State of Haryana*** 2015(11) SCC 43. It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

22. It is further settled position of law that suspicion howsoever grave it is, it cannot take place of evidence. Recently in **Devi Lal vs. State of Rajasthan; AIR 2019 SC 688** the Apex Court, while dealing with a case, observed as under:

"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."

23. In the present case, needle of suspicion definitely goes against the accused persons, but it does not pin point the appellant. As per diary statement of PW-3 Gajram, it is Jamunia, who pressed her by a quilt whereas in the court statement of PW-3, he stated that it is the appellant, who pressed the deceased. Moreover, the statement of PW-3 Gajram and PW-5 Babu Ram have already been disbelieved by the trial court holding that these are not trustworthy witnesses as they were having inimical relations with the accused persons. On the same set of evidence, the trial court has acquitted some of the accused, whereas has convicted the appellant and deceased accused Harkaran. The evidence adduced by the prosecution is not clinching and conclusive and therefore, we find it difficult to uphold the judgment of the trial court. The accused appellant is entitled to get the benefit of doubt.

24. The appeal is, accordingly, **allowed.** The judgment of Trial Court is set aside. Appellant Chhatar Pal is on bail, therefore, no further order is required

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(2019)11ILR A891

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.11.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.

HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 286 of 2002

Ranjeet @ Jamidar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.U. Pandey, Sri R.K. Dwivedi.

Counsel for the Respondent.
Govt. Advocate

A. -Criminal Law-Indian Penal Code,1860 - Criminal appeal against conviction - Section 302 & Section 324 of I.P.C.- culpability of the appellant - Section 32 of the Indian Evidence Act deals with the cases in which statement of relevant facts made by a person who is dead or cannot be found etc., is relevant *viz-a-viz* Section 161 and 162 of Cr.P.C.- the statement recorded by the police under Section 161 of the Cr.P.C., falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act is clearly relevant and admissible - held-the statement of the person recorded under Section 161 can be treated as dying declaration after death - dying declaration is admissible in evidence by virtue of Section 32 of Indian Evidence Act-statement of victim/deceased recorded by Police under Section 161 of Cr.P.C. immediately before her death can be considered as dying declaration - mere delay in sending copy of F.I.R. do not entitle the appellant a benefit of doubt - recovery of *kulhadi* (axe) is not admissible under Section 27 of the Indian Evidence Act - onus to prove the defence was upon the appellant which she has failed to discharge despite opportunity being granted. (Para-16,18,19,22,27,29,31,33)

Appeal dismissed .(E-7)

List of cases cited:-

1. Marudanal Augusti Vs St. of Ker. (1980) SCC (Cri) 985

2. Ishwar Singh Vs The St. of U.P. AIR (1976) SC 2423.

3. Mukeshbhai Gopalbhai Barot Vs St. of Guj. AIR (2010) SC 3692

4. Sri Bhagwan Vs St. of U. P.(2013) 12 SCC 137

5. Nijjam Faraghi @ Nijjam Faruqui Vs St. of W. B. (1998) 2 SCC 45

6. Khushal Rao Vs St. of Bom. (1958) SCR 552
7. Paparambaka Rosamma & ors. Vs St. of A.P**.** (1999) 7 SCC 695

8. Laxman Vs St. of Mah. (2002) 6 SCC 710

9. Laxmi Vs Om Prakash (2001) 6 SCC 118

10. Nallapati Sivaiah Vs S.D.O., Guntur, A.P. (2007) 15 SCC 465

11. Pala Singh & anr. Vs State of Pun. (1972) 2 SCC 640

12. Sarwan Singh & ors. Vs St. of Pun. (1976) 4 SCC 369

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Sri Rajesh Kumar Dwivedi, learned amicus curiae for the appellant and Sri Pankaj Kumar Tiwari, learned Addl. G.A. for the State.

2. This appeal is directed against the judgment and order dated 22nd December, 2001 passed by learned Additional Sessions Judge/Special Judge, Essential Commodities Act, Sultanpur, in Sessions Trial No.353 of 1996 titled as State vs. Ranjeet @ Jamidar, whereby the appellant has been convicted for the offence under Section 302 of the Indian Penal Code (hereinafter referred to as "I.P.C.") and sentenced to undergo rigorous imprisonment for life and to pay fine for a sum of Rs.5,000/-, in default of payment of fine to further undergo rigorous imprisonment for six months. The appellant has also been convicted for the offence under Section 324 of I.P.C. and sentenced to undergo rigorous imprisonment for three years and to pay fine for a sum of Rs.5,000/-, in default of payment of fine to further undergo rigorous imprisonment for six months.

3. The facts as unfolded during trial of the case are that the complainant, Ram Bahadur Yadav S/o Dwarika Prasad lodged a complaint on 15.05.1996, in which, he stated that on the intervening night of 14/15.05.1996 at about 11:00 PM, marriage procession *(barat)* had come to his village, on hearing of yelling of mother of Murali S/o Lal Bahadur, he went towards her house and saw that the appellant, Ranjeet @ Jamidar, who belongs to his village was beating to his *bhabhi*, Shivkali with *kulhadi* (axe) as a result of which she received injuries on her head and stomach, when he tried to separate her, he was also attacked on head by accused, when they cried then Murali, Chhatai and other persons came there and at that time Ranjeet @ Jamidar ran away from the spot.

4. On the basis of the said complaint, the First Information Report (hereinafter referred to as "F.I.R.") No.28 of 1996 for the offence under Sections 324/307 of I.P.C. was recorded as Case Crime No.95 of 1996 at Police Station Munshiganj, District Sultanpur. The same is recorded in general diary as report No.2. During investigation, the injured, namely, Shivkali and Ram Bahadur Yadav were medically examined, statement of injured, Smt. Shivkali was recorded. The injured, Smt. Shivkali died on

15.05.1996, inquest paper was prepared, postmortem got conducted by Dr. C.P. Tiwari at District Hospital Sultanpur. After completion of the investigation, chargesheet for the offence under Sections 302 and 324 of I.P.C. was filed against the appellant. After complying with the provisions of Section 207 of I.P.C., the case was committed to learned Sessions Judge, Sultanpur.

5. After hearing both the parties and considering the record of the case, on 20th November, 1998, learned trial court found sufficient ground to proceed against the appellant, Ranjeet @ Jamidar for the offence punishable under Sections 302 and 324 of I.P.C. The appellant abjured his guilt and claimed trial.

6. In support of its case, the prosecution examined as many as nine witnesses. PW-1, Ram Bahadur Yadav is the complainant, he has proved the complaint as Ex. KA-1. PW-2, Chhotai is an eyewitness, he deposed that marriage procession *(barat)* had come to his house about four years ago in the month of May, marriage procession *(barat)* had come to his house at about 11:00 PM, he heard yelling of Smt. Shivkali widow of Lal Bahadur, he reached at her door and saw that Ranjeet was giving beating to Shivkali with *kulhadi* (axe), when Ram Bahadur Yadav was tired to separate them then Ranjeet inflicted *kulhadi* (axe) on him also, there was a light of lamp on the door of Shivkali, Murali also reached there, who saw the incident, Murali is the elder son of Smt. Shivkali, he identified accused/appellant, Ranjeet who inflicted injuries on the head and stomach of Shivkali and Ram Bahadur received two injuries, Ram Bahadur and Ram Shankar took Shivkali to Police Station and case was registered and Shivkali was sent to District Hospital where she died at about 9:00 AM. PW-3, Dr. A.P. Mishra from District Hospital, Sultanpur, who medically examined the injured, namely, Smt. Shivkali and Ram Bahadur Yadav, he has proved the medical report of Shivkali as Ex. KA-2 and medical report of Ram Bahadur Yadav as Ex. KA-3, he disclosed five injuries on the body of of deceased Shivkali and two injuries on the body of Ram Bahadur Yadav and the injured Shivkali was in serious and shocked position. PW-4, S.I. Ramvali Pandey is the Investigating Officer, he has deposed that on 15.05.1996, investigation was handed over to him, he recorded statement of injured, Smt. Shivkali W/o Lal Bahadur, which is Ex. KA-4, thereafter, he recorded statement of Ram Bahadur Yadav and statement of Murali, he inspected the spot and prepared the site plan which is Ex. KA-5 and recorded the statement of Vasudev Yadav and Chhotelal who are the witnesses of recovery, S.O. Ajeet Kumar Singh seized bloodstained soil and plain soil vide seizure memo as Ex. KA-6, which wears his signature. PW-5, Dr. C.P. Tiwari, who conducted autopsy on the body of the deceased, Smt. Shivkali, he has deposed that on 15.05.1996 at about 5:00 PM he conducted autopsy on the body of Shivkali W/o Lal Bahadur, he has proved the postmortem report as Ex. KA-7, he opined the cause of death due to coma shock and hemorrhage as a result of anti-morterm injuries and injuries No.3 and 4 were possible with *kulhadi* (axe). PW-6, Ajeet Kumar Singh was working as S.O. Munshiganj, on 15.05.1996, he has deposed that Case Crime No.95 of 1996 under Sections 324/307 of I.P.C. was registered in his presence and the investigation was handed over to S.I.

Ramvali Pandey, he along with Ramvali Pandey reached the spot and bloodstained soil, plain soil and *kulhadi* (axe) were seized vide seizure memo as Ex. KA-6, he has also deposed that on 16.05.1996 after the death of Smt. Shivkali, Section 302 of I.P.C. was added and the investigation was taken over by him, he recorded statements of Constable Dinesh Chandra Mishra and Ashok Kumar Singh and statement of Chhotai, he made efforts to arrest the accused but he was not traceable, on 19.05.1996, copy of *panchnama* and copy of postmortem report were kept on the file, on 01.06.1996, statement of S.I. M.P. Singh who prepared *panchnama* was recorded and other proceedings were conducted on 12.06.1996 and the recovered article from the spot were sent to FSL through Kailash Nath Katiyar on 05.06.1996, on 26.06.1996, remand of accused was obtained and chargesheet was prepared which is Ex. KA-8. He has also proved *kulhadi* (axe) as Ex.-1, which was recovered from the spot. PW-7, S.I. Mahendra Pratap Singh has proved the *panchnama* (inquest report) as Ex. KA-9 he has also deposed that he obtained R.I. papers, photographs of the body, challan vide seizure memo as Ex. KA-10 to Ex. KA-14. PW-8 C.P. Ashok Kumar Singh who recorded report No.12 at 9:15 Hrs on 16.05.1996 copy of which is Ex. KA-15. PW-9 HC Salik Ram Pandey who recorded the chick F.I.R., he has proved copy of F.I.R. as Ex. KA-16, he recorded Report No.2 at 2:30 PM on 15.05.1996 in the rojnamacha copy of which is Ex. KA-17.

7. After completion of prosecution evidence, Statement of the appellant/accused under Section 313 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") was recorded. The appellant denied complicity in the crime and pleaded false implication. He stated that on the night of the incident, he was in the house of his relative at Village Jalalpur and said that before incident his bhabhi (Shivkali) has complained that Ram Bahadur keeps bad eyes at her due to that he had scolded Ram Bahadur and further stated that Ex.-1, *kulhadi* (axe) was of the Ram Bahadur. Ram Bahadur had tried to rape his bhabhi. He is falsely implicated because he had opposed Ram Bahadur. The appellant choose not to lead defence evidence.

8. After appreciating evidence and considering the rival contentions of the parties, learned trial court found the appellant to be guilty having committed the offence under Sections 302/324 of I.P.C. and convicted the appellant for the same and sentenced him vide impugned judgment and order dated 22.12.2001.

9. Being aggrieved by the impugned judgment and order dated 22.12.2001, the appellant preferred the present criminal appeal.

10. Learned amicus curiae for the appellant contended that Smt. Shivkali died after about 4-5 Hrs of the incident but no dying declaration was recorded, the statement of injured recorded under Section 161 of Cr.P.C. cannot be treated as a dying declaration. The deceased Shivkali was not in a position to give any statement.

11. Learned amicus curiae for the appellant also urged that there is an inordinate delay in lodging the F.I.R., the incident occurred at about 11:00 PM on 14.05.1996, the complainant Ram

Bahadur Yadav had received injuries and was not in a position to lodge the complaint and the F.I.R. was recorded on 15.05.1996 at 2:30 AM; the injured Smt. Shivkali died in District Hospital, Sultanpur on 15.05.1996 at 9:00 AM and the case was converted to Section 302 read with Section 324 of I.P.C. on 16.05.1996; the copy of F.I.R. was not forwarded to Ilaka Magistrate forthwith. Learned amicus curiae for the appellant also submitted that there is delay in conducting the inquest report. Crime number is not mentioned on the inquest report which creates suspicion that the F.I.R. was not in existence at the time of inquest report. In this regard, reliance was placed upon in the case of **'Marudanal Augusti vs. State of Kerala',** 1980 SCC (Cri) 985 and **'Ishwar Singh vs. The State of Uttar Pradesh'**, AIR 1976 SC 2423.

12. Learned amicus curiae for the appellant further submitted that the weapon of offence i.e., *kulhadi* (axe) was not produced before the trial court and not shown to autopsy surgeon to seek whether the injuries to be caused by the said weapon or not; learned amicus curiae for the appellant also submitted that the prosecution has not been examined material witnesses, namely, Murali and Chhatai (who were the eye witnesses of the incident) and Chhotelal, Jokhuram and Vasudev (who were the witnesses of recovery), which creates suspicion in the case of prosecution; there are contradictions in the testimony of prosecution witnesses; there is no recovery of bloodstained clothes of the appellant. In this regard, reliance was placed upon in the case of **'Ishwar Singh vs. The State of Uttar Pradesh',** AIR 1976 SC 2423.

13. Learned Addl. G.A. refuting the submission of learned amicus curiae for the appellant and submitted that the trial court has rightly analyzed the evidence on record and committed no error; the statement of injured Smt. Shivkali (who later on died) was recorded by PW-4, S.I. Ramvali Pandey on 15.05.1996 and the same is admissible in evidence and appellant/accused can be convicted on the basis of said dying declaration.

14. We have given our anxious thought to the submissions made by learned amicus curiae for the appellant and learned Addl. G.A. for the State and have carefully perused the material on record.

15. The main thrust of the submissions of learned amicus curiae for the appellant is that the statement of injured cannot be treated as dying declaration since death occurred at 9:00 AM on 15.05.1996 that is after about 10 Hrs. of the incident.

16. Before proceeding to examine the culpability of the appellant before us, in the conspectus of the facts, it would be worthwhile to consider the relevant provisions of Section 32 of the Indian Evidence Act. Section 32 of the Indian Evidence Act deals with the cases in which statement of relevant facts made by a person who is dead or cannot be found etc., is relevant *viz-a-viz* Section 161 and 162 of Cr.P.C. Section 32 of the Indian Evidence Act reads as under:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-- *Statements, written or verbal, of relevant facts made by a person who is dead, or*

who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:--

(1) When it relates to cause of death.--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

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17. Chapter XII of the Cr.P.C. contains Sections 161 and 162 of the Cr.P.C. Section 161 of the Cr.P.C. deals with examination of witnesses by Police. Section 162 of the Cr.P.C. deals with "statements to Police not to be signed: use of statements in evidence". Sections 161 and 162 of the Cr.P.C. read as under:-

***"161. Examination of witnesses by police.**--(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

[Provided that statement made under this sub-section may also be recorded by audio-video electronic means:]

[Provided further that the statement of a woman against whom an offence under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, [Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB], Section 376-E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.]

***162. Statements to police not to be signed: Use of statements in evidence.--**(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:*

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.--An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

18. Thus, from a bare reading of sub-Section(2) to Section 162 of Cr.P.C. it is clear that sub-Section(2) is an exception to what has been laid down in sub-Section (1). Therefore, the statement recorded by the police under Section 161 of the Cr.P.C., falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act is clearly relevant and admissible.

19. In **'Mukeshbhai Gopalbhai Barot vs. State of Gujarat'**, AIR 2010 SC 3692, the Hon'ble Supreme Court considered the provisions of Sections 161 and 162 of the Cr.P.C. and Section 32 of the Indian Evidence Act. In the said case, the victim, who received burn injuries on 14.09.1993 was admitted to Ahmedabad Civil Hospital, her statement was recorded by the Executive Magistrate and by the Police. The statement recorded by the Police under Section 161 of the Cr.P.C. was discarded by the High Court taking the view that it had no evidentiary value. The said view of the High Court was not accepted by the Hon'ble Supreme Court. It was held that the statement of the person recorded under Section 161 can be treated as dying declaration after death. The relevant paragraphs -4 and 5 read as under:-

"4. We have considered the arguments advanced by the learned counsel for the parties. At the very outset, we must deal with the observations of the High Court that the dying declarations Exs.44 and 48 could not be taken as evidence in view of the provisions of Section 161 and 162 of the Cr.P.C. when read cumulatively. These findings are, however, erroneous. Sub-section (1) of Section 32 of the Indian Evidence Act, 1872 deals with several situations including the relevance of a statement made by a person who is dead. The provision reads as under:

Sec.32. Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured

without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

We see that the aforesaid dying declarations are relevant in view of the above provision. Even otherwise, Section 161 and 162 of the Cr.P.C. admittedly provide for a restrictive use of the statements recorded during the course of the investigation but sub-section (2) of Section 162 deals with a situation where the maker of the statement dies' and reads as under:

"(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

5. A bare perusal of the aforesaid provision when read with Section 32 of the Indian Evidence Act would reveal that a statement of a person recorded under Section 161 would be treated as a dying declaration after his death. The observation of the High Court that the dying declarations Ex.44 and 48 had no evidentiary value, therefore, is erroneous. In this view of the matter, the first dying declaration made to the Magistrate on 14th September 1993 would, in fact, be the First Information Report in this case."

20. In another case of '**Sri Bhagwan vs. State of Uttar pradesh',** (2013) 12 SCC 137, while considering the provisions of Section 161 of the Cr.P.C. and Section 32 of the Indian Evidence Act, the Hon'ble Supreme Court observed as under:-

"20. While keeping the above prescription in mind, when we test the submission of the learned counsel for the appellant in the case on hand at the time when Section 161 CrPC statement of the deceased was recorded, the offence registered was under Section 326 IPC having regard to the grievous injuries sustained by the victim. PW 4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW 4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under Section 161 CrPC. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent counsel merits acceptance.

21. Mr Ratnakar Dash, learned Senior Counsel made a specific reference to Section 162(2) CrPC in support of his

submission that the said section carves out an exception and credence that can be given to a Section 161 CrPC statement by leaving it like a declaration under Section 32(1) of the Evidence Act under certain exceptional circumstances. Section 162(2) CrPC reads as under:

"162. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act."

22. Under Section 32(1) of the Evidence Act it has been provided as under:

*"**32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.**--Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:*

***(1) When it relates to cause of death.**--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

23. Going by Section 32(1) of the Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the extraordinary credence attached to such statement falling under Section 32(1) of the Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration.

24. As far as the implication of Section 162(2) CrPC is concerned, as a proposition of law, unlike the excepted circumstances under which Section 161 CrPC statement could be relied upon, as rightly contended by the learned Senior Counsel for the respondent, once the said statement though recorded under Section 161 CrPC assumes the character of dying declaration falling within the four corners of Section 32(1) of the Evidence Act, then whatever credence that would apply to a declaration governed by Section 32(1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 CrPC. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such."

21. In the case of **'Nijjam Faraghi alias Nijjam Faruqui vs. State of West**

Bengal', (1998) 2 SCC 45, the kerosene oil was poured on the victim and she was put on fire on 13.06.1985, she died on 31.07.1985. The Hon'ble Supreme Court after referred to the provisions of Section 32 of the Indian Evidence Act held that mere fact that the victim died long after making the dying declaration, said statement does not loose its value. The relevant paragraph of the said judgment reads as under:-

"9. There is no merit in the contention that the appellant's wife died long after making the dying declarations and therefore those statements have no value. The contention overlooks the express provision in Section 32 of the Evidence Act. The second paragraph of sub-section (1) reads as follows:

"Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

No doubt it has been pointed out that when a person is expecting his death to take place shortly he would not be indulging in falsehood. But that does not mean that such a statement loses its value if the person lives for a longer time than expected. The question has to be considered in each case on the facts and circumstances established therein. If there is nothing on record to show that the statement could not have been true or if the other evidence on record corroborates the contents of the statements, the court can certainly accept the same and act upon it. In the present case both courts have discussed the entire evidence on record and found that two dying declarations contained in Exs. 5 and 6 are acceptable."

22. Law of dying declaration is, by now, almost settled that dying declaration is admissible in evidence by virtue of Section 32 of Indian Evidence Act. In the case of **"Khushal Rao v. State of Bombay",** 1958 SCR 552 it is held that :-

"xxxxx This provision has been made by the Legislature, advesedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence, which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the Legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death has been accorded by the Legislature a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence o show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man,

when his power of resistance against telling a falsehood was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction."

23. In **"Paparambaka Rosamma and Others v. State of A.P.",** (1999) 7 SCC 695 it has been observed that where conviction is solely based on the dying declaration, the Court has to consider carefully the dying declaration and the evidence of the witnesses supporting it. Case should be taken to ensure whether it is established that the dying declaration was genuine, true and free from doubts and was recorded when the injured was in a fit state of mind.

24. In the case of **"Laxman Vs. State of Maharashtra"** (2002) 6 SCC 710, the Constitution Bench of Hon'ble Court has held thus:-

"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 hold 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."

25. In **"Laxmi V. Om Prakash",** (2001) 6 SCC 118, the Supreme Court has pointed out that the admissibility of the dying declaration rests on the principle of necessity. The principles thereof have been culled out in the following terms in paras 28 and 29 of the pronouncement which shed valuable light on the issue under examination in the present case and read as follows:-

"29. A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances (see Tapinder Singh v. State of Punjab, 1970 CriLJ 1415). One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it. In Bhagwan Das v. State of Rajasthan (1957) 1 SCR 854, the learned Sessions Judge found inter alia that it was improbable if the maker of the dying declaration was able to talk so as to make a statement. This Court while upholding the finding of the learned Sessions Judge held the dying declaration by itself insufficient for sustaining a conviction on a charge of murder. In Kako Singh @ Surender Singh v. State of M.P. 1982 CriLJ 986, the dying declaration was refused to be acted upon when there was

no specific statement by the doctor that the deceased after being burnt was conscious or could have made a coherent statement. In Darshan Singh v. State of Punjab 1983 CriLj 985, this Court found that the deceased could not possibly have been in a position to make any kind of intelligible statement and therefore said that the dying declaration could not be relied on for any purpose and had to be excluded from consideration. In Mohar Singh v. State of Punjab 1981 CriLJ 998, the dying declaration was recorded by the investigating officer. This Court excluded the same from consideration for failure of the investigating officer to get the dying declaration attested by the doctor who was alleged to be present in the hospital or anyone else present."

26. In the pronouncement in the case of **"Nallapati Sivaiah Vs. Sub Divisional Officer, Guntur, Andhra Pradesh"**, reported as (2007) 15 SCC 465 the Supreme Court ruled thus:-

*"28. In **K. Ramachandra Reddy v. Public Prosecutor** [(1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994] the Court having noticed the evidence of PW 20 therein who conducted the post-mortem that there were as many as 48 injuries on the person of the deceased out of which there were 28 incised wounds on the various parts of the body including quite a few gaping incised injuries, came to the conclusion that in view of those serious injuries it was difficult to believe that the deceased would have been in a fit state of mind to make a dying declaration. It was also a case where the Magistrate did not put a direct question to the injured whether he was capable mentally to make any statement. In the circumstances this Court came to the conclusion that the Magistrate committed a serious irregularity in "not putting a direct question to the injured whether he was capable mentally to make any statement". It has been observed that even though the deceased might have been conscious in the strict sense of the term,*

"there must be reliable evidence to show, in view of his intense suffering and serious injuries, that he was in a fit state of mind to make a statement regarding the occurrence".

The certificate issued by the doctor that the deceased was in a fit state of mind to make statement by itself would not be sufficient to dispel the doubts created by the circumstances and particularly the omission by the Magistrate in not putting a direct question to the deceased regarding the mental condition of the injured.

xxxxxxx"

27. Reverting back to the facts of the present case, statement of victim/deceased recorded by Police under Section 161 of Cr.P.C. immediately before her death can be considered as dying declaration. In the present case, the incident occurred at 11:00 PM, F.I.R. was recorded at 2:30 AM and thereafter, the injured was taken to District Hospital, Sultanpur. The delay of three and a half hours in lodging F.I.R. cannot be said to be inordinate delay and thus, this submission of the appellant does not hold any water.

28. The deceased Smt. Shivkali was medically examined by P.W.-3, Dr. A.P. Misra in District Hospital, Sultanpur on 15.05.1996 at 05:00 AM and found following injuries:-

"1. Incised wound L shaped 6 cm x 3 cm x 0.2 cm on the scalp mid line 6 cm above the eyebrow. Wound is bone deep. Moy is clear cut blooding stopped.

2. I.W. 3 cm x 0.2 cm above the left eyebrow on the forehead left side muscle deep. Blooding stopped Moy is clear cut.

3. I.W. 1.5 cm x 0.1 cm cut on the forehead right side 2 cm above the eyebrow. Muscle deep. Blooding stopped.

4. Incised Wound 10 cm x 2 cm on the abdomen in the epigastrium, depth could not be measured blood stopped externally.

5. Stabs wound 1 cm x 0.5 cm on the abdomen 2 cm away from navel depth could not be measured, omentum coming out."

Doctor opined that injuries No.1 to 5 are caused by sharp and cutting edged object. Injury No.1, 4 and 5 were kept in observation and x-ray of skull, abdomen was advised; rest all injuries are simple. In the MLC, it is mentioned that the patient was in shock and was admitted in hospital. Later on, Smt. Shivkali died at about 09:00 AM on 15.05.1996.

29. As regards, the delay in sending the copy of F.I.R. to the Senior Officer, it is well settled law that mere delay in discharge of the F.I.R., is not a circumstance which can throw out the prosecution case in its entirety. In this regard, reliance can be placed on judgment in the case of **'Pala Singh and another vs. State of Punjab'**, (1972) 2 SCC 640 and in the case of **'Sarwan Singh and others vs. State of Punjab',** (1976) 4 SCC 369. Though, there is a delay in sending copy of F.I.R. to senior officers, however, in view of the law laid down in the aforesaid judgments, mere delay in sending copy of F.I.R. do not entitle the appellant a benefit of doubt.

30. So far as non-examination of prosecution witness Murali is concerned, it may be mentioned that it has come in the testimony of Chottai (PW-2) that Murali is not traceable. Hence, non-examination of Murali is of no consequence.

31. Further, it is true that the recovery of *kulhadi* (axe) is not admissible under Section 27 of the Indian Evidence Act because the *kulhadi* was not recovered at the instance of the appellant/accused. In this case, *kulhadi* was recovered from the spot on 15.05.1996 and the same was seized vide seizure memo Ex. KA-6. The appellant was not arrested at the spot and rather he surrendered on 30.05.1996 and was remanded to judicial custody by Ist Additional Chief Judicial Magistrate. Moreover the *kulhadi* was not shown to the Doctor who conducted the autopsy on the body of the deceased. However, other circumstantial evidences have to be considered for extending the benefit of doubt, if any, to the appellant/accused. In the present case, it is clear that the cut injuries could be by axe. The fact that the weapon was neither shown to the doctor nor was shown to the appellant during cross-examination is not of much consequence as there is clear medical evidence regarding the injury being caused by knife, axe and battle axe.

32. Another submission made by learned amicus curiae for the appellant is that PW-1, Ram Bahadur Yadav was having an evil eye on the deceased, Smt. Shivkali (*bhabhi* of the accused) and the appellant used to oppose the same; on the date of incident, Ram Bahadur Yadav had visited the house of deceased and wanted to commit rape which was opposed by her and, therefore, PW-1, Ram Bahadur Yadav committed murder of the deceased, Smt. Shivkali.

33. In case version of the appellant is believed that Ram Bahadur Yadav was having an evil eye of the deceased and on the date of incident he visited the house of the deceased to rape her, it is unbelievable that a person visiting the house of victim with an intention to rape her with carry an axe with him. Even if, he is carrying it, we are unable to apprehend as to how the fact of intention of Ram Bahadur Yadav of committing rape upon the deceased came into the knowledge of the appellant. Moreover, as per MLC Ram Bahadur Yadav also received injuries on her body. It is also worth-mentioning here that the deceased named the appellant in the F.I.R. which after her death is also considered as her dying declaration. Thus, in case it was Ram Bahadur Yadav to went to commit rape upon her, there is no reason for the deceased to falsely implicate the appellant by naming him in her statement under Section 161 of Cr.P.C. The appellant has also failed to show any reason as to why Ram Bahadur Yadav (PW-1) or the Investigating Officer would have falsely implicated the appellant as there is no previous enmity between them. Also, onus to prove the defence was upon the appellant which she has failed to discharge despite opportunity being granted.

34. Thus, in the facts and circumstances of the case, the present appeal is devoid of any merit, same deserves to be dismissed and the same is hereby **dismissed.** The fees of Sri Rajesh Kumar Dwivedi, learned amicus curiae is fixed at Rs.10,000/- (rupees ten thousand only).

35. The trial court record along with copy of this judgment be sent back forthwith.

36. A copy of this judgment be also sent to the appellant through Superintendent Jail concerned.

(2019)11ILR A905

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 325 of 1990

Gurnam Singh ...Appellant (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Mohd.Shahanshah Alam Ansari (A.C.)

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A.

A. Criminal Law-Indian Penal Code,1860 - Section 302 of IPC - single gunshot injury to the deceased - Statements of the accused-appellant recorded under Section 313 of Cr.P.C. - three eyewitnesses, i.e. PW-1, PW-2 and PW-3 duly supported the prosecution case - Postmortem report of the deceased also supports the prosecution case where number of pellet injuries have been found on the body of the deceased - at the instance of the appellant, gun was seized which has also been proved by the prosecution - the statement of eye-witnesses, complicity of the appellant in commission of offence duly proved by the prosecution - entire chain of events did not occur in a spur of moment or during sudden quarrel - no evidence to suggest that it is the deceased who initiated any hot-talk - Demanding back his due from the appellant would under no circumstance be termed as quarrel on the part of the deceased or provocation from his side - Instead

returning the due amount to the deceased or giving him any assurance, the appellant adopted a drastic approach and killed him - the case of the appellant would not fall under any Exception of Section 300 of IPC - the trial court was justified in convicting the appellant under Section 302 of IPC. (Para-16,17,18)

Criminal Appeal dismissed (E-7)

List of cases cited: -

1. K.M. Nanavati Vs St. of Mah. AIR (1962) Supreme Court 605

2. Dhirajbhai Gorakhbhai Nayak Vs St. of Guj. (2003) 9 SCC 322

3. Bavisetti Kameswara Rao Vs St. of A.P. Rep. by its Public Prosecutor High Court of A.P., Hyderabad, (2008) 15 SCC 725

4. Guru Dev Singh Vs St. of M.P., (2011) 5 SCC 721

5. Dhirendra Kumar @ Dhiroo Vs St. of Uttarakhand, (2015) 89 ACC 623

6. The St. of U.P. Vs Faquirey, (2019) 5 SCC 605

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 12.2.1990 passed by the IInd Additional District & Sessions Judge, Muzaffarnagar in Sessions Trial No. 8 of 1987, convicting the appellant under Section 302 of IPC and sentencing him to undergo rigorous imprisonment for life.

2. In the present case, name of the deceased is Santokh Singh, who had advanced Rs.4,000/- to appellant-Gurnam Singh on credit basis and on 29.9.1986, at about 11.30 am, when deceased demanded back his money, there was altercation between the two and then it is said that the appellant caused single gunshot injury to the deceased, resulting his death. Incident has been witnessed by Gurubachan Singh (PW-1), brother-in-law of the deceased, Jogendra Kore (PW-2), wife of the deceased and Shravan Singh (PW-3). On the basis of written report Ex.Ka.2 lodged by Gurubachan Singh (PW-1), FIR Ex.Ka.3 was registered at 02.15 pm against the appellant under Section 302 of IPC.

3. Inquest on the dead body of the deceased was conducted vide Ex.Ka.7 and the body was sent for postmortem, which was conducted vide Ex.Ka.6 on 30.9.1986 by Dr. B.K. Agrawal. As the postmortem report was admitted by the defence at the stage of trial, Autopsy Surgeon has not been examined. As per postmortem report, following injuries were found on the body of the deceased:

"(1) One gunshot wound of entry 6 mm x 6 mm x muscle deep on the (L) forehead 1 cm above eyebrow.

(2) Two gunshot wounds of entry 6 mm x 6 mm x muscle deep on the (R) side of nose and upper lip 4 cm away from each other.

(3) Multiple gun shot wound of entry in a area of 44 cm x 33 cm on the (R) neck (R) Chest (R) Abdomen. Each measuring 6 mm x 6 mm to 1 cm x 1 cm at varying distance of each other. All are skin to cavity - deep.

(4) Multiple gun shot wound of entry in a area of 45 cm x 9 cm on the outer frontal aspect of (R) upper limb. Each measuring 6 mm x 6 mm to 1 cm x 1 cm at varying distance of each other.

(5) Three gun shot wounds of entry on the top of (L) shoulder each measuring 6 mm x 6 mm x muscle deep in a area of 4 cm x 4 cm.

(6) Two gun shot wound of entry on the (L) Chest (one at level of (L) nipple laterally 1 cm away 9' O clock point and other one 8 cm above) Each measuring 6 mm x 6 mm x muscle deep.

Margins of all above injury are inverted blackening and tattooing absent. Direction from above downward backward."

According to Autopsy Surgeon, cause of death of the deceased was shock and haemorrhage as a result of injury described.

4. While framing charge, the trial judge has framed charge against the appellant under Section 302 of IPC.

5. So as to hold appellant guilty, prosecution has examined seven witnesses, whereas four defence witnesses have also been examined. Statements of the accused-appellant was recorded under Section 313 of Cr.P.C. in which, he pleaded his defence that the firearm injury was caused by his father and that too, while exercising the right of private defence.

6. By the impugned judgement, trial judge has convicted the appellant under Section 302 of IPC and sentenced him as stated in para no.1 of this judgement. Hence, this appeal.

7. Learned counsel for the appellant submits:

(i) that Gurubachan Singh (PW-1), Jogendra Kore (PW-2) and Shravan Singh (PW-3) are not reliable witnesses and they have falsely implicated the appellant.

(ii) that it is the deceased, who came to the house of the appellant and had burnt his hutment and in self defence, father of the appellant caused gunshot injury resulting unfortunate death of the deceased. Learned counsel submits that the appellant had nothing to do with the incident and he has been falsely implicated.

(iii) that even if the entire prosecution case is taken as it is, appellant cannot be convicted for committing the murder of the deceased and at best, he is liable to be convicted under Section 304 Part-I or Part-II of I.P.C.

8. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that conviction of the appellant is in accordance with law and there is no infirmity in the same. He submits that there is absolutely no evidence on record to suggest that it is the father of the appellant, who caused gunshot injury to the deceased.

9. We have heard learned counsel for the parties and perused the record.

10. Gurubachan Singh (PW-1), is a brother-in-law of the deceased and the informant. He states that marriage of his sister Jogendra Kore (PW-2) was solemnized with the deceased and that since last five years, he was residing with his brother-in-law. There was a sale agreement between the appellant and the deceased, and the appellant had taken Rs.8,000/- as advance from the deceased. When appellant had not executed the sale deed, deceased demanded back his money but despite assurance, the same was refused. On the date of incident, at about

11.30 am, when he, his sister and the deceased were going towards the market, on the way, deceased met the appellant and demanded back his Rs.4,000/-. However, instead of giving the amount, appellant started abusing the deceased and returned back to his house and soon thereafter, he came out from his house along with his gun, climbed up on his terrace and then caused gunshot injury to the deceased resulting his death. In cross-examination, this witness remained firm and nothing could be elicited from him and rather he has reiterated that after altercation, the appellant went inside his house, returned back along with his gun, climbed up on his terrace and then caused gunshot injury to the deceased.

11. Jogendra Kore (PW-2) is a wife of the deceased. Her statement is almost similar to that of Gurubachan Singh (PW-1). She too has categorically stated that her husband demanded back his money from the appellant; there was altercation between them, the appellant went inside his house, came out along with his gun and strip of cartridges, climbed up on his terrace and then caused gunshot injury to the deceased. In cross-examination, she too remained firm. She has categorically denied the fact that any hutment of the appellant was burnt by anyone.

12. Shravan Singh (PW-3) is another eye-witness to the incident, has also supported the prosecution case and stated that there was altercation between the appellant and the deceased and when deceased demanded back his money. The appellant went on his terrace, exhorted from there and then caused gunshot injury to the deceased resulting his death.

13. Virendra Singh (PW-4) recorded the First Information Report. Satish Kumar (PW-5) took the body for post-mortem and Bharat Singh (PW-6), is a witness of inquest.

14. Rajendra Singh Yadav (PW-7) is the Investigating Officer, has duly supported the prosecution case. The Investigating Officer has also proved the recovery of gun seized from the possession of the appellant.

15. Sheoraj (DW-1) has stated that the hutment of the father of appellant was burnt by the deceased and in self defence, the firearm injury was caused by the father of the deceased.

16. Close scrutiny of evidence makes it clear that the appellant had taken some amount from the deceased for executing a sale deed and there was dispute between the two. The deceased used to demand his money back from the appellant, which was repeatedly refused by him and on the date of incident, in presence of Gurubachan Singh (PW-1), Jogendra Kore (PW-2) and Shravan Singh (PW-3), the deceased again demanded back his money, but instead giving the same, appellant went inside his house, came out along with his gun and strip of cartridges, climbed up on his terrace and after exhorting, caused gunshot injury to the deceased. All the three eye-witnesses, i.e. PW-1, PW-2 and PW-3 have duly supported the prosecution case. Postmortem report of the deceased also supports the prosecution case where number of pellet injuries have been found on the body of the deceased. Furthermore, at the instance of the appellant, gun was seized which has also been proved by the prosecution. Considering the statement of eye-witnesses, complicity of the appellant in commission of offence has been duly proved by the prosecution.

17. True it is, that present appears to be a case of single gunshot injury but the fact remains that after altercation, appellant had sufficient time to cool down. However, he went inside his house, came out from the same carrying a gun in his hands, climbed up on his terrace, exhorted from there and thereafter caused gunshot injury to the deceased. The Supreme Court in the case of **K.M. Nanavati vs. State of Maharashtra1** held as under:

"84. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation ? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

85. The Indian law, relevant to the present enquiry, may be stated thus : (1) The test of "graveand sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to Section 300of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

In **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat2,** the Supreme Court held as under:

"10. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

11. The fourth exception of Section 300, IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to

deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPCis not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

In **Bavisetti Kameswara Rao vs. State of A.P. Rep. by its Public Prosecutor High Court of A.P., Hyderabad3,** the Supreme Court held as under:

"13. It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of a single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was pre-meditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screw driver, the learned counsel urged that it was only an accidental use

on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screw driver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.

17. We also do not accept the contention of the learned counsel for the defence which was raised only by way of a desperate argument that the incident was sudden and it was without any premeditation, thereby the learned counsel wanted to bring the evidence under Section 304 Part I. In short the counsel aimed at Exception I of Section 300IPC. Exception 4 was also sought to be relied upon. We do not think the evidence available would warrant the offence covered by Exception 1 as there was no such grave and sudden provocation on the part of the deceased. Similarly it was not a case of sudden fight in the heat of passion nor was it a case of sudden quarrel without the offender having taken undue advantage or acted in a cruel or unusual manner. There is evidence on record to suggest that there was a previous altercation and the accused persons were seething in anger to take the revenge of the incident which had taken place on 27th of the same month. Further, it was only after the deceased came in front of the shop of the accused on his motorbike, first there was an exchange of abuses and it was then that the incident took place where not only the accused but even the second accused is proved to have attacked the deceased. This could not, therefore, be a case of a sudden fight. Therefore, the question of application of Section 304 Part I is also ruled out."

In **Guru Dev Singh vs. State of M.P.4,** the Supreme Court held as under:

"26. With regard to law dealing with Exception 1 toSection 300we may refer to *K. M. Nanavati v. State of Maharashtra* reported in AIR 1962 SC 605 in which this Court held that the following conditions must be complied with for the application of Exception 1 toSection 300of the IPC:

"(1) the deceased must have given provocation to the accused,

(2) the provocation must be grave,

(3) the provocation must be sudden,

(4) the offender, by reason of the said provocation, shall have been deprived of his power of self-control,

(5) he should have killed the deceased during the continuance of the deprivation of the power of self-control, and

(6) the offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident."

27. With regard to Exception 4 to Section 300we may refer to *Kulesh Mondal v. The State of West Bengal* reported in (2007) 8 SCC 578 in which this Court held: (SCC p. 581, paras 12-13).

"12. The residuary plea relates to the applicability of Exception 4 to Section 300IPC, as it is contended that the incident took place in course of a sudden quarrel.

13. For bringing it in operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not

having acted in a cruel or unusual manner."

28. In *Babulal Bhagwan Khandare & Anr. v. State of Maharashtra reported in (2005) 10 SCC 404*, this Court detailed the law relating to Exceptions 1 and 4 to Section 300IPC in the following terms: (SCC pp. 410-11, paras 17-19)

"17. The Fourth Exception to Section 300IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution (sic provocation) not covered by the First Exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1.

18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

19. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan* reported in 1993 4 SCC 238,it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were

likely to cause death he had taken undue advantage".

In **Dhirendra Kumar @ Dhiroo vs. State of Uttarakhand5,** the Supreme Court held as under:

"15. Question whether a case falls under Section 302or 304 has to be decided from case to case depending on factors like the circumstances in which the incident takes place, the nature of weapon used and whether weapon was carried or was taken from the spot and whether the assault was aimed on vital part of the body; the amount of force used; whether the deceased participated in the sudden fight; whether there was any previous enmity; whether there was any sudden provocation; whether the attack was in the heat of passion; whether the person inflicting the injury took any undue advantage or acted in a cruel or unusual manner. The list of circumstances is not exhaustive and there may be several other circumstances with reference to individual cases. Applying these tests to the present case, we are unable to accept the defence on behalf of the appellant. It was a case of previous enmity and the nature of injury suggests intention to cause death or a fatal injury on a vital part of the body with full force sufficient to cause death. In these circumstances, we do not find any ground to interfere."

In **The State of Uttar Pradesh vs. Faquirey6,** the Supreme Court held as under:

"9. According to Exception I to Section 300IPC, culpable homicide is not murder if the offender causes the death of the person who gave the provocation, whilst deprived of the power of self-control by grave and sudden provocation. It would be relevant to refer to the First Proviso to Exception I which provides that the provocation should be one which is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. No overtact is alleged against the deceased by which it can be stated that the Respondent was provoked. From the proved facts of this case it appears that the provocation was voluntary on the part of the offender. Such provocation cannot come to the rescue of the Respondent to claim that he is not liable to be convicted under Section 302IPC."

18. It is thus clear that entire chain of events did not occur in a spur of moment or during sudden quarrel. Though there was sudden quarrel between the two, but thereafter there was ample time for the appellant to cool down. However, the appellant prepared himself, took his gun and strip of cartridges from his house, climbed up on his terrace and then after exhortation (खड़े रहो अपने पैसे लेकर जाना)ए caused gunshot injury to the deceased. Moreover, the deceased never provoked the appellant and he simply demanded his Rs.4000/- from him. There is absolutely no evidence on record to suggest that it is the deceased who initiated any hot-talk. Demanding back his due from the appellant would under no circumstance be termed as quarrel on the part of the deceased or provocation from his side. Instead returning the due amount to the deceased or giving him any assurance, the appellant adopted a drastic approach and killed him. Considering the evidence available on record, under no circumstance, the deceased can be faulted with. Taking the entire evidence as it is, the case of the appellant would not fall under any Exception of Section 300 of IPC and, therefore, we are of the view that the trial court was justified in convicting the appellant under Section

302 of IPC and his case would not fall for any lesser offence.

19. Considering all aspects of the case, trial court appears to be justified in convicting the appellant. The appeal has no substance and the same is, accordingly, **dismissed**. The appellant is reported to be on bail, he be taken into custody forthwith to serve the remaining sentence.

20. We appreciate the assistance rendered by Mohd. Shahanshah Alam Ansari, Amicus and direct the State Government to pay Rs.5,000/- to him as his remuneration.

(2019)11ILR A914

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No.- 347 of 1988

Raju @ Raj Kumar & Anr.
...Appellants (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.P.S. Raghava, Sri Sunil Kumar.

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

A. Criminal Law-Sections 360 and 361 of the Code of Criminal Procedure, 1973; Indian Penal Code,1860 - Sections 325/34 I.P.C. - non-cognizable case - The prosecution witnesses proved the documents of the prosecution like injury report, postmortem report, inquest report and copy of G.D. - Section 4 of The United Provinces First Offenders Probation Act, 1938 - Power of court to release certain offenders on probation of good conduct.- in any case where the court could have dealt with an accused under Section 360 of the Code and yet does not want to grant the benefit of the said provision then it shall record in its judgement the specific reasons for not having done so - the trial court overlooked the provisions of Sections 360 and 361 of the Code of Criminal Procedure and it was mandatory duty cast on the trial court which ought to have been performed- conviction of the appellant maintained - direct that the appellant be released on probation of good conduct. (Para 4,5,13,14,16)

Criminal Appeal disposed of. (E-7)

(Delivered by Hon'ble Ajit Singh, J.)

1. This criminal appeal has been filed against the judgement and order dated 28.1.1988 passed by IXth Additional Sessions Judge, Bulandshahar in S.T. No. 482 of 1985, convicting and sentencing the appellants under Sections 325/34 I.P.C. to undergo Rigorous Imprisonment for the period of three years.

2. The brief facts leading to this appeal are that an FIR was lodged at police station-Khurja City on 20.7.1985 at about 7.30 a.m. by Ganga Prasad, son of Chunni Lal, resident of Bagh Rishalda, which was registered as non-cognizable case. It was alleged in the FIR that today, in the morning at about 7.00 a.m. when he was sitting on his Chabutara, the accused who were Gangsters and were having enmity with him were going by the side of his Chabutra singing indecent songs. When he told them not to sing indecent songs, the accused persons started assaulting him with lathi, kicks and fists. They also abused him and threatened him with dire consequences. He further stated

that he apprehends danger to his life at the hands of the accused persons. This incident was allegedly witnessed by Ravi Shankar and Harkesh. The FIR was registered under Sections 323, 504 and 506 I.P.C. Later on informant was taken to the hospital at Khurja and considering his condition to be serious he was referred to Delhi and on 20.7.1985 the complainant Ganga Prasad was taken to Jai Prakash Narain Hospital where he succumbed to injuries at about 10.00 p.m. on 29.7.1985. After the death of the deceased Ganga Prasad an application was submitted by Ravi Shankar, son of the deceased at police station regarding the death of his father, alleging therein that his father has succumbed to injuries inflicted by the accused Raju @ Raj Kumar and Kalwa on 20.7.1985 at about 7.00 a.m. On this information Section 304 I.P.C. was also added.

3. After completion of investigation, the Investigating Officer has submitted charge sheet against the accused persons and cognizance was taken by the Magistrate. The case was committed to the court of Session.

4. In order to prove its case the prosecution has examined three witnesses. Ravi Shankar PW1, Smt. Sapna alias Guddi PW2 and Jagdish PW3. PW3 Jagdish has not supported the prosecution case and has been declared hostile. During trial several formal witnesses were also examined and the prosecution witnesses proved the documents of the prosecution like injury report, postmortem report, inquest report and copy of G.D.

5. After the prosecution evidence the statements of the accused under Section 313 Cr.P.C. were recorded and they denied the prosecution evidence and submitted that a false FIR was lodged against them and wrong charge sheet was also submitted against them and witnesses had given false statements against them.

6. Accused Kaluwa has stated in his statement that the mother of Ravi Shankar is Nanno who is his real sister and litigation is pending between them. He has been falsely implicated in the present case due to enmity. The accused persons have also filed certain documents in their defence.

7. After hearing the arguments advanced by learned counsel for the appellants and learned counsel for the complainant, the trial court convicted and sentenced the accused as aforesaid. Aggrieved by the impugned judgement, this criminal appeal has been filed.

8. Learned counsel for the appellant submitted that the appellant no. 2, Kalwa has died during the pendency of the appeal in the year 1992 and in this regard the Chief Judicial Magistrate, Bulandshahar has submitted a report, mentioning therein that appellant no. 2, Kalwa had died in the year 1992.

9. Considering the report of the CJM, Bulandshahar and considering the Circular issued by this Court from time to time, the appeal qua appellant no. 2, Kalwa stands abated.

10. The appeal is heard on behalf of appellant no. 1, Raju @ Raj Kumar.

11. Learned counsel for the appellant submitted that at the time of incident the accused Raju @ Raj Kumar

was minor. The incident has taken place in the year 1985 and the present appellant was convicted after more than 3 years in 1988. He next submitted that the present accused was not having any criminal history at the time of conviction and after conviction there was also no criminal history against him. He further submitted that he does not want to press this appeal on merits and he seeks that lenient view be taken against the present appellant because the incident had taken place in the year 1985 and the present accused Raju @ Raj Kumar was minor at the time of incident and other co-accused Kalwa has died way back in the year 1992 and it will not be proper to send the present accused after more than 30 years to serve the sentence in prison. It was the first offence committed by the appellant and he be given probation under United Provinces First Offenders Act, 1938.

12. Learned A.G.A. has vehemently opposed the appeal.

13. After considering the rival submissions, considering the facts and circumstances of the case as well as considering that it was the first offence of the present accused Raju @ Raj Kumar and at the time of occurrence he was allegedly minor and after considering the provisions of The United Provinces First Offenders Probation Act, 1938 and after perusing the impugned judgment, it transpires that the learned trial court had not considered the applicability of The United Provinces First Offenderrs Probation Act, 1938 and has not taken into account the age, character and antecedent of the accused and has not considered the physical and mental condition of the accused at the time of passing the impugned judgement. Section 4 of The United Provinces First Offenders Probation Act, 1938 is applicable in the State of U.P. which provides as under :

"4. Power of court to release certain offenders on probation of good conduct. *- **(1)** When any person is convicted of an offence not punishable with death or transportation 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, antecedents or physical or mental condition 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 conduct 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 the court shall not direct the release of an offender under this section unless it is satisfied that the offender, or his surety, has a fixed place of abode and regular occupation in the place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the [State Government], which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for

special reasons to be recorded in writing, it does not consider it proper to do so.

(2) Where the offender ordered to be released under sub-section (1) is under twenty-four years of age, the court may make a supervision order directing that such offender shall be under the supervision of such probation officer as may be named in the order during the period specified therein and imposing such other conditions for securing such supervision as may be specified in the order :

Provided that the period so specified shall not extend beyond the date on which, in the opinion of the court, the offender will attain the age of twenty-five years.

(3) A court making an order under sub-section (2) shall require the offender, before he is released to enter into a bond, with or without sureties, to observe the condition with respect to residence, abstention from intoxicants and any other matters as the court may, having regard to the particular circumstances of the case, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(4) A court making an order under sub-section (2) shall furnish to the offender and the sureties, if any, a notice in writing stating in simple terms the conditions of the bond."

14. After considering the provision of Section 4 of the aforementioned act and considering the mandate of Section 360 and 361 of Cr.P.C., which indicates that in any case where the court could have dealt with an accused under Section 360 of the Code and yet does not want to grant the benefit of the said provision then it shall record in its judgemnt the specific reasons for not having done so. This has apparently not been done, inasmuch as the trial court overlooked the provisions of Sections 360 and 361 of the Code of Criminal Procedure and it was mandatory duty cast on the trial court which ought to have been performed.

15. Looking to the facts and circumstances of the present case, this Court see no reasons not to apply the provisions of Section 360 of the Code of Criminal Procedure.

16. Accordingly, this Court while maintaining the conviction of the appellant , direct that he will be dealt with under Section 4 of The United Provinces First Offenders Probation Act, 1938 and direct that the appellant be released on probation of good conduct instead of sentencing him, and he should enter into a bond with one surety to appear and receive the sentence when called upon during the period of one year for the purpose in question. The bond for a year shall be executed before the learned Chief Judicial Magistrate, Bulandshahar within one month after receiving certified copy of this order.

17. The appeal is accordingly disposed of.

(2019)11ILR A917

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.11.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.
HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No.- 395 of 1987

Lokai Chamar ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.P. Shukla, Sri Pradeep Kumar Tripathi, Sri Rajendra Prasad, Sri Sajid Raza Rizvi, Sri Satish Shukla.

Counsel for the Respondent.:
G.A.

A. Criminal Law-Indian Penal Code,1860 - Section 396 of I.P.C. (Dacoity with murder) - Neither intention, nor knowledge, that murder would be committed in the course of the commission of such dacoity, is required to be proved to exist in the contemplation of any of the said other persons - They would all nevertheless, be exposed to the rigor of Section 396 of the I.P.C.- The provision is, therefore, *sui generis,* in that it seeks to hold all participants to the crime liable for an offence (of murder) never even intended by them, individually - No article which was subject matter of dacoity has been recovered - no other incriminating evidence to connect the appellant with the offence - The trial court did not record a finding that there were more than five persons who committed dacoity - the prosecution failed to either proof the participation of five or more persons in the commission of the offence or establish their identity- the conviction and sentence of the appellant being repugnant to letter and spirit of Sections 391 and 396 of the I.P.C.(Para 3,5,8,15,21,47,49,50,52)

B. Distinction between Section 34 and 396 of the I.P.C - Section 396 of the I.P.C. makes all persons liable for the offence of dacoity with murder even though murder is actually committed only by one of the said "dacoits", and may not even have been in the contemplation, much less knowledge, of any of the others. Section 34 of the I.P.C. renders the persons liable for any offence only if all the persons shared a common intention to commit the offence and the offence was committed by all of them together. (Para-23)

C. Section 9 of the Evidence Act (Facts necessary to explain or introduce relevant facts) - The T.I.P. (Test identification parade) is not a substantive evidence. The substantive evidence is the evidence of identification in Court - The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act- They do not constitute evidence and these parades are governed by Section 162 of the Cr.P.C. (Para 34,35,38,45,46)

Appeal allowed (E-7)

Chronological list of cases cited: -

1. Jai Bhagwan & ors. Vs St. of Har. (1999) 3 SCC 102

2. Ram Lakhan Vs St. of U.P. (1983) 2 SCC 65

3. Saktu & anr. Vs St. of U.P., (1973) 1 SCC 202

4. Dalip Singh & ors. Vs St. of Pun. AIR (1953) SC 364

5. Mohan Singh & anr Vs St. of Pun. AIR (1963) SC 174

6. Krishna Govind Patil Vs St. of Mah. AIR (1963) SC 1413

7. Ram Bilas Singh & ors. Vs St. of Bihar (1964) 1 SCR 775

8. Maina Singh Vs St. of Raj. (1976) 2 SCC 827

9. Ram Dular Rai & ors. Vs St. of Bihar (2003) 12 SCC 352

10. State of Maharashtra Vs Suresh (2000) 1 SCC 471

11. Harbajan Singh Vs St. of J&K. (1975) 4 SCC 480

12. Hari Nath & anr. Vs St. of U.P., (1988)1 SCC 14

13. Manoj Giri Vs St. of Chhatisgarh (2013) 5 SCC 798

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Sri Pradeep Kumar Tripathi, learned counsel for the appellant and Ms. Ruhi Siddiqui, learned Addl. G.A. for the State.

2. This is an appeal filed by the appellant, Lokai Chamar against the judgment and order dated 14.04.1987 passed by learned VIIth Additional District & Sessions Judge, Sitapur, in Sessions Trial No.160 of 1986, whereby the appellant has been convicted for the offence under Section 396 of Indian Penal Code (hereinafter referred to as "I.P.C.") and sentenced to undergo imprisonment for life. However, the co-accused, Munna has been acquitted.

3. The facts of the case as unfolded by the prosecution are that on 12.09.1985, the complainant, namely, Sundar Lal S/o Gaya Prasad lodged a complaint that *bhajan kirtan* was going on till about 1:30 AM, thereafter, they slept and the other persons of the village went to their respective houses, in the meantime, about 10-12 bad elements armed with *lathi, ballam, addhi* (handmade pistol) and gun came and tried to open the door, when they did not open the door then one of the bad elements jumped the wall, came inside the house and opened the *kund*i and the other persons accompaning him also entered in the house, and gave beatings with *danda* to his mother and enquired about the valuable articles. When those bad elements were putting the looted articles on the door of the house, the gas was burning in the house; and on getting an occasion, he went to the southern window and made a noise, on this villagers, Chhanga S/o Preetam, Sobaran S/o Maikoo Chamar, Fakeeray S/o Sukkha Chamar, Surendra S/o Jagannath, Sripal S/o Sirdar and other persons came with *lathi* and torch and challenged the said persons, and on this the bad elements fired 3-4 times with a view to put them on fear, he (complainant) put fire on leaf of sugarcane and *jhakar* and the villagers fired from their licensed guns, on this the said bad elements along with looted articles started to go to western side, one bad element was apprehended by his father then the other bad elements fired from the gun by which injury was caused at chest and right hand of his father and some bullet shots *(chharre)* hit on the hip of his wife. The said bad elements were seen and identified by him, his family members and other villagers in the light of gas and fire. They can identify them if bad elements appeared before them, he and his wife can also identify the looted articles, which were taken by bad elements. The looted articles, which were taken by bad elements are as under:-

(i) Gas, which was burning in the house Prabhat Marka.

(ii) Old used batua, which is made of kaskut, weighted about 12 kg. to which Puran Badhai name is printed.

(iii) 2 boxes made of tin.

(iv) Rs.400/- cash.

(v) Three new sarees.

(vi) Two old plates made of kaskut.

(vii) Two old *bilwa*.

(viii) One lota and lotiya which made of kalayi and a white silver glass.

On the basis of said complaint, First Information Report (hereinafter referred to as "F.I.R."), Case crime No. 147 of 1985 was registered for the offence

under Sections 395 and 397 of I.P.C. at Police Station- Pisawa, District- Sitapur at 08:25 AM on 12.09.1985.

4. On 12.09.1985, the injured, namely, Gaya Prasad, Chhutanni W/o Gaya Prasad and Vindeswari Devi W/o Sundarlal were medically examined in District Hospital, Sitapur. The father of complainant, namely, Gaya Prasad died, his body was inspected, inquest papers were prepared, on 14.09.1985 the dead body of the deceased, Gaya Prasad was inspected, the delivery deed of gas and torch along with bloodstained soil, plain soil, empty cartridges, gun shots and ash was prepared, which were recovered from the spot. The site plan was prepared and statements of the witnesses were recorded. The accused, Lokai Chamar was arrested on 31.10.1985 and Munna was arrested on 18.11.1985. Test identification parade (hereinafter referred to as "T.I.P.") was got conducted. On completion of investigation, chargesheet for the offence under Section 396 of I.P.C. was filed against accused, Lokai Chamar and Munna.

5. After complying with the provisions of Sections 207 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C."), the chargesheet was committed to learned trial court.

6. After hearing arguments on charge, learned trial court found a *prima facie* case to try the accused, Lokai Chamar and Munna for the offence under Section 396 of I.P.C. and, accordingly, charge for the offence under Section 396 of I.P.C. was framed on 16.06.1986.

7. To bring home the guilt of the accused persons, the prosecution examined as many as five witnesses. PW-1, Sundar Lal, who is the complainant, he has deposed his complaint as Ex. KA-1. He has also deposed that the injured were taken to hospital and got medically examined, his father was sent to Sitapur Hospital where he died. Thereafter, he came to know that the accused persons had been arrested and he went to jail to identify them. PW-2, Sobaran, who is the neighbour and eye witness, he has proved the delivery deed of torch and gas as Ex. KA-2. He has also deposed that when accused persons were arrested, he went to the jail for identifying the accused persons, he identified both the accused persons as the persons who were identified by him in jail. PW-3, Chhanga Lal, who is also neighbour and witness to T.I.P., he has deposed that he identified the accused persons and he knew them earlier, one of them was Munna and the other was Lokai. PW-4, S.I. B.R. Singh, who is the Investigating Officer has deposed about the various steps taken by him during investigation. He has proved the site plan as Ex. KA-3, seizure memo of plain soil and bloodstain soil as Ex. KA-4, seizure memo of empty cortages, *tikli* and bullet shots *(chharre)* as Ex. KA-5, seizurre memo of ash as Ex. KA-6 and delievery deed of gas and torch as Ex. KA- 7; he further deposed that on 14.09.1985, injury report was received and on 16.09.1985, postmortem report was received, on the basis of which, Section 396 of I.P.C. was added after that further investigation was held by S.O. Tej Bahadur and the chargesheet was prepared by him and deposed the chargesheet as Ex. KA-8. PW-5, Constable Bhola Singh is the person who recorded F.I.R., he has deposed that he recored Case Crime No.147 of 1985 under Sections 395 and 397 of I.P.C. and made entry in the *roznama* at Serial

No.10 at 08:05 A.M. and deposed copy of *roznama* as Ex. KA-9 and also deposed G.D. as Ex. KA-10.

8. On completion of the prosecution evidence, statement of the appellant/accused, Lakai Chamar and Munna under Section 313 of Cr.P.C. was recorded and incriminating evidence was put to them to which the accused persons denied. The accused persons did not choose to lead any defence evidence.

9. After hearing the arguments and considering evidence on record learned trial court found the appellant guilty for the offence under Section 396 of I.P.C. and sentenced him vide judgment and order dated 14.04.1987. However, the co-accused, Munna was acquitted.

10. Being aggrieved by the impugned judgment and order dated 14.04.1987, the appellant has preferred the present criminal appeal.

SUBMISSION ON BEHALF OF THE PARTIES

11. Learned counsel for the appellant vehemently argued that learned trial court erred in convicting the appellant for the offence punishable under Section 396 of I.P.C. It was submitted that two persons were tried for the offence under Section 396 of I.P.C., when the trial court acquitted one of them, no conviction could have been recorded of the remaining accused i.e., the appellant for an offence punishable under Section 396 of I.P.C. It was also submitted that for recording of conviction of an accused under Section 396 of I.P.C., there must be five or more than five persons and, therefore, the trial court was wrong in invoking and applying Section 396 of I.P.C. According to learned counsel for the appellant, the judgment of conviction and order on sentence deserves to be set aside on this ground alone.

12. Learned counsel for the appellant further contended that the appellant was not identified by the prosecution witnesses as he was shown to the witnesses, namely, PW-1, Sundar Lal, PW-2, Sobaran and PW-3, Chhanga Lal.

13. On the other hand, Ms. Ruhi Siddiqui, learned Addl. G.A. for the State supported the judgment of conviction and order on sentence. She submitted that the co-accused, Munna has been acquitted but the appellant, Lokai Chamar has been rightly convicted by the trial court after analyzing the entire evidence. Learned Addl. G.A. for the State submitted that the prosecution has proved the guilt of the appellant by examining PW-1, complainant, Sundar Lal, PW-2, Sobaran and PW-3, Chhanga Lal.

14. We have given our anxious thought to the submissions advanced by learned counsel for the appellant and learned Addl. G.A. for the State and also carefully perused the material available on record.

15. Before proceeding to examine the culpability of the appellant before us, in the conspectus of the facts and findings recorded herein above, it would be worthwhile to consider the relevant provisions of Section 34, 149 and 300 of I.P.C., thus:

"34. Acts done by several persons in furtherance of common intention.--*When a criminal act is done by several persons, in furtherance of the*

common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--I*f an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.*

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--*

Secondly.--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--

Thirdly.--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--

Fouthly.--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.

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.

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.*

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 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.*

16. Chapter XVII of the Cr.P.C. deals with offenses against property. Section 378 to 382 deal with theft. Section 383 to Section 389 concern offences of extortion. Section 390 to 402 deal with robbery and dacoity. Section 391 defines dacoity as:

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

17. Section 395 of the IPC provides punishment for dacoity. Section 396 prescribes penalty for an offence of dacoity with murder. The same reads thus;

***396. Dacoity with murder.**--If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."*

18. From a conjoint reading of Section 391 and 396 of I.P.C., it is manifestly clear that the essential prerequisite of joint participation of five or more persons in the commission of the offence of dacoity and if in the course thereof anyone of them commits murder, all members of the assembly, would be guilty of dacoity with murder and would be liable to be punished as enjoin thereby. Thus, the pre-condition to perceive an offence of dacoity of murder is a participating assembly of five or more persons for commission of the offence. In the absence of such an assembly, no such offence is made out rendering the conviction, therefore, of any person in isolation for murder, even if proved, in permissible in law.

19. An immediate feature of Section 396 of I.P.C., which strikes one at first reading thereof, is that it is a self contain provision. In other words, contributory liability, thereunder, does not depend, in order to stand erect, on the crutches of any other provision. The provision creates vicarious liability sans *mens rea*, and is, to that extent, *sui generis* in nature. Section 396 of I.P.C., in its plain terms applies to every situation in which five or more persons commit dacoity and, in the course of the commission of such dacoity, anyone of the said persons, commits murder. All five persons, thereby, become liable, by statutory prescription, to the offence of "dacoity with murder", and expose themselves to the punishment stipulated in the said provision.

20. The three essential ingredients for invoking Section 396 of I.P.C. are that (i) one of the persons must commit murder, i.e., his act must amount to "murder" within the meaning of Section 300 of I.P.C., (ii) the said person must be one of the five or more persons who have joined together to commit dacoity, and (iii) the murder must be committed in the course of commission of such dacoity.

21. If these conditions are fulfilled, then Section 396 of I.P.C. would kick in and blight all the other persons, involved in the act of dacoity, even if one of them was even aware that murder was about to be committed. In other words, so far as the remaining persons are concerned, all the prosecution is require to prove, in order for Section 396 of the I.P.C. to apply, is their intention to commit dacoity. Neither intention, nor knowledge, that murder would be committed in the course of the commission of such dacoity, is required to be proved to exist in the contemplation of any of the said other persons. All persons must, therefore, possess the *mens rea,* therefore, may be attributable only to one of the said persons. They would all nevertheless, be exposed to the rigour of Section 396 of the I.P.C. The provision is, therefore, sui generis, in that it seeks to hold persons liable for an offence never even intended by them.

22. Thus, Section 396 and 34 of the I.P.C. are mutually incompatible. Section 34 of the I.P.C., by its very title, covers "acts done by other persons in furtherance of common intention". It proceeds to refer expressly to "a criminal act done by other persons in furtherance of the common intention of all". In such a situation, each of the persons is made liable by the said persons "for that act". In other words, if, under Section 34 of the I.P.C. more than one person are tried to be mulcted with the offence of having committed "dacoity with murder" it would have to be shown that the act of "dacoity with murder" is done by all the persons and that all the persons had a common intention to commit dacoity with murder. The possibility of their having to commit murder, in the course of committing dacoity must, therefore, be shown to have been in the contemplation of all the said persons. In such a situation, Section 34 of the I.P.C. would make each of such persons liable for committing dacoity with murder.

23. The clear distinction between Section 34 and 396 of the I.P.C. is, therefore, that while Section 396 of the I.P.C. makes all persons liable for the offence of dacoity with murder even though murder is actually committed only by one of the said "dacoits", and may not even have been in the contemplation, much less knowledge, of any of the others, Section 34 of the I.P.C. renders the persons liable for any offence only if all the persons shared a common intention to commit the offence of dacoity with murder, and the offence was committed by all of them together.

24. Therefore, Section 34 of the I.P.C. could never apply to any of the persons to whom the intention to commit murder could not be attributed; consequently, such an accused could never be committed under Section 302 read with Section 34 of the I.P.C. In this regard reliance with advantage may be made to the judgment in the case of **'Jai Bhagwan and others vs. State of Haryana',** (1999) 3 SCC 102. In the said case it was held:

"10. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

25. In the case of **'Ram Lakhan vs. State of U.P',** (1983) 2 SCC 65, the appellant was convicted for an offence punishable under Section 395 of the I.P.C. and sentenced to rigorous imprisonment for seven years. The F.I.R. was registered against nine persons. The trial court, however, acquitted five persons and convicted four accused persons. On appeal, the High Court acquitted three persons out of said four persons and convicted one of the accused, who filed an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that conviction for an offence of dacoity of less than five persons is not sustainable. It was also held that before an offence under Section 395 of the I.P.C. can be made out there must be an assembly of five or more persons. On the findings of trial court and the High Court, it was manifest that only person was left, who could not be convicted for an offence under Section 395 of the I.P.C.

26. In the case of **'Saktu and another vs. State of U.P.'**, (1973) 1 SCC 202, the F.I.R. was lodged by the informant, Jwala Prasad. The case of prosecution was that 15-16 persons entered in the house of complainant and looted the property. All the accused persons were charged for the offences punishable under Sections 395, 397 and 412 of the I.P.C. The trial court acquitted one of the accused. In an appeal, the High Court of Allahabad acquitted some other accused persons but convicted three accused persons. In appeal before the Hon'ble Supreme Court it was contended that as the High Court found that only three persons had participated in the occurrence, there was an error in convicting them for dacoity, since the offence of dacoity could not be committed by less than five persons. The Hon'ble Supreme Court, however, negatived the contention and observed as follows:-

"6. The last contention advanced on behalf of the appellants is that as the High Court found that only three persons had participated in the occurrence it was an error to convict them of dacoity, because the offence of dacoity cannot be committed by less than five persons. In support of this submission counsel relies on the decision in Ram Shankar Singh v. State of Uttar Pradesh [AIR 1956 SC 441 : 1936 Cri LJ 822] . We are unable to accept this submission. In Ram Shankar Singh case six known persons were charged with dacoity and as the High Court acquitted three out of the six, it was held by this Court that the remaining three could not have been convicted for dacoity. The charge in the instant case is that apart from the named seven or eight persons, there were five or six others who had taken part in the commission of the dacoity. The

circumstance therefore that all, except the three accused, have been acquitted by the High Court will not militate against the conviction of those three for dacoity. It is important that it was at no time disputed that more than 13 or 14 persons had taken part in the robbery. The High Court acquitted a large number of the accused because their identity could not be established. The High Court, however, did not find that the group which committed robbery in the house of Jwala Prasad consisted of less than five persons."

27. Similarly Section 149 of the I.P.C. provides for common assembly. The Hon'ble Supreme Court considered the provisions of Section 149 of the I.P.C. in the case of **'Dalip Singh and others vs. State of Punjab',** AIR 1953 SC 364. In the said case, it was held that if the prosecution failed to establish that the appellants were five or more, Section 149 of the I.P.C. cannot be invoked. But the Hon'ble Supreme Court held that it is not essential that five persons must always be convicted for invocation of the said provision. Where it is possible to conclude that though five or more persons were "unquestionably" at the place of offence and the identity of one or more persons was in doubt, conviction of less than five persons with the aid of Section 149 of the I.P.C. would be legal and lawful. In the said case, it was observed as under:-

"19. Before Section 149 can be called in aid, the court must find with certainty that there were at least five persons sharing the common object. A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.

20. This is not to say that five persons must always be convicted before Section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of Section 149 would be good. But if that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty. Men cannot be hanged on vacillating and vaguely uncertain conclusions."

28. The aforesaid judgment in **Dalip Singh's case (supra)** was referred in the case of **'Mohan Singh and another vs. State of Punjab', AIR 1963 SC 174.** In the said case, two of the five persons were tried for the offences punishable under Section 302 read with Section 147 and 149 of the I.P.C. were convicted. In the charge, said five accused persons and none others were mentioned as forming unlawful assembly and the evidence led was confined to them. The question was whether two persons could be convicted by applying Section 149 of the I.P.C. It was stated:

"9.....Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section

149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five....."

29. The aforesaid judgment in **Mohan Singh's case (supra)** was considered in the case of **'Krishna Govind Patil vs. State of Maharashtra',** AIR 1963 SC 1413, and it was held:

"7.....It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court-witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence....."

30. In another case **'Ram Bilas Singh and others vs. State of Bihar', (1964)** 1 SCR 775, the Hon'ble Supreme Court observed as under:

"15.....The decisions of this court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not identified, it, would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of Section 149 IPC provided it comes to the conclusion that five or more persons participated in the incident....."

31. In **'Maina Singh vs. State of Rajasthan',** (1976) 2 SCC 827, the appellant along with four other persons were charged for the offence under Section 302 read with Section 149 of the

I.P.C. Only the appellant was convicted for the offence under Section 302 read with Section 34 of the I.P.C. and the other accused persons were acquitted. There was no indication either in the F.I.R. or in the evidence that any other person unnamed or unidentified other than the five persons charged, to have participated in the crime. The conviction was challenged by the appellant. The Hon'ble Supreme Court while setting aside the conviction for an offence punishable under Section 302 read with Section 34 of the I.P.C. held that if in a given case, the charge discloses only the named persons as co-accused and prosecution witnesses confine their testimony to them, even then it would permissible to come to a conclusion that others, named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there is other evidence to lead to that conclusion, but not otherwise.

32. In yet another decision, the Hon'ble Supreme Court in the case of **'Ram Dular Rai and others vs. State of Bihar',** (2003) 12 SCC 352, it was stated:

"6. Coming to the question whether Section 149 has application when presence of more than five persons is established, but only four are identified, Section 149 does not require that all the five persons must be identified. What is required to be established is the presence of five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149 IPC."

33. Thus, it is clear that for recording conviction for an offence of dacoity, there must be five or more persons. In the absence of such finding, an accused cannot be convicted for an offence of dacoity. However, it may be that there are five or more persons and the factum of five or more persons is either not disputed or is established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal, returning a finding that their identity is not established. In such a case, the conviction of less than five persons can be maintained. But in the absence of such finding, less than five persons cannot be convicted for an offence of dacoity.

34. It is settled rule of law that the T.I.P. is not a substantive evidence. The substantive evidence is the evidence of identification in Court. The same is clear from the provisions of Section 9 of the Indian Evidence Act, 1872 as well as catena of decisions. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. Generally, the substantive evidence of a witness is the statement made in the Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of T.I.P. is to test and strengthen the trustworthiness of the said evidence. The T.I.P. belongs to the stage of investigation and there is no provision in the Cr.P.C. which obliges the investigating agency to hold, or confers a right upon the accused to claim a T.I.P. They do not constitute evidence and these parades are governed by Section 162 of

the Cr.P.C. Failure to hold a T.I.P. would not make in admissible the evidence of identification in Court. However, the weight to be attached to such identification should be a matter of for the Courts depending upon the facts, in appropriate cases it may accept the evidence of identification even without insisting on corroboration. Thus, it is considered a safe rule of prudence to generally look for corroboration of the testimony of witnesses in Court as to the identity of the accused who are not known to them, in the form of earlier test identification proceeding. The said rule, however, is subject to the exceptions, when the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

35. The purpose of T.I.P. is to have corroboration of evidence of the witnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by T.I.P. would not be in any way material. The purpose of T.I.P. is succinctly stated by the Hon'ble Supreme Court in the case of **'State of Maharashtra vs. Suresh'**, (2000) 1 SCC 471 as follows:

"22.....We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence....."

36. In '**Harbajan Singh vs. State of Jammu & Kashmir**', (1975) 4 SCC 480, it was found that the appellant and one Gurmukh Singh were absent at the time of roll-call and when they were arrested on the night of 16.12.1971 their rifles smelt of fresh gunpowder and that the empty cartridges case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. In the said circumstances, the Hon'ble Supreme Court held:

"4.....In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigating officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. [(1970) 3 SCC 518 : 1971 SCC (Cri) 124 : (1971) 2 SCR 917] absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant....."

37. In another case **'Hari Nath and another vs. State of U.P.',** (1988) 1 SCC 14, the Hon'ble Supreme Court observed as under:

"16.....The conduct of an identification parade belongs to the realm, and is part of the investigation. The evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself, detracts from the credibility of the test.

17. The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's Convicting the Innocent records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed the learned author refers to the source of mistaken identification thus:

"The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally -- the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused."

18. Glanville Williams in The Proof of Guilt -- (Hamlyn Lectures) -- refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus:

"There is no difference from the subjective point of view, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other. .... The witness's certainty may not be immediate, without this delay being necessarily a sign of error. Nevertheless, error is more frequent when recognition comes some time after seeing....

The act of recognition is very open to suggestion in all its forms....

Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it.

(emphasis supplied)"

19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identify. In Sheikh Hasib v. State of Bihar [(1972) 4 SCC 773 : AIR 1972 SC 283 : 1972 Cri LJ 233] this Court observed: (SCC p. 777, para 5)

"... the purpose of test identification is to test that evidence, the

safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.""

38. Thus, it is clear that much evidentiary value cannot be attached to the identification of the accused in the Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the particular person concerned, if the identification is made for the first time in Court.

39. Learned Addl. G.A. for the State has relied upon judgment in the case of **'Manoj Giri vs. State of Chhatisgarh',** (2013) 5 SCC 798, we have gone through the said judgment and find that the proposition law laid down in the said judgment is undisputed.

40. In the instant case, the appellant, Lokai was not arrested at the spot. The appellant, Lokai was arrested in a Case Crime No.395 under Section 399/402 of I.P.C. and Case Crime No.396 under Section 25 of the Arms Act, the appellant was interrogated and he made a disclosure statement on the basis of which he was arrested in the present case on 31.10.1985. The T.I.P. was conducted in jail on 10.01.1986 by S.E. Magistrate in which the witnesses, namely, Sundar Lal (PW-1), Sobaran (PW-2) and Chhanga Lal (PW-3) and Surendra S/o Jagannath identified the appellant/accused. As far as the T.I.P. is concerned, it is relevant to note that the appellant, Lokai contended that he has been falsely implicated and he was identified by the witnesses as he was shown to the witnesses at the police station before holding T.I.P.

41. PW-1, Sundar Lal deposed that he identified the appellant in jail, he did not know the appellant prior to the incident. PW-2, Sobaran also deposed that he had identified the accused persons in jail and for the first time he saw the appellant at the time of incident. PW-3, Chhanga Lal has deposed that he had gone to jail to identify the accused persons, he had identified the accused persons because he knew them before the T.I.P. and their names are Munna and Lokai.

42. It is pertinent to mention here that Surendra S/o Jagannath who had identified the appellant in the T.I.P. proceeding in jail has not been examined by the prosecution.

43. It is unbelievable that at about 1:30 AM in the night when it was pitched dark, the witnesses who were frightened could have seen actual faces of the accused persons just by the light of gas cylinder and leaf of sugarcane. Further, there were 10-12 dacoits in number, armed with lathi and gun, who had entered in the house after jumping the wall, it cannot be believed that the witnesses standing at a distance in a feeble light would have been able to identify the dacoits/accused persons.

44. Though PW-1, Sundar Lal and PW-2, Sobaran have denied the defence plea, in view of the fact that the incident occurred at about 1:30 AM (in the night) on 12.09.1985 in the pitch of darkness, the identification of the appellant by the witnesses has to be viewed with caution and the Court has to look for corroboration strengthening the identification.

45. As discussed above, T.I.P. was conducted in jail on 10.01.1986 by S.E Magistrate. However, the T.I.P. is not a substantive evidence and conviction cannot be based solely on the identification by the witnesses in the T.I.P. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles, which are the subject matter of dacoity and the alleged weapons used in the crime.

46. Moreover, the T.I.P. has not been proved by the prosecution. The S.E. Magistrate, who conducted T.I.P. has not been examined. Even the Investigating Officer, S.I. B.R. Singh while appearing as PW-4 has not deposed that T.I.P. was got conducted nor he proved the T.I.P. proceeding.

47. The weapon of offence alleged to have been used in the commission of offence has not been recovered. No article which was subject matter of dacoity has been recovered. The co-accused, Munna has been acquitted by the trial court. There is no other incriminating evidence to connect the appellant with the offence.

48. At this juncture, it is pertinent to mention here that the charge against the appellant, Lokai, and co-accused Munna was framed on 16.06.1986 by learned Additional Sessions Judge, Sitapur wherein it is stated that on the intervening night between 11/12th September 1985 at about 1:30 AM, they committed dacoity at the house of Sundar Lal and in so conjointly committing dacoity one of them or more committed the murder of Gaya Prasad. The charge discloses only the named persons i.e., Lokai and Munna as accused and the prosecution witnesses confine their testimonies to them, even then it would not be permissible to come to the conclusion that others, named or unnamed, besides the two accused named in the charge or the evidence of prosecution witnesses, acted conjointly with one of the charged accused if there is no other evidence to lead to that conclusion.

49. The trial court did not record a finding that there were more than five persons who committed dacoity and out of them two accused could be identified but the remaining accused persons could not be identified.

50. As discussed above, the prosecution has miserably failed to either proof the participation of five or more persons in the commission of the offence or establish their identity.

51. In that view of the matter having regard to the law authoritatively laid down in the aforesaid judgments and in the absence of singular charge under Section 396 of the I.P.C. against the appellant and co-accused Munna (who has been acquitted by trial court) sans five or more persons, and failure to establish identity of the appellant, Lokai and the charge not disclosing other persons, we are of the considered opinion that the conviction for the offence of dacoity with murder punishable under Section 396 of the I.P.C., in the facts and circumstances of the case cannot be sustained in the eyes of law.

52. In our considered view, the conviction and sentence of the appellant being repugnant to letter and spirit of Sections 391 and 396 of the I.P.C., the same is liable to be set aside.

53. In view of the aforesaid facts and circumstances of the case, the appeal is **allowed** and the impugned judgment

and order dated 14.04.1987 passed by VIIth Additional District & Sessions Judge, Sitapur are hereby set aside. The appellant is acquitted of the charge leveled against him.

54. Lower court record along with copy of judgment be sent back forthwith.

(2019)11ILR A933

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 473 of 1987

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

Counsel for the Appellant:
Sri Abrar Ahamad Siddiqui, (A.C.).

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

A. Criminal Law-Indian Penal Code,1860 - Sections 302 and 452 of IPC - Cause of death of the deceased was due to coma as a result of ante mortem head injury, likely to be caused by gunshot injury - Injury is sufficient to cause death in ordinary course of nature - delay in lodging the FIR in every case is not fatal - present case two days delay in lodging the FIR creates a serious doubt as to whether the report lodged by (PW-1) is genuine or not - prosecution failed to prove the guilt of the appellant beyond a reasonable doubt - the appellant deserves to be given benefit of doubt. (Para 3,16,17,)

Appeal allowed (E-7)

List of cases cited:-

1. Jai Prakash Singh Vs St. of Bihar (2012) 4 SCC 379

2. Kali Ram Vs St. of H.P. (1973) AIR 2773

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 11.2.1987 passed by IV Additional Sessions Judge, Bulandshahr in Sessions Trial No.471 of 1985, convicting the appellant under Sections 302 and 452 of IPC and sentencing him to undergo imprisonment for life and two years rigorous imprisonment respectively.

2. As per prosecution case, in the night intervening 18/19.7.1985, accused appellant Birju, acquitted accused Rame and two other persons entered the house of deceased-Kunvar Pal and caused gunshot injury to him. Injured was immediately taken to the Government Hospital, Bulandshahr from where, considering his serious condition, he was referred to All India Institute of Medical Sciences, (AIIMS) New Delhi where, during treatment, he died on 24.7.1985. In the meanwhile, on 21.7.1985, on the basis of written report Ex.Ka.1 lodged by (PW-1) Fatah Singh, FIR Ex. Ka.16 was registered against the accused appellant, acquitted accused Rame and two other unknown persons under Sections 452 and 307 of IPC.

Further case of the prosecution is that prior to the incident, there was some quarrel between the appellant and the deceased over a dispute relating to one wall as a result of which, the deceased was done to death by the accused appellant. The incident is said to

have been witnessed by (PW-2) Smt. Surajwati, wife of the deceased in the light of earthen lamp *(Lantern)* which was burning in the house of the deceased. Upon hearing the cries of Smt. Surajwati and the sound of gunshot, (PW-1) Fatah Singh, who was incidentally sleeping inside the house of the deceased, rushed to the place of occurrence and saw accused persons fleeing from the spot. (PW-1) Fatah Singh and (PW-2) Smt. Surajwati both have identified appellant Birju, to be one of the assailants.

3. After the death of the deceased, inquest Ex.Ka.11 was conducted on his body on 24.7.1985 and the body was sent for postmortem which was conducted on the same day by (PW-4) Dr Rohitashwa, vide Ex.Ka.7.

As per Autopsy Surgeon, following ante-mortem injuries were found on the body of deceased Kunvar Pal:

"1. Infected stitched wound of semi circular shape present over of tempo parietal region 23.0 cm in length starting from tragus of ear to parietal eminence.

2. Infected abraded contusion 1.5 cm above (Rt) eyebrow with healing margin of 3 x 1.0 cm size in frontal region.

3. Tracheotomy wound of 2 x 1.0 cm size in middle with 2 stitches at lower end in vertical present 3.0 cm above the suprasternal Notch.

Scalp - as mentioned & hoematoma under mentioned injuries (1) & (2)

Skull - linear fracture in left middle cranial fosa extending upto left mandibular joint & maxillary bone hole of 5.0 cm diameter at tempo frontal (L) region with destruction of meninges and brain tissues.

Brain - extradural hoematoma over left frontal lobe on anterio superior surface laceration involving left front of tempo-parietal region of 13 x 7 x 0.5 cm size with contusion of variable size at places, two pellets found in brain tissue & are in muscle tissue."

Cause of death of the deceased was due to coma as a result of ante mortem head injury, likely to be caused by gunshot injury. Injury No.(1) is sufficient to cause death in ordinary course of nature.

4. During investigation, police could not get the two unknown persons and had filed charge-sheet against the appellant and the acquitted accused Rame.

5. While framing charge, the trial Judge has framed charge against the appellant under Sections 302 and 452 of IPC, whereas against accquited accused Rame, charge was framed under Sections 452 and 302/34 of IPC.

6. So as to hold accused persons guilty, prosecution has examined seven witnesses. Statements of the accused persons were recorded under Section 313 Cr PC in which, they pleaded their innocence and false implication.

7. By the impugned judgment, the trial Judge has acquitted co-accused Rame of all the charges, whereas the appellant has been convicted and sentenced, as mentioned in para-1 of this judgment. Hence, this appeal.

8. Learned counsel for the appellant submits:-

(i) that a very improbable story has been put forth by the prosecution that on account of a minor wall dispute, the deceased was done to death by the appellant.

(ii) that the incident occurred in the midnight, at 2:00 am on 19.7.1985 and, therefore, question of identification of the appellant in the dark night becomes doubtful.

(iii) that there was no sufficient source of light at the place of occurrence.

(iv) that there is inordinate delay of two days in lodging the FIR and no reasonable explanation has been offered by the prosecution regarding this delay. Considering the delay in lodging the FIR, possibility of false implication of the appellant cannot be ruled out.

(v) that motive part has not been proved by the prosecution.

(vi) that presence of lodger of FIR Fatah Singh (PW-1) at the place of occurrence is doubtful.

(vii) that, in fact, some unknown thieves have entered the house of the deceased, committed his murder and that is why, while recording the inquest, this fact has been mentioned and likewise, in the postmortem report, this fact has been narrated.

(viii) that had the appellant killed the deceased and the incident had been witnessed by (PW-1) Fatah Singh and (PW-2) Smt. Surajwati, a prompt report would have been lodged and, at least, while giving the history of the case, it ought to have been disclosed before the treating Doctors that it is the appellant who caused gunshot injuries to the deceased.

(ix) that no weapon has been seized from the possession of the appellant.

9. On the other hand, supporting the impugned judgment, learned State Counsel submits that conviction of the appellant is in accordance with law and there is no infirmity in the same. He submits that even assuming that there is two days delay in lodging the FIR, the same appears to be justified because the family members of the deceased, including (PW-1) and (PW-2) were first taking care of the health of the deceased and then the report was lodged. He submits that there is no proper cross-examination of the witnesses regarding presence of source of light and thus, the identification of the appellant cannot be questioned at the appellate stage.

10. We have heard learned counsel for the parties and perused the record.

11. (PW-1) Fatah Singh, is a cousin of the deceased. He states that a day prior to the incident, he came to the house of his maternal uncle (Chater Singh) and had a talk with the family members, he was informed that on account of a wall between his house and the house of appellant, there was some dispute. He states that in the night, he slept in the *Varandah,* whereas his maternal uncle and aunt were sleeping adjacent to him. His cousin Kunvar Pal and his wife Smt. Surajwati were sleeping in another *Varahdah,* where an earthen lamp was burning. At about 2:00-2:30 in the midnight, he heard the sound of gunshot and as he was having his torch with him, in the torch light, he saw the appellant and other accused persons and that the appellant was having country made pistol with him. He also saw his cousin Kunvar Pal in the injured condition and thereafter, accused persons fled away from the spot. He further states that the injured was

taken to Government Hospital, Bulandshahr from where, on the advice of the Doctor, he was taken to All India Institute of Medical Sciences, New Delhi. He further states that after three days of the incident, he returned from New Delhi and then lodged the report vide Ex.Ka.1.

In the cross-examination, he states that for about 3-4 days he was there along with the deceased in New Delhi. He further states that from the persons present at New Delhi, Doctor had inquired as to how the injuries were sustained by the deceased, but no such personal query was made from him. In paragraph 8, he has stated that it was a dark night, but an earthen lamp was burning. He has further stated that light of earthen lamp was not sufficient to identify the accused persons and therefore, in the report lodged by him, he had disclosed that he identified the appellant in the light of earthen lamp and also in the torch light. He has categorically stated that he had not seen any one causing firearm injury to the deceased and he reached to the place of occurrence after the incident. He admits that there was a lane behind the house of his maternal uncle and he identified the accused while they were running from the said lane. He further states that the accused persons have crossed the wall of about five feet and he identified the accused persons after peeping from the said wall. He further states that while the accused persons were running, they turned back and that is why he could identify them. He states that acquitted accused Rame has nothing to do with his maternal uncle and likewise, he has nothing to do with the accused.

12. (PW-2) Smt. Surajwati, is a wife of the deceased and an eye witness to the occurrence. She states that a day prior to the incident, there was a quarrel between her husband and the appellant over a dispute relating to a wall and that her husband was threatened. She further states that when the incident occurred, she heard that (PW-1) Fatah Singh came to her house. She further states that (PW-1) was sleeping along with her father-in-law and mother-in-law in a separate *Varandah*, whereas she was sleeping along with her husband in another *Varandah*. At about 2:00-2:30 in the midnight, she was cleaning her minor child who had gone to attend the nature's call and at that time, four persons jumped her wall and gained entry in the *Varandah*. According to her, out of four persons, she could identify the appellant and the acquitted accused Rame and that the appellant was having a firearm with him, caused gunshot injuries to her husband. After hearing her cries, her father-in-law, mother-in-law and (PW-1) Fatah Singh came at the place of occurrence after opening the door and at that time (PW-1) was having torch with him. She states that she identified the accused persons in the light of earthen lamp and after causing injuries to her husband, they fled away from the spot. She further states that her husband was immediately taken to Government Hospital, Bulandshahr from where, he was referred to the All India Institute of Medical Sciences, New Delhi and there he died after about five days.

In the cross-examination, she states that three persons had covered their faces and she identified acquitted accused Rame from his voice. She further states that she might have committed a mistake in identifying the accused persons. She has also stated that the treating Doctor at

Bulandshahr had never asked them as to how the injuries were sustained by the deceased nor there was any such talk while the x-ray of the deceased was being taken. She further states that she did not disclose to the Doctor as to why her husband was subjected to injuries. She further states that while she came to Bulandshahr along with the deceased, in between there was a police station, but nothing was informed to the police. She has clarified that prior to the incident, there was no *marpeet* between her husband and the appellant and that on account of rains, the wall fell down. She further states that when the accused persons had jumped her wall, at that time, she was cleaning her minor child who had returned after attending the nature's call and while doing so, she saw the accused persons.

13. (PW-3) Chatar Singh, is a father of the deceased, has turned hostile. (PW-4) Dr Rohitashwa, conducted the postmortem on the body of the deceased. (PW-5) Sukhveer, is a Constable who at the relevant time was posted at All India Institute of Medical Sciences, New Delhi, has stated that on 19.7.1985, the injured was brought to the hospital. (PW-6) Chandra Pal Singh, registered FIR and did major part of investigation. (PW-7) Randeep Talwar, is a witness of inquest, has stated that, at the time of inquest, none of the accused was named and it was disclosed to him that the injuries have been caused to the deceased by thieves.

14. Close scrutiny of the evidence makes it clear that on or around 19.7.1985, deceased Kunvar Pal sustained gunshot injuries and was taken to Government Hospital, Bulandshahr from where, he was referred to All India Institute of Medical Sciences, New Delhi, where he succumbed to his injuries on 24.7.1985. In the meanwhile, on 21.7.1985, on the basis of written report Ex.Ka.1 lodged by (PW-1) Fatah Singh, FIR Ex.Ka.16 was registered against the appellant and three other accused persons under Sections 452 and 307 of IPC. According to prosecution, it is the appellant who caused firearm injuries to the deceased, resulting his death and the incident has been witnessed by (PW-2) Smt. Surajwati, wife of the deceased, who has stated that she saw the incident in the light of earthen lamp *(Lantern)* and, at the same time, she also states that she might have committed mistake in identifying the accused persons.

15. Another important witness of the prosecution (PW-1) was incidentally present at the place of occurrence. He states that after hearing the sound of gunshot, he along with his maternal uncle (hostile) and aunt (not examined) rushed to the place of occurrence and saw the appellant fleeing from the spot. He further states that he had a torch in his hand and saw the occurrence in the torch light and also in the light of earthen lamp *(Lantern)*. Nowhere in his statement, he has clarified as to how all of a sudden he reached to the house of his maternal uncle. There is absolutely no justification as to what for he had gone to the house of the deceased. His presence at the place of occurrence becomes doubtful because the FIR is not a prompt one. Undisputedly, the FIR has been lodged after two days of the incident in which (PW-1) had shown himself to be present at the place of occurrence and allegedly saw the appellant fleeing from the spot. Even according to (PW-1), he saw the appellant in a lane after jumping the wall of about

five feet. If (PW-1) had seen the appellant in a lane, whether the light of earthen lamp *(Lantern)* was there or not, has not been made clear by the prosecution. According to prosecution itself, the earthen lamp was burning in the *Varandah* of the house, whereas (PW-1) saw the appellant in a lane. In the surrounding circumstances, presence of (PW-1) at the place of occurrence becomes doubtful and likewise, seeing the appellant by (PW-1) also becomes doubtful. The prosecution has further failed to establish that the light of earthen lamp *(Lantern)* was good enough where the accused persons could have been identified by the witnesses in a dark night when the incident occurred inside the house.

16. Yet another important aspect of the case is that injured was taken to two Government Hospitals, first at Government Hospital, Bulandshahr and thereafter, at All India Institute of Medical Sciences, New Delhi, but nowhere this fact was disclosed to the treating Doctors that it is the accused persons who caused gunshot injuries to the deceased. As per prosecution case, it was disclosed by the witnesses that some thieves have entered the house of the deceased and committed his murder and, therefore, possibility of false implication of the appellant, in a delayed FIR lodged by (PW-1) Fatah Singh, cannot be ruled out.

True it is that delay in lodging the FIR in every case is not fatal, but if the facts of the present case are considered along with the evidence available on record, two days delay in lodging the FIR creates a serious doubt as to whether the report lodged by (PW-1) is genuine or not. Law in this respect is very clear. In **Jai Prakash Singh vs. State of Bihar1,** the Supreme Court, while dealing with similar issue, held as under:

12. The FIR 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 lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. *(Vide: Thulia Kali vs. State of Tamil Nadu, AIR 1973 SC 501; State of Punjab vs. Surja Ram, AIR 1995 SC 2413; Girish Yadav & Ors. vs. State of MP, (1996) 8 SCC 186; and Takdir Samsuddin Sheikh vs. State of Gujarat & Anr., AIR 2012 SC 37)."*

17. The evidence collected by the prosecution creates a doubt as to whether the incident has been witnessed by (PW-2) Smt. Surajdevi or not and likewise, whether (PW-1) Fatah Singh was present at the time of occurrence and saw the appellant fleeing from the spot. Furthermore, according to (PW-2) Smt. Surajwati, out of four accused persons, three had covered their faces and even she

has not stated that it is the appellant only who was present with his uncovered face. In this view of the matter, we are of the view that the prosecution has failed to prove the guilt of the appellant beyond a reasonable doubt and in such a situation, the appellant deserves to be given benefit of doubt.

In **Kali Ram vs. State of Himachal Pradesh2,** the Supreme Court, while dealing with the issue relating to withholding or affording benefit of doubt, observed as under:

"26. It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on page 3 of the book entitled "The Accused" by J.A. Coutts 1966 Edition, "When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, Second Edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of *Shivaji Sahabrao Bobade & Anr.* (AIR 1973 SC 2622) as is clear from the following observations :

"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 distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations".

18. Having considered the aforesaid facts, law and the evidence available on record, in our opinion, present appeal deserves to be **allowed.** Order accordingly. The impugned judgment and order is set aside. Since the appellant is reported to be on bail, no further order is required in his respect.

19. Let a copy of this judgment be sent to the concerned trial Court forthwith for compliance.

20. We appreciate the assistance rendered by Sri Abrar Ahmad Siddiqui, learned Amicus and the State Government is directed to pay him Rs.7,000/- towards his remuneration.

(2019)11ILR A940

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 477 of 1987

Parto ...Appellant (In Jail)
Versus
State ...Respondent.

Counsel for the Appellant:
Sri Santosh Kumar Tiwari, Sri Surendra Nath Tiwari, Sri Tejpal.

Counsel for the Respondent:
Sri H.M.B. Singh, A.G.A.

A. Criminal Law-Indian Penal Code,1860 - Section 302 of IPC - statements of two eye-witnesses - accused appellant caused firearm injuries to the deceased, resulting his death - Postmortem report of the deceased supports the prosecution - the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity - 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 - Relationship is not a factor to affect credibility of a witness - A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness - evidence found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness - FIR can be proved ante-timed or ante-dated by adducing proper

evidence - trial Court fully justified in convicting the appellant.(Para 14,16,18,19)

B. Criminal Law-Code of Criminal Procedure, 1973 - Section 174 of Cr PC - inquest report - The evidentiary value of the inquest report prepared under Section 174 of Cr PC is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest - object of report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted. (Para 15)

Appeal dismissed (E-7)

Chronological list of cases cited: -

1. Pedda Narayana Vs St. of A.P. (1975) 4 SCC 153

2. Khujji Vs St. of M.P. (1991) 3 SCC 627

3. Kuldip Singh Vs St. of Pun. (1992) Suppl.3 SCC 1

4. George & Ors. Vs St. of Ker. & anr. (1998) 4 SCC 605

5. Suresh Rai Vs St. of Bihar (2000) 4 SCC 84

6. Amar Singh Vs Balwinder Singh (2003) 2 SCC 518

7. Radha Mohan Singh Vs St. of U.P. (2006) 2 SCC 450 and

8. Sambhu Das Vs St. of Assam (2010) 10 SCC 374

9. Radha Mohan Singh @ Lal Saheb & ors. Vs St. of U.P. (2006) 2 SCC 450

10. Anil Rai Vs St. of Bihar (2001) 7 SCC 318

11. St. of U.P. Vs Jagdeo Singh (2003) 1 SCC 456

12. Bhagalool Lodh & anr. Vs St. of U.P. (2011) 13 SCC 206

13. Dahari & ors. Vs St. of U.P. (2012) 10 SCC 256

14. Raju @ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

15. Gangabhavani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

16. Jodhan Vs St. of M.P. (2015) 11 SCC 52

17. Bur Singh & anr. Vs St. of Pun. (2008) 16 SCC 65

18. Sudhakar v. St. AIR (2018) SC 1372

19. Ganapathi Vs St. of T.N**.** AIR (2018) SC 1635

20. Harbans Kaur & anr. Vs St. of Har. (2005) AIR SCW 2074

21. Namdeo Vs St. of Mah. (2007) AIR SCW 1835

22. Sonelal Vs St. of M.P., (2008) AIR SCW 7988

23. Dharnidhar Vs St. of U. P. & ors.(2010) 7 SCC 759)

24. Yogesh Singh Vs Mahabeer Singh & ors. (2016) AIR (SC) 5160

25. Bikau Pandey Vs St. of Bihar AIR (2004) SC 997

26. Jai Prakash Singh Vs St. of Bihar (2012) 4 SCC 379

27. Madru Singh Vs St. of M.P. (1997) SCC (Crl.) 3527

28. Ram Sanjiwan Singh Vs St. of Bihar (1996) 8 SCC 552

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 10.2.1987 passed by the Sessions Judge, Mathura in Sessions Trial No.283 of

1985, convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. As per prosecution case, on 5.7.1985 at 7:00 pm, accused appellant Parto along with three other accused persons namely, Biri Singh, Radhey Shyam and Jaggo reached near the well, where deceased Soran Singh, after taking his bath, was sitting on a platform. It is said that the accused appellant was carrying gun; accused Biri Singh was having a country made pistol; and accused Radhey Shyam and Jaggo were having gun with them. After reaching to the place of occurrence, accused Biri Singh exhorted by saying 'kill him, as he contests lot of cases'. Accused Radhey Shyam and Jaggo caught hold the deceased and then the appellant caused gunshot injury to the deceased, as a result of which the deceased fell down. Hue and cry was raised by the witnesses, including (PW-1) Bhura, (PW-2) Gumani and (PW-6) Raman and an attempt was also made by them to catch hold the accused persons, but as the accused persons were having weapons with them, they fled away from the spot. When injured Soran Singh was being shifted to the Hospital, on the way he expired. On the basis of written report Ex.Ka.1 lodged by (PW-1) Bhura (brother of the deceased) FIR Ex.Ka.10 was registered at 10:00 pm on 5.7.1985 against four accused persons, including the appellant under Section 302 of IPC.

3. Inquest on the dead body of the deceased was conducted vide Ex. Ka.3 on 5.7.1985 and the body was sent for postmortem which was conducted on 6.7.1985 vide Ex. Ka.2 by (PW-4) Dr. Nepal Singh.

As per Autopsy Surgeon, following gunshot injuries were noticed on the body of the deceased:

1. Fire arm wound of entry 2 cm x 2 cm x cavity deep on Rt. side back, 7 cm above from Rt. hip bone. Blackening, tattooing and scorching present on around the wound.

2. Fire arm wound of exit 1 cm x 1.5 cm x cavity deep on front of Abdomen, 3 cm above from Penis in mid-line connected with Injury No.1.

Cause of death of the deceased was due to Syncopy as a result of A/M Injury noted.

4. While framing charge, the trial Judge has framed charge against the accused persons under Section 302/34 of IPC.

5. So as to hold accused persons guilty, prosecution has examined eight witnesses, whereas three defence witnesses have also been examined. Statements of accused persons were recorded under Section 313 of Cr PC in which, they pleaded their innocence and false implication.

6. By the impugned judgment and order, the trial Judge has acquitted accused Biri Singh, Radhey Shyam and Jaggo of all the offences, whereas the appellant has been convicted under Section 302 of IPC and sentenced, as mentioned in paragraph-1 of this judgment. Hence, this appeal.

7. Counsel for the appellant submits:-

(i) that the FIR is ante-timed.

(ii) that on the same set of evidence, three accused persons have

been acquitted and, therefore, the learned trial Judge has erred in law, in convicting the appellant.

(iii) that (PW-1) Bhura and (PW-2) Gumani are interested witnesses and, therefore, they have falsely implicated the appellant.

(iv) that there are material contradictions in the statements of (PW-1) Bhura and (PW-2) Gumani and, therefore, they are not trustworthy witnesses.

(v) that another eye-witness has been examined as (PW-6) Raman, but his testimony has been discarded by the trial Court.

(vi) that if the FIR was registered before preparing inquest, in the inquest, (PW-1) Bhura and (PW-2) Gumani ought to have disclosed the names of accused persons and likewise, details of the incident ought to have been given by them.

(vii) that on account of previous enmity between two families, the appellant has been falsely implicated.

8. On the other hand, supporting the impugned judgment and order, it has been argued by learned State Counsel that the conviction of the appellant is in accordance with law and there is no infirmity in the same. He submits that the incident occurred in the presence of (PW-1) Bhura and (PW-2) Gumani and their testimony cannot be discarded simply on the ground that they are relatives of the deceased. He further submits that minor contradictions in the statements of eye-witnesses are required to be ignored considering the fact that they are rustic villagers and those minor contradictions do not go to the root of the matter. He also submits that in the inquest report, prosecution was not obliged to mention as to in what manner the incident took place and likewise, it was not necessary to mention the names of the accused persons. It has been argued that the postmortem report of the deceased also supports the prosecution case. Lastly, it has been argued that the acquittal of co-accused persons will not give any benefit to the appellant as there is sufficient material against him.

9. (PW-1) Bhura, is a brother of the deceased and the informant. He is also an eye-witness to the occurrence. He has stated that he knew all the accused persons and there is an old dispute between his family and that of accused Parto/Parma and Biri. On the date of incident, after taking bath, deceased Soran was sitting on a platform and he (this witness) along with some other persons were also taking bath. Brother-in-law of the deceased, namely Dharmo (Raman-PW-6) also reached to the place of occurrence and then all the accused persons reached there carrying firearms with them. Accused appellant was having gun with him; accused Jaggo and Sita Ram caught hold the deceased and thereafter, accused Biri exhorted that 'the deceased has become chronic litigant and, therefore, be killed' and hearing this, accused appellant caused gunshot injuries to the deceased. He has clarified that Sita Ram and Radhey Shyam are the same person and on account of fear, none of the witnesses could come forward. He picked-up his brother, took him on a bullock cart and on the way to police station, they could get tractor of one Sonahari, however, by the time, injured was shifted in the tractor, he expired.

In the cross-examination, this witness remained very firm and reiterated

as to the manner in which the incident occurred.

10. (PW-2) Gumani, is another brother of the deceased and also an eye witness to the occurrence. His statement is almost identical to that of (PW-1) Bhura. He too has stated that after taking bath, the deceased was sitting on a platform, whereas he and other witnesses were also taking bath on the well. The accused persons, including the appellant reached at the place of occurrence, accused Jaggo and Radhey Shyam caught hold the deceased and then accused Biri exhorted that 'the deceased is contesting number of cases and, therefore, he be killed' and then, the appellant caused firearm injuries to the deceased.

In the cross-examination, this witness also remained firm and has reiterated as to the manner in which the incident occurred.

11. (PW-6) Raman, is a brother-in-law of the deceased, has also been cited as an eye-witness to the incident. He states that he came to the house of the deceased to take his sister and when he came to know that his brother-in-law had gone to the well for taking bath, he too had gone there and as soon as he reached there, he saw the accused appellant causing firearm injuries to the deceased.

In the cross-examination, he however, has stated that he did not know the accused persons prior to the incident and he came to know about their names after the incident. It is relevant to note here that no test identification parade had been conducted by the prosecution and considering the inconsistencies in the statement of this witness, he has already been disbelieved by the trial Judge.

12. (PW-3) Sheoraj Singh, is a Constable, took the body for postmortem. (PW-4) Dr Nepal Singh, conducted the postmortem on the body of the deceased. (PW-5) Ninmani Singh, Scribe of the FIR. (PW-7) Pratap Singh Verma, is the first Investigating Officer, did the part investigation, and (PW-8) Ram Pratap Singh, is the second Investigating Officer, has duly supported the prosecution case.

13. (DW-1) Chetrapal Singh, is Scribe of the written report which was lodged by (PW-1) Bhura. (DW-2) Mahendra Singh, has stated that injured-deceased was taken on a tractor. (DW-3) Chandra Prakash Saxena has not stated anything specific.

14. Close scrutiny of the evidence, in particular the statements of two eye-witnesses, i.e. (PW-1) Bhura and (PW-2) Gumani, makes it clear that on 5.7.1985, it is accused appellant Parto who caused firearm injuries to the deceased, resulting his death. In the Court, (PW-1) Bhura was very firm in saying that it is the accused appellant who caused firm arm injuries to the deceased, resulting his death. Postmortem report of the deceased also supports the prosecution case. We have no reason to doubt the same. True it is that (PW-6) Raman does not appear to be a trustworthy and reliable witness and that is why, his testimony has been discarded by the Court below.

15. We find no substance in the argument of the defence that in the inquest, details as to how the incident occurred have not been mentioned and likewise, as to who caused firearm injury

to the deceased has also not been mentioned in the inquest.

The evidentiary value of the inquest report prepared under Section 174 of Cr PC has also been long settled through a series of judicial pronouncements. It is well established that inquest report is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest. The object of preparing such report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted. (See: Pedda Narayana vs. State of AP, (1975) 4 SCC 153; Khujji vs. State of MP, (1991) 3 SCC 627; Kuldip Singh vs. State of Punjab, 1992 Suppl. 3 SCC 1; George & Ors. vs. State of Kerala & Anr., (1998) 4 SCC 605; Suresh Rai vs. State of Bihar, (2000) 4 SCC 84; Amar Singh vs. Balwinder Singh, (2003) 2 SCC 518; Radha Mohan Singh vs. State of UP, (2006) 2 SCC 450 and Sambhu Das vs. State of Assam, (2010) 10 SCC 374.

The Apex Court, while dealing with similar issue, in **Radha Mohan Singh @ Lal Saheb & Ors. vs. State of UP1**, observed as under:

13. The provision for holding of inquest is contained in Section 174 Cr PC and the heading of the section is *Police to enquire and report on suicide etc.* Sub-sections (1) and (2) thereof read as under :

"174. *Police to enquire and report on suicide, etc*. (1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub- Divisional Magistrate."

14. The language of the aforesaid statutory provision is plain and simple and there is no ambiguity therein. An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are

summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. Neither in practice nor in law is it necessary for the person holding the inquest to mention all these details.

15. In *Pedda Narayana v. State of A.P.,* AIR 1975 SC 1252, it was held that the proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. In *Shakila Khader v. Nausher Gama,* AIR 1975 SC 1324, the contention raised that non-mention of a person's name in the inquest report would show that he was not an eyewitness of the incident was repelled on the ground that an inquest under Section 174 Cr PC is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in *Eqbal Baig v. State of A P,* AIR 1987 SC 923 that the non-mention of name of an eyewitness in the inquest report could not be a ground to reject his testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of commission of the offence as the inquest report is not the statement of a person wherein all the names (accused and also the eyewitnesses) ought to have been mentioned. The view taken in Pedda Narayan (supra) was approved by a three-Judge Bench in *Khujji @ Surendra Tiwari v. State of M P,* AIR 1991 SC 1853 and it was held that the testimony of an eyewitness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. The nature and purpose of inquest held under Section 174 Cr PC was also explained in *Amar Singh v. Balwinder Singh,* 2003 (2) SCC 518. In the said case the High Court had observed that the fact that the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried weight in favour of the accused. After noticing the language used in Section 174 Cr PC and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution. Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited, viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence.

There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eyewitnesses or the gist of their statements nor is it required to be signed by any eyewitness. In *Meharaj Singh v. State of UP* (supra), the language used by the legislature in Section 174 Cr PC was not taken note of nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby overruled. The challenge laid to the prosecution case by Shri Jain on the basis of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted."

16. We further find no substance in the argument of the defence that only interested witnesses have been examined and there is no independent witness and, therefore, the prosecution case becomes doubtful.

It is settled position of law that the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. All that the Courts require as a rule of prudence, not as a rule of law, is that the evidence of such witness should be scrutinized with a little care. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house then the only witnesses who could see the occurrence may be the family members. In such cases, it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness is scrutinized with a little care and the Court is satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration. 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. (See: Anil Rai vs. State of Bihar (2001) 7 SCC 318; State of U.P. vs. Jagdeo Singh (2003) 1 SCC 456; Bhagalool Lodh & Anr. vs. State of U.P. (2011) 13 SCC 206; Dahari & Ors. vs. State of U.P. (2012) 10 SCC 256; Raju @ Balachandran & Ors. vs. State of Tamil Nadu (2012) 12 SCC 701; Gangabhavani vs. Rayapati Venkat Reddy & Ors. (2013) 15 SCC 298; Jodhan vs. State of M.P. (2015) 11 SCC 52)

The Supreme Court in **Bur Singh and Anr. vs. State of Punjab2** has held that 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. Further, the Supreme Court in **Sudhakar v. State3 and Ganapathi v. State of Tamil Nadu4** relying in its earlier judgments held as under:

"18. Then, next comes the question 'what is the difference between a related witness and an interested witness?. The plea of "interested witness", "related witness" has been succinctly explained by this Court that "related" is not equivalent to "interested". 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. In this case at hand PW 1 and 5 were not only related witness, but also 'interested witness' as they had pecuniary interest in getting the accused petitioner punished. [refer State of U.P. v. Kishanpal and Ors., (2008) 16 SCC 73] : (2008 AIR SCW 6322). As the prosecution has relied upon the evidence of interested witnesses, it would be prudent in the facts and circumstances of this case to be cautious while analyzing such evidence. It may be noted that other than these witnesses, there are no independent witnesses available to support the case of the prosecution."

Relationship is not a factor to affect credibility of a witness. There is no proposition in law that relatives are to be treated as untruthful witnesses. To the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. A witness who is a relative of deceased or victim of the crime cannot be characterized as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness. (See: Harbans Kaur and another vs. State of Haryana, 2005 AIR SCW 2074; Namdeo vs. State of Maharashtra, 2007 AIR SCW 1835; Sonelal vs. State of M.P., 2008 AIR SCW 7988; and Dharnidhar vs. State of Uttar Pradesh and Others & other connected appeals, (2010) 7 SCC 759).

The Apex Court, while considering the issue relating to independent witness in **Yogesh Singh vs. Mahabeer Singh & Ors.5** observed as under:

50. The learned counsel for the respondents has also sought to assail the prosecution version on the ground of lack of independent witnesses. We are not impressed by this submission in the light of the observations made by this Court in *Darya Singh Vs. State of Punjab*, AIR 1965 SC 328 = 1964 (7) SCR 397, wherein it was observed:

"It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers arc generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the

evidence actually adduced should be disbelieved on that ground alone without examining its merits."

51. Similarly, in *Raghubir Singh Vs. State of U.P.*, (1972) 3 SCC 79, it was held that the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. In this connection, general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when tempers on both sides are running high, has to be borne in mind.

52. Further, in *Appabhai and Anr. Vs. State of Gujarat*, 1988 Supp (1) SCC 241, this Court has observed :

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

17. Further, there is no substance in the argument of the defence that as some of the accused have been acquitted, the appellant also deserves acquittal. Assuming that if some of the accused have wrongly been acquitted by the trial Judge, it does not mean that similar treatment should be given to the appellant. As there is no appeal assailing the acquittal of some of accused, we refrain ourselves to pass any comment on the judgment impugned so far as acquittal of some of the accused is concerned, but benefit of the said mistake cannot be given to the appellant.

The Apex Court in **Bikau Pandey vs. State of Bihar,**6 while considering the identical issue, observed as under:

"8. Acquittal of some of the accused persons will not come to the rescue of the other appellants in respect of whom the High Court has considered the evidence on record and found them guilty. As noted above, PW-1 has no relationship with the deceased and his assertion in the examination-in-chief has gone unchallenged. It is to be noted that nothing has been elicited in the cross-examination of various witnesses as regards the place of occurrence and the manner of occurrence. That being the position, the convictions as done cannot be faulted."

16. Merely because two persons have been acquitted that benefit cannot be extended to others in view of the direct evidence establishing their presence and participation in the crime. Though it was pleaded that there was no evidence regarding the breaking of lock as deposed by eyewitnesses, it is to be noted that investigating officer's objective findings clearly lead to acceptability of such plea.

The broken lock was seized and exhibited as Exb-1. The marks of violence on the door were clearly noticed and noted by the investigating officer."

18. We also find no substance in the argument of the defence that the FIR is ante-timed. The incident occurred at 7:00 pm on 5.7.1985 and at 10:00 pm, FIR was lodged. Considering the fact that after the incident, (PW-1) Bhura (his brother) picked-up him, took him on a bullock cart and on the way to police station, he could get a tractor of one Sonahari and, by the time, injured-deceased was shifted in the same, he expired. (PW-1) Bhura, might have taken sometime to adjust himself and then rushed to the police station for lodging the FIR. Three hours delay in lodging the FIR, thus, cannot be called unusual. There was no time for (PW-1) to concoct the story or fabricate the evidence in any manner. Therefore, it cannot be said that the report is ante-timed. Moreover, there is no evidence as to when and in what manner this entire false story has been cooked up by (PW-1). Law in this respect is very clear.

In **Jai Prakash Singh v State of Bihar7** the Supreme Court observed as under:

12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. *(Vide: Thulia Kali v. State of T.N. (1972) 3 SCC 393, State of Punjab v. Surja Ram, 1995 Supp. (3) SCC 419, Girish Yadav v. State of MP, (1996) 8 SCC 186 and Takdir Samsuddin Sheikh v. State of Gujarat (2011) 10 SCC 158."*

The Supreme Court in **Madru Singh vs. State of Madhya Pradesh8 and Ram Sanjiwan Singh Vs. State of Bihar**9, answered the similar question in 'negative'. In the said decisions, it has been held by the Supreme Court that from the cross-examination of prosecution witnesses, circumstances have to be elicited which would show that the FIR was ante-timed and then alone an inference can be drawn that the FIR was ante-timed.

It is further settled position of law that FIR can be proved ante-timed or ante-dated by adducing proper evidence. The lodger of FIR should be subjected to proper cross examination as to on what basis defence pleads the FIR to be ante-timed or ante-dated. Likewise, the police officer, who has recorded the FIR, is also required to be properly cross-examined as to on what basis defence pleads the FIR to be ante-dated or ante-timed. If no such requirement of law is completed and no such proper cross-examination of the witnesses is being done, it cannot be presumed that the FIR is ante-dated or ante-timed.

19. Applying to the above principles of law and after due appreciation of the evidence available on record, we are of the view that the trial Court was fully justified in convicting the appellant, who has been named as main person to cause firearm injuries to the deceased. Appeal has no substance and, the same is, accordingly, **dismissed.**

20. Appellant is reported to be on bail, he be taken into custody forthwith to serve the remaining sentence.

21. Let a copy of this judgment be sent to the concerned trial Court for necessary compliance.

(2019)11ILR A951

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 591 of 1986

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

Counsel for the Appellants:
Sri Samar Singh, Sri Babit Kumar, Sri Brajesh Kumar, Sri Prabhat Kumar Srivastava, Sri Pratap bhanu Umrao (A.C.), Sri Prashant Kumar Singh.

Counsel for the Opposite Party:
Sri H.M.B. Sinha, A.G.A.

A. Criminal Law- Indian Penal Code,1860 - Section 302 read with Section 34 of IPC - under Section 201 of IPC - conduct of the appellant suspicious - merely on the basis of this conduct, it cannot be held that he committed the murder of the deceased - suspicion howsoever grave, cannot substitute proof - no conclusive evidence - no such incriminating evidence - evidence of last seen ("Last seen theory" & Principle of "last seen alive")- not very conclusive - merely on the basis of said evidence, it cannot be said that the appellants committed the murder of the deceased - Circumstantial evidence - not good enough to hold the conviction of the accused-appellants - whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence - circumstances adduced when considered collectively - must lead to the only conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged - circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused - trial court not justified in convicting the appellants - Appellants are entitled for benefit of doubt. (Para 21,23,24,25)

Appeal allowed.(E-7)

Chronological list of cases cited: -

1. Devi Lal Vs St. of Raj. AIR (2019) SC 688

2. Nizam & anr. Vs St. of Raj. (2016) 1 SCC 550

3. St. of Raj. Vs Kashi Ram (2006) 12 SCC 254

4. Sattatiya @ Satish Rajanna Kartalla Vs St. of Mah. (2008) 3 SCC 210

5. S. Govindaraju Vs St. of Kar. (2013) 15 SCC 315

6. Sujit Biswas Vs St. of Assam (2013)12 SCC 406

7. Raja @Rajinder Vs St. of Har. 2015(11) SCC 43

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated

18.2.1986 passed by the VIII Additional District and Sessions Judge, Ghaziabad in Sessions Trial No. 30 of 1983, convicting the appellants under Section 302 read with Section 34 of IPC and sentencing them to undergo imprisonment for life and further convicting the appellants under Section 201 of IPC and sentencing them to undergo three years' rigorous imprisonment, with a direction that both the sentences shall run concurrently.

2. In the present case, name of deceased is Jagroshni, wife of accused appellant no.1-Madan Lal. The couple had two sons aged three years and one year. On 31.03.1982, accused Madan Lal along with his children and the deceased had gone to attend the village fair at Sikri and on 2.4.1982, he returned from the said fair along with his two children only. He informed his brother-in-law Balraj (PW-1) that in the fair, his wife went missing and despite extensive search when he could not get her, he returned along with his two children. Further case of the prosecution is that deceased Jagroshni used to insult her husband Madan Lal before the public at large and her husband Madan Lal used to suspect her character. In the fair, accused Madan Lal hatched conspiracy with his brother-in-law, accused Ramvir (died during pendency of the appeal) and Kallu Ram for eliminating the deceased and, accordingly, the same was done and after committing the murder of the deceased, her body was thrown near a brook. Balraj (PW-1) brother of the deceased, after coming to know that his sister went missing from the village fair, lodged an FIR vide Ex.Ka.4 on 4.4.1982 at Police Station Civil Lines, Delhi. Based on this report, offence under Section 364 of IPC was registered against accused-Madan Lal. Later, on 5.4.1982, skin of left foot claw and skin of left hand claw were recovered near a brook at Sikri, Police Station Modi Nagar, District Gaziabad, U.P. In the recovery memo, it has been mentioned that there was no bone attached to the said skin. Further, red nail polish was noticed on four fingers and thumb. That apart, one pair of slipper and one bed sheet *(chadar)* were also seized. It is further case of the prosecution that on 10.04.1982 vide Ex.Ka.10, at the instance of accused persons, one dead body was recovered from a sugar cane field, which was wrapped in a bed sheet *(chadar)*.

3. Inquest on the dead body of the deceased was conducted on 10.4.1982 and the body was sent for postmortem which was conducted vide Ex.Ka.11 on 11.4.1982 by Dr. Vinay Krishna Matin (PW-10). Autopsy Surgeon has found following injuries on the body of the deceased:

"(i) Old lacerated wound on the right side of the head in the area of parietal.

(ii) Incised wound 2" x 1-1/25" on left frontal bone.

(iii) Left radial ulna was fractured. "

According to autopsy surgeon, cause of death of the deceased was head injury, shock and haemorrhage.

4. After completing the investigation, charge-sheet was filed against four accused persons, namely Madan Lal, Ramvir, Kallu Ram and Dale Ram and while framing charge, the learned trial judge framed charge against them under Sections 302/34 and 201 of IPC.

5. So as to hold accused persons guilty, prosecution has examined twelve witnesses, whereas one defence witness has also been examined. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which, they pleaded their innocence and false implication.

6. By the impugned judgement, trial judge has acquitted accused Dale Ram of all the offences, whereas remaining three accused have been convicted and sentenced as mentioned in paragraph no. 1 of this judgement. Hence, this appeal. However, during pendency of this appeal, accused appellant no.2-Ram Vir has expired and the present appeal is confined to accused appellant nos. 1 and 3 only.

7. Learned counsel for the appellants submits:

(i) that appellants have been convicted solely on the basis of circumstantial evidence but the nature of circumstantial evidence is so weak, which cannot be made basis for their conviction.

(ii) that identification of dead body itself is disputed and the prosecution has utterly failed to prove that two portions of the body recovered vide Ex.Ka.2 and Ex.Ka.10 were of the deceased.

(iii) that there is absolutely no evidence to show as to in what manner, deceased was murdered by the accused persons.

(iv) that evidence of so called last seen given by Gopi Chand (PW-5) and Khan Chandra (PW-6) is not conclusive and the mere fact that these two witnesses saw the appellants in the village fair, cannot lead to only conclusion that it is the appellants, who committed the murder of the deceased.

8. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that conviction of the appellants is in accordance with law and there is no infirmity in the same. He submits that the conduct of the appellants, in particular, appellant no.1-Madan Lal is very important where he did not lodged any report about the missing of his wife and returned from the village fair along with his two children.

9. We have heard learned counsel for the parties and perused the record.

10. Balraj (PW-1), is a brother of the deceased, has stated that marriage of the deceased was solemnized with accused Madan Lal about seven-eight years prior to the incident and that quite often they used to quarrel. About two and half years back, his sister along with her husband and two children had gone to see the village fair at Sikri, fromwhere accused appellant no.1 returned along with his two children and had informed that deceased went missing from the said fair. He states that he lodged the report Ex.Ka.4 based on which, the case was registered against appellant no.1. He further states that at the instance of this appellant, claws of one foot and one hand along with one pair of slipper and one sheet *(chadar)* were recovered near the brook, which were of the deceased. He further states that from another place, a dead body was recovered which was of his sister. He states that in the forearm of the deceased, her name was mentioned as 'Jagroshni'. In respect of accused Kallu Ram, he has stated that he was informed by the villagers that

accused Kallu Ram had also gone along with accused Madan Lal.

11. Jeeva Ram (PW-2) is a witness of first recovery Ex.Ka.2 by which skin of left foot claw and skin of left hand claw along with one pair of slipper and one sheet *(chadar)* were recovered near the brook at Sikri, Modinagar, Ghaziabad.

12. Leela Ram (PW-3) is a witness of recovery of a dead body vide Ex.Ka.3.

13. Mahak Singh (PW-4) took the body for post-mortem and assisted during initial investigation.

14. Gopi Chand (PW-5) is a witness of last seen. He states that along with one Khan Chandra and Jagdish, he too had gone to the village fair and there he saw appellants Madan Lal, Ram Vir along with deceased and two children. He states that about one and half lakhs people were there in the village fair and he reached at about 10:00 pm. He states that he cannot tell how many other persons were there along with Madan Lal and Ram Vir.

15. Khan Chandra (PW-6), is another witness of last seen, his statement is almost similar to that of Gopi Chand (PW-5).

16. Savran Singh (PW-7) is the first Investigating Officer.

17. Kishan Pal Singh (PW-8) made GD entry regarding transfer of the case from Delhi to P.S. Modi Nagar, Uttar Pradesh. Bhagwat Singh Motana (PW-9) assisted during investigation.

18. Dr. Vinay Krishna Matin (PW-10) conducted the postmortem on the body of the deceased.

19. Hukum Chandra (PW-11) is the second Investigating Officer and Dhara Singh (PW-12) registered the first FIR at Delhi under Section 364 of IPC.

20. Sheesh Ram (DW-1) has not stated anything specific, which may be of any help to the accused persons.

21. Close scrutiny of evidence makes it clear that deceased was the wife of accused Madan Lal and had gone to see the village fair on 31.3.1982. From the fair, appellant Madan Lal returned along with his two children without his wife. Appellant informed his brother-in-law (PW-1) that his wife went missing from the village fair and then at the instance of Balraj (PW-1), FIR under Section 364 of IPC was registered against the accused. True it is, that conduct of the appellant-Madan Lal becomes suspicious as he failed to satisfactorily explain as to where his wife had gone but merely on the basis of this conduct, it cannot be held that he committed the murder of the deceased.

It is a settled position of law that in criminal trial, suspicion howsoever grave, cannot substitute proof. Recently in **Devi Lal vs. State of Rajasthan1,** the Apex Court, while dealing with a case, observed as under:

"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."

22. Vide Ex.Ka. 2, skin of left foot claw and skin of left hand claw along with one pair of slipper and one sheet *(chadar)* were recovered on 5.4.1982, but there is no conclusive evidence that the same were of the body of the deceased. Yet another recovery was affected on 10.4.1982 vide Ex.Ka.10 where one full dead body of a lady was recovered allegedly of the deceased. In the second recovery, nowhere it has been mentioned that any portion of the body was missing and the only thing which has been mentioned is that body was highly decomposed. If some portion of the body was recovered on 5.4.1982 then in the second recovery, it ought to have been mentioned that full body was not recovered and part of the same was missing. Furthermore, the body is said to have identified on the basis of her name Jagroshni, which was allegedly shown in the forearm of the deceased but merely on this basis, it cannot be said conclusively that the said body was of the deceased. Identification of the dead body is in fact not very clear as the same was highly decomposed. As per autopsy surgeon, face of the body was clear and identifiable, whereas the witnesses have not identified the same on the basis of her face.

23. Most important aspect of the case is that there is no conclusive evidence that it is the appellants who committed the murder of the deceased. No such incriminating evidence has been adduced by the prosecution pointing out the guilt of the appellants in commission of the murder of the deceased. The evidence of last seen is also not very conclusive and merely on the basis of said evidence, it cannot be said that it is the appellants who committed the murder of the deceased. The law in respect of last seen theory is well settled.

In **Nizam and another vs. State of Rajasthan2,** the Supreme Court while dealing with "last seen theory" observed as under:

"14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of "last seen alive" in **State of Rajasthan v. Kashi Ram3**, this Court held as under :

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are

unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden to prove in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohammad, In Re. (AIR 1960 Mad 218)"

24. Circumstantial evidence available on record is not good enough to hold the conviction of the accused-appellants. Law in respect of circumstantial evidence is very clear.

In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra4**, the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P*. [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

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

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

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

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

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

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain

is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on

circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

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

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

In **S. Govindaraju v State of Karnataka5,** the Apex Court, while dealing with circumstantial evidence, observed as under:

"29. It is obligatory on the part of the accused while being examined under Section 313 of Cr PC to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence in order to decide whether or not the chain of circumstances is complete. When the attention of the accused is drawn to circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. (Vide: Munish Mabar v. State of Haryana, AIR 2013 SC 912).

31. The prosecution successfully proved its case and, therefore, provisions of Section 113 of the Evidence Act, 1872 come into play. The appellant/accused did not make any attempt, whatsoever, to rebut the said presumption contained therein. More so, Shanthi, deceased died in the house of the appellant. He did not disclose as where he had been at the time of incident. In such a fact situation, the provisions of Section 106 of the Evidence Act may also be made applicable as the appellant/accused had special knowledge regarding such facts, though he failed to furnish any explanation thus, the court could draw an adverse inference against him."

In **Devi Lal vs. State of Rajasthan** (supra), the Supreme Court, while dealing with circumstantial evidence, observed as under:

"14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116*. The relevant excerpts from para 153 of the decision is assuredly apposite:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra* [(1973) 2 SCC 793 where the observations were made:

"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."

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

It has further been considered by this Court in ***Sujit Biswas Vs. State of Assam 2013(12) SCC 406 and Raja alias Rajinder Vs. State of Haryana 2015(11) SCC 43*** that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

25. As already stated, the middle of suspicion definitely goes against accused Madan Lal but that itself would not be sufficient to uphold his conviction. If the overall evidence is appreciated, that creates a doubt as to whether it is the appellant Mandan Lal who committed the murder of the deceased or not. If any such doubt if there, in the prosecution case, it is the appellants who are entitled to receive the benefit of the same. The trial court was not justified in convicting the appellants. Appellants are entitled for benefit of doubt.

26. The appeal is, accordingly, **allowed**. Appellants are reported to be on bail and, therefore, no further order is required.

27. We appreciate the assistance rendered by Sri Pratap Bhanu Umrao, Amicus. He would be entitled to receive Rs.7,000/- towards his remuneration from the State Government.

(2019)11ILR A959

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.11.2019

BEFORE

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

Criminal Appeal No. 605 of 1982

Prahlad & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Satish Chandra, Sri Neeraj Sahu, Sri Sushil Pandey

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Indian Penal Code,1860 - Section 374(2) of the Cr.P.C.- direct evidence of eyewitnesses. Motive - has no significance - the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused persons, as to what tempted them to commit the crime- cases based on direct evidence of the witnesses should be decided on the basis of quality and probative value of the evidence of such eye witnesses - The evidence of all prosecution witnesses is consistent on the point of identification of the accused persons, role played by all of them and firing of gun shot - The medical evidence also fully corroborates the ocular evidence of the incident - Statements of the witnesses clearly reveal that all the accused persons were present at the scene of occurrence and were actively involved in accomplishing their part of common design - prosecution by its trustworthy, acceptable and reliable evidence has proved its case beyond all reasonable doubts. (Para 19,25,27,28)

B. Evidence Law-The Indian Evidence Act, 1872 - Section134 - evidence has to be weighed and not counted -no legal impediment in convicting a person on the sole testimony of a single witness- if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration-The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise - serious contradictions and omissions may materially affect the case of the prosecution but not every contradiction or omission. (Para 21)

Appeal dismissed. (E-7)

Chronological list of cases cited:-

1. Ezajhussain sabdarhussain Vs St. Of Guj. (2019) 2 JIC 33(SC)

2. St. Of Raj. Vs ANI @ Hanif & ors. (1997) Supreme Court Cases (Cri) 851.

3. Ramesh Singh @ Photi Vs St. Of A.P. , (2004) 11 SCC 305

4. Ramaswami Ayyangar & ors. Vs St. Of T.N. (1976) Supreme Court Cases (Cri) 518.

5. Vijender Singh Vs St. Of U.P. (2017) 1 JIC 328(SC).

6. Rajkishore Purohit Vs St. Of M. P. & ors. (2017) Supreme Court Cases (Cri) 483.

7. Balwant Singh & ors. Vs St. Of pun. (2008) CRI.L.J. 1648.

8. Dalip Singh & ors. Vs The St. of Pun. MANU/SC/0031/1953 : [1954]1SCR145

9. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

10. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

11. St. of Raj. Vs Smt. Kalki & anr. MANU/SC/0254/1981: AIR 1981 SC 1390

12. Molu & ors. v. St. of Har. AIR (1976) SUPREME COURT 2499

13. Krishna Pillai Sree Kumar & anr. Vs St. of Ker. AIR (1981) SUPREME COURT 1237

14. Praful Sudhakar Parab Vs St. of Mah. AIR (2016) SUPREME COURT 3107

15. Vadivelu Thevar Vs St. of Mad. AIR (1957) SC 614

16. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

17. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. as reported in AIR (1983) 753,MANU/SC/0090/1983

18. Krishna Mochi & ors. Vs St. of Bihar MANU/SC/0327/2002

19. Rajasthan Vs Smt. Kalki & anr. MANU/SC/0254/1981

20. Gangadhar Behera & ors. Vs St. of Ori. MANU/SC/0875/2002

21. St. Of Raj. Vs ANI @ Hanif & ors. (1997) Supreme Court Cases (Cri) 851,

22. Ramesh Singh @ Photi Vs St. Of A.P. ,(2004) 11 SCC 305,

23. Ramaswami Ayyangar & ors. Vs St. of T.N. (1976) Supreme Court Cases (Cri) 518,

24. Vijender Singh Vs St. Of U.P. (2017) 1JIC 328(SC),

25. Rajkishore Purohit Vs St. Of M.P. & ors. (2017) Supreme Court Cases (Cri) 483,

26. Balwant Singh & ors. Vs St. of Pun. (2008) CRI.L.J. 1648.

27. St. of Raj. Vs ANI @ Hanif & ors. 1997 Supreme Court Cases (Cri) 851:1997 CRI. L. J. 1529

28. Zahira Habibullah Sheikh & ors. Vs St. of Guj. & ors. AIR (2006) SUPREME COURT 1367

29. Ramesh Singh @ Photi Vs St. of A.P. MANU/SC/0278/2004, (2004) 11 SCC 305,

30. Ramaswami Ayyangar & ors. Vs St. of T.N. (1976) 3 SCC 779 (1976 CRI. L. J. 1563),

31. Vijender Singh Vs St. Of U.P. (2017) 1 JIC 328(SC)

32. Rajkishore Purohit Vs St. Of M.P. & ors. (2017) Supreme Court Cases (Cri) 483

33. Balwant Singh & ors. Vs St. of Pun. (2008) CRI.L.J. 1648

34. Nand Kishore Vs St. of M.P. (MANU/SC/0753/2011 : (2011) 12 SCC 120),

35. Asif Khan Vs St. of Mah. & ors. MANU/SC/0323/2019

36. Mehbub Shah Vs Emperor MANU/PR/0013/1945,

37. Pandurang & ors.Vs St. of Hyderabad MANU/SC/0048/1954

38. Mohan Singh & anr. Vs St. of Pun. MANU/SC/0176/1962

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

Heard learned counsel for the appellants and learned A.G.A. for the State.

2- This criminal appeal has been preferred by the appellants **Prahlad, Suresh, Ram Jeewan and Vishwanath** under Section 374(2) of the Cr.P.C. against the judgment and order dated 03.08.1982 passed by Vth Additional Sessions Judge, Sitapur convicting the appellant Suresh for imprisonment for life under Section 302 I.P.C. and one year R.I. under Section 323 read with Section 34 I.P.C. and appellants Prahlad, Ram Jeewan, Vishwanath for imprisonment for

life under Section 302 I.P.C. read with Section 34 I.P.C. and one year R.I. under Section 323 I.P.C. read with Section 34 I.P.C. in Sessions Trial No. 445 of 1979 arising out of Case Crime No. 152 of 1978, Police Station Mishrikh, District Sitapur.

3- Appellants No.3 & 4 namely Ram Jiwan and Vishwanath have died during the pendency of this appeal and appeal with regard to them has been abated vide order dated 08.01.2019 and 11.04.2019.

4- The prosecution story as emerges from the record of the trial Court is that a written report, Exhibit-ka4 was presented by informant Inderdutt at 7:30 am on 11.06.1978 scribed by one Mahesh Prasad at Police Station Mishrikh, District Sitapur stating therein that Ramjiwan and ramdutt are his real brothers, they were inmical towards each other pertaining to the partition of their agricultural land and on the basis of this enmity Ram Jiwan lodged an FIR against Ramdutt and others for the offence under Section 452 I.P.C. and a case pertaining to that was pending in the Court. About 15 days before, there was some quarrel in between his nephew Satya Narayan and maternal grandson of Ram Jiwan, on which Ram Jiwan came to the house of Ramdutt with a *"lathi'*, in order to beat Satya Narayan and when he did not find Satya Narayan, he threatened to see them.

It was further stated that in the intervening night, his family members and Ramdutt along with his family members went asleep after taking their dinner. A lantern was lighting in each of the house. In the mid of night, Prahlad and Suresh armed with *"katta' (Country-made pistols)* and Ram Jiwan and Vishwa Nath armed with *"lathi'* (Stick), climbed on the roof of his (Inderdutt) house. Suresh pointed his pistol towards Inderdutt in order to murder him, on which Ram Jiwan told him that he is Inderdutt and not Ramdutt and he is not the person to be killed. On this, all accused persons with the help of a ladder reached in the Courtyard of Ramdutt's house, where he along with his family members was sleeping. They caught hold of Ramdutt and dragged him in a room *(Kothri)* of his house. Suresh fired a shot at Ramdutt in that *"Kothri'* and Ramdutt ran towards his courtyard, where he was assaulted with *"lathi'* by Ram Jiwan and Vishwanath. Ram Jiwan was commanding others to kill Ramdutt and when wife of Ramdutt attempted to save him, Ram Jiwan and Vishwanath also assaulted her. On an alarm raised by them, Nattharam, Sarju and Shripal and other villagers came to the house of Ramdutt and made a noise, where-on all accused persons ran away from the main door of the house of Ramdutta. He after arranging a bullock cart was coming to the police station for lodging the FIR, however, near village Karmasepur Ramdutt succumbed to the injuries and died.

5- On the basis of this written report, the Chick FIR, Exhibit-ka-8 was prepared and a corresponding G.D. Entry, Exhibit-ka-9 was made in the General Diary at "Rapat No.9 dated 11.06.1978 at 7:30 am. Injured Smt. Rani wife of deceased Ramdutt was referred to the hospital for management of her injuries.

6- The investigation of the crime was entrusted to Shri Narayan Dutt Pandey, who at first conducted the Inquest (Exhibit-ka-10) of the dead body

of Ramdutt, which was lying in a bullock cart at the police station and also prepared necessary papers for the purpose of post-mortem of the body of deceased i.e. Photo lash, Exhibit-ka-11, Challan Lash, Exhibit-ka-12, letter to the C.M.O., Exhibit-ka-13, Sample seal, Exhibit-ka-14 and Memo of Cloth (Sari), Exhibit-ka-15 of the wife of deceased, by which the body was covered. The dead body of the deceased was sent through Constable Bhoorelal for the post-mortem. The statement of the wife of deceased, who was present at the police station was also recorded by him along with the statement of other persons present there.

7- Smt. Rani wife of deceased, who was referred to P.H.C., Mishrikh for her medical examination was examined on 11.06.1978 at 8:30 pm. by P.W.-1/Ravi Shanker Tripathi, who after examining the injured prepared a medical report (Exhibit-ka-1). He also noted following injuries on her person :-

Injury No.1/Contusion 4" x 2" on the outer side of the left arm just below the shoulder.

Injury No.2/Contusion 2½" x 2" on the right side of the chest 6" below the axilla.

Injury No.3/Contusion 3" x 2" on the left buttock.

Injury No.4/Contusion on 4" x 4" on the left side of the back 3" below shoulder and 3" from middle.

In the opinion of Dr. Tripathi these injuries were simple, appeared to be caused by some blunt weapon like lathi and at the time of the examination all injuries were found more than half day old.

8- On 11th June, 1978 at 4.15 pm. the post-mortem examination on the body of late Ramdutt was performed at the district mortuary by P.W.-2, Dr. L.P. Shukla, the then M.O. District Hospital, Sitapur and he also prepared a report Ex.ka-2. At the time of post mortem rigor mortis was present in upper and lower limbs of body and there was no sign of decomposition. Dr. Shukla came to the conclusion that the death of the deceased had occurred about half day before. He also found following antemortem injuries on the body of the deceased :-

Injury No.1/Multiple contusion in an area of 30 cm. x 8 cm. on left shoulder and upper arm upto left elbow on postero-lateral aspect.

Injury No.2/Multiple contusion in an area of 33 cm. x 28 cm. on whole of the back left side.

Injury No.3/Multiple firearm wounds of entry in an area of 9 cm. x 9 cm. on left side chest 6 cm. below nipple at 5:30' O clock position each wound measuring 0.3 cm. x 0.3 cm. x cavity deep margins inverted. Blackening present direction left to right and downwards.

Injury No.4/Abrasion 1 cm. x ½ cm. on front of left knee at patella line.

Injury No.5/Abrasion 1 cm. x ½ cm. on the right upper leg in front 7 cm. below knee.

Injury No.6/Abrasion ½ cm. x ½ cm. on the right upper part leg just below right knee.

The internal examination of the body disclosed that the 7th rib was punctured and left lung, pleura were lacerated and ruptured. Heart was empty. The chest cavity contained about 4 ozs of blood. Stomach contained 3 to 4 ozs of digested food. Both the intestines were full upto rectum. 24 small rounded pellets

were recovered from the chest cavity. The blood stained "angoochha' and "Janeu' Exhibits ka-3 and 4 were found on the dead body and were sealed separately. In the opinion of Dr. Shukla death of Ramdutt was caused due to shock and hemorrhage resulting from the said antemortem injuries. He further opined that it was likely that after being injured Ram Dutt might have remained alive for 4-5 hours.

9. The Investigating Officer thereafter arrived at the spot, where he recorded the statements of the family members of informant and deceased and also prepared the Site Plan, Exhibit-ka-17. Four Tickli of cartridge was given to him by the informant, which was sealed by him at the spot and a memo, Exhibit-Ka-6 was prepared. He also inspected the lanterns of the house of Inderdutt and Ramdutt (Deceased) and prepared a memo, Exhibit-ka-5. He also inspected the torches of Nattharam, Sarju and Shripal and also prepared a memo, Exhibit-ka-3. After the transfer of the first Investigating Officer, Shri Narayan Dutt Pandey, the investigation was taken over by Sub Inspector Prem Madhava, who after recording the statement of scribe of FIR namely Mahesh submitted the Charge-sheet in the matter (Exhibit-ka-7) against all accused persons.

10. The case being exclusively triable by the Court of Sessions was committed to Sessions Court and charges under Section 302 I.P.C. and 323 read with Section 34 I.P.C. were framed against appellant Suresh, while charges under Section 302 read with Section 34 I.P.C. and Section 323 read with Section 34 of I.P.C. were framed against accused-appellants Prahlad, Ram Jiwan and Vishwanath. All accused persons pleaded not guilty and claimed trial.

11. The prosecution in order to prove its case beyond reasonable doubt relied on following documentary evidence:-

1. Written Report,
Exhibit-ka-1
2. Chick FIR,
Exhibit-ka-8
3. G.D. Entry of FIR,
Exhibit-ka-9
4. Inquest report,
Exhibit-ka-10
5. Photo Lash,
Exhibit-ka-11
6. Challan Lash,
Exhibit-ka-12
7. Letter C.M.O.,
Exhibit-ka-13
8. Sample seal,
Exhibit-ka-14
9. Memo of Cloth (Sari),
Exhibit-ka-15
10. Memo of "dhoti' found on the dead body, Exhibit-ka-16,
11. Site Plan
Exhibit-ka-17
12. Memo of taking ticklis provided by complainant, Exhibit-ka-6,
13. Memo of inspection of lanterns Exhibit-ka-5
14. Memo of examination of torches of witnesses Shripal, Sarju and Nattharam
Exhibit-ka-3
15. postmortem report
Exhibit-ka-2
16. Charge-sheet
Exhibit-ka-7.

12. Apart from above mentioned documentary evidence, prosecution also testified following witnesses in support of their case:-

P.W.-1/Dr. Ravi Shanker Tripathi, (Doctor, who examined Smt. Rani)

P.W.-2/Dr. L.P. Shukla (Doctor, who conducted the postmortem on the body of deceased Ramdutt)

P.W.-3/Smt. Rani
(Eye witness/wife of deceased)

P.W.-4/Nattharam
(Eye witness)

P.W.-5/Inderdutt
(Informant/eye witness)

P.W.-6/Sarju Prasad
(Eye witness)

P.W.-7/Prem Madhav Shukla
(Second Investigating Officer)

P.W.-8/Constable Bhoorelal,
(who took the body for postmortem)

P.W.-9/Shri Ram Bahadur Verma, (Constable clerk who scribed FIR and G.D.)

P.W.-10/Shri Narayan Dutt Pandey, (Ist Investigating Officer)

13. After the completion of the evidence of the prosecution, the statement of the all accused persons were recorded under Section 313 of the Cr.P.C., wherein all accused persons have denied the incident or any offence committed by them.

Accused Prahlad has further stated that he lives in his in-law's house situated about 16 miles away from the spot and he is a resident of village Daripur which is about 20 miles away from the village, where incident happened.

Accused Ram Jiwan in his statement has stated that no litigation was pending pertaining to the partition of agricultural land, the roofs of houses of Ram Dutt and Inderdutt are adjacent and also that he is having 03 daughters and he has given all his properties in their favour and his brothers were inimical towards him for this reason. Accused Vishwanath in his statement has stated that he lives about 16 miles away from the place of occurrence, Suresh is son-in-law of Ram Jiwan and his maternal nephew and, therefore, he has been falsely implicated.

14. Learned counsel for the appellants while referring to the judgment and order of the Trial Court submits that all the witnesses produced by the prosecution in this case are related to the deceased and informant. Independent witness Sripal and others, though were present at the spot, have not been produced by the prosecution.

He further submits that there was no motive alleged by the prosecution for the offence and a very strong motive is required to murder a real brother, therefore, the case of the prosecution is false.

He further submits that the First Information Report is ante-timed and in the facts and circumstances of the case could not be believed. According to him, deceased Ramdutt was killed by unknown persons in an incident of dacoity and due to enmity with the accused persons this false case has been carved out against the appellants with the help of local police. The incident is highly improbable. Source of light as shown by the prosecution could not be believed. No blood has been recovered from the room (kothri), where shot was allegedly fired and the medical evidence also does not corroborate the ocular evidence, therefore, the whole story of the prosecution is not believable.

He further submits that Prahlad has apparently been falsely implicated, as no role has been assigned to him by P.W.3- Smt. Rani, therefore, he could not be convicted with the help of Section 34 I.P.C.

He overwhelmingly submits that it is a case, wherein it is apparent that the false implication of the appellants has been done and the Trial Court has therefore erred in appreciating the evidence available on record and the appellants are liable to be acquitted of the charges framed against them.

In support of his submissions, learned counsel for the appellants relied on a case law namely ***Ezajhussain sabdarhussain vs State Of Gujrat*** reported in ***2019(2)JIC 33(SC).***

15. Learned A.G.A. on the other hand has stated that the prosecution has proved its case beyond all reasonable doubts and no illegality or even irregularity has been committed by the Court below in appreciation of evidence.

He further submits that the evidence of P.W.-3/Smt. Rani, P.W.-4/Nattharam, P.W.-5/Inderdutt and P.W.-6/Sarju Prasad is natural, trustworthy and reliable. The case being based on direct evidence the motive looses its significance, otherwise also it is evident and proved on record that parties were highly inimical towards each other.

He further submits that P.W.-3/Smt. Rani is a Rustic villager and minor contradictions appearing in her testimony should be seen in the background of her status, power of perception and reproduction. All witnesses of the fact have given a natural and reliable ocular account of the incident, whereby it is proved that appellant Suresh by firing shot at deceased Ramdutt committed his murder in furtherance of the common intention of all accused persons.

He further submits that the common intention of all the appellants/accused persons is evident by the manner in which, they climbed the roof of the deceased after arming themselves with country-made pistols and "lathis' and the manner in which the deceased was taken in the inner room (kothri), where he was shot at by Suresh, while his hands were caught hold by accused appellants Ram Jiwan and Vishwanath, which clearly suggests that all accused persons were working in prosecution of their common intention.

He further submits that it is also proved that Prahlad has pointed his pistol towards the son of deceased namely Satyanarain and therefore, the manner in which all the accused persons departed after committing the crime through the main door of the house of deceased Ramdutt is also sufficient proof that they were sharing a common intention to murder deceased Ram Dutt. Therefore, there is nothing wrong in the Judgment of the Trial Court, whereby the accused Suresh has been convicted for the offence under Section 302 of I.P.C. and rest of the accused persons were convicted for the offence of murder with the help of Section 34 of I.P.C.

Learned A.G.A. in support of his arguments relied on following case laws:-

1. State Of Rajasthan vs ANI alias Hanif and others reported in ***1997 Supreme Court Cases (Cri) 851.***

2. Ramesh Singh @ Photi vs State Of A.P. reported in ***(2004) 11 SCC 305***

3. Ramaswami Ayyangar and Othrs vs State Of Tamil Nadu reported in ***1976 Supreme Court Cases (Cri) 518.***

4. Vijender Singh Vs State Of UP reported in ***2017(1)JIC 328(SC).***

5. Rajkishore Purohit vs State Of Madhya Pradesh & Others reported in ***2017 Supreme Court Cases (Cri) 483.***

6. Balwant Singh & Othrs vs State Of punjab, reported in ***2008 CRI.L.J. 1648.***

16. Having heard the arguments of learned counsel for the rival parties, it appears in the interest of things that a brief survey of the testimony of the prosecution witnesses be made, so that the arguments of the rival parties may be appreciated in a better way.

P.W.-1/Dr. Ravi Shanker Tripathi is the Doctor, who has examined Smt. Rani wife of deceased on 11.06.1978 at P.H.C., Mishrikh at 8:30 am in the morning. He has proved the injury report of injured Smt. Rani in his signature and hand writing and proved the same as Exhibit-ka-1. The details of the injuries noted by him have been given in paragraph No. 7 of this judgment.

P.W.-2/Dr. L.P. Shukla has conducted the postmortem on the body of the deceased Ramdutt at District Hospital, Sitapur on 11.06.1978 at 4:15 pm. He has proved the postmortem report in his handwriting and signature as Exhibit-ka-2. The details of the injuries and other particulars noted by him pertaining to the body of the deceased Ram dutt has been elaborately mentioned in Para no. 8 of this Judgment.

P.W.-3/Smt. Rani is the wife of deceased Ram dutt and in the facts and circumstances of the case, she is the star witness of instant crime. She has stated that there was some dispute in between her husband Ramdutt and Ram Jiwan pertaining to their agriculture land. She further stated that Ram Jiwan had instituted a criminal case against her husband, son, complainant Inderdutt and his son. She further stated that the house of Inderdutt/complainant is adjacent to her house. About 01 year and 11 months ago, when she, her husband, her son as well as her daughters were sleeping in the courtyard of the house and a lantern was lighting outside the room, at about mid night all accused persons descended, through a ladder from the roof of her house, in her courtyard. Suresh and Prahlad were armed with country-made pistols, while Ram Jiwan and Vishwanath were armed with *''lathis'*. They dragged her husband Ramdutt in the inner room situated towards east of her house, where Ram Jiwan and Vishwanath caught hold the hands of her husband and accused Suresh fired at Ramdutt. Her husband in order to save himself ran towards courtyard and fell there, where Vishwanath and Ram Jiwan assaulted him with *''lathis'*. She covered her husband and requested the accused persons not to beat him, on which, she was also assaulted. On an alarm raised by her and her brother-in-law Inderdutt from the roof of her house and by Shripal, Natthu and Sarju who came at the spot, all accused persons fled from the main door of her house. After the departure of the accused persons above witnesses came in her house with torches and "lathis' along with Inderdutt and she told the whole story to them. Her husband at that point was alive. They were taking him in a bullock cart to the police station along with other persons of the village and when they reached near village Karmasepur, her husband died. The FIR of the incident was lodged by Inderdutt, which was written by Mahesh Master.

P.W.-4/Nattharam is the first cousin of deceased Ramdutt, Inderdutt,

complainant/informant as well as of Ram Jiwan. He stated that at about mid night he heard gunshot sound and took his *"lathi'* and torch and rushed towards the house of Ram Dutt. When he arrived near the house of Inderdutt, he heard shouts from within the house of Ramdutt and also that accused persons Suresh, Prahlad, Ram Jiwan and Vishwanath were assaulting the inmates of the house.

He further stated to have seen accused Suresh and Prahlad armed with *"katta' (Country-made pistol)* and Ram Jiwan and Vishwanath armed with "lathis' emerging from the main door of the deceased Ramdutt. Sarju Prasad and Shripal were also holding torches in their hands. When he went inside, he saw that Ramdutt was unconscious and the wife of deceased Ramdutt told them that her husband has been dragged in the *"Kothri'* by accused persons and when her son Satyanarain attempted to intervene, Prahlad took him on gun point and at that time, Suresh fired at her husband who after being hit ran towards the courtyard to save himself and when she attempted to save her husband, she was also beaten with "lathis' by them.

P.W.-5/Inderdutt is the informant of this case, who stated that a criminal case was lodged by Ram Jiwan against him, deceased Ram dutt and other persons and also that about 15 days before the murder of Ramdutt, there was a quarrel in between Satyanarain and the grand-maternal son of Ram Jiwan, on which, Ram Jiwan came to the house of Ram dutt with a *"lathi'* and when he did not find Satyanarain, he intimidated that he will see them. He further stated that at the relevant time, he was lying on his cot at the roof of his house. The house of Ramdutt is adjacent to his house and there is a ladder for the purpose of climbing on the roof of their houses. He saw that accused persons Suresh and Prahlad armed with *"katta'* and Vishwanath and Ram Jiwan armed with "lathis' climbed on his roof and Suresh pointed his pistol towards him, when Ram Jiwan intervened and told Suresh not to shoot, as he was Inderdutt and not Ramdutt. At this, all accused persons descended in the courtyard of Ramdutt through the ladder and dragged Ram Dutt towards *"kothri'*, wherein accused Suresh fired at Ramdutt.

He further stated that, when Ramdutt ran towards the courtyard, he was assaulted by Ram Jiwan and Vishwanath by "lathis' and when wife of deceased Smt. Rani attempted to save him, she was also assaulted by them. On an alarm raised by them, Nattharam, Sarju Prasad, Shripal came at the spot with "lathis' and torches and when all of them raised an alarm, accused persons ran away from the main door of the house of Ramdutt.

He further stated that he after arranging a bullock cart was carrying Ramdutt to the Police Station, however Ramdutt died on the way and he after getting a report written by Mahesh master informed the police. He also stated that when the Investigating Officer came, he showed him the lantern of his house as well as of Ramdutt's house and handed over 04 tiklis of cartridge to the Investigating Officer.

P.W.-6/Sarju Prasad is an eye witness, who came along with Nattharam, who is his real brother. They are living nearby with three or four houses falling in between. He corroborated the testimony of Nattharam that they heard a noise and a gunshot sound at mid of night and arrived outside the house of Ramdutt and saw Sarju, Prahlad, Ram Jiwan and Vishwanath armed with *"katta'* and

"lathis' emerging from the main door of Ramdutt. He also stated that there was high pitch enmity in between Ram Jiwan and Ram Dutt. He also stated that about 15 days prior to the instant incident a quarrel had occurred in between son of Ram Dutt i.e. Satyanarain and grand-maternal son of Ram Jiwan i.e. Raj Bahadur. Accused Ramjiwan thereafter came to the house of Ramdutt to beat Satyanarain and when did not find him, he threatened to teach him a lesson.

P.W.-10/Shri Narayan Dutt Pandey is the first Investigating Officer of the case and he stated to have conducted the inquest and prepared a report, Exhibit-ka-10 and also prepared necessary papers for the purpose of postmortem, Exhibit-ka-11 to Exhibit-ka-15 and also took the *"Saree'* in his custody by which the dead body of ramdutt was covered and he also inspected the lanterns and torches.

He further stated to have seized 04 *tiklis* of cartridge given to him by the complainant and also that he recorded the statement of witnesses Smt. Rani, Natthu, Sarju, Sripal and Ramdutt and other persons. He also stated to have collected the material sent from the postmortem house.

P.W.-7/Shri Prem Madhava Shukla is the 2nd Investigating Officer, who stated that he after recording the statement of Mahesh Prasad submitted a charge-sheet, (Exhibit-ka-7).

P.W.-8/Constable Bhoorelal has submitted to have taken the dead body of Ramdutt to the hospital for the purpose of postmortem in a sealed condition and did not allow anyone to touch the body.

P.W.-9/Shri Ram Bahadur was Constable clerk at the relevant time at Police Station Mishrikh, who stated to have written the Chick First Information Report, Exhibit-ka-8 and entry of G.D., Exhibit-ka-9 in his handwriting.

17. Learned counsel for the appellants submits that all witnesses produced by the prosecution are related to the deceased and informant and independent witnesses including Sri Pal were not produced by the prosecution.

He further submits that conviction could not be based on the evidence of interested witnesses, when the prosecution has deliberately withheld independent witnesses.

Learned A.G.A., however, confronted this argument on the basis that all prosecution witnesses of this case are the most natural witnesses, as they are either inmates of the house of deceased or were residents of the same village.

In **Dalip Singh and Ors. v. The State of Punjab MANU/SC/0031/1953 : [1954]1SCR145** it has been laid down as under:-

"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. 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."

In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** The Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

Hon'ble Supreme Court in **Gangabhavani vs. Rayapati Venkat Reddy and Ors. , MANU/SC/0897/2013** held as under :-

"11. 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.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

*12. In **State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 :** AIR 1981 SC 1390, this Court held:*

"5A. 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."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473)."

"14. 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."

Perusal of the record would reveal that accused Ram Jiwan, deceased Ram Dutt and informant Inderdutt were real brothers. Ram Jiwan being the eldest and Inderdutt being the youngest brother. It is also stated by the witnesses that during the lifetime of his father, accused Ram Jiwan started living separately and doing separate cultivation after getting a portion of land from his father, while other two brothers Ram Dutt and Inderdutt remained with their father. However, at the time of incident, all brothers were living separately. Therefore, it is a unique case, where a real brother has been killed by another real brother and the informant of the offence is the third real brother. In the First Information Report, it has been stated that when Ram Dutt, his wife and their children went asleep after taking their dinner, at about mid of night, Prahlad and Suresh armed with *"katta'* and Ram Jiwan and Vishwanath armed with Sticks *(lathi)* came to the roof of Inderdutt, where he was sleeping. Suresh pointed his pistol towards him and at that moment, accused Ram Jiwan informed him that the person standing in front of him is Inder Dutt and not Ram Dutt and he is not the person, to be killed. Thereafter, all accused persons went in the Courtyard of deceased Ram Dutt through a ladder and all of them took Ram Dutt in a *"Kothari'* (Inner room) and there Suresh fired at deceased Ram Dutt, while Ram Jiwan and Vishwanath were holding the hands of deceased and Prahlad was pointing his country-made pistol towards Satyanarain (son of deceased Ram Dutta). Ram Dutt in order to save himself ran towards courtyard, where Ram Jiwan and Vishwanath assaulted him with *''lathis'* and when his wife Smt. Rani came in between, she was beaten too. Nattharam, Sarju and Shripal and other people of the village stated to have arrived at the scene holding sticks and torches in their hands and all of them saw all accused persons emerging from the main door of the Ram Dutt. When the witnesses went inside the house, the whole story was told to them by P.W.-3/Smt. Rani and, thereafter, Ram Dutt was being taken to police station in a Bullock cart, however, he died on his way.

P.W.3/Smt. Rani has narrated the whole story in detail as to how her husband was killed. She stated that in the *''kothri'*, Ram Jeewan and Vishwanath had caught hold of the deceased, while Suresh fired at him from a country-made pistol and in the courtyard also, her husband and she were beaten by Vishwanath and Ram Jiwan. She also stated about the arrival of witnesses Sripal, Nattha and Sarju outside her house who saw the accused persons emerging out from the main door of her house. In her cross-examination, she stated that Nattha and Sarju are real brothers and Sarju was an accused in proceeding of Section 107, 116 of Cr.P.C. along with her husband Ram Dutt. She further stated that the houses of these witnesses are near to each other with 2-3 houses falling in between their houses.

P.W.-4/Nattharam and P.W.-6/Sarju Prasad have stated about hearing of a sound of gunshot and also shouts coming from the Ramdutt's house and that they took *''lathi'* and torches with them and reached at the door of the

Ramdutt's house. Both of them stated to have seen, in the light of torches, all accused persons emerging from the main door of the house of Ramdutt and also that they saw pistols in the hands of Suresh and Prahlad and "lathis' in the hand of Ram Jiwan and Vishwanath.

P.W.-3/Smt. Rani has also stated that after departure of accused persons, P.W.-4/Nattharam and P.W.-6/Sarju as well as P.W.-5/Inderdutt came in her courtyard and to them, she narrated the whole incident. It is evident that P.W.-4/Nattharam and P.W.-6/Sarju are the witnesses of only hearing the shouts coming out from the house of Ram Dutt and thereafter to have witnessed all accused persons emerging out from the main door of the house of Ram Dutt.

P.W.-5/Inder Dutt is also a witness of only the fact, as to what had happened on the roof and in the courtyard of the house of deceased Ram Dutt. Therefore, none of these witnesses was in a position to witness as to what had happened inside the *''Kothri'* except P.W.-3/Smt. Rani who was inside the Kothri.

As said earlier, P.W.-4/Nattharam and P.W.-6/Sarju are real brothers and also first cousin of Ram Dutt, Ram Jiwan and Inder Dutt. Apart from them, only Sripal was named in the First Information Report as a witness, but has not been produced by the prosecution during trial. Apart from them, certain other persons have also stated to have gathered at the scene, but they have also not been produced by the prosecution. It is also an admitted fact that P.W.-4/Nattha and P.W.-6/Sarju are equally related to the deceased, informant as well as to the accused Ram Jiwan, and in the facts and circumstances of the case, all these witnesses appears to be natural witnesses of the crime. P.W.-4/Nattha and P.W.-6/Sarju only stated to have arrived outside the house of Ram Dutt on hearing a gunshot and shouts. Simply because of the fact that Sarju was arrayed as a party along with Inderdutt and Ram Dutt in a proceeding under Section 107 and 116 of the Cr.P.C. would not label his evidence as of an interested witness. P.W.-4/Nattharam @ Nattha is stated to have stood surety for Ram Dutt in a criminal case instituted by accused Ram Jiwan. This fact will also not make him inimical witness, as standing surety for first cousin (Ramdutt) will not array him as inimical towards accused Ram Jiwan. Therefore, keeping in view the whole evidence available on record, it emerges that P.W.-4/Nattha and P.W.-6/Sarju have only claimed to have witnessed accused persons running from the main door of the house of deceased and they have not claimed to have seen the incident which occurred inside the house of Ramdutt. Therefore, in the facts and circumstances of the case all these witnesses appear to be natural and impartial witnesses of the incident. Had they been interested witnesses they might have narrated a story of having witnessed the whole incident. Therefore, their testimony could not be discarded only on the basis of their relation with the deceased or informant as they are equally related with accused Ram Jiwan.

18. So far as the contention of learned counsel for the appellants, that a strong motive and reason is required to murder the real brother, is concerned, suffice is to say that a very strong motive and reason is also required to falsely implicate the real brother for the murder of his real brother. Therefore, we do not find any substance in this contention of learned counsel for the appellants and

even if the prosecution witnesses are related to the informant or the deceased, their testimony could not be rejected outrightly and it is only that the same has to be appreciated and analyzed with care and caution.

It is also to be understood that the prosecution is not obliged to present each and every witness of the crime as its witness. Presenting of the witnesses is the prerogative of the public prosecutor and a witness about whom prosecutor is having prior information that he will not support the case of the prosecution, he is not obliged to present him. This argument may also be dealt with from another angle. The instant incident admittedly has happened in between real brothers. Therefore there will always be an apprehension in the mind of the independent witnesses that at some point of time in future, the accused persons and informant or victim may compromise the matter within themselves and by testifying themselves as witness, they will not like to earn bad blood of the accused persons.

Keeping in view all evidence, facts and circumstances of the case, in our considered view all the witnesses produced by the prosecution are natural and their otherwise truthful testimony could not be rejected on the ground of their relation with the deceased or informant, as they are equally related to accused Ram Jiwan also. In these facts and circumstances of the case, if independent witness Shripal is not produced by the public prosecutor and actually have been discharged, the same will not make the case the prosecution as doubtful.

19. The next submission of learned counsel for the appellants is that the motive, which has been alleged by the prosecution has not been proved and the evidence, facts and circumstances of the case suggests that accused persons were not having any motive to murder Ram Dutt, who was the real brother of accused Ram Jiwan and, therefore, the whole story of the prosecution appears to be fabricated and concocted.

The law pertaining to the motive is now not a debatable issue. The law is well-settled that in cases based on direct evidence of eye witnesses, the motive is not having much significance.

A three Judges Bench Of **Hon'ble Supreme Court in Molu and others Appellants v. State of Haryana AIR 1976 SUPREME COURT 2499** opined as under :-

"11. Finally it was argued by the appellants, following the reasons given by the Sessions Judge, that there was no adequate motive for the accused to commit murder of two persons and to cause injuries to others. It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes. however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye-witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. For these reasons, therefore, we agree with the High Court that the prosecution has been able to prove the case against the appellants beyond reasonable doubt."

Hon'ble Supreme Court in **Krishna Pillai Sree Kumar and another**

v. State of Kerala, AIR 1981 SUPREME COURT 1237 held as under:-

"7. It is undisputed that some bad blood existed between the deceased on the one hand and the appellants on the other prior to the occurrence. The animosity may not have been very bitter but then it is too much to say that it could not possibly form a motive for the occurrence. The variation in human nature being so vast murders are known to have been actuated by much lesser motives. In any case, it is not a sine qua non for the success of the prosecution that the motive must be proved. So long as the other evidence remains convincing and is not open to reasonable doubt, a conviction may well be based on it."

In **Praful Sudhakar Parab v. State of MaharashtraAIR 2016 SUPREME COURT 3107** Hon'ble Supreme Court stated as under :-

"16. One of the submissions which has been raised by the learned amicus curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash laying in the office but no evidence was led by the prosecution to prove that how much cash were there in the pay office. Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in Ravinder Kumar and another v. State of Punjab, 2001 (7) SCC 690 : (AIR 2001 SC 3570), has laid down following in paragraph 18:

"18.....It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in State of Himachal Pradesh v. Jeet Singh {1999 (4) SCC 370 : (AIR 1999 SC 1293)}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Keeping in view the above stated law we are of the considered opinion that the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused persons, as to what tempted them to commit the crime. Therefore, the cases which are based on direct evidence of the witnesses should be decided on the basis of quality and probative value of the evidence of such eye witnesses. In the instant case, there are certain admitted

and proved facts, which persuade us to believe that there was enmity in between real brothers namely Ram Jiwan and Ram Dutt and, therefore, the same may be a reason for the accused persons to commit crime.

Perusal of evidence on record would further reveal that Ram Jiwan was not having any son and his two daughters were married. One of such daughters was married to accused Suresh . Suresh was admittedly living in the same village and was cultivating the land gifted to his wife by his father-in-law namely Ram Jiwan. It is also evident that accused Ram Jiwan during the lifetime of his father started living separately and was also cultivating his share of land, separately. It is also proved on record that he had gifted this land to his daughters by a gift deed. P.W.-3/Smt. Rani has Stated that total area of the land which came in the share of accused Ram Jiwan was about 6 acres, while Ram Dutt and Inderdutt remained with their father and after the death of their father Ramdutt and Inderdutt inherited about 16 "Bighas' of land each, which they partitioned amongst themselves. However, there is nothing on record, which may suggest that any dispute pertaining to the partition of agricultural land was pending in any court.

Significantly, P.W.-3/Smt. Rani in her statement has stated that for the last 04 years, they were not on talking terms with accused Ram Jiwan and were not having any relation with them. It is also an established fact that accused Ram Jiwan lodged an FIR against Ramdutt, his son and also against Inderdutt, under Section 323, 452 of I.P.C. and in turn her husband also lodged a cross FIR.

P.W.-3/Smt. Rani in her statement has further stated that despite the fact that her husband (Ramdutt) was beaten in the incident, but Ram Jiwan lodged the FIR against them. This incident is stated to have happened about a little more than one year before the instant incident. It is also proved on record that both sides were also challaned under Sections 107, 116 of the Cr.P.C. It is also stated in the First Information Report and P.W.-5/Inderdutt has also stated in his chief-examination that about 15 days, prior to the instant incident, some scuffle had taken place in between maternal grandson of Ram Jiwan i.e. Raj Bahadur with the son of deceased Ram Dutt i.e. Satyanarain and Ram Jiwan, armed with *"lathi'*, came to the house of Ramdutt in search of Satyanarain and when he did not find him, he threatened to teach him a lesson. However, in cross-examination, P.W.-5/Inderdutt has denied to have seen this incident himself and has stated to have heard about the same.

Though, none of the party has stated that getting of more land by Ram Jiwan was the root of enmity in between them but all prosecution witnesses have stated that there was enmity in between the parties due to the agricultural land. Thus keeping in view that Ramjiwan, who got a bigger share of the agricultural land in comparison to Ram Dutt and Inderdutt and apparently Inderdutt and deceased Ramdutt were on the same side, taking of more agricultural land by Ram Jiwan and thereafter gifted it to his daughters and also the cultivation of a portion of that land by his son-in-law namely Suresh may be a cause of heart burning and bad blood in between the parties. Though, in the instant case, being a case based on direct evidence, the prosecution was not obliged to prove motive, but there are ample and sufficient reasons available to the parties to have

bad blood and enmity in between, especially in the background of pendency of criminal cases between them.

20. It is further submitted by learned counsel for the appellants that the FIR in the instant matter is ante-timed and the local police has been instrumental in lodging the FIR ante-timed.

We have perused the evidence available on record in the background of this submission and have found that the instant incident had occurred at about midnight of the intervening night of 10/11.06.1978. The distance of Police Station Mishrikh is about 06 miles from the spot. It has been stated by P.W.-3/Smt. Rani and also stated in the First Information Report that deceased Ramdutt was being taken to the police station by a bullock cart and he, on the way died near village Karmasepur. The FIR in this case has been lodged by Inderdutt on 11.06.1978 at about 7:30 am. P.W.-3/Smt. Rani in her cross-examination has stated that she departed for the police station about 02 hours after the incident and when they reached near village Shivbhan, there was very heavy rain, which forced her to stop and take shelter in a school building and after waiting for about two hours, she resumed her journey towards the police station at about 4:00 a.m. and the police station is about 02 Kos away from village Shivbhan. She further stated to have arrived at the police station at the time of sunrise.

It is further stated by her that Mahesh master was with them and Inderdutt and Mahesh wrote the FIR at the gate of the police station. However, she could not recall as to from where the pen and paper was arranged and, thereafter, she was sent for medical examination.

P.W.-5/Inderdutt has also stated that Mahesh Master is brother of Karuna Shanker, who is the husband of his wife's sister and Mahesh wrote the FIR at the *Mohare* (mend) of the well of police station.

He further submits that the constable clerk at the police station asked him to give a written report and he got the paper from "Tehsil' and lodged the FIR. He also corroborated the statement of P.W.-3/Smt. Rani that when they reached village Shivbhan, there was heavy rain.

P.W.-9/ Sub Inspector Ram Bahadur, who was posted as a Constable Clerk at the Police Station Mishrikh at the relevant point of time has proved in his statement that the written application was given to him by Inderdutt at 7:30 am. on 11.06.1978. He further stated to have written the Chick FIR, Exhibit-ka-8 and also recorded the substance in the G.D., Exhibit-ka-9. P.W.-10/Shri Narayan Dutt Pandey (Investigating Officer) in his statement has proved the Inquest Report, Exhibit-ka-10 and also proved preparation of necessary papers for the purpose of postmortem. No cuttings or interpolations have been highlighted by the appellants in these documents. These witnesses have been cross-examined at length, but we have not found anything in their cross examination, from which an inference can be drawn that the FIR has been ante-dated or ante-timed. In our considered opinion, the FIR in the instant case is neither ante-dated nor ante-timed and in the facts and circumstances of the case, it is prompt and inspire confidence in this Court. Therefore, we do not find any substance in the arguments of learned counsel for the appellants that FIR is either ante-dated or ante-timed.

21. It has been further stated by learned counsel for the appellants that in fact deceased Ramdutt was killed in an incident of "dacoity' by some unknown persons and with the help of local police, accused persons have been falsely implicated. He claimed that there was no source of light at the time of alleged incident and the medical evidence also does not corroborate the oral testimony. No tikli or blood has been found in the "kothri', where Ramdutt was allegedly shot. No blood has either been found in the courtyard where part of the incident is alleged to have happened. The tiklis of Cartridge were given by the complainant to the Investigating Officer and there are inherent lacuna's, contradictions and improvements in the testimony of all prosecution witnesses, their presence on the scene of occurrence is highly doubtful and the prosecution has miserably failed to prove its case beyond reasonable doubt and the court below has committed a manifest error in convicting the appellants.

Ld. AGA however submits that the evidence of the prosecution witnesses is trustworthy and reliable and their presence at the scene of crime is natural. PW-3/Rani is an injured witness and minor contradictions occurring in her evidence should not be given much importance. The source of light is lantern lighting at the courtyard of deceased and the torches being held by the witnesses Natharam and sarju.

Hon,ble Apex Court in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614** held as under:-

"The contention that in a murder case, the Court should insist upon plurality of witnesses, is much broadly stated."

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section has enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

" Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.

Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

Vadivelu Thevar case (supra) was referred to with approval in many cases thereafter and it was held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. It is what the essence of Section 134 of the Indian Evidence Act, 1872. But, if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration. Therefore, it is not the number and the quantity, but the quality which is material. The time tested principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise.

*In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** it was observed that :-*

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

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as** reported in **AIR 1983, 753, MANU/SC/0090/1983** while appreciating evidence of witnesses in the background of minor discrepancies laid down following principles:-

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

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

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

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

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

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

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

In **Krishna Mochi and Ors. vs. State of Bihar, MANU/SC/0327/2002** relying on State of **Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 it was opined by Hon'ble Supreme Court that** normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

In **Gangadhar Behera and others v State of Orissa,** reported in MANU/SC/0875/2002 it is held that" *A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common* sense. *It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admin.). MANU/SC/0093/1978. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties."*

Therefore it is well settled that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and hits the root of the matter, the defence can take advantage of such

inconsistencies. However, every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. It is only the serious contradictions and omissions which may materially affect the case of the prosecution but not every contradiction or omission.

22. We have perused the evidence of prosecution available on record in the light of rival submissions and the principles enunciated in above cited case laws. The story of prosecution as contained in the FIR and stated by the prosecution witnesses, P.W.-3/Smt. Rani, P.W.-4/Nattharam, P.W.-5/Inderdutt and P.W.-6/Sarju is to the tune that in the intervening night of 10/11.06.1978 all 04 accused persons came to the roof of Inderdutt and Suresh pointed pistol on him. Ram Jiwan intervened and told Suresh that he is not Ramdutt and not the person to be killed, on which, all accused persons reached the courtyard of Ramdutt through a ladder and took Ramdutt to an inner room of the house (kothri), where Ram Jiwan and Vishwanath caught hold of the hands of Ramdutt and Suresh fired a shot at him and at that time, Prahlad was pointing his pistol towards Satyanarain. Ramdutt ran towards courtyard and fell there and Ram Jiwan and Vishwanath assaulted him with "lathis' and when P.W.-3/Smt. Rani came to save him, she was also assaulted. On alarm being raised by Inderdutt from the roof, Smt. Rani from the courtyard and by Nattha, Sarju and others from outside the main door of the house of deceased Ramdutt, all accused persons ran through the main door of the house of Ramdutt and were seen by the witnesses in the light of torches. When witnesses went in the house of Ramdutt, they saw him lying unconscious and Smt. Rani told them about the whole incident.

From the evidence of P.W.-3/Smt. Rani, it is proved that she also got injured in the same incident, when she tried to save her husband from accused persons Ram Jiwan and Vishwanath. She in her statement has narrated the whole story as to how the accused persons took her husband inside the *"kothri'* and Suresh fired at him. It is also stated by her that after the accused persons fled away through the main gate of her house, the witnesses including P.W.-4/Nattharam and P.W.-6/Sarju came in and she narrated the whole story to them.

P.W.-1/Dr. Ravi Shanker Tripathi is the person, who had examined Smt. Rani on 11.06.1978 at about 8:30 am. at P.H.C., Mishrikh and he found 04 contusion injuries on her person of the dimension of 4" x 2", 2½" x 2", 3" x 2" and 4" x 4" on left arm, right side of chest, left buttock and on the back of left shoulder, respectively. The injuries were stated about half day old. Therefore, the version of incident as stated by P.W.-3/Smt. Rani corresponds to the injuries found on her person, so is the time of incident. The postmortem of the deceased Ramdutt was conducted by P.W.-2/Dr. L.P. Shukla, who found multiple contusions on left shoulder, back of left side, abrasions on left knee, right upper leg, apart from multiple fire arm wounds of entry in an area of 9 cm. x 9 cm. on left side of chest of deceased. Each of this wound was measuring 0.3 cm. x 0.3 cm. and was cavity deep, the margins were inverted and blackening was present. On internal examination, 24 pellets were recovered from the chest cavity and the

Doctor has opined that deceased might have died about at 4-5 am. on 10/11.06.1978. It is further opined by him that deceased might have remained alive for 4 to 5 hours after the incident. This statement of the Doctor perfectly matches with the facts of incident as stated by P.W.-3/Smt. Rani and P.W.-5/Inderdutt. So far as the time of death of deceased, the manner of "marpeet' and the time of incident is concerned, medical evidence firmly corroborates the story of prosecution in material particulars and leaves no room for any suspicion.

23. As said earlier, P.W.-5/Inderdutt was sleeping on the roof of his house and was the first person, who met all the accused persons there. It is an admitted position that the roof of the houses of Inderdutt and Ramdutt are closely adjacent to each other. The evidence of this witness is related to the fact as to how all accused persons armed with "katta' and "lathi' came to his roof. How Suresh pointed his pistol towards him as he misidentified him as Ramdutt and Ram Jiwan corrected him by saying that he is Inderdutt and not Ramdutt, on which they went to the courtyard of Ramdutt and by dragging Ramdutt inside the "kothri', Suresh fired at him while ramjiwan and vishwanath caught hold of him. What has happened inside the "kothri' could not be seen by P.W.-5/Inderdutt and it appears that what he has stated about the incident happened in "kothri' is based on information provided to him by P.W.-3/Smt. Rani, when he went to the courtyard after the incident. This witness has stated in his cross-examination that he raised an alarm from his roof and he did not see the accused persons inside the room (kothri) of the deceased's house . On overall scrutiny of the evidence of this witness we find his evidence as reliable, truthful and acceptable in the facts and circumstances of the case. Why accused persons spared him is not a fact which prosecution is obliged to prove. Nothing has come in the cross-examination of this witness, which may cast any doubt pertaining to his reliability. What was going on in the minds of accused persons at the relevant point of time could not be proved by the prosecution, but sparing of Inderdutt by the accused persons suggest only one inference that the common intention of all accused persons was to murder only Ramdutt. We are in agreement with the reasoning of the Trial Court that deceased Ramdutt was having a criminal background, as some cases pertaining to "dacoity' had been instituted against him in the past and, therefore, he was a tough person. So the accused persons might have not seen Inderdutt as any danger or hurdle for them, while Ramdutt being a tough person with criminal background was a tough rival.

24. Now comes the testimony of two witnesses i.e. P.W.-4/Nattharam and P.W.-6/Sarju. These two real brothers have stated to have arrived at the house of Ramdutt after hearing gun shot and shouts. P.W.-6/Sarju has been arrayed as a party in a proceeding under Section 107, 116 of the Cr.P.C. with Ramdutt and Inderdutt, while Nattharam stood as a surety for Ramdutt in a criminal case instituted by Ram Jiwan. In our considered opinion, both these situations will not make or brand these witnesses as interested witness, for the reason that they were also equally related to the deceased and accused Ram Jiwan. We do not see any reason as to what benefit these witnesses will get in giving false evidence against Ram Jiwan, who is their first

cousin, when no enmity of these witnesses with accused Ram Jiwan has been suggested. One important thing, which branded the testimony of these witnesses is their truthfulness as they have confined their evidence to the facts, which were possible for them to witness. They fairly stated that they remained out of the house of deceased Ramdutt and could only hear sounds coming from inside and they did not try to break open the main door. There is every probability and possibility that in the calm of night, these witnesses might have heard sound of gunshot and shouts. This reason is acceptable in the facts and circumstances of the case which persuaded them to reach at the spot. They have also stated to have witnessed the accused persons emerging from the main door of the deceased in the light of torches, which they were carrying with them. This is a common practice for the villagers to carry Torches whenever they go out in the night. There appears no confusion, with regard to the identity of the accused persons as all prosecution witnesses know accused persons from before the incident and we do not see any reason for not accepting, the otherwise reliable testimony of these witnesses.

25. As said earlier, what has happened in the inner room (kothri) has only been witnessed by P.W.-3/Smt. Rani, her family members and accused persons and other prosecution witnesses were not in a position to see as to what is happening inside the *"kothri'*.

Having gone through the testimony of P.W.-3/Smt. Rani, it is apparent that she has given minute details of the occurrence, pertaining to the manner in which all the accused persons came in her courtyard and how they took the deceased in the *"kothri'*, where Ram Jeewan and Vishwanath caught hold of his hands and Suresh fired a shot from pistol. The whole occurrence with precision and minute details has been narrated by her. She has also stated that a lantern was lighting outside the room of his house and when Investigating Officer came to his house, the same lantern was lighting at that very spot and the Investigating Officer also examined it. This has also been corroborated by the Investigating Officer P.W.-10/Shri Pandey. The fact that the lantern was lighting at the place told by P.W.-3/Smt. Rani, has also been corroborated by P.W.-4/Nattharam and P.W.-5/Inderdutt. In the FIR also, it has been stated that in both the houses, lanterns were lighting. P.W.-3/Smt. Rani has also stated that she usually did not dim the lantern in the night. Therefore it is also proved that there was sufficient light in the house of the deceased to identify already known accused persons.

In her cross-examination P.W.-3/Smt. Rani stated that Suresh fired at his husband from a distance of about one and half length of hand and blood was oozing from the fire arm wound and he fell in the courtyard. She further stated that she was standing at a distance of about one hand from the deceased, when Suresh fired at him. According to her, in courtyard blood spread on to the earth, but due to heavy rain, which occurred that night, blood was washed away by rain water. It is also evident that multiple fire arm injuries have been found on the left side of the chest of the deceased having blackening around them which fortifies the statement of P.W.-3/Smt. Rani that the shot was fired from a close range. The non-finding of blood in the courtyard has also been

amply explained by this witness when she stated that heavy rain had occurred at that night and whatever blood was spilled on the floor might have been washed away by the rain water. P.W.-5/Inderdutt have found *tiklis* of cartridge in the "kothri' and had given to the Investigating Officer, who also prepared a memo of that.

Therefore, in our considered opinion, the evidence of all prosecution witnesses is consistent on the point of identification of accused persons, role played by all of them and firing of gun shot by Suresh on the deceased, when deceased was held by Ram Jiwan and Vishwanath and also about the assault given in the courtyard to the deceased as well as to P.W.-3/Smt. Rani by Ram Jiwan and Vishwanath. All accused persons have also been seen by P.W.-4/Nattharam, P.W.-5/Inderdutt and P.W.-6/Sarju, when they were running from the main gate of the house of deceased along with arms held by them. We do not find any reason as to why these witnesses, who are also related to the accused persons will give false evidence against them. The medical evidence also fully corroborates the ocular evidence of the incident. In our considered opinion the prosecution by its trustworthy, acceptable and reliable evidence has proved its case beyond all reasonable doubts.

26. At this stage, learned counsel for the appellants overwhelmingly submits that accused Prahlad has not been assigned any role by the star witness of this incident, P.W.-3/Smt. Rani and in her cross-examination, has made improvement pertaining to the role of Prahlad and the role assigned by her to appellant Prahlad was in response to a querry put by the trial judge asking her as to what was Prahlad doing at that time. Therefore, the Trial Court has committed a grave error in asking such question and also in convicting the appellant Prahlad for the offence of murder with the aid of Section 34 of I.P.C. He relied on ***Ezajhussain sabdarhussain vs State Of Gujrat*** reported in ***2019(2)JIC 33(SC)***

Learned A.G.A., however, submits that P.W.-3/Smt. Rani is a rustic village women and small contradictions and improvements made by her are liable be ignored, she being illiterate.

He further submits that the manner in which accused Prahlad had accompanied the other accused persons with a *"katta'* in his hand and also emerged with other accused persons from the main door of the house of deceased, clearly reveals that there was a common intention and plan of all accused persons to murder Ram Dutt, therefore, he has rightly been held guilty of murder with the aid of Section 34 of I.P.C. Learned A.G.A. has relied on **State Of Rajasthan vs ANI alias Hanif and others** reported in **1997 Supreme Court Cases (Cri) 851, Ramesh Singh @ Photi vs State Of A.P.** reported in **(2004) 11 SCC 305, Ramaswami Ayyangar and Othrs vs State Of Tamil Nadu** reported in **1976 Supreme Court Cases (Cri) 518, Vijender Singh Vs State Of U.P.** reported in **2017(1)JIC 328(SC), Rajkishore Purohit vs State Of Madhya Pradesh & Others** reported in **2017 Supreme Court Cases (Cri) 483, Balwant Singh & Othrs vs State Of punjab,** reported in **2008 CRI.L.J. 1648.**

In **State Of Rajasthan vs ANI alias Hanif and others** reported in **1997 Supreme Court Cases (Cri) 851 also** reported in **1997 CRI. L. J. 1529** relied on by Ld. AGA Hon'ble Supreme Court observed as under :-

"11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

12. *Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation.A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth.The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."*

We are also of the very strong view that The Role of trial Judge during trial of a criminal case could never be of a silent spectator. The criminal trial is nothing but a journey to unearth the truth as to what has actually happened at relevant time and it is the duty of the trial judge to remain actively involved in this process and should do every thing which may facilitate the truth to come on surface. The law can not favor anything but the truth. Therefore if the trial judge in a quest to know the truth put some questions to PW-3 Smt. Rani, it shows that the trial Judge was conscious of his role as a trial Judge. Our view finds support from the following observations of the Hon'ble Supreme Court in **"Zahira Habibullah Sheikh and Ors. vs. State of Gujarat and others, AIR 2006 SUPREME COURT 1367" :-**

"33. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated

completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process. not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in rational to proceedings, even if a fair trial is till possible, except at the risk of undermining the fair name and standing of the Judges or impartial and independent adjudicators.

46. *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 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 Courts 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 to such prosecuting agency showing indifference or adopting an attitude of total aloofness.*

47. The power of the Court under Section 165 of the Evidence Act is in a way complementary to is power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution."

In **Ramesh Singh @ Photi vs State Of A.P. reported in MANU/SC/0278/2004, (2004) 11 SCC 305,** relied on by Ld AGA Hon'ble Supreme Court has opined as under :-

"Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant

circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

In **Ramaswami Ayyangar and Othrs vs State Of Tamil Nadu reported in 1976 3 SCC 779 (1976 CRI. L. J. 1563),** relied on by Ld. AGA it was observed as under :-

"12- .....The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common, design, is itself tantamount to actual participation in the 'criminal act.' The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them."

Ld. AGA also relied on **Vijender Singh Vs State Of UP reported in 2017(1)JIC 328(SC)** wherein after considering many authorities on the subject it was held that in absence of any injury caused by a weapon carried by accused persons can not be the governing factor to rule out Section 34 IPC, if it is manifest from the evidence that the accused persons accompanied the other accused persons, who were armed with gun and they themselves carried lathi and ballam respectively. Carrying of weapons, arrival at a particular place and at the same time, entering into the shed where murder of the deceased was committed, definitely attract the constructive liability as engrafted under section 34 IPC.

In **Rajkishore Purohit vs State Of Madhya Pradesh & Others reported in 2017 Supreme Court Cases (Cri) 483 relied on by** Ld. AGA it is held that if common intention by meeting of minds is established in the facts and circumstances of the case, there need not necessarily be an overt act or possession of weapon is required, to establish common intention.

Similarly in **Balwant Singh & Othrs vs State Of punjab, reported in 2008 CRI.L.J. 1648,** relied on by Ld. AGA it is held that when persons go together armed with deadly weapons and fatal injuries are caused to the deceased all of them would be liable in view of Section 34 IPC.

Ld. Counsel for the appellants has also relied on **Ezajhussain Sabdarhussain vs State Of Gujrat reported in 2019(2)JIC 33(SC)** wherein Honble Supreme Court Opined as under :-

"14-.....Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to whichSection 34can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required bySection 34is different from the same intention or similar intention.As has been observed by the Privy Council in Mahbub Shah v. King Emperor I.L.R. (1945) IndAp 148 common intention within the meaning ofSection 34implies a pre arrranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to the pre arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

15. *The essence of the joint liability during the criminal act in furtherance of such common intention has been discussed by a two-Judge Bench of this Court in Ramashish Yadav and Others(supra) wherein it was held as under:- "....Section 34lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert."*

In the case **Nand Kishore v. State of Madhya Pradesh reported in (MANU/SC/0753/2011 : (2011) 12 SCC 120)**, Hon'ble Supreme Court discussed the ambit and scope of Section 34 of Indian Penal Code as well as its applicability to a given case as under:

"20. A bare reading of this section shows that the section could be dissected as follows:

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and

(c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court is determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually

would arise. The criminal act, according to Section 34 Indian Penal Code must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. "

Hon'ble Supreme Court in **Asif Khan vs. State of Maharashtra and Ors. Reorted in MANU/SC/0323/2019** after considering **Mehbub Shah v. Emperor MANU/PR/0013/1945, Pandurang and Ors. v. State of Hyderabad MANU/SC/0048/1954 and Mohan Singh and Anr. v. State of Punjab MANU/SC/0176/1962** held as under:-

"22. In Pandurang and Ors. v. State of Hyderabad MANU/SC/0048/1954 : AIR 1955 SC 216, Justice Vivian Bose, speaking for the Bench considered the ingredients of Section 34 and relying on Privy Council judgment in Mehbub Shah v. Emperor (supra) laid down following in Paragraph Nos. 32 to 34:

32.....

33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the Section because there was no prior meeting of minds to form a pre-arranged plan. In a case like

that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperor and Mahbub Shah v. King-Emperor. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a prearranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

23. The Constitution Bench of this Court in Mohan Singh and Anr. v. State of Punjab MANU/SC/0176/1962 : AIR 1963 SC 174 had again reiterated the ingredients of Section 34. Constitution Bench has also relied on and approved the Privy Council judgment in Mehbub Shah v. Emperor (supra) noticing the essential constituents of vicarious liability Under Section 34, Justice Gajendragadkar speaking for the Bench laid down following in Paragraph No. 13:

13. ...The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the Accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two Sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the Accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. King-Emperor common intention within the meaning of Section 34 implies a pre-arranged plan, and to convict the Accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant

to the prearranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."

27. Having regard to the evidence of the prosecution witnesses as well as keeping in view the facts and circumstances of the case as well as the law discussed above, we do not find any force in this submission of learned counsel for the appellants. In the FIR, it has been specifically stated that all accused persons including Prahlad climbed the roof of Inderdutt and he was carrying a *"katta'* (Country Made Pistol) along with Suresh, while other accused persons were armed with *"lathis'*. When Suresh pointed his pistol towards Inderdutt, accused Prahlad was standing there along with other co-accused persons. When all of them descended in the courtyard of the deceased, Prahlad was also with them. When the deceased was dragged inside the *"kothri'* , Prahlad was also with them and when Suresh shot at Ramdutt, while Ram Jiwan and Vishwanath were holding the hands of deceased, Prahlad was also with the accused persons. Only controversy is about the fact that P.W.-3/Smt. Rani has not assigned any specific act to accused Prahlad in his in-chief-examination or to say even in his statement under Section 161 of the Cr.P.C. However, in her cross-examination responding to a querry of the court she replied that when his husband was being shot at Prahlad took his son Satyanarain on gun point and his son could not do any thing. Though this has been stated for the first time by this witness in her cross-examination, however, we would like to emphasize that the best way to appreciate the evidence of any witness is to test and scrutinize the entire evidence of such witness on the touchstone of probability, keeping in view his status, power of perception and reproduction. Admittedly, P.W.-3/Smt. Rani is a rustic village lady. We in this judgment herein-before have already held that all the eye witnesses of this case except P.W.-3/Smt. Rani were not in a position to witness as to what had happened inside the *"kothri'*, where Suresh fired a shot at the deceased inside the *"kothri'* and after being hit, deceased fell in the courtyard of the house, where again P.W.-5/Inderdutt was in a position to see him.

It is also evident from the evidence of prosecution witnesses PW-4/Nattha and P.W.6/Sarju that when accused persons fled away from the main door of the house of deceased, they saw Prahlad running with them, holding a country-made pistol in his hand.

28. As discussed earlier, it has also came in evidence that these 02 witnesses namely prosecution witness PW-No.4/Nattha and P.W.6/Sarju were holding torches in their hands, so it is also proved beyond any reasonable doubt that accused Prahlad was also seen emerging from the main door of the house of the deceased, along with other accused persons, with a *"katta'* in his hand. P.W.4/Nattha has stated in his statement that when he entered the courtyard of the deceased after the incident was over, wife of deceased told him about the whole story and also as to how his son Satyanarain challenged accused persons, on which Prahlad took him on gun point. So it also transpires that so far as the part of incident which occurred in Kothri, pertaining to the pointing of katta towards

satyanarain by Prahlad is concerned, the same was narrated to P.W.4/Nattha by P.W.4/ Smt. Rani when he entered her courtyard. Therefore, we do not find any reason to disbelieve the evidence of P.W.-4/Nattha and P.W.-6/Sarju, pertaining to the fact that they saw all accused persons running away from the main door of the house of deceased and Prahlad was also seen running with them holding a *"katta'* in his hand. The whole prosecution evidence available on record clearly establishes that Prahlad was acting in furtherance a well-knit common intention of all accused persons to murder Ramdutt. The common intention of all accused persons to commit murder of Ramdutt could be gathered from the conduct of all accused persons before, during and after commission of the offence. Statements of the witnesses clearly reveal that all the accused persons were present at the scene of occurrence and were actively involved in accomplishing their part of common design. The conduct of appellant Prahlad in climbing the roof of P.W.-5/Inderdutt, at the mid of the night with other accused persons, holding a *"katta'* in his hand and going with them to the courtyard of deceased and dragging him inside the *"kothri'* and after the deceased was shot at by Suresh and Smt. Rani was assaulted by Ramjiwan and Vishwanath in courtyard, his running away from the main door of the house of deceased, along with other accused persons, are sufficient proof that the accused Prahlad was sharing a common intention and was acting in co-ordination with other accused persons to murder Ramdutt. Therefore, he has been rightly convicted by the Court below under Sections 302 I.P.C. read with Section 34 of I.P.C.

In view of the reasons given herein above, we do not find any force in this appeal and the same is liable to be dismissed.

29. The appeal filed by the appellants namely Prahlad and Suresh is, thus, **dismissed** and the judgment and order of the Court below dated 03.08.1982 is **affirmed.**

As per the record of this Court and report of office dated 16.10.2019, the appellants Prahlad and Suresh are in Jail. They will serve out the sentence as ordered by the Trial Court.

30. The appeal with regard to the appellants No.3 & 4 namely Ram Jiwan and Vishwanath has already been abated, on account of their death, vide orders dated 08.01.2019 and 11.04.2019 of this Court.

A copy of this Judgment be immediately sent to the trial Court for compliance.

(2019)11ILR A990

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Appeal No. 663 of 1991

Raju Sharma ...Appellant(In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri R.P. Singh, Sri Satya Dheer Singh Jadaun.

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

A. Evidence Law-Indian Evidence Act, 1872 r/w Section 302 I.P.C - circumstantial evidence- the

circumstances should be of a conclusive nature and tendency - should be such as to exclude every hypothesis but the one proposed to be proved - 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 - must be such as to show that within all human probability the act must have been done by the accused- The factum of recovery was not admitted by the accused-appellant - the burden was on the prosecution to prove the recovery, which it failed to discharge - the evidence that remains to connect the accused-appellant with the murder of the deceased is the evidence of last seen provided by (P.W.2).- the probative value of the evidence - of a weak type - may not be sufficient to record conviction of the accused or shift the burden on the accused to prove his innocence - the circumstances as against the accused-appellant are not satisfactorily proved - chain of circumstances is not complete - involvement of some other person in the crime cannot be ruled out - benefit of doubt must go to the accused-appellant - conviction of the accused appellant is unsustainable. (Para 16,19,20,24,26,29)

B. Evidence Law-Evidence Act,1872 - illustration (g) to section 114 - Non-production of the book of account maintained by the deceased, in view of illustration (g) to section 114 of the Evidence Act, gives rise to a presumption that if the same had been produced it might not have reflected any dues payable by the accused-appellant to the deceased - the prosecution by withholding the book of account maintained by the deceased and by not providing any documentary evidence as regards dues payable by the accused-appellant to the deceased has rendered its evidence, as regards motive for the crime, not reliable.(Para 18)

Appeal allowed (E-7)

Chronological list of cases cited:-

1. Mohibur Rahman Vs St. of Assam, (2002) 6 SCC 715

2. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755

3. Hanumant Govind Nargundkar Vs The St. Of M.P. : AIR 1952 SC 343

4. Sharad Birdhi Chand Sarda Vs St. Of Mah. : 1984 (4) SCC 116

(Delivered by Hon'ble Manoj Misra, J.
Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This appeal is against the judgment and order dated 30.03.1991 passed by the VIth Additional District & Sessions Judge, Kanpur Nagar in Sessions Trial No. 286 of 1987 by which the appellant - Raju Sharma son of Puttan Sharma has been convicted under Section 302 I.P.C. and sentenced to suffer life imprisonment.

2. In brief, the factual matrix of the case is as follows:

3. On 15.07.1986, post midnight, at about 00.30 hrs an information was given to the police regarding discovery of a body in a gunny bag at a corner near garbage dump of Navin Market of Kanpur City. Inquest report (Ex. Ka 9) was prepared at 04.30 hrs by Mohd. Yakub Ansari (P.W.7). The inquest report discloses that information of discovery of dead body was received from one Ram Bahadur (not examined). The post mortem examination was conducted at about 15:30 hrs (or 03.30pm) on 15.07.1986. Dr. A.K. Tiwari (P.W.5) prepared the post mortem report (Exhibit Ka-3). As per the post mortem report, multiple ante mortem incised wound injuries were found on the face and neck of the deceased. The larynx, oesophagus

and both sides vessels of the neck were found cut. The cause of death was due to shock and haemorrhage as a result of ante mortem injuries. The time of death was estimated about three days before. The post mortem report noticed that the body was in a state of decomposition. The length of the body was stated to be 5 feet 2 inches.

4. Interestingly, on 15.07.1986, at 3.30 p.m., at P.S. Harvansh Mohal, Kanpur Nagar, a written first information report (for short FIR) (Exhibit Ka-1), scribed by Krishna Lal (not examined), was lodged by Shiv Prasad (P.W.1), which was registered as Case Crime No. 252 of 1986, under Section 364 I.P.C. In the FIR it was alleged that P.W.1's brother, Ram Kumar, son of late Pooran Kushwaha, aged about 30 years, fair complexion, height 5 feet 2 inches, who had been bringing milk from the village and selling to shopkeepers in the city at Kanpur, like everyday, on 13.07.1986, had gone to Kanpur in connection with his business but did not return back. It was alleged that the family members had been searching for him and that they had discovered his milk containers, two in number, with an old lady, who described herself as Hasina Begum, later, she was examined as Sakina (P.W.4). It was alleged that though the whereabouts of Ram Kumar could not be ascertained but through milk vendors it was learnt that Ram Kumar had gone to Hulaganj to settle his account with one Raju Mithaiwala. It was alleged that the said information was given to him by Hasina Begum in the presence of Lalu son of Madhav (not examined) and others. After alleging as above, suspicion was expressed that Ram Kumar has been abducted and murdered. Later, in the day (15.07.1986), within an hour of lodging the FIR, the body of the deceased was identified by the informant at the mortuary.

5. During the course of investigation, the police disclosed recovery of a Tehmat (Lungi) of the deceased from the shop of the appellant in the presence of witnesses - Sri Prakash (not examined) and Babu (not examined) and prepared a recovery memo (Exhibit Ka-15) dated 18.07.1986. The said recovery memo is however not signed by the appellant.

6. After investigation, a charge-sheet (Exhibit Ka-16) was submitted against the appellant by Shiromani Singh Chauhan (P.W.9) for offences punishable under Sections 364 and 302 I.P.C. The matter was thereafter committed to the court of session. Two charges were framed, namely, (a) that the appellant committed murder of the deceased Ram Kumar, punishable under Section 302 I.P.C.; and (b) that the appellant abducted the deceased Ram Kumar with an intent to commit murder, punishable under Section 364 I.P.C. The appellant denied the charges and claimed for trial.

7. During the course of trial, the prosecution examined nine witnesses. Their testimony in brief is as follows:

(a) Shiv Prasad (P.W.1- informant - brother of the deceased) stated that the deceased like every day left for Kanpur city in the morning to sell milk but did not return back till the evening, as a result, on the next day, P.W.1 went to the city to search for him. There, near central Dharamshala, where milk is sold, he met Hasina Begum who told P.W.1 that the accused had taken the

deceased for settling the account. P.W.1 stated that the deceased had to collect milk dues of three months, outstanding against the accused. P.W.1 disclosed that the deceased wanted to buy a tempo therefore he used to sell milk on credit to the accused for getting a lump sum amount in return. P.W.1 stated that he identified his brother's body at the mortuary on the day he lodged the FIR. On recall, P.W.1 disclosed that when his brother left the house he was wearing a green colored shirt and a Lungi with squares. In his cross examination, P.W.1 admitted that his brother maintained a book of account which carries name of persons to whom his brother used to sell milk, which is there, but he had not brought/produced. Upon suggestion that P.W.1 had named Raju Mithaiwala of Hulaganj as the suspect, P.W.1 admitted that he knew the name of Raju Sharma (accused-appellant) since before lodging of the FIR as also that he resided at Mohalla Moosa Toli and had a shop there, but in the report Raju Mithaiwala of Hulaganj was mentioned. P.W.1 also stated that the Tehmat and the shirt of the deceased was identified by him at the police station 3-4 days after the incident. P.W.1 denied the suggestion that his brother had been missing since much before 13.07.1986 and that he lodged a false FIR at the instance of the police. P.W.1 also denied the suggestion that the accused had no sweetmeat shop.

(b) P.W.2 - (Satish Chandra) stated that he saw the deceased in the company of the accused - appellant, at about 4 pm, near Nairaina Chauraha, sitting on a Rickshaw, going towards Ghanta Ghar (clock tower). P.W.2 stated that he inquired from Ram Kumar (the deceased) whether he was going to his home upon which the deceased told him that he is here to settle his account with Raju Sharma (Mithaiwala) (the accused-appellant) and would return home after settling his account. P.W.2 stated that, on the next day, between 11-12 hours, he met Omkar (not examined), a food grains dealer and brother of Ram Kumar, who informed P.W.2 that Ram Kumar (the deceased) had not returned back home since last evening. Upon which, P.W.2 told him that he saw Ram Kumar yesterday, at about 4 pm, near Nairana Chauraha. He stated that when he told this to Omkar, deceased's brother - Shiv Prasad (P.W.1) was present. In his cross-examination, upon suggestion that he was lying because he had business relations with the informant, he refuted the suggestion.

(c) P.W.3 - Rampati (wife of the deceased) disclosed that her husband had 2-3 months milk-dues to collect from the accused Raju Sharma and that he used to deposit the money with the accused because he wanted to purchase a Tempo. She also disclosed that the deceased had made deposit of Rs. 2,000/-, by way booking amount, to purchase a Tempo. The Tempo advance deposit receipt was proved by her and the same was exhibited. She also stated that her husband, a day before the incident, on Saturday, had taken her jewelery articles to Kanpur for sale to collect money for purchase of Tempo. She also stated that the deceased had left for Kanpur city wearing a shirt and Tehmat (Lungi). She stated that she had recognized the recovered Tehmat at the police station. She also recognized the Tehmat produced in court as that of her husband though in her cross examination she could not disclose any distinguishing features by which she could recognize it. To demonstrate that the deceased had cordial

relations with the accused she disclosed that she had been with her husband at a function hosted by the accused. In her cross-examination, she denied the suggestion that she was lying and giving a tutored statement though she stated that in connection with the case she had come 8-10 times and few things have been told to her and few things she remembers.

(d) P.W. 4- Sakeena, who had been referred to as Hasina Begum by the informant, stated that deceased - Ram Kumar (the deceased) had left his empty milk containers with her for cleaning, at about 10-11 am, on that fateful Sunday, thereafter, he did not return back. She stated that on the next day deceased's wife had come and she had informed her that he had gone to Raju Sharma for settling his accounts. In her cross examination she stated that milk-men leave their containers for her to clean but she is not in a position to tell the name of all of them though she remembers the name of Ram Kumar (the deceased). She stated that Ram Kumar had not told her the name of any person other than Raju Sharma. Upon being confronted with her statement, under section 161 CrPC, to the effect that the deceased had left with Munna Ghosi and thereafter he did not return, she stated that she doesn't know as to how that was written. She also could not disclose the date, month and the year when Ram Kumar (the deceased) last met her and told her that he was going to meet Raju Sharma.

(e) P.W.5 - Dr. A.K. Tiwari, apart from proving the post mortem report and the injuries noticed by him, stated that he conducted the post - mortem on 15.07.1986 at 3.30 pm and according to his estimate the deceased died about three days before.

(f) P.W.6 - Har Prasad stated that up to 17.07.1986 investigation of the case was done by him, where after the investigation was assigned to Jograj Singh (not examined). By that date he had recorded statement of informant - Shiv Prasad; FIR scribe - Krishna Lal; Smt. Hasina Begum; deceased's wife Ram Pati; deceased's brother Vishwanath and Onkar. In his cross-examination he stated that Hasina Begum had given her statement that Ram Kumar (the deceased) had gone with Ghosi and thereafter did not return back. He also stated that Hasina Begum had not used the word "Sharma" after Raju. He also stated that Shiv Prasad - informant had not shown him the book of accounts maintained by the deceased. He stated that informant had not told the police that the deceased had gone to Raju Sharma for collecting dues. P.W.6 stated that he had gone to Munna Ghosi's house at Mishri Bazaar on 15.7.1986 and 16.07.1986 but the house was found locked. He denied the suggestion that Raju Sharma has been falsely implicated.

(g) P.W.7- Mohd. Yakub stated that on 15.07.1986 when he was posted at Chowki Parade, Kotwali, Kanpur Nagar, information was received, at about 2.00 am, regarding discovery of a body in a gunny bag, near garbage dump, at Naveen Market, after which, inquest proceedings were conducted at 4.30 am.

(h) P.W.8- Nand Lal Dubey proved the entry of the first information report in the general diary.

(i) P.W.9 - Siromani Singh Chauhan stated that the investigation of the case was started by Har Prasad Singh (PW6) whereafter it was assigned to Jograj Singh (not examined) and upon his transfer the investigation was taken over by him. He stated that on 18.7.1986 the house of the accused at Bhoosa Toli was

searched by Jograj Singh (not examined), who prepared the memo relating to recovery of Tehmat. He proved submission of charge-sheet by him. In his cross-examination he admitted that the Tehmat was not recovered in his presence. He also stated that Jograj Singh, as per his knowledge, resides in District Hardoi.

8. The incriminating circumstances derived from the evidence led by the prosecution were put to the accused and his statement under Section 313 Cr.P.C. was recorded. The accused denied the incriminating circumstances and claimed that the witnesses were lying under the pressure of the police.

9. At this stage, we would like to put on record that the recovery of Tehmat allegedly made from the house of the accused-appellant in a search operation though is witnessed by Sri Prakash son of Kallu and Babu son of Rasool Bux but neither of them was examined during trial. Even the concerned police officer, namely, Jograj Singh, who made the recovery was not examined. It may also be observed that neither from the paper book prepared by the office nor from the lower court original record it is ascertainable whether the incriminating circumstance of recovery was admitted by the accused-appellant in his statement recorded under section 313 CrPC inasmuch as the relevant page of the original record, at its bottom, where the answer is noted, is badly mutilated and appears to have been nibbled either by white ant or rodent. Under the circumstances, we referred to the manual type-written copy of the paper book, which is available in the exhibits file. From there, we could find that the incriminating circumstance of recovery of Tehmat was put to the accused by way of question no.12 to which he replied by stating that he does not know. Thus, it can be safely assumed that the factum of recovery was not admitted by the accused and therefore it required proof.

10. After hearing both sides the trial court found the following circumstances proved: (a) that on 13.07.1986, the deceased had left his house for Kanpur City in connection with his milk business; (b) that at the time he left the house, he was wearing a Tehmat apart from other garments; (c) that the deceased had milk dues to collect from accused-appellant; (d) that the deceased was last seen alive with the accused-appellant in the evening of 13.07.1986 at about 4 pm; (e) that, thereafter, the deceased was not seen alive; (f) that on 15.7.1987 his body was recovered from a Bin with multiple injuries which suggested a homicidal death; (g) that the body had only underclothes on it; (h) that the Tehmat which the deceased was wearing at the time he left the house was recovered from the place owned and possessed by the deceased. By treating those circumstances as to form a chain, in absence of any explanation from the accused appellant as to when he parted company with the deceased or as to how the deceased died, it was held that the chain of circumstances was complete and it pointed towards the guilt of the accused-appellant by ruling out all other hypothesis and, therefore, the appellant was liable for the murder of the deceased. The trial court, however, found charge of offence punishable under Section 364 I.P.C not proved.

11. We have heard learned counsel for the appellant; the learned A.G.A. for the State; and have perused the record.

12. The learned counsel for the appellant has assailed the judgment and

order passed by the trial court by contending as follows:

(a) That, according to the post mortem report of the doctor, the death could have occurred three days before, which means that the deceased died in between 11.07.1986 and 12.07.1986, that is, three days before the post mortem which was conducted on 15.07.1986. This clearly suggests that the prosecution story that the deceased was seen alive in the evening of 13.07.1986 at 4 pm is completely unreliable.

(b) That, according to the statement of P.W.1 (deceased's brother), the deceased used to maintain a book of account mentioning the name of persons with whom the deceased had business dealings, which was in the possession of P.W.1, yet the same was not produced to demonstrate that there were milk dues payable by the accused-appellant to the deceased and, therefore, the motive for the crime as well as the circumstance that the deceased had gone to collect the dues was not proved.

(c) That in the first information report, which has been lodged on 15.07.1986, at 3:30 pm, there is no disclosure with regard to the deceased being last seen with the accused-appellant by any particular witness. There is also no disclosure about the name of any witness who may have last seen the deceased with the appellant. Whereas, in the testimony of P.W.2 - Satish Chandra -- the witness who last saw the deceased with the appellant at 4.00 pm on 13.07.1986 -- it has come that on the next day, which would be 14.07.1986, he had told deceased's other brother, namely, Omkar, who is a food grains dealer, in the presence of the informant (P.W.1), that the deceased was seen last evening in the company of the accused-appellant, at about 4 pm, near Nairaina Chauraha. Absence of such disclosure by the informant (P.W.1) in the FIR clearly reflects that P.W.2 was set up later just to create false evidence of last seen. Moreover, the evidence of last seen is very weak, particularly, when it is not in close proximity with the place and time from where the body is recovered.

(d) That the recovery of the Tehmat from the premises of the accused-appellant, firstly, has not been proved as neither the witnesses of the recovery nor the Investigating Officer, namely, Jograj Singh, who allegedly effected recovery, was examined as a witness; secondly, the Tehmat had no distinguishable features, at least shown to the court, from which it could be ascertained that it was of the deceased; and, thirdly, the Tehmat, so recovered, has not been forensically examined to connect it with the deceased.

13. He thus contended that the judgment and order of the court below is liable to be set aside and the appellant is entitled to be acquitted.

14. **Per contra,** the learned A.G.A. supported the judgment and order passed by the trial court and submitted that opinion expressed by the doctor that the death could have occurred 3 days before is not conclusive as there could always be a variation of about 12 to 24 hours in the estimation of time of death, particularly, when the body is examined after 48 hours of the time of death. He contended that the evidence of P.W.1 and P.W.3 clearly disclosed that the deceased had milk dues to be collected from the accused-appellant; and that, on the fateful day, he had left for Kanpur City and after reaching there had gone to settle the

account with the accused-appellant. The motive for the crime is thus proved. P.W. 2 saw the deceased in the company of the accused-appellant, at about 4 pm, going on a rickshaw, where after the deceased was not seen alive and his body was recovered two days later suggesting that he was murdered in between and since the Tehmat worn by the deceased was recovered from the premises of the accused-appellant, in absence of any explanation from the accused-appellant, the chain of circumstances pointing to the guilt of the accused was complete. Hence, the conviction of the accused-appellant is justified.

15. We have given thoughtful consideration to the rival submissions and have perused the record carefully.

16. Before we proceed to analyze the evidence that has come on record, we may remind ourselves that this is a case based on circumstantial evidence. The law as regards proof of guilt by circumstantial evidence is well settled by a series of decisions of the Apex Court starting from Hanumant Govind Nargundkar vs The State Of Madhya Pradesh : AIR 1952 SC 343 and the celebrated decision in the case of Sharad Birdhi Chand Sarda vs State Of Maharashtra : 1984 (4) SCC 116, which is, that 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.

17. When we break the prosecution evidence into parts, we find that the prosecution was successful in proving that the deceased had left his house for Kanpur city on or about 13.07.1987 in connection with milk business; that he gave his milk containers for washing to P.W.4 on 13.07.1987; that in the night of 15.07.1987, that is between 00.30 hrs to 02.00 hrs, his body was found in a gunny bag near a Bin at Naveen Market in Kanpur city; that the inquest was held at about 4.30 hrs on 15.07.1987; that post mortem was conducted at 15.30 hrs on 15.7.1987 which disclosed that the death was homicidal; that the FIR was lodged by P.W.1 at 15.30 hrs on 15.07.1987 without naming any one though it was alleged that from the information received it appeared that the deceased had gone for settling accounts with one Raju Mithaiwala at Hulaganj; and that later, on the same day, the body of the deceased was identified by P.W.1 at the mortuary.

18. As regards the motive for the crime, the incriminating circumstance that the deceased used to deposit milk dues with the accused-appellant and had gone to collect the same was denied by the accused-appellant in his statement recorded under section 313 CrPC by denying business relation with the deceased. No documentary evidence was produced by the prosecution to prove existence of such deposit. The books of account though maintained by the

deceased and available, as it appears from the statement of P.W.1, was neither produced in evidence nor shown to the investigating officer. A specific question was put to P.W.1 in that regard. He admitted having the books of account containing name of persons with whom the deceased had dealings but he did not produce the same. Non-production of the book of account maintained by the deceased, in view of illustration (g) to section 114 of the Evidence Act, gives rise to a presumption that if the same had been produced it might not have reflected any dues payable by the accused-appellant to the deceased. Hence, in our view, the prosecution by withholding the book of account maintained by the deceased and by not providing any documentary evidence as regards milk dues payable by the accused-appellant to the deceased has rendered its evidence, as regards motive for the crime, not reliable.

19. In so far as the circumstance of recovery of Tehmat worn by the deceased from the premises of the accused-appellant is concerned the same has not been proved. Neither of the two witnesses of the recovery nor the investigating officer who carried out the search operation to effect the recovery was examined by the prosecution. The factum of recovery was not admitted by the accused-appellant, therefore the burden was on the prosecution to prove the recovery, which it failed to discharge.

20. Hence, the evidence that remains to connect the accused-appellant with the murder of the deceased is the evidence of last seen provided by Satish Chand (P.W.2). Whether the evidence of P.W.2 in that regard is reliable, and, if it is so, whether sufficient to record conviction, is what needs to be examined.

21. On careful perusal of the record, we find that statement of P.W.2 was recorded on 11.07.1989. In his statement in chief, he simply states that about 3 years ago from today, when he had come to Kanpur, at about 4.00 pm., while he was traveling from Nairaina Chauraha to Ghanta Ghar, on way, he spotted the deceased on a rickshaw with Raju Mithaiwala (the accused-appellant present in court). He stated that upon seeing the deceased he had asked him whether he is returning home, upon which, the deceased told him that he would return back after settling his account with the accused-appellant. P.W.2 stated that next day, in between 11 - 12, day time, he met deceased's brother Omkar (not examined), who complained that the deceased had not returned home, upon which, the witness told him that he had seen the deceased with the accused-appellant last evening at Nairaina Chauraha. He also stated that when he disclosed the above fact to Omkar, Shiv Prasad (informant - P.W.1) was present.

22. Interestingly, P.W.1 in his testimony stated that it was Hasina Begum (found to be Sakina-P.W.4) who had told him that the deceased had gone with the accused-appellant for collecting milk dues. P.W.4 does not specifically depose that she saw the deceased going with the accused-appellant though she claims in her cross examination that the deceased told her that he was going to the place of Raju Sharma. P.W.1 does not state that he came to know about the deceased being with the accused-appellant through P.W.2. Rather, he states that when Hasina Begum (P.W.4-Sakina)

told him about the above fact, P.W.2 and others were present. In the FIR lodged by P.W.1 which was lodged a day later, that is on 15.7.1986, there is no disclosure about getting information from P.W.2 (Satish Chand). Further, from the statement of P.W.2 made during his cross examination it appears that his statement was recorded by the investigating officer after 2-3 days which is suggestive of the fact that when no witness was found, he was made a witness. Non disclosure of receipt of any information from P.W.2 by P.W.1, who had been with P.W.2, is suggestive of the fact that P.W.2 has been set up later to create some kind of evidence. Hence, we are of the considered view that the testimony of P.W.2 that he last saw the deceased in the company of the accused-appellant is not reliable.

23. Even if we accept the prosecution evidence that the deceased was last seen with the accused-appellant on 13.07. 1986 at about 4.00 pm going on a rickshaw at Nairaina Chauraha that, by itself, would not be sufficient to throw burden on the accused to explain and, in absence whereof, to record conviction of the accused-appellant, particularly, when we have already found that the alleged recovery of Tehmat from the premises of the accused-appellant was not proved.

24. At this stage, we may notice the law relating to the probative value of the evidence of the deceased being last seen alive with the accused. In ***Mohibur Rahman v. State of Assam, (2002) 6 SCC 715***, the apex court as regards the probative value of the evidence of the deceased being last seen alive with the accused observed as follows:

10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide."

25. In the case of ***State of Goa v. Sanjay Thakran, (2007) 3 SCC 755,*** after taking notice of a number of decisions on the theory of last seen, the apex court held as follows:

34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a

considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

26. The legal principle deducible from the decisions noticed above is that the evidence of the deceased being last seen alive with the accused is of a weak type and, ordinarily, by itself, may not be sufficient to record conviction of the accused or shift the burden on the accused to prove his innocence. But where the place and time when the deceased was last seen alive with the accused is in close proximity to the place and time of death or discovery of the body of the deceased so as to rule out intervention of others in the crime, the burden may, in the facts of a case, shift on the accused to explain his innocence and in absence of explanation or a false explanation it may provide a missing link to the chain of circumstances to enable the court to hold the accused guilty.

27. In the instant case, the deceased, if at all, was last seen alive at 4.00 p.m on 13.07.1987 with the accused at Nairaina Chauraha in a public street. Deceased's body was recovered from a Bin in Naveen Market on 15.07.1987 post mid night. No evidence has been led to show that the Bin from where the body was recovered was next to the house of the accused-appellant. Further, no evidence has been led to show that the place where the body was recovered was in close proximity to the house of the accused-appellant. There is also no evidence led to show that Nairaina Chauraha was in close proximity to the Bin. Even if it was, no prudent person would accept that the deceased was murdered on or about 4.00 pm during day time and that too on a public street. Under the circumstances, the evidence led by the prosecution is not such which would exclude the intervention of others in the crime and thereby cast a burden on the accused-appellant to render an explanation. Hence, we are also of the view that even if the evidence of the deceased being last seen with the appellant is accepted, in the facts of the case, it is not sufficient to hold the accused-appellant guilty for want of explanation.

28. At this stage, we may also refer to the testimony of Sakeena (P.W.4), who

has been examined by the prosecution to prove that on the fateful day i.e. 13.07.1986 the deceased had provided the empty milk containers to her for cleaning and that he had left her by telling her that he is going to the place of accused-appellant. From her statement recorded in court it appears that she was confronted with her statement recorded under Section 161 CrPC wherein she had disclosed that the deceased had left with Munna Ghosi. The investigating officer Har Prasad Singh (P.W.6) was questioned in that regard and he admitted that Hasina Begum (Sakina-P.W.4) had stated that Ram Kumar had left with Ghosi and that thereafter he did not return. Further, P.W.6 stated that he had gone to search for Munna Ghosi on 15.07.1986 and 16.07.1986 but his house was found locked.

29. When we take a conspectus of the entire prosecution evidence, we find, firstly, that the circumstances as against the accused-appellant are not satisfactorily proved, secondly, the chain of circumstances is not complete and, thirdly, the involvement of some other person in the crime cannot be ruled out. Hence, the benefit of doubt must go to the accused-appellant. The conviction of the accused appellant is, therefore, unsustainable.

30. Consequently, the appeal is **allowed.** The judgment and order dated 30.03.1991 passed by the VIth Additional District & Sessions Judge, Kanpur Nagar in Session Trial No. 286 of 1987 is hereby set aside. The appellant is acquitted of the charge of murder. If the appellant is on bail, he need not surrender.

31. Let the record as well as this order be sent to the court below for compliance.

(2019)11ILR A1001

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 709 of 1986

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

Counsel for the Appellants:
Sri Rajesh Kumar Singh, Amicus Curiae.

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A.

A. Criminal Law-Indian Penal Code,1860 - Section 302/34, 307/34 of IPC - The incident occurred on a trivial issue between the accused and the deceased over fencing of the land - The accused persons caused a single injury on the chest of the deceased. No premeditation on part of the accused persons - The incident occurred on a sudden provocation, in a heat of passion.- complicity of the accused persons in commission of offence has been duly proved by the prosecution - 'Murder' - 'Culpable Homicide' not amounting to murder - Exception 4 to Section 300 of the IPC applies in the absence of any premeditation - The exception contemplates that the sudden fight may start upon the heat of passion on a sudden quarrel - The fourth exception to Section 300 IPC covers acts done in a sudden fight - the case of the appellant would, thus, fall under Exception 4 of Section 300 of IPC - Held that the appellants are liable to be convicted for committing 'culpable homicide not amounting to murder' - Considering the nature of injuries caused to the deceased, the appellants are liable to be

convicted under Section 304 Part I of IPC and not under Section 304 Part II of IPC. - medical report of injured and the statement of the doctor, appears to be correct - conviction under Section 307/34 of IPC is maintained. (Para 16,18,23,24,25,26)

Appeal partly allowed (E-7)

Chronological list of cases cited:-

1. St. of A.P. Vs Rayavarapu Punnayya & anr. (1976) 4 SCC 382

2. Budhi Singh Vs St. of H. P. (2012) 13 SCC 663

3. Kikar Singh Vs St. of Raj. (1993) 4 SCC 238

4. Surain Singh Vs The St. of Pun. Cri. Appeal No.2284 of 2009

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 28.02.1986 passed by II Additional Sessions Judge, Aligarh in Sessions Trial No. 336 of 1985 convicting the accused Harbir and Karan Singh under Section 302/34 of IPC and sentencing them to undergo imprisonment for life. The trial court has further convicted accused Bijendra, Devendra Singh and Karan Singh under Section 307/34 of IPC and sentenced accused Bijendra and Karan Singh for seven years rigorous imprisonment, whereas accused Devendra Singh has been sentenced for three years rigorous imprisonment. Accused Harbir has been acquitted of the offence under Section 307/34 of IPC. The sentences awarded to the accused Karan Singh and Harbir Singh shall run concurrently.

2. In the present case, name of the deceased is Mukhtiar Singh, father of PW-2 Autar Singh and PW-3 Onkar Singh. It is said that there was some dispute between accused Karan Singh and the deceased over fencing of the land and on the date of incident i.e. 20.02.1985, accused Karan Singh had asked the deceased to remove the said fencing. When deceased had refused to remove the fencing, accused Karan Singh with the help of his two sons Harbir and Bijendra and grandson Devendra Singh caused single injury to the deceased by spear (Ballam) resulting his death. In the same incident, PW-3 Onkar Singh also suffered injuries and his MLC is Ex.Ka.1 conducted by PW-1 Dr. H.C. Goel. On the basis of written report Ex.Ka.2, lodged by PW-2 Autar Singh on 20.02.1985, FIR Ex.Ka.5 was registered against all the four accused persons under Sections 302 and 307 of IPC.

3. Inquest on dead body of the deceased was conducted vide Ex.Ka.7 and the body was sent for postmortem, which was conducted on 21.02.1985 vide Ex.Ka-4 by PW-6 Dr. M.L. Walecha. As per Autopsy Surgeon, following single ante mortem injury was found on the chest of the deceased:

"Incised wound 6 cm x 3 cm x chest cavity deep on left side of chest on upper part 11 cms above the nipple at 10' clock position. Wound extends to left shoulder. Direction of wound is down wards and back wards. Margins clear cut."

The cause of death of the deceased was due to shock and haemorrhage resulting from injuries described.

4. While framing charge, the trial judge has framed charge against all the

accused persons under Sections 302/34 and 307/34 of IPC and against accused Harbir, separate charge under Section 302 of IPC was also framed.

5. So as to hold accused persons guilty, prosecution has examined nine witnesses whereas one defence witness has also been examined. Statements of the accused persons were recorded under Section 313 Cr.P.C. in which they pleaded their innocence and false implication.

6. By the impugned judgement, the trial judge has convicted the appellants as mentioned in paragraph no. 1 of this judgment. Hence, this appeal.

7. Learned counsel for the appellants submits:-

(i) that the trial judge has erred in law in convicting appellants Harbir and Karan Singh under Section 302/34 of I.P.C. He submits that even if the entire prosecution case is taken as it is, at best, these accused persons can be convicted under Section 304 Part II of IPC. In respect of other accused persons Bijendra, Devendra Singh and Karan Singh, it has been argued that offence under Section 307 of IPC is not made out against them.

8. On the other hand, supporting the impugned judgment, it has been argued by State Counsel that the conviction of the appellants is in accordance with law and there is no infirmity in the same.

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

10. PW-1 Dr. H.C. Goel has proved the injury report vide Ex.Ka.1 sustained by injured PW-3 Onkar Singh and has found the following injuries on his body.

"1. Incised wound 1cm x ¼ cm x muscle deep present left side upper arm outer and upper part. Margins clean cut.

2. Incised wound 1½ cm x ¼ cm x chest deep present left side chest upper and laterally kept uo, Advised X Ray.

3. Contusion 1¼ cm x ½ cm present left side back of chest middle part.

4. Contusion 2 cm x ½ cm present Rt. side back of chest middle part.

5. Contusion 1 cm x ¼ cm present of left ankle outer side."

He has stated that the incised wound sustained by the victim could have been caused by 'Ballam' or by some other sharp edged weapon.

11. PW-2 Autar Singh is a son of deceased and eye witness to the occurrence. He is also the lodger of FIR. He has stated that on account of putting fencing on the land, there was dispute between his father and the family of Karan Singh. Karan Singh had asked his father to remove the said fencing. There was hot talk between the two. Karan Singh went back to his house by saying that he would teach a lesson to his father and then all the accused persons came out from the house carrying 'ballam' and clubs with them and then they caused injuries to his father and also to him. In cross-examination, this witness remained firm and has reiterated the entire incident.

12. PW-3 Onkar Singh is another son of deceased and eye witness to the occurrence. His statement is almost identical to that of PW-2 Autar Singh. He too has categorically stated as to the manner in which Mukhtiar Singh was

done to death by the accused persons and he was also assaulted.

13. PW-4 Ram Sanehi Lal is a police constable, assisted during investigation. PW-5 Manturi Singh is a neighbour of the deceased, who reached to the place of occurrence after hearing commotion between the parties. He states that the accused persons were carrying 'ballams' and clubs with them and they caused injuries to Mukhtiar Singh and Onkar Singh and Mukhtiar Singh had expired. PW-6 Dr. M.L. Walecha conducted postmortem on the body of the deceased. PW-7 Satya Prakash registered the FIR. PW-8 Kesri is another eye witness to the incident has also supported the prosecution case. PW-9 A.U. Siddiqui is an Investigating Officer of the case.

14. DW-1 Ravikaran Singh has stated that when he reached to the place of occurrence, there was heavy crowd and people were talking that some dacoits have committed the incident.

15. Close scrutiny of evidence, in particular the statements of PW-2 Autar Singh, PW-3 Onkar Singh, PW-5 Manturi Singh and PW-8 Kesri make it clear that on account of some fencing dispute, there was some quarrel between the deceased Mukhtiar Singh and Karan Singh and then Karan Singh with the help of other accused persons caused injuries to the deceased. All the accused persons were armed with either 'ballam' or club and when PW-3, Onkar Singh intervened in the matter, he too was beaten by the accused persons. Postmortem report of the deceased also supports the ocular version of the witnesses and likewise medical evidence of Onkar Singh also supports the statement of eye witness.

16. Considering the evidence available on record, complicity of the accused persons in commission of offence has been duly proved by the prosecution. The next question, which arises for consideration of this Court is as to whether the act of the accused Harbir and Karan Singh would fall within the definition of 'murder' or it would be 'culpable homicide' not amounting to murder.

17. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:

"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-

Secondly. - 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 -

Thirdly. - 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 -

Fourthly. - 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.

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.

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.

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 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."

18. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt

upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

19. The Apex Court in **State of A.P. vs. Rayavarapu Punnayya and Another; (1976) 4 SCC 382** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The *second* may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of

a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

20. In **Budhi Singh vs. State of Himachal Pradesh; (2012) 13 SCC 663,** the Supreme Court held as under:

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

21. In **Kikar Singh vs. State of Rajasthan; (1993) 4 SCC 238,** the Apex Court held as under:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage;

(4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

22. All the above three cases were considered by the Apex Court in **Surain Singh v The State of Punjab;** Criminal Appeal No.2284 of 2009, decided on April 10, 2017 and ultimately, it has been held by the Apex Court in that particular case, that the accused was liable to be convicted under Section 304 Part II of IPC and not under Section 302 of IPC.

23. If we apply the above principle of law in the present case, what emerges from the evidence, is that the incident occurred on a trivial issue between accused Karan Singh and deceased over fencing of the land. The accused persons have caused single injury on the chest of the deceased, there was no premeditation on the part of the accused persons, the incident occurred on a sudden provocation, in a heat of passion. Though there was sufficient opportunity for the accused persons to further assault the deceased but they did not do the same.

24. Considering all the above aspects, the case of the appellant would, thus, fall under Exception 4 of Section 300 of IPC and it can be safely held that the appellants are liable to be convicted

for committing 'culpable homicide not amounting to murder'.

25. The next question is whether the appellant is liable to be convicted under Section 304 Part I or Part II of IPC. Considering the nature of injuries caused by him to the deceased, we are of the view that the appellants Harbir and Karan Singh are liable to be convicted under Section 304 Part I of IPC and not under Section 304 Part II of IPC.

26. So far as conviction of the appellants Bijendra and Devendra Singh under Section 307/34 of IPC is concerned, looking to the medical report of injured Onkar Singh and the statement of the doctor, the same appears to be correct and does not call for any interference. Accordingly, their conviction under Section 307/34 of IPC is maintained.

27. Yet another question, which arises for consideration of this Court is as to what would be the appropriate sentence to be imposed upon Harbir and Karan Singh. The incident occurred about 34 years back and therefore, ends of justice would be served if they are sentenced to seven years rigorous imprisonment. Order accordingly. Sentence of three years of accused Devendra under Section 307/34 of IPC is maintained. Sentence of Bijendra under Section 307/34 is reduced to three years rigorous imprisonment from that of seven years. Order accordingly.

28. The appeal is partly **allowed.**

29. The accused-appellants are on bail. They be taken into custody forthwith and be sent back to jail for serving the remaining sentence.

30. We appreciate the assistance rendered by Sri Rajesh Kumar Singh (Amicus) and we direct the State Government to pay Rs. 5000/- to him towards his remuneration.

(2019)11ILR A1009

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.11.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.
HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 746 of 1983

Narvada & Ors. ...Appellants.
Versus
The State ...Respondent.

Counsel for the Appellants:
Sri Nagendra Mohan

Counsel for the Respondent:
Govt. Advocate.

A. Criminal Law-Indian Penal Code,1860 - Sections 147,148, 302 read with 149 IPC - Section 161 of the Cr.P.C. Motive. Enmity is a double aged weapon – Testimony of direct eye witnesses available - must be decided on the basis of the quality and probative value of the evidence of eye witnesses and other witnesses of prosecution- First Information Report is not an encyclopedia of an incident - prosecution not obliged to prove those facts which prosecution either could not prove or which are not in the knowledge of the prosecution. No material contradictions with regard to the genesis of incident and the testimony of all the factual witnesses - The medical evidence fully corroborates the version of the prosecution as contained in the FIR and also in the testimony of eye witnesses - The First Information Report is prompt and is not either ante-dated or ante-timed - Presence of faecal matter either

in the small or big intestine of the deceased persons is not a circumstance strong enough to uproot the otherwise truthful and reliable evidence of three natural eye witnesses - The manner wherein the assault has been made clearly proves that all appellants formed an unlawful assembly and object of which was to murder deceased persons and they in furtherance of the common object of the assembly murdered deceased persons.

(Para 11, 15,44,62,66,68)

B. Evidence Law-Indian Evidence Act, 1872 - Section 134. Number of witnesses – Law does not require any particular number of witnesses to prove any fact- Plurality of witnesses in a criminal trial is not the legislative intent- if the testimony of a witness is found reliable on the touch stone of credibility, accused can be convicted on the basis of testimony of even single witness- every accused person is presumed to be innocent till the prosecution through reliable and acceptable evidence proves its case beyond all reasonable doubt- merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. (Para 37)

Appeal dismissed (E-7)

Chronological list of cases cited:-

1. State (Delhi Admn.) Vs Laxman Kumar MANU/SC/0109/1985

2. Krishna Mochi & ors. Vs St. of Bihar MANU/SC/0327/2002

3. Radha Mohan Singh @ Lal Saheb & ors. Vs St. of U.P. (2006)2 Supreme Court Cases 450.

4. Susanta Das & ors. Vs St. of Orr. (2016)4 Supreme Court Cases 371.

5. Surendra Pal & ors.Vs St. of U. P. & anr. (2010)9 Supreme Court Cases399.

6. Bur Singh & anr. Vs St. of Pun. reproted in (2008)16 Supreme Court Cases 65.

7. Chapter 15 of Modi's- A Text Book of Medical Jurisprudence and Toxicology 25th Edition."

8. Vadivelu Thevar Vs St. of Mad. AIR (1957) SC 614

9. Jagdish Prasad Vs St. of M.P. (AIR 1994 SC 1251)

10. Lallu Manjhi Vs St. of Jharkhand AIR (2003) SC 854

11. AIR 2003 SUPREME COURT 3617, Sucha singh v/s State of Punjab

12. Masalti & ors. Vs St. of U.P. MANU/SC/0074/1964,

13. St. of Pun. Vs Jagir Singh (AIR 1973 SC 2407)

14. Lehna Vs St. of Har. (2002 (3) SCC76)

15. Krishna Mochi & ors. Vs St. of Bihar etc. (2002 (4) JT (SC)186)

16. St. of Guj. Vs J.P Varu 2016Cr.L.J4185(SupremeCourt)

17. Raj Kumar Singh @ Raju @ Batya Vs St. of Raj. AIR (2013) SUPREME COURT 3150

18. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

19. St. of Raj. Vs Smt. Kalki & anr. MANU/SC/0254/1981 : AIR 1981 SC 1390

20. Sachchey Lal Tiwari Vs St. of U.P. MANU/SC/0865/2004 :AIR 2004 SC 5039

21. Bhagaloo Lodh & ors. Vs St. of U.P. reported inMANU/SC/0700/2011

22. M.C. Ali & anr. Vs St. of Ker. MANU/SC/0247/2010 : AIR 2010 SC 1639;

23. Myladimmal Surendran & ors. Vs St. of Ker. MANU/SC/0670/2010 : AIR 2010 SC 3281;

24. Shyam Vs St.of M.P. MANU/SC/7112/2007 : (2009) 16 SCC 531;

25. Prithi Vs St. of Har. MANU/SC/0532/2010 : (2010) 8 SCC 536;

26. Surendra Pal & ors. Vs St. of U.P. & anr. MANU/SC/0713/2010 : (2010) 9 SCC 399;

27. Himanshu @ Chintu Vs St. (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36)

28. Ram Praksh & ors. Vs The St. of U.P. reported in Manu/SC/0062/1968

29. Bimla Devi & ors. Vs Rajesh Singh & ors., MANU/SC/1455/2015

30. Anil Rai Vs St. of Bihar MANU/SC/1586/2001

31. Gangabhavani Vs Rayapati Venkat Reddy & ors. (04.09.2013- SC) : MANU/SC/0897/2013

32. In St. of Kar. Vs K. Yarappa Reddy,MANU/SC/0633/1999

33. C. Muniappan Vs St. of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402]

34. Bodhraj @ Bodha & ors. Vs St. of J&K. reported in MANU/SC/0723/2002: (2002) 8 SCC 45

35. Sheo Shankar Singh Vs St. of Jharkhand MANU/SC/0116/2011

36. Abuthagir & ors Vs St. MANU/SC/0968/2009 : (2009) 17 SCC 208

37. Ranbir & ors. Vs St. of Pun. MANU/SC/0441/1973 : 1974] 1 SCR 102,

38. Bodhraj @ Bodha & ors. Vs St. of J&K. MANU/SC/0723/2002 : 2002 CriLJ 4664,

39. Banti @ Guddu Vs St. of M.P. MANU/SC/0864/2003 : 2004 CriLJ 372

40. St. of U.P. Vs Satish MANU/SC/0090/2005 : (2005) 3 SCC 114."

41. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

42. Rana Pratap & ors. Vs St. of Har. (1988) (3) S.C.C. 327

43. St. of U.P. Vs Devendra Singh, MANU/SC/0343/2004

44. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

45. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. AIR (1983) 753, MANU/SC/0090/1983

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

Heard Shri Nagendra Mohan, learned counsel for the appellants and Ms. Nand Prabha Shukla, learned AGA for the State and perused the record.

1. This criminal appeal has been filed by the appellants- Narvada, Mashaley, Sukkhi, Jaswant and Gajraj against the judgment and order dated 7.10.1983, passed by Vth Additional Sessions Judge, Hardoi in Sessions Trial No. 67 of 1983, convicting the appellants no. 1,2 and 3 under Section 148 IPC and appellants no.4 and 5 under Section 147 IPC and further all the appellants under Section 302/149 IPC and sentencing them to 2 years R.I., 1 year R.I. and imprisonment for life respectively. The appeal with regard to the appellant no.2 Mashaley has been abated on account of his death vide order dated 01.12.2015 and of appellant Sukkhi on 01.07.2019 on account of his death..

2. At the outset we would like to refer the following observations of Hon'ble Supreme Court in **State (Delhi Admn.) v. Laxman Kumar MANU/SC/0109/1985,** quoted in **Krishna Mochi and Ors. vs. State of Bihar MANU/SC/0327/2002**,by Hon'ble Mr Justice M.B. Shah :-

"Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical power of a litigating individual or the might of the ruler nor even the opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecutor is given an opportunity of supporting the charge and the accused is equally given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed mind of the Judge that leads to determination of the lis..."

3. The prosecution story as unfolds from record of the subordinate court is that a written application was submitted by informant Suresh Pal Singh son of Natthu Singh on 5.8.1982 at 11.15 A.M at Police Station Behta Gokul District Hardoi, alleging that today at about 9.00 A.M. his father Natthu Singh and uncle Sobaran Singh along with Balvant Pasi were returning from their fields and when they reached near Kahjuria situated towards east of village, the accused persons Narvada, Mashaley and Sukkhi armed with guns and Gajraj and Jaswant armed with Lathis emerged out from behind the bushes and Khajuria. Narvada challenged his father Natthu Singh and commanded other accused persons to kill him. All five accused persons surrounded his father (Natthu Singh) and uncle (Sobaran Singh) and they fired 5 to 6 shots which hit Natthu Singh and Sobaran Singh and they succumbed to the injuries on the spot, instantly. Balvant Pasi made a hue and cry which attracted Mahesh son of Balwant, Natthu Kachi son of Hori and Ram Chandra son of Ram Swaroop who were grazing their cattles nearby. He also rushed to the spot and challenged accused persons, on which accused Gajraj and Jaswant assaulted both the persons with *Lathis.* All accused persons after committing the crime fled away towards the east.

4. It is further stated that about 7½ years ago the father of accused Narvada, namely, Bandha was murdered and Natthu Singh, Sobaran Singh and Balwant were charged for his murder and on the basis of this enmity Narvada and other co-accused persons has murdered his father and uncle.

5. On the basis of this application (Exbt. Ka-1) an FIR (Exbt . Ka-2) was registered at 11.15 A.M. at Case Crime No.118 of 1982, under Sections 147,148, 149, 302 IPC against the above mentioned five accused persons. An entry of the same was also made in the General Diary (Exbt . Ka-3) and the investigation of the case was entrusted to Shri Jai Chand Singh, who at that time was not available at the Police Station and therefore Sub Inspector Shri Shyam Singh Parihar proceeded towards the spot.

6. Sub Inspector Shyam Singh after arriving at the spot prepared Inquest report Exbt.- Ka-8, Photo Lash, Exbt.-Ka-9, Challan Lash Exbt.-Ka -10,Report Exbt.-Ka-11, Inquest Report Exbt.-Ka-12, PhotoLash Exbt.-Ka13,ChallanLash, Exbt. Ka-14,Memo blood stained soil, Exbt .-Ka-16, Memo simple soil Exbt.-Ka-17 pertaining to the dead bodies of

Natthu Singh and Sobaran Singh and with the letter of request for post mortem, the dead bodies were handed over by him to Constable Siddh Nath who carried the dead bodies along with the relevant papers to District Hospital, Hardoi.He also collected blood stained and simple soil from the spot and sealed it in separate containers.

7. S.H.O. Shri Jai Chand Singh also arrived at the spot at about 5.45 P.M. and took over the investigation from Shri Shyam Singh Parihar and recorded the statement of informant Suresh Pal Singh and on his identification inspected the spot and prepared site plan (Exbt. Ka-4). He also recorded the statement of Balwant and other witnesses on 6.8.1982.

8. On 6.8.1982 the dead bodies of Nathu Singh and Sobran singh were brought at District Hospital, Hardoi. The postmortem on the dead body of Natthu Singh was conducted on same day at 2.15 P.M. by PW 4 Dr. R.M. Gupta and following ante-mortem injuries were noted:-

(1) Lacerated wound 2 cms. X ½ cms. Bone deep on right side head 10 cms. above in front of right root of ear. Obliquely placed.

(2) Lacerated wound 3 cms. X 1.5 cms. X bone deep on head, right side 1 cm. Infront and just below injury no.1.

(3) Lacerated wound 5 cms. X1 cm. X bone deep right side forehead obliquely placed, lower end ending at lateral end of right eye brow.

(4) Lacerated wound 3 cms. X 1 cm. X muscle deep on right side face 1 cm. Below to right lower eye lid, obliquely placed.

(5) Lacerated wound 5 cms. at outer region of right ear middle part missing and this lacerated wound curving and dividing the lobule of ear in two parts.

(6) Two gun shot wounds of entry 1.5 cm. X 1 cm. ½ cm. apart from each other on right forearm medially middle third forearm. Margins inverted and lacerated.

(7) Gun shot wound of exit 3 cms. X 2 cms. On right forearm middle third, margin averted and lacerated. This injury was communicating to injury no.7. Direction upward laterally muscle deep.

(8) Multiple firearm wound of entry on right side chest in an area 9 cms. X 8 cms. X chest cavity deep each wound size 1 cm. X 1 cm. On and around the right nipple in between 11 to 6 O' Clock position. One fire arm wound of entry is just adjacent to right nipple at 2 O' Clock position, margins inverted and lacerated.

(9) One firearm wound of exit 1.5 cm. X 1.5 cm. on left out axillary line 15 cms. above and laterally to left nipple, at 2 O' Clock position margin averted and lacerated.

(10) One firearm wound of exit 1.5 cm. X 1.5 cm. on left shoulder 6 cms. below to tip of clavicle. Margin averted and lacerated.

Direction of fire arm wound of entry upward slightly backwards and to left side.

On internal examination the doctor found frontal forehead fractured, membranes lacerated and congested. Brain lacerated. 5Th, 6th and 7th ribs of right side fractured under injury no.8, 3rd, 4th and 5th ribs of left side fractured. Both pleura cavity lacerated at multiple places under injury no.8 and both lungs lacerated at multiple places. Liquid and

faeces and gases present in the large intestines.

The doctor opined that the death of the dead body was caused about one day before the post-mortem examination due to shock and haemorrhage as a result of ante-mortem injuries found on the dead body.

9. On 6.8.1982 at 4 P.M. the above mentioned Dr. R.M. Gupta also conducted the post mortem on the dead body of deceased Sobaran and found following ante- mortem injuries on the dead body:-

(1) Lacerated wound 4 cms. X 1 cm. X scalp on head right side 14 cms. above and behind right root of ear obliquely placed, clotted blood present.

(2) Lacerated wound 3.5 cm. X ` cm. X scalp on head right side 2 cms. in front to injury no.1, vertically placed, clotted blood present.

(3) Lacerated wound 5 cms. X 1.5 cms. X bone deep vertically placed 5 cms. Above to root of right ear. Clotted blood present.

(4) Lacerated wound 3 cms. X 1 cm. X scalp deep on left side head 8 cms. above to the left eye-brow vertically placed, clotted blood present.

(5) Fire-arm wound of entry and exit on right arm lower posterienlly part 6 cms. x 6 cms. on reteral half of the wound margins are inverted and lacerated. Medially margin are averted and lacerated. There is a tissue loss of muscle and skin. Slightly blackening present on entry side.

(6) Firearm wound of entry on abdomen 4 cms. x 3 cms. x abdomen cavity deep, 2 cms. below to umbilicus from 6 to 8 O' Clock position. Blackening present around the wound.

The direction of injury no.5 was downwards and medially and direction of injury no.6 was backwards and slightly upwards.

On internal examination the doctor found peritoneum lacerated under injury no.6.

The doctor opined that the death of the dead body brought to him was caused due to shock and haemorrhage as a result of ante-mortem injuries found by him about one day before the post-mortem examination.

10. The Investigating Officer after completion of the investigation, submitted a charge sheet against all accused persons under Sections 147, 148, 149, 302 IPC.

11. The case being exclusively triable by the court of Sessions was committed to the Sessions Court Hardoi and charges under Sections 148, 302 read with 149 IPC were framed against the accused persons, Narvada, Mashaley and Sukkhi while charges under Sections 147, 302 read with 149 IPC were framed against the accused persons, Jaswant and Gajraj

12. All accused persons denied the charges, pleads not guilty and claimed trial.

13. Prosecution in order to prove the charges relied on following documentary evidence before the court below.

Sl. No. Documents	**Description of Exhibit Ka-**
(1)	Written Tehrir Ka-1
(2)	FIR Chick Ka-2
(3)	G.D. F.I.R. Ka-3

(4) Site Plan Ka-4
(5) Charge sheet Ka-5
(6) Postmortem report Ka-6
(7) Postmortem report Ka-7
(8) Inquest report Ka-8
(9) Photo Lash Ka-9
(10) Challan Lash Ka-10
(11) Report Ka-11
(12) Inquest Report Ka-12
(13) Photo Lash Ka-13
(14) Challan Lash Ka-14
(15) Report for Postmortem Ka-15
(16) Memo blood stained soil Ka-16
(17) Memo simple soil Ka-17
(18) Copy G.D. Ka-18
(19) Copy G.D. Ka-19

14. Apart from the above documentary evidence prosecution also examined following witnesses to bring home the charges against the accused persons.

(1) P.W. 1 Suresh Pal Singh (Informant)
(2) P.W. 2 Balwant Singh (Eye witness)
(3) P.W. 3 Ram Chandra (Eye witness)
(4) P.W. 4 S.I. Jai Chand (Investigating Officer)
(5) P.W. 5 Dr. R.M.Gupta (who conducted post - mortem)
(6) P.W. 6 S.H.O.Shyam Singh (Investigating Officer)
(7) P.W.7 Constable Siddh Nath (who carried dead body for P.M.)
(8) P.W. 8 Constable Gopi Lal Pathak (G.D. Scribe)

15. After completion of the prosecution evidence statement of accused/ appellants was recorded under Section 313 of the Cr.P.C. wherein accused-appellant Narvada denied the evidence produced by the prosecution and further stated that in a case of 307 IPC instituted against him Balwant and Ram Chandra were witnesses and also that at about 7 ½ years before the incident, his father was murdered and two deceased persons Natthu Singh and Sobaran Singh and also Balwant Singh were charged for his murder and the case was pending at the time of incident. Accused Mashaley and Sukkhi, in their statement recorded under Section 313 of the Cr.P.C. have denied any ill will or grudge against both the deceased persons and accused Mashaley stated that there had been a quarrel between him and witness Balwant Pasi and the witnesses are inimical towards him. While accused Sukkhi claimed that Balwant was a witness against him in a case pertaining to Section 307 IPC. Accused Gajraj also denied the evidence of the prosecution and stated that witness Balwant had stolen and sold his buffalo pertaining to which an FIR was lodged by him and Balwant is having

enmity due to this. Accused Jaswant in his statement under Section 313 of the Cr.P.C. also denied the evidence of the prosecution and stated that all the witnesses are from the party of Suresh. All the accused persons have claimed that they have been falsely implicated on the basis of enmity.

16. Before proceeding further it is in the interest of things that a brief account of the testimony of the prosecution and defence witnesses be stated, so as the arguments of rival parties could be appreciated in a better way.

17. P.W. 1 Suresh Pal in his evidence has stated that about 7 ½ years before the incident, father of Narvada, namely, Bandha was murdered. His father Natthu Singh and uncle Sobaran Singh, Balwant Pasi and one Jokhai were charged for his murder and accused persons were having enmity with him and his family members on this score.

18. He further stated that on 5.8.1982 at about 6.00 A.M. his father, Natthu Singh, uncle- Sobaran and Balwant Pasi went towards the east of village to look-after their fields. Since they did not return back for long, he at 8.00 A.M. started towards the fields, in search of them. When he reached near metallic road situated towards the East of village, he saw Balwant raising alarm and found his father and uncle towards the North of him and all above named accused persons were also there.

19. He further stated that accused, Narvada, Mashaley and Sukkhi were armed with guns and accused, Gajraj and Jaswant were armed with *Lathis* and they killed his father and uncle by firing from guns and assault given by the *Lathis.* According to him Ram Chandra, Natthu Kachi and Mahesh were also present at the spot and when they challenged, the accused persons fled away towards the east. His father and uncle both died on the spot.

20. P.W.2- Balwant is the eye witness of the incident, who at the time of the occurrence was accompanying both the deceased persons. He stated that about 9 months before Natthu Singh and Sobaran Singh were done to death. He, along with Natthu Singh and Sobaran Singh was returning towards the village through the metallic road from their fields. When they reached near Khajuria and bushes, Narvada, Mashaley and Sukkhi armed with guns and Jaswant and Gajraj armed with *Lathis,* emerged out from behind the bushes. Narvada challenged and commanded others to kill them, thereafter Narvada fired at Natthu Singh, who fell down, while Gajraj started assaulting him by *Lathi.* Sukkhi fired two shots from his Gun towards Sobaran, who also fell down and Jaswant assaulted him with Lathi. Thereafter when Natthu Singh attemped to stand up, Mashaley fired at him. He again stated that he by mistake has stated that Sukkhi made two fires, while in fact second fire towards Sobaran was made by accused narvada. According to this witness incident , apart from him, was witnessed by Natthu Kachi, Mahesh, Suresh and Ram Chandra. When they went near Natthu Singh and Sobaran both were dead.

21. P.W.3- Ram Chandra is also an eye witness of the incident, who has deposed that Natthu Singh and Sobaran Singh were murdered at about 8.00 A.M.

about nine months before recording for his statement. He along with Mahesh and Natthu Kachi were grazing cattle, about 100 paces away from the spot, when he heard alarm and sound of fire and advanced towards spot and saw that accused- Narvada, Mashaley and Sukkhi were holding guns in their hands while Jaswant and Gajraj were holding *Lathis.* Narvada fired towards Natthu Singh while Mashaley towards Sobaran and Sukkhi fired towards Natthu Singh. Accused Gajraj and Jaswant assaulted both Natthu Singh and Sobaraban Singh by *Lathis.* It is further stated by him that two gun shots were sustained by Sobaran Singh and second fire was fired by Sukkhi and after committing crime the accused persons fled towards the east. He saw the incident from north side of the spot and towards the southern side of the spot, Suresh and Balwant were standing, who where making alarm. It is further stated by him that both Natthu Singh and Sobaran Singh died at the spot.

22. P.W.4- Sub Inspector Jai Chandra Singh has conducted investigation and submitted the charge sheet. He has proved various stages of investigation and also proved Chick FIR, G.D. Entry, Site Plan and charge sheet as Exbts Ka- 2 to Ka-5.

23. P.W. 5- Dr. R.M. Gupta performed the postmortem on bodies of both the deceased persons and prepared postmortem reports and proved the report as Exbt. Ka-6 and Exbt. Ka-7 The report and its contents has been elaborately reproduced in paragraph no. 8 and 9 of this judgment.

24. P.W.6- S.H.O. Shyam Singh Parihar is the witness, who was present at the Police Station when the FIR was lodged and in absence of S.H.O. Jai Chandra Singh,he proceeded towards the spot and has proved to perform inquest reports and other relevant papers necessary for postmortem as Exbt. Ka-8 to Exbt . Ka-15 . He also stated to have collected the sample and blood stained soil from the spot and also that both the dead bodies were handed over to Constable Siddh Nath and Chaukidar of the village for taking them for postmortem.

25. P.W.7- Constable Siddh Nath has deposed to have brought the dead bodies to Sadar Police Line along with Chaukidar Beni and also that on the next day i.e. 6.8.1982, he handed over the bodies and papers to the doctor concerned at District Hospital, Hardoi.

26. P.W.8- Head Constable Gopi Lal is the person who has proved deposit of containers containing simple and blood stained soil in the Police Station and also of making entry of the same in the G.D. and proved the same as Exbt. Ka-18. He also proved deposit of pellets contained in two envelops brought by Constable Siddh Nath from postmortem house and also to have made an entryof the same in the G.D. as Exbt. Ka-19.

27. The accused persons in their defence has produced D.W.1- Constable Chandra Pal Singh, who deposed to have brought Register no. 8 of the Police Station and stated that the deceased Natthu Singh was accused in one case of murder. He further deposed that three cases i.e. under Section 307 IPC 110 Cr.P.C. and Section 394 IPC are also registered against the witness Balwant.

28. We have heard Shri Nagendra Mohan, learned counsel for the appellants

as well as learned AGA for the State in depth and have also perused the record.

29. From the above evidence certain facts appear to be undisputed that accused Mashaley (died during pendency of appeal) and Sukkhi are real brothers. Accused Narvada is their cousin brother and accused Gajraj and Jaswant are from their party. It is also apparent that about 7 ½ years before the incident at hand, father of Narvada (Bandha) was murdered and Natthu Singh, Sobaran Singh along with Balwant and Jokhaee were charged for his murder and the case was pending at the time of the incident. It is also evident that accused Gajraj, Jaswant and Narvada were witnesses in that case. Therefore both the parties were highly inimical towards each other and were having very bitter relations.

30. Learned counsel for the appellants while referring to the impugned judgment and order of the court below submits that whole story of the prosecution is based on false facts and the accused persons have been roped in due to enmity. He further submits that both the deceased persons, namely, Natthu Singh and Sobaran Singh have not died in the alleged occurrence, as claimed by the prosecution. He overwhelmingly submits that both the deceased persons were actually done to death by some other persons in the early hours of the morning or in the intervening night of 4-5.8.1982. It is also submitted that the deceased was a history sheeter and could have been murdered by any one. To further substantiate his argument, Shri Nagendra Mohan, learned counsel for the appellants submits that the fact of the death of the two deceased persons in the early hours on 5.8.1982 or in the intervening night 4-5.8.1982 is well established by the postmortem reports of both the deceased persons as in the postmortem report of both the deceased persons in small intestines faecal matter along with gases have been found, which establishes that the deceased persons had not eased themselves and this fact is in direct contrast of the testimony of P.W.1- Suresh Pal Singh who claimed that Natthu Singh, on the fateful day, had gone to ease himself before going to his fields. Therefore, according to him, the court below had materially erred in not taking into consideration this material point.

31. Shri Nagendra Mohan, learned counsel for the appellants, further submits that testimony of witness of fact, namely, P.W. 1- Suresh Pal Singh, P.W. 2 Balwant Pasiand P.W.3 Ram Chander, in the facts and circumstances of the case, is not reliable and in fact they have not witnessed any occurrence. There are material contradictions in their testimonies in the manner of committing crime by the accused persons as well as in the time and place of the occurrence. Therefore, the court below has materially erred in accepting their unreliable and untruthful testimony.

32. Shri Nagendra Mohan, learned counsel for the appellants, overwhelmingly submits that the FIR in this case is ante-timed and ante-dated. To substantiate his points he referred to the undue delay happened in the postmortem of the dead bodies of the two deceased persons and also that the statement of informant, P.W.1- Suresh Pal Singh was not recorded at the Police Station when he was present in the Police Station for the purpose of lodging FIR. It is also highlighted by him that the statement of

other witnesses were also not recorded on the same day i.e. 5.8.1982. He further submits that cuttings and over-writings in the inquest reports of both the deceased persons along with other infirmities mentioned above, clearly reveals that the FIR of the case was not in existence at the time of inquest and post mortem and the same has been ante-timed as well as ante-dated and therefore the prosecution case could not be believed.

33. Learned counsel for the appellants overwhelmingly emphasized that the witness Balwant Singh is a star witness of this case. He, like the other two deceased persons was having equal enmity with the accused persons but surprisingly not a single scratch has been caused by the accused persons on his person and this circumstance clearly reveals that by any stretch of imagination he could not be in the company of deceased persons and he is not a eye witness of the incident.

34. It is further submitted by learned counsel for the appellants that the conduct of P.W.1- Suresh Pal Singh as well as of witness Balwant Singh for not attempting to save their father and uncle, is highly improbable. Moreover, the P.W. 1, Suresh Pal Singh in his statement has admitted that he after returning from the Police Station did not go to the spot but remained at his home in the same village where the bodies of his father and uncle were lying unattended. It is highly improbable and renders the testimony of this witness as untruthful. He overwhelmingly submits that this is a case where glaring and material contradictions are apparent in the testimony of factual witnesses and therefore, the trial court has erred in convicting the accused persons and they are liable to be acquitted of the charges framed against them.

35. Learned AGA, per contra submits that accused persons were having a strong motive to eliminate the deceased persons as they had murdered the father of the accused Narvada. It is further submitted by him that enmity in between the prosecution side and the accused persons side is well established. The occurrence has happened on 5.8.1982 at about 8-9 A.M. in the morning and the same has been witnessed by PW-2 Balwant Pasi who was accompanying deceased persons, as well as by PW-1 Suresh Pal Singh son of deceased Natthu Singh and other witnesses including PW-3 Ram Chandra who were grazing their animals near the spots. He overwhelmingly submits that the presence of faecal matter in the large and small intestines and gases is not of any significance and it depends on various factors including digesting capability of a particular person and also on his bowl movements and even after attending call of nature faecal matter may be found in the large intestines.

36. It is further submitted that P.W.5- Dr. R.M. Gupta has categorically opined that both the deceased persons might have been done to death about 8.00 to 9.00 A.M. in the morning on 5.8.1982. The witnesses are natural and there is no material contradictions in their statements pertaining to commission of the crime by accused persons. The delay in performing postmortem has been explained by P.W.7- Constable Siddh Nath who brought dead bodies to the District Hospital, Hardoi and the fact of not recording the statement of P.W. 1- Suresh Pal Singh at the Police Station has also been explained by P.W.4

Shyam Singh Parihar who has stated that he asked Suresh Pal Singh to rush the spot and himself proceeded towards the village on bicycle. It is also submitted that the criminal background of the deceased Natthu Singh and Sobaran Singh is not of any benefit to the accused persons, as no right is conferred on any person to murder even any hardened criminal.

37. It is further submitted by learned AGA that in both the inquest reports the crime number and other details have been mentioned and this argument of learned counsel for the appellants is not tenable that some minor over cuttings will vitiate the whole prosecution case. He overwhelmingly submits that irregularities and illegalities committed during the course of investigation shall not be a ground to discard the reliable evidence of the prosecution witnesses. Therefore the prosecution has proved its case beyond all reasonable doubts and there is no occasion to interfere in the otherwise well reasoned judgment of the subordinate court.

Learned AGA relied on following case laws:-

"(I) Radha Mohan Singh Alias Lal Saheb and others Versus State of U.P. reported in (2006)2 Supreme Court Cases 450.

(II) Susanta Das and others Versus State of Orrissa reported in (2016)4 Supreme Court Cases 371.

(III) Surendra Pal and others Vs. State of Uttar Pradesh and another reported in (2010)9 Supreme Court Cases 399.

(IV) Bur Singh and another Vs. State of Punjab reproted in (2008)16 Supreme Court Cases 65.

(V) Chapter 15 of Modi's- A Text Book of Medical Jurisprudence and Toxicology 25th Edition."

At the outset we would like to observe that there cannot be any doubt in the proposition that Section 134 of Evidence Act do not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent, it is not the quantity but quality which matters. Therefore, if the testimony of a witness is found reliable on the touch stone of credibility, accused can be convicted on the basis of testimony of even single witness. This principle was highlighted in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614,** wherein it is held by Hon,ble Apex Court that *"The contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated."*

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes

into play. The matter thus must depend upon the circumstance of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

Vadivelu Thevar case (supra) was referred to with approval in **Jagdish Prasad v. State of M.P. (AIR 1994 SC 1251)**. It was held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'). But, if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses.Therefore, it is not the number, the quantity, but the quality which is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise.

In Lallu Manjhi vs. State of Jharkhand, AIR 2003 SC 854 Hon,ble Supreme Court held in ***Para 10,*** *that "The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely* ***(i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable.*** *In the first two categories there may be no difficulty*

in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."

In AIR 2003 SUPREME COURT 3617, Sucha singh v/s State of Punjab Honble Apex Court after considering **Masalti and others vs. State of U.P. MANU/SC/0074/1964, State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76),** *opined as under:- "Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that, it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Ali v. State of Uttar Pradesh (AIR 1957 SC 366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurcharan Singh and another v. (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli*

Nayata and another v. State of Madhya Pradesh, 1972 3 SCC 751) and Ugar Ahir and others v. State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and others v.state of punjab (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and another (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in ***Krishna Mochi and others v. State of Bihar etc. (2002 (4) JT (SC) 186)*****."**

In **State of Gujarat vs J.P Varu reported in 2016 Cr.L.J 4185 (Supreme Court)** it has been propounded by the Supreme Court that, ***" Para 13*** *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."*

In **AIR 2013 SUPREME COURT 3150, Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan** Hon,ble Supreme Court held that ***Para 17*** *"Suspicion, however grave it may be, cannot take place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the Court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is*

avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

Therefore, the gist of the aforesaid law propounded by the Hon'ble Supreme Court is that every accused person is presumed to be innocent till the prosecution through reliable and acceptable evidence proves its case beyond all reasonable doubt. In other words, in criminal trial, it is the duty of the prosecution to prove its case beyond all reasonable doubt. However, it is not each and every doubt which can be termed as reasonable and benefit of only that doubt can be claimed by the accused persons ,which is reasonable in the facts and circumstances of the case and which grow out of the evidence , itself.

Moreover In **Gangabhavani vs. Rayapati Venkat Reddy and Ors. , MANU/SC/0897/2013** Hon'ble Supreme Court held as under :-

"11. 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.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

12. In ***State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390,*** this Court held:

"5A. 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."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In ***Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039,*** *while dealing with the case this Court held:*

"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."

14. 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."

In **Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011** it was held as under :-

"14. 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. ***(Vide: M.C. Ali and Anr. v. State of Kerala MANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).***

In view of the law laid hereinabove, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses."

It is therefore settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of a witness, more so a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out, whether it is cogent and credible evidence.

Therefore the evidence available on record is desired to be appreciated in the background of above mentioned settled principles of appreciation of evidence.

38. Now we deal the first argument of Shri Nagendra Mohan, learned Counsel for the appellants that both the deceased persons, namely, Natthu Singh and Sobaran Singh were done to death some time in the intervening night of 4-

5.8.1982 or in the early hours of the morning of 5.8.1982 by some unknown persons and due to enmity, the appellants have been falsely implicated.Learned Senior Counsel has relied on the report of postmortem of both the deceased persons wherein liquid faecal and gases in small intestines and faecal matter and gases in large intestines were found. Highlighting the above factual matrix, he submits that both the deceased persons had not attended the call of nature till they were done to death and in villages normally villagers before going any where first go to ease themselves. The PW-1 has admitted that deceased Natthu Singh went to ease himself before going to see his fields. Therefore these facts create reasonable doubt in the story of prosecution.

39. Keeping in view the above submissions of learned counsel for the appellants, if we peruse the evidence of P.W. 5- Dr. R.M. Gupta, who conducted the postmortem on the bodies of both the deceased persons, we find that he has deposed that stomach of Natthu Singh was empty, Liquid faecal and gases were found in his small intestines while faecal matter and gases were found in his large intestines. Similarly Dr. R.M. Gupta has also deposed to have found liquid faecal + gases in small intestines and faecal matter + gases in large intestines of deceased Sobaran Singh.

40. This witness has categorically stated that the death of both the deceased persons i.e. Natthu Singh and Sobaran Singh has been caused about 24 hours before the postmortem. It is also opined by him that the death of both deceased persons might have been caused on 5.8.1982 at about 8 A.M.. He also opined that both the deceased persons Natthu Singh and Sobaran Singh may or may not have attended the call of nature before their death. However, he categorically opined that there is little possibility of Natthu Singh dying at 3 or 4 A.M.

41. P.W. 1- Suresh Pal Singh in his cross examination has admitted that his father used to go to attend nature's call in the morning and on the day of incident also he went to his fields after easing himself. No such statement has been made by him pertaining to the other deceased person, namely, Sobaran Singh. He has also stated in his cross examination that occasionally his father and uncle both go to look after their fields. Therefore in absence of any evidence with regard to the deceased Sobaran Singh that he went to the fields after easing, no inference could be drawn that Deceased Sobaran Singh also eased himself before going to the fields. So far as Natthu Singh is concerned, even if it is taken that before going to his field, he went to ease himself, even this circumstance could not draw any adverse inference on two scores; firstly, the presence of faecal matter in large intestine is not a decisive and conclusive factor to draw an inference that the deceased Natthu Singh has not eased himself. Presence of faecal matter in the large intestine, even after some one has eased, is not rare and it depends on so many factors including the digesting system of the person concerned and also as to whether he is suffering from constipation, as well as also on the quality and time of food taken by him. Many healthy persons are usually seen going many times in the morning to ease themselves.

42. Hon'ble Supreme Court in **Ram Praksh and others vs. The State of Uttar Pradesh** reported in Manu/**SC/0062/1968,** while dealing with

a similar argument held in pargraph 5 of the report as under:-

"5. On the second point, it is urged, that according to the medical evidence the death might have been caused on the night intervening 18th and 19th July, 1966, Dr. S. P. Gulati P.W. 4, who had performed the postmortem examination stated that faecal matter and gas were present in the small and large intestines of Ganeshi Lal; owing to this reason he thought it probable that the deceased had not eased himself till the time of receiving the injuries. Mr. Anthony says that it is well-known that a person with normal habits particularly in villages empties his bowels early in the morning. The presence of the faecal matter in the small and large intestines showed that Ganeshi Lal must have died within some hours of his taking food on the previous night namely by the midnight of 18th and 19th July, 1966. This, according to Mr. Anthony, established that the prosecution case about the time of death cannot be accepted. Reliance has been placed on the statement in Modi's Medical Jurisprudence and Toxicology, 10th Ed., p. 151, that one can give an opinion that the death occurred some time after the deceased go up in the morning if the large intestines was found empty of faecal matter. It is submitted that conversely it can well be said that if the large intestine is found full of faecal matter it should be inferred that death did not take place in the morning. The learned trial judge discussed this matter in his judgment and disposed it of by saying that there was no proof that before the occurrence Ganeshi Lal had eased himself and that even if he had gone for that purpose there was no presumption that his bowels had moved. According to him, the question of time had to be decided on the basis of direct and other evidence on the record. We concur in that view and find it difficult to accept that the question of time should be decided only by taking into consideration the fact that faecal matter was found in the intestines of the deceased. This may be a factor which might have to be considered along with the other evidence but this fact alone cannot be decisive."

43. Keeping in view the above, factual and legal position, presence of faecal matter in the large intestine of the deceased persons could not be conclusive or determinative circumstance to disbelieve the prosecution story, specially in the back ground of the fact that Dr. R.M. Gupta (P.W.5) has specifically opined that possible time of death of both the deceased persons may be about 8.00 A.M. on 5.8.1982. Therefore in view of above we are not inspired by this argument of learned counsel for the appellants.

44. Second argument advanced by learned counsel for the appellants is that the FIR in the instant case had been ante-timed and ante-dated as the statement of the informant, P.W.1- Suresh Pal Singh under Section 161 of the Cr.P.C. was not recorded at the Police Station where he was present for the purpose of lodging of FIR and also that in the inquest report there are cuttings in the column of time of lodging of FIR and time of starting of inquest with regard to the inquest of Sobaran Singh as well as the description of arms etc. has not been given in the inquest reports.

45. We have perused the record in the back ground of the argument

advanced by learned Senior Counsel and have found that P.W. 1- Suresh Pal Singh has stated, in his evidence, to have lodged the FIR on the day of occurrence i.e. 5.8.1982. In his cross examination he has stated that he wrote the application (Tehrir) at his home and 15-20 minutes were consumed therein. He further stated that about 2 hours were consumed in reaching the Police Station. He did not meet *Daroga Ji* till he leaves Police Station. It is further stated by him that he remained at the Police Station for about half an hour and returned to his village within 4-1/2 hours. In the FIR the time of incident has been written as 9 A.M., however, in his statement he has stated that the time of occurrence was in between 8 to 9 A.M. It is further stated that no body was having a watch with him. His statement under Section 161 of the Cr.P.C. was recorded by the Investigating Officer at about 6 P.M. on the day of occurrence at the spot. He fuhrer stated that his mind was not working properly so he wrote in the FIR whatever comes to his mind at that moment.

46. A perusal of Exbt. Ka-3, which is a copy of General Diary dated 5.8.1982, shows that on the basis of an application submitted by P.W.1- Suresh Pal Singh the FIR was lodged at Case Crime No. 118 of 1982 under Sections 147, 148, 149, 302 IPC. On 05.08.1982 at 11.15 a.m.. This copy of general diary has been proved by P.W.4- Jai Chand Singh who had seen head moharrir Gopi Lal and recognize his hand writing. Keeping this in view, it is established that the FIR in the matter was registered at about 11.15 A.M. on 5.8.1982 which is prompt, keeping in view the distance of Police Station from the spot .

47. P.W. 1- Suresh Pal Singh had also admitted that his statement was recorded by the Investigating Officer at 6 P.M. at the spot on the date of occurrence. P.W.4- Jai Chand Singh, to whom investigation was entrusted was not available at the Police Station at the time of lodging of FIR and in his absence preliminary investigation had been done by PW-6 Sub Inspector Shyam Singh Parihar. P.W.4- Jai Chand Singh has corroborated the statement of P.W. 1- Suresh Pal Singh when he stated that he reached the spot about 5.45 P.M. on 5.8.1982 and took over the investigation and recorded the statement of P.W. 1- Suresh Pal Singh and on his pointing, also prepared site plan. He also stated to have recorded the statement of S.I. Shyam Singh Parihar and witness Balwant Singh on 6.8.1982. In his cross examination he stated that there was no eye witness present apart from P.W. 1- Suresh Pal Singh, when he reached the spot. In paragraph 14 of his cross examination, he specifically stated that he called the witnesses but they were not available. Surprisingly no question was put by defence to this witness or to P.W.6- S.O. Shyam Singh Parihar as to why the statement of P.W. 1- Suresh Pal Singh was not recorded at Police Station itself. However, P.W. 6- Shyam Singh Parihar in his statement has stated that FIR in this case was lodged in his presence and according to the general diary he departed from the Police Station to the place of occurrence at about 11.15 A.M. He asked Suresh Pal Singh to rush from Police Station and himself departed towards the village on bicycle and arrived at the spot around 1.30 P.M. Surprisingly no question was put to him as to why he did not record the statement of P.W. 1- Suresh Pal Singh at the time when he was at the

Police Station for the purpose of lodging First Information Report. When no question with regard to not recording the statement of P.W. 1- Suresh Pal Singh at the Police Station was put to P.W.6- Shyam Singh Parihar, no benefit of it could be claimed by the defence subsequently, because no opportunity has been given to the witness to explain this circumstance. The defence cannot play hide and seek with the prosecution. It was the duty of the defence to put this circumstance specifically to the Investigating Officer or to the PW 6 Shayam Singh Parihar to provide an opportunity to the Investigating Officer or to Shyam Singh Parihar, to explain as to why the statement of P.W. 1- Suresh Pal Singh was not recorded at the Police Station itself.

Otherwise also it is apparent from the evidence available on record that within half an hour of the incident, P.W.1- Suresh Pal Singh, who at that time was of the age of about 17 years, left for Police Station and reached there at about 11.15 A.M. and got the FIR lodged. It is also apparent that S.H.O. of the Police Station, namely, P.W.4- Jai Chand Singh, to whom the investigation was entrusted, was not present at the Police Station. It is also apparent on record that P.W.6- Shyam Singh Parihar asked P.W.1- Suresh Pal Singh to rush to the spot and after reaching the village and after performing the proceedings of inquest etc., when P.W.4- Jai Chand Singh arrived at the spot at about 5.45 P.M. he (P.W.4- Jai Chand Singh) recorded the statement of P.W.1- Suresh Pal Singh at about 6 P.M. on 5.8.1982. Therefore the circumstance of not recording the statement of P.W.1- Suresh Pal Singh has been amply explained by evidence available on record and no adverse inference can be derived from it.

48. Now comes the question of some cuttings allegedly made on the inquest report of deceased Sobaran Singh and non mentioning of material particulars in the inquest reports of both Deceased persons and on the basis of it an argument has been placed by learned counsel for the appellant that till the inquest no FIR was in existence and the same has been ante-dated and ante-timed.

49. We have perused the record in the background of the argument advanced by learned Senior Counsel. As stated earlier when the First Information Report was lodged P.W.4- Jai Chand Singh , Station House Officer was not available at the Police Station and S.I. Shyam Singh Parihar (P.W.6) was present there and he arrived at the spot by bicycle at about 1.30 P.M. P.W.4- Jai Chand Singh, however, reached the spot at about 5.45 P.M. on 5.8.1982. P.W.6- Shyam Singh Parihar in his statement has admitted to have prepared the inquest reports pertaining to both the deceased persons. He in his cross examination has admitted that in the inquest report pertaining to Sobaran Singh the time of FIR was written as 9.00 A.M. and there after by making cutting on it, it was written as 11 A.M. Likewise in this inquest report starting time of inquest has been written as 11.20 A.M. and after cutting it was written as 13.30. Therefore it has been categorically admitted by this witness that after making cutting, corrections have been made by him in the inquest report of Sobaran Singh and also that signature has not been made by him on the cuttings. The statement of this witness clearly reveals that he has made some cuttings in

the inquest report of Sobran Singh and thereby have corrected the time of lodging of FIR as 11.15 A.M. instead of 9.00 A.M. and the time of starting of inquest report as 13.30 instead of 11.20 A.M.

In **Bimla Devi and Ors. vs. Rajesh Singh and Ors., MANU/SC/1455/2015 held as under :-**

"10. The next factual lacunae raised was overwriting in the inquest report. The inquest report by the police officer is prepared Under Section 174 of the Code of Criminal Procedure, 1973. The scope of the section is investigation by the police in cases of unnatural or suspicious death. However, the scope is very limited and aimed at ascertaining the first apparent signs of the death. Apart from this the police officer has to investigate the place wherefrom the dead body is recovered, describe wounds, fractures, bruises and other marks of injury as may be found on the body, stating in what manner or by what weapon or instrument, such injuries appear to have been inflicted. From the above, it thus becomes clear, that the section aims at preserving the first look at the recovered body and it need not contain every detail. Mere overwriting in the name of the informant would not affect the proceedings. The fact of homicidal death was not in dispute and the manner in which the death was occurred is also not disputed. Then merely name being overwritten will not help the defence, when the contents of the inquest report was supported by the eye witnesses and also the medical evidences."

50. We have very carefully perused the inquest reports of both the deceased persons available on record as Exbt Ka-8 and Exbt. Ka-12 and have found that in the inquest report of Natthu Singh(Exbt Ka-8) in the heading Case Crime No. 118 of 1982 under Sections 147, 148, 149, 302 IPC against Narvada and others has been written. The time of lodging of the FIR has been shown as 11.15 A.M. on 5.8.1982 and the starting time of inquest is written as 13.30 house (1.30 P.M.). The name of the informant in the inquest has been shown as Suresh son of Natthu Singh and it is also written that death has been caused by gun shot and other injuries. The closing time of the inquest is shown as 15.00 hours. The whole inquest report is prepared in one hand writing and in one ink, without any cutting. Therefore it is apparent that so far as the inquest report of deceased Natthu Singh is concerned the Case Crime Number, Sections, the name of the informant, the time of lodging of FIR, starting time of inquest, closing time of inquest, the manner whereby the deceased has been killed and also the name of the informant have been shown in the column earmarked for the same. In nutshell all particulars necessary, for the inquest is present in this inquest.

51. Now comes inquest of Sobaran Singh, which is available on record as Exbt. Ka-12, wherein also the Case Crime Number, Sections, against Narvada and others, name of the informant has been mentioned. The only dispute appears to be with the cutting pertaining to the time of lodging of FIR and start of inquest. Earlier it appears to be written as 9 AM and 11.15 A.M. but subsequently it was written as 11.15 A.M. and 13.30 hours. Surprisingly in the cross examination no question was put to P.W. 6- Shyam Singh Parihar by the appellants about the cutting

made in the inquest report of Sobaran Singh and the only question which was put to him about the inquest report was non mentioning of the weapons of assault etc. Therefore no opportunity appears to have been given to P.W. 6- Shyam Singh Parihar to explain the circumstance under which the cutting in the first column of the inquest report pertaining to deceased Sobaran Singh was made by him. Therefore no benefit of such cutting can be claimed by the appellants.Perusal of both the inquest reports reveals that the inquest report of Natthu Singh was started at 15 hours and P.W.6- Shyam Singh Parihar in his evidence has stated to have reached the village at about 1.30 P.M., on the same day. Firstly he prepared the inquest report of deceased Natthu Singh(Exbt. Ka-8) and thereafter inquest of deceased Sobaran (Exbt. Ka-12) was started. When the inquest report of Natthu Singh (Exbt. Ka-8) was completed at 15 hours (3.00 P.M.) there was no occasion for the P.W. 6- Shyam Singh Parihar to start the inquest of deceased Sobaran Singh (Exbt. Ka-12) at 13.30 hours. That's why in the inquest of Sobran , in the first column, below 13.30 hours words 15 hours has been written and P.W.6- Shyam Singh Parihar in his cross examination has stated in paragraph 5 that below 13.30 hours, time 15 hours has been written, which clearly means that the inquest of deceased Sobaran was started on 15 hours (3 P.M.) and ended on 16.15 hours (4.15 P.M.). Apart from this in all the papers, prepared by P.W.6- Shyam Singh Parihar at the spot, for the purpose of postmortem of both the bodies, namely, Exbt. Ka-9 and Ka-13 sketch dead body, Exbt. Ka-10 and Ka-14 Chick R.I., Exbt. Ka-11 and Ka-15 Chick C.M.O., Exbt Ka-16 and Ka-17 Memo of blood stained and simple earth, Crime number of the case i.e. 118/1982 under Sections 147, 148, 149, 302 IPC has been written, which amply suggests that the FIR, in this case had come into existence before the inquest and the minor discrepancies occurring in the preparation of inquest reports are not of such magnitude, on the basis of which the case of the prosecution could be doubted. Had the FIR not been lodged prior to the inquest report, as claimed by the learned counsel for the appellants, it would have been impossible for P.W.6- Shyam Singh Parihar to have written crime number 118/1982 and other particulars of the FIR, including the penal sections and the name of the first accused, namely Narvada in the heading of the inquest report and other papers prepared by him for the postmortem. After going through the whole record and meticulously examining the inquest report and other papers prepared by P.W.6- Shyam Singh Parihar, we are convinced that the FIR is neither ante-timed nor ante- dated.

54. The next contention of learned counsel for the appellants is that FIR in this case was received in the office of Chief Judicial Magistrate on 13.9.1982 and therefore the delay in sending the report to the Magistrate casts doubt on the FIR and on prosecution case.

Perusal of Chick FIR available on record as Exbt. Ka-2, reveals that it was received in the office of Circle Officer of Police on 6.8.1982, as is apparent from an endorsement of the Circle Officer concerned on the Chick FIR of receiving the FIR i.e. on 6.8.1982. There is no endorsement of receiving the same by the C.J.M. concerned. However, P.W.4- S.H.O. Jai Chand has stated in his cross examination that the Chick FIR was

sent to the Magistrate on 5.8.1982 through Constable, Bhairo Prasad at 11.15 A.M. In our considered Opinion when the FiR was received at the office of Circle Officer at 6.8.1982 for the purpose of forwarding it to the Chief Judicial Magistrate, there appears truthfulness in the version of the prosecution that the same had been dispatched on 5.8.1982 from the police station concerned through Circle Officer Police.

Hon'ble Apex Court in **Anil Rai vs. State of Bihar, MANU/SC/1586/2001,** held as under :-

"30. This provision is 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 Section 159 of the Code of Criminal Procedure. But where the F.I.R. is shown to have actually been recorded without delay and investigation started on the basis of the F.I.R., the delay in sending the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable Pala Singh and Anr. v. State of Punjab MANU/SC/0199/1972 : AIR 1972 SC 2679. Extraordinary delay in sending the copy of the F.I.R. to the Magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvement and embellishment by setting up a distorted version of the occurrence. The delay contemplated under Section 157 of the Code of Criminal Procedure for doubting the authenticity of the F.I.R. is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial. This Court in Sarwan Singh and Ors. v. State of Punjab MANU/SC/0169/1976 : AIR 1976 SC 2304, held that delay in despatch of first information report by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when it is found on facts that the prosecution had given a very cogent and reasonable explanation for the delay in despatch of the F.I.R."

Therefore keeping in view the above factual matrix and law the receiving of the Chick FIR in the office of the Chief Judicial Magistrate late, is not a circumstance which may adversely affect the prosecution.

56. Learned counsel for the appellants also submits that the deceased were of bad characters, as has been deposed by D.W.1 and they may be done to death by any one. This argument of learned counsel for the appellants need not to be deliberated in depth as being a bad character will not provide any presumption in favor of the accused persons that they have not committed the crime and only on the basis of hypothetical assumption a criminal case could not be decided. The law is well settled on this point that a criminal case is to be decided on the quality of the evidence placed before the court of law in the back ground of settled principle of admissibility and the probative value of the evidence, Therefore the case in hand is also to be decided on the quality of the evidence available on record keeping an eye on the Golden principle of proof beyond reasonable doubt.

57. It is overwhelmingly submitted by learned counsel for the appellants that the prosecution case is doubtful on following scores as all the witnesses of fact have deposed falsely and they have not witnessed any incident at all:-

(I) The presence of prosecution witnesses, P.W.2- Balwant and P.W. 3- Ram Chandra is highly doubtful as the statement of these witnesses were not recorded by the Investigating Officer on the day of occurrence while they were present in the village.

(II) The conduct of P.W. 1- Suresh Pal Singh was abnormal as he, after returning from Police Station, did not go to the spot where the dead bodies of his father and uncle were lying.

(III) P.W.2- Balwant, who allegedly was with the two deceased persons at the time of incident, has not received even a single scratch on his body and he as well as P.W.1- Suresh Pal Singh did not try to save the deceased persons.

(IV) There are material contradictions in the evidence of all three factual witnesses and their testimony could not be believed and accused persons are entitled to be given benefit of doubt.

58. We deal first point first. The statement of prosecution witnesses no.2 Balwant and P.W.3- Ram Chandra was not recorded on the day of the occurrence i.e. 05.08.1982. P.W.4- Jai Chand Singh who was the Investigating Officer of the case has stated in his evidence that he recorded the statement of P.W.6- S.I. Shyam Singh Parihar and P.W.2- Balwant and other witnesses on 6.8.1982 and of P.W.3- Ram Chandra on 11.8.1982.

59. We have carefully perused the statement of P.W.4- Jai Chand recorded before the trial court. He stated to have reached the village and at the spot at about 5.45 P.M. on the day of occurrence and prepared a site plan and also recorded the statement of P.W.1-Suresh Pal Singh on the same day at 6.00 P.M. In his cross examination, he stated that at the scene of crime apart from Suresh Pal Singh no other witness was present. He met Suresh Pal Singh, S.I. Shyam Singh Parihar, Constable Mulayam Singh and Constable Ram Krishna Pandey, at the spot. In paragraph 14 of his cross examination, he stated that he got the witnesses searched, but they were not available. However, he admitted that the word witness has not been written in the case diary. He repelled a suggestion of the appellants that till his arrival at the spot neither accused nor witnesses were known to him. We have carefully perused his statement and have found that no specific question has been put to this witness pertaining to the fact, as to why he did not record the statement of witnesses P.W.2- Balwant and P.W.3- Ram Chandra on the day of occurrence. Therefore, this witness has been denied a right to explain the delay occurred in recording the statement of P.W.2- Balwant and P.W. -3 Ram Chandra.

In **Gangabhavani vs. Rayapati Venkat Reddy and Ors. (04.09.2013 - SC) : MANU/SC/0897/2013** held as under :-

"17. This Court in Laxmibai (Dead) Thr. L.Rs. and Anr. v. Bhagwantbuva (Dead) Thr. L.Rs. and Ors. MANU/SC/0072/2013 : AIR 2013 SC 1204 examined the effect of non-cross

examination of witness on a particular fact/circumstance and held as under:

31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.

P.W.2- Balwant on the other hand has stated in his evidence at paragraph 10 of his cross examination that he remained near the dead bodies for about half an hour and P.W.1- Suresh Pal Singh was not there. He again went to the spot after 10-15 minutes. Daroga Ji came at the spot at 1.30 P.M. and when Daroga Jai arrived there he, Ram Chandra, Natthu Kachi and Suresh Pal Singh were not there. He remained with Daroga Ji for 10-15 minutes.

It is to be recalled at this stage that at 1.30 P.M. Sub Inspector Shyam Singh Parihar (P.W.6) arrived at the spot, as Investigating Officer P.W.4- Jai Chand was not available at the Police Station at the time of registration of F.I.R. and therefore Shyam Singh Parihar (P.W.6) could not record the statement of Balwant and Ram chander. It is also evident that P.W.4- Jai Chand arrived in the village and at the spot at about 5.45 P.M. P.W.2 - Balwant in his statement has stated that Daroga Ji did not inquire from him on the day of occurrence and his statement was recorded the next day. It transpires from the above evidence of P.W.2- Balwant that a serious effort was not made by the Investigating Officer, P.W.4- Jai Chand to record his statement, even he was available in the village, in the evening of 05.08.1982. The laxity in investigation on the part of the Investigating Officer is also apparent, as he was not available at the Police Station when the FIR was lodged and even after lodging of the FIR he arrived at the village at about 5.45 P.M. and remained there till 7 P.M. and prepared the site plan at 7.00 P.M.. However, in absence of any specific question not put to P.W.4- Jai Chand (Investigating Officer) by the defence, it only appears that this is a case of carelessness on the part of Investigating Officer. It is to be understood that Investigating Officers know as to how the investigation should be done. They have all the means to conduct a proper and fair investigation but some time either knowingly or unknowingly, if any

irregularity or even illegality is committed by them, the same could not form the basis to reject the otherwise truthful evidence of eye witnesses. Any illegality or irregularity committed by the investigating officer, wherein the informant or witnesses are not the privy, either bonafidely or deliberately, could not be the basis to reject the testimony of truthful eye witnesses. The law is well settled on this point that Criminal justice Administration could not be left on the mercy of an erring Investigating Officer.

In State of Karnataka vs. K. Yarappa Reddy, MANU/SC/0633/1999 held as under :-

"It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation.

It is well nigh settled that even if the investigation is illegal or even suspicious the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to that level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers.

Criminal justice should not he made the casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case."

In **C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402]** , Hon'ble Supreme Court explained the law on this point in the following manner:

"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

Coming to the statement of P.W.3- Ram Chandra, statement of whom was recorded on 11.08.1982, he has stated in paragraph 6 of his statement that he remained at his home for whole of the day on the day of incident and on the next day at about 8-9 A.M. he went to village Maholia and returned from there after 5-6 days. This part of the statement of this witness appears to be truthful in the facts and circumstances of the case as P.W.2- Balwant Singh has stated that Investigating Officer recorded his

statement at about 10.00A.M. on the next day of incident. Therefore, there was no occasion for the Investigating Officer to met P.W.3- Ram Chandra on the next day as P.W.3- Ram Chandra had already left the village at about 8-9 A.M. on 6.8.1982 for village Maholia. Therefore non recording of the statement of P.W.2 Balwant and P.W.3- Ram Chandra on the day of occurrence is not fatal to the prosecution, while the delay has been adequately explained by the facts, circumstances and evidence available on record. Once reasonable explanation has been furnished about the delay occurred in recording the statement of witnesses by the Investigating Officer, the same is not fatal to the prosecution, specially when the delay is not on the part of either informant or his witnesses.

Hon'ble Apex Court has considered this aspect in the case of **Bodhraj @ Bodha and others V. State of Jammu and Kashmir** reported in MANU/SC/0723/2002: (2002) 8 SCC 45 and has observed in para 33 which is reproduced as under:--

"Another point which was urged was the alleged delayed examination of the witnesses. Here again, it was explained as to why there was delay. Important witnesses were examined immediately. Further statements were recorded subsequently. Reasons necessitating such examination were indicated. It was urged that the same was to rope in accused persons. This aspect has also been considered by the Trial Court and the High Court. It has been recorded that there was valid reason for the subsequent and/or delayed examination. Such conclusion has been arrived at after analyzing the explanation offered. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion."

Hon'ble Apex Court has again considered this aspect in the case of **Sheo Shankar Singh V. State of Jharkhand** and another reported in **MANU/SC/0116/2011** in para 66 which is reproduced as under:--

"The legal position is well settled that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the witness

suspect or affect the prosecution version."

Hon'ble Apex Court has also considered this aspect in the case of **Abuthagir and others V. State** represented by Inspector of Police, Madurai reported in **MANU/SC/0968/2009 : (2009)** 17 SCC 208 and has observed in paras 28 and 29 which are reproduced as under:--

"28. Much emphasis has been led by learned Counsel for the appellants on the alleged delayed examination of the witnesses. It is well settled that delay in examination of the prosecution witnesses by the police during the course of investigation ipso facto may not be a ground to create a doubt regarding the veracity of the prosecution's case.

29. So far as the delay in recording a statement of the witnesses is concerned no question was put to the investigating officer specifically as to why there was delay in recording the statement. Unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for delayed examination is plausible and possible and the Court accepts the same as plausible there is no reason to interfere with the conclusion. (See Ranbir and Ors. v. State of Punjab reported in MANU/SC/0441/1973 : 1974] 1 SCR 102, Bodhraj @ Bodha and Ors. V. State of Jammu and Kashmir reported in MANU/SC/0723/2002 : 2002 CriLJ 4664, Banti @ Guddu v. V. State of M.P. reported in MANU/SC/0864/2003 : 2004 CriLJ 372 and State of U.P. v. Satish reported in MANU/SC/0090/2005 : (2005) 3 SCC 114."

61. Now we deal the second contention of learned counsel for the appellants pertaining to the alleged abnormal conduct of P.W.1- Suresh Pal Singh in not going to the place of occurrence after returning from the Police Station.

Perusal of the record shows that it is in para 16 of the statement of P.W.1- Suresh Pal Singh wherein he stated that he did not go to the spot from Police Station after lodging the FIR as ***"Uska ji Ghabra raha tha. Voh thak gaya tha isi liye ghar jakar pad gaya."*** The age of this witness at the time of recording of his statement before the court below was 18 years and at the time of incident, he might be of the age of about 17 years. A young lad of 17 years who has witnessed brutal murder of his father and real uncle, few hours ago, by no stretch of imagination would be in stable mental condition and he also fairly admitted this in his in-chief examination that his mind was not working properly.

In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** The Supreme Court held as under :-

"The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their, course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely

because they have behaved or reacted in an unusual manner.

*In **Rana Pratap and Ors. v. State of Haryana 1988 (3) S.C.C. 327.** Chinnappa Reddy J. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed; (at p. 330).*

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

11. These may be some of the reactions. There may be still more. Even a man of prowess may become pusillanimous by witnessing a serious crime. In this case, the courts below, in our opinion, have taken into consideration of all those respects and rightly did not insist upon the evidence from other independent witnesses. The prosecution case cannot be doubted or discarded for not examining strangers at the bus stand who might have also witnessed the crime. We, therefore, reject the first contention urged for the appellants."

In **State of Uttar Pradesh vs. Devendra Singh, MANU/SC/0343/2004** while discussing the issue of behavior of witness commented as under :-

"Human behavior varies from person to person. Different people behave and react differently in different situations. Human behavior depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. (See Rana Partap and Ors. v. State of Haryana MANU/SC/0137/1983 : 1983CriLJ1272)."

Therefore, keeping in view the tender age of Suresh Pal Singh at the time of incident and the fact that his father and real uncle were done to death in front of his eyes only few hours ago, the circumstance of him going to his home while returning from the Police Station and not going to the spot is not of much significance. However, it is established and proved that his statement was recorded by the Investigating Officer at the spot on the same day at 6.00 P.M.

62. The third contention of learned counsel for the appellants is with regard to the fact that P.W.2- Balwant Singh did not sustain any injury in the incident while he was with the deceased persons and the enmity of accused persons with him was of the same degree as was with two deceased persons. According to him this belies the whole evidence of P.W.2- Balwant Singh as highly interested and not acceptable.

At the very outset, we would like to observe that what was in the mind of accused persons at the time of commission of crime can only be known to the perpetrators of crime and the law is well settled in this respect that the prosecution is not obliged to prove those facts which prosecution either could not prove or which are not in the knowledge of the prosecution. Therefore what was going on in the mind of accused persons at the time of committing crime can only be disclosed by accused persons themselves. Therefore why the accused persons targeted only Natthu Singh and Sobaran Singh could only be disclosed by them. However, P.W.2- Balwant Singh in his statement at paragraph 5 has stated that the accused persons atonce emerged from behind the bushes and were about 4-5 paces away from them. He further stated that they (he, Natthu Singh and Sobaran Singh) were together. He ran forward and chased by accused Narvada for 10-15 paces and meanwhile 2-3 village girls came in between them who were carrying water nd also that no gun shot was fired at him and he moved forward about 25-30 paces and thereafter accused persons fired at Natthu Singh. Therefore it transpires from the evidence of this witness that accused persons, specifically Narvada chased him but due to the emerging of 2-3 village girls in between them, he could not fire at him and in the meantime, he went out of range. The statement of this witness i.e. P.W.2- Balwant Singh is further corroborated by P.W.1- Suresh Pal Singh when he, in his statement at page 4 paragraph 15 stated that at the time of incident, he was 40 paces away from the place of incident and Balwant was 20-25 paces away from him. P.W.3- Ram Chandra in his chief examination has also stated that he saw the incident from the North side of Natthu Singh and Sobaran Singh and P.W.1- Suresh Pal Singh and P.W.2- Balwant Singh were towards the South of them. This statement of this witness further corroborates the testimony of P.W.2- Balwant Singh and Suresh Pal Singh that Suresh Pal Singh and Balwant Singh were on the same side of the spot and Balwant Singh was 20-25 paces away from the place of occurrence. Therefore the evidence on record discloses that Narvada could not fire at Balwant Singh due to the coming of some village girls in between them who were carrying water and till then not a single fire was fired and all the gun shots were fired by the accused persons there after. In view of above if no injury has been caused to P.W.2- Balwant Singh, in the incident, that seems to be of not much significance and in the facts and circumstances of the case P.W.2- Balwant Singh appears to be a truthful witness.

64. The fourth argument, overwhelmingly submitted by learned counsel for the appellants is that there are material contradictions in the testimony of all three eye witnesses and their testimony could not be believed. It is stated by him that there is material contradictions in the narration of the

incident by P.W.1- Suresh Pal Singh and P.W.2- Balwant Singh and P.W.3- Ram Chandra and actually no body has seen the occurrence. P.W.1- Suresh Pal Singh was not in a position to witness the alleged incident as there was no occasion for him to reach the spot and the testimony of Balwant Singh and Ram Chandra could not be believed due to inherent weakness.

We are conscious that while appreciating the evidence on record with reference to the contentions raised, this court is required to exercise due diligence though the standard of such exercise would be of an exercise by prudent person. The Court must bear in mind the set up and the circumstances in which the crime has been committed, the quality of evidence, nature and temperament of the witnesses, the level of understanding and power of perception and examination of individual witness and probability in ordinary course of nature about the act complained of as might have been witnessed by the witnesses. The endeavor must be to find out the truth from the evidence on record. At the same time, it must not be forgotten that there cannot be a prosecution case with a cast iron perfection in all respects and reason being that the perfection to that degree in ordinary course of human life is an impossibility. Nevertheless, obligation lies upon this Court to analyze, sift and assess the evidence on record, with reference to trustworthiness and truthfulness of the prosecution case, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the evidence without being obsessed by an air of total suspicion about the case of the prosecution. What is to be insisted upon is the proof beyond reasonable doubt and necessity of a ring of truth around the testimony of witnesses. The contradictions, infirmities pointed out in prosecution case must be assessed at the yardsticks of probabilities of the existence of a fact or not. Unless, infirmities and contradictions are of such a nature as to undermine the paucity of the evidence and found to be tainted to the core of the prosecution case, over emphasis may not be applied to such contradictions and infirmities. To judge the credibility of the evidence of witness, one has to look to his entire evidence, and if any discrepancies found in the ocular account of the witnesses not affecting the root, the witness may not be labeled as not credit worthy. At the same time, seeking rule of corroboration, mathematical niceties may not be expected. The evidence of the witnesses must be read as a whole and once impression is formed that the evidence contains ring of truth, rejecting whole of the evidence of such a witness would amount to doing injustice to a reliable and honest witness. Even an honest and truthful witnesses may differ with regard to the facts not related to the main cause of prosecution case, and their evidence therefore must be appreciated keeping in mind the power of observation, retention and reproduction of the same by the witness to be judged by human standards. The attending circumstances of the case and the probabilities must be judged keeping in mind the human conduct of a normal prudent person and occurring of the events in ordinary course of nature.

In ***Appabhai and Ors. vs. State of Gujarat,*** *MANU/SC/0028/1988 it was observed that :-*

"A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross

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

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

In **Gangabhavani vs. Rayapati Venkat Reddy and Ors. Reported in MANU/SC/0897/2013** held as under:-

*"In **State of U.P. v. Naresh MANU/SC/0228/2011 : (2011) 4 SCC 324,** this Court after considering a large number of its earlier judgments held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.*

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

A similar view has been reiterated by this Court in Tehsildar Singh and Anr. v. State of U.P. MANU/SC/0053/1959 : AIR 1959 SC 1012; Pudhu Raja and Anr. v. State, Rep. by Inspector of Police MANU/SC/0761/2012 : JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi) MANU/SC/0333/2013 : (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of

the witnesses and find out as to whether their depositions inspire confidence."

Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** observed and settled following principles for appreciation of evidence without entering into re-appraisal or re-appreciation of the evidence:

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

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

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

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

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

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

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

We have carefully perused the evidence of all three witnesses of fact namely P.W.1- Suresh Pal Singh, P.W.2- Balwant Singh and P.W.3- Ram Chandra and have found that there is no material contradictions in their testimony which may shake the trust of this Court in them. No doubt deceased Natthu Singh and Sobaran Singh were inimical with Narvada and others, but enmity is a double aged weapon and this may also provide an opportunity to accused persons to commit the crime as both the deceased persons were charged with the murder of the father of one of the accused Narvada and all other co-accused persons are either related to or are of the party of accused Narvada. So there was strong motive available to accused persons also, to commit the crime. Otherwise also when a criminal case is based on direct

eye witnesses account, the same must be decided on the basis of the quality and probative value of the evidence of eye witnesses and other witnesses of prosecution.

Perusal of record reveals that the facts pertaining to the incident as narrated in the First Information Report are very clear and it is stated that on the basis of old enmity accused persons Narvada, Sukkhi and Mashaley (since deceased), armed with guns and Gajraj and Jaswant armed with *lathis* emerged out from behind the bushes and Kahjuria and assaulted both the deceased persons i.e. Natthu Singh and Sobaran Singh on 5.8.1982 at about 8-9 A.M. P.W.1- Suresh Pal Singh arrived at the spot after hearing the alarm made by PW-2 Balwant Singh as he was on the way to see as to why his father (Natthu Singh) and uncle (Sobaran Singh) have not returned back from their fields. The fact that FIR is silent on the point that both deceased persons along with Balwant Singh went to look-after their field is of no consequence. The law is well settled that First Information Report is not an encyclopedia of an incident. P.W.2- Balwant Singh at the time of commission of crime was with the deceased persons as he accompanied them, when he was purchasing *"Bidi'* from the shop and at the time of incident was returning with them. P.W.3- Ram Chandra was grazing his cattle a vew paces away from the spot. Therefore all three eye witnesses P.W.1- Suresh Pal Singh, P.W.2- Balwant Singh and P.W.3- Ram Chandra are natural witnesses.

67. The evidence of all three above eye witnesses is consistent on the point that assault from guns have been made by Narvada, Mashaley and Sukkhi and these accused persons fired from their guns and also that Jaswant and Gajraj assaulted the deceased persons with "Lathis'. The fact that P.W.1- Suresh Pal Singh in his statement has stated the time of incident as 8 A.M. is also of no importance as he in his cross examination at para 14 has clarified that in the FIR time of occurrence was written as 9 A.M., on the basis of guess work and actually the incident occurred in between 8 to 9 A.M. He further stated that nobody was having a watch with him and also that he was under duress due to the incident and his mind was not working properly as the bodies of his father and real uncle were lying in the village.The evidence of this witness is reliable and truthful and minor contradictions appearing in his testimony is natural.

68. In depth scrutiny of evidence of all three eye witnesses would reveal that there is no material contradictions with regard to the genesis of incident and the testimony of all the factual witnesses is corroborating each other. No doubt there are insignificant discrepancies in their statements about, as to who amongst the accused persons fired first or who amongst them fired upon which deceased person. But, as said earlier, these are all minor discrepancies, not going to the root of the matter and are bound to occur as the statement of eye witness was recorded in the Trial Court about 9 months after the incident. No body is expected to testify in the court and reproduced the incident video-graphically, every person perceive any incident on his own perception and give his own account of incident and due to this natural phenomenon minor discrepancies are bound to occur. Therefore the minor meaningless discrepancies occurring in the statement of eye witness is of no consequence and is

not in a position to impeach the otherwise trustworthy evidence of the eye witnesses. The place of occurrence has been amply proved and there is no doubt about that. Multiple fire arm injuries and lacerated wound mostly bone deep have been found on the bodies of both the deceased persons at the time of postmortem and there is no contradiction in the ocular and medical evidence. The medical evidence available on record fully corroborates the version of the prosecution as contained in the FIR and also in the testimony of eye witnesses. The first Information Report is prompt and is not either ante-dated or ante- timed. The time of death of both deceased persons, namely, Natthu Singh and Sobaran Singh is established between 8 A.M. to 9 A.M., as per the statement of eye witnesses as well as by the medical evidence. Presence of faecal matter either in the small or big intestine of the deceased persons is not a circumstance strong enough to uproot the otherwise truthful and reliable evidence of three eye witnesses, in the backdrop that both the parties i.e. informant and accused persons are having high pitched enmity against each other. Keeping in view the strained relations of parties, one cannot expect that independent witnesses will come forward and depose against the accused persons and will earn bad blood for them.

In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** Hon'ble Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

So non production of other witnesses by the prosecution is also not a circumstance which may adversely affect it. No doubt there is some negligence on the part of the Investigating Officer PW-4 Jai Chand as he has not recorded the statement of P.W.2- Balwant Singh and P.W.3- Ram Chandra on 5.8.1982 as both these witnesses were available on that day. But keeping in view the reasonable explanation available on record pertaining to the fact that there is no laxity or carelessness on the part of these witnesses in recording their statements, the prosecution case could not be doubted and the otherwise truthful evidence of the eye witnesses could not be disbelieved on the basis of any mistake, knowingly or unknowingly committed by the Investigation Officer. After scrutinizing the evidence of all three eye witnesses, namely, P.W.1- Suresh Pal Singh, P.W.2- Balwant Singh and P.W.3- Ram Chandra, we do not have any hesitation in branding and categorizing their testimonies as truthful, reliable and acceptable in the facts and circumstances of the case. The manner wherein the assault has been made clearly proves that all appellants formed an unlawful assembly and object of which was to murder deceased persons and they in furtherance of the common

object of the assembly murdered Nathu Singh and Sobran Singh.

69. Having regard to our above findings we do not find any merit in this appeal and in our considered opinion the same is liable to be dismissed.

70. Appellant Mashaley had died and appeal with regard to him has already been abated vide order dated 1.12.2015. Appellant Sukkhi has also died during pendency of the appeal and appeal was also abated with regard to him vide order dated 1.7.2019.

71. The appeal filed by appellants Narvada, Jaswant and Gajraj against the judgment and order dated 7.10.1983, passed by Vth Additional Sessions Judge, Hardoi, is ***dismissed*** and impugned judgment and order passed by the trial court is ***affirmed.*** Appellants, namely, ***Narvada, Jaswant*** and ***Gajraj*** are on bail. Their bail bonds are cancelled and they are directed to surrender before the Chief Judicial Magistrate, Hardoi within 15 days from today to serve out the sentence as awarded by the trial court.

72. A copy of this judgment along with lower court record be immediately sent to the trial court for compliance and in case the appellants do not surrender before the court, the trial court will secure their presence in the prison to serve out the remaining sentence as awarded by the trial court.

(2019)11ILR A1045

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE PANKAJ BHATIA, J.

Criminal Appeal No 1122 of 1993

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

Counsel for the Appellants:
Sri D.S. Tiwari, Sri Jagdish Prasad Tripathi, Urmila Tripathi, Sri S.C. Pandey, Sri Ram Jee Saxena, Sri Raghuvansh Chandra.

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

A. Evidence Law-Indian Evidence Act, 1872 - Testimony of an interested witness can form basis of conviction but the same must be accepted with caution only after it is carefully scrutinized - a material witness must not ordinarily be withheld - if withheld, in absence of cogent explanation, adverse inference is to be drawn, particularly, where the prosecution evidence available is coming through highly interested witnesses, who are not injured - non-examination of an injured witness by itself may not be sufficient to discard the prosecution case particularly when it is not shown that the witness was alive or was in a position to depose in court or where there is a plausible explanation for his non-examination or where there are more than one injured witnesses and some or one of them have already been examined - No recovery of any weapon of assault has been made - the prosecution evidence fails as it poses more questions than what it seeks to answer - the benefit of doubt must go to the accused. (Para 55,63,65,70,71)

Appeal allowed (E-7)

Chronological list of cases cited:-

1. Hari Obula Reddy & ors. Vs The St. of A.P. : (1981) 3 SCC 675

2. Pandurang Chandrakant Mhatre & ors. v. St. of Mah. : (2009) 10 SCC 773

3. Jalpat Rai & ors. Vs St. of Har. : (2011) 14 SCC 208

4. Prabhat Vs St. of Mah. : (2013) 10 SCC 391

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

1. This appeal assails the judgment and order dated 29.06.1993 passed by Additional Sessions Judge/ Special Judge, Meerut in S. T. No.294 of 1989 by which the appellants, namely, Mahak Chand and Mahkar both sons of Jai Lal; and Nand Kishore son of Phool Singh have been convicted under Sections 302 / 34, 307 / 34 and 449 I.P.C and punished as follows: life imprisonment for offence punishable under section 302/ 34 I.P.C.; three years R.I. each for offences punishable under Sections 307 / 34 and 449 I.P.C. All the sentences to run concurrently.

2. The prosecution case as narrated in the first information report (for short FIR), which has been lodged by Charat Singh (P.W.1) at P.S. Kithore, District Meerut as Case Crime No. 227 of 1987 on 25.09.1987, at 3:30 AM, is that Mahak Chand (appellant no.1) is a dacoit. He threatens villagers therefore nobody complains against him. The informant's family however had been opposing him. As a result, Mahak Chand had been inimical towards the informant. In the night of 30/31.07.1987 an attempt on the life of informant's brother Bharat Singh was made by Mahak Chand in association with Nand Kishore (appellant no.3) and Ashok of which information was given at the police station. Ashok and Nand Kishore had obtained bail but Mahak Chand was absconding. On 15.09.1987, Mahak Chand and his brother Kallia (who expired before the trial) threatened the informant that if he does not enter into a compromise in that case his entire family would be eliminated. Thus, pressure was being continuously exerted on informant's family to file affidavit in their favour. After narrating the above background, it was alleged that in the night of 24.09.1987, while the informant (P.W.1) and Mathura (P.W.2) along with others were present at the house of Ram Chandra (cousin of the informant), to look after Ram Chandra, who was seriously ill, at about 11 pm, they heard cries of ladies coming from informant's house. Upon hearing those cries, informant and P.W.2 rushed towards the house. As they reached the gate of the house, in the light of a torch, they saw accused Mahak Chand (appellant no.1); Kallia; Mahkar (appellant no.2); and Nand Kishore (appellant no.3) coming out from the gate. Mahak Chand and Kallia had *Bhala* and Mahkar and Nand Kishore had *Ballam* in their hand. They all ran away towards the west in the Gali. When PW1 and PW2 went upstairs on to the second floor, they found Kailaso (informant's wife) lying dead on one cot and Sarmoz (Kailaso's sister's daughter - niece) lying injured and unconscious on another cot laid just next to the cot of the deceased. Harpati (wife of Bharat Singh - Bhabhi of P.W.1) and P.W.1's niece (Km. Babita - P.W.3) came and told P.W.1 and P.W.2 that Kallia; Mahak Chand; Mahkar; and Nand Kishore have killed informant's wife (Kailaso - the deceased) and caused injury to Sarmoz (deceased's niece) with *Ballam* and *Bhala*.

3. After the FIR was lodged, the Investigation Officer (for short I.O.), namely, Satyabir Singh Chauhan -P.W.8, proceeded to the spot, recovered bloodstained and plain scrapes of the floor

beneath the two cots as well as the bloodstained covers etc., and prepared a fard (Ex Ka-9). Inquest report (Ex Ka 8) was also prepared, which revealed that inquest proceedings started at about 7 am and concluded by 9 am on 25.09.1987. In the column relating to clothes found on the body of the deceased, it was recorded that the body was having just a lower undergarment on it. A *Chithi Majrubi* (letter for medical examination/ treatment of the injured) addressed to the In-charge Primary Health Centre, Machare, Meerut was prepared for Sarmoz. She was however referred to P.L. Sharma Hospital, Meerut. At P.L. Sharma Hospital, Meerut, at about 7.15 AM, on 25.09.1989, she was examined by Dr. S.C. Nigam (P.W.6), who prepared her injury report (Ex. Ka-5). A punctured wound 2.8 cm x 0.8 cm x depth not probed on right side abdomen, 8 cm above the umbilicus, at about 11 o'clock position, margin clean cut and everted, with Omentum protruding out from the wound, was found. Injury was kept under observation and X-ray was advised. The injury report observes that detailed examination could not be done due to serious condition of the patient. Duration of the injury was found fresh, caused by sharp, hard and pointed object.

4. The autopsy of the deceased was conducted by Dr. G.C. Gaur (P.W.5) on 25.09.1987, at about 4:30 pm. The autopsy report (Ex.Ka-4) discloses following ante-mortem injuries:

"(i) Incised wound measuring 4 cm x 1.5 cm x bone deep with underlying 5th vertebrae cut on right side of neck, 3 cm below the angle of right mandible placed horizontally;

(ii) Incised wound measuring 8 cm x 1 cm x skin deep on upper surface of right shoulder;

(iii) Incised wound measuring 2.5 cm x 1 cm x chest cavity deep on left side of chest, 10 cm below the left axilla."

5. As per the report the estimated time of death was about one day before. The age of the deceased was estimated 40 years. According to the doctor, death was due to shock and haemorrhage as a result of the ante-mortem injuries noticed.

6. On 02.10.1987, the second I.O., namely, Rangnath Pandey (P.W.7), who took over investigation on 30.09.1987 from PW8, disclosed recovery of lantern and torch and prepared its Fard.

7. P.W.7 completed the investigation and submitted charge-sheet (Ext. Ka-8) against all the four accused, namely, Mahak Chand, Kallia and Mahkar, sons of Jai Lal; and Nand Kishore son of Phool Singh. The charge-sheet enlisted as many as 21 witnesses including Charat Singh (P.W.1); Mathura (P.W.2); Smt. Harpati (not examined) and Km. Babita (P.W.3) but the name of Km. Sarmoz (the person injured in the incident) was conspicuous by its absence.

8. After taking cognizance on the charge-sheet, the case was committed to the court of sessions. Before the charges could be framed, Kallia expired and the case against him therefore abated.

9. Charge of offences punishable under sections 302/ 34; 307/ 34; 449 IPC was framed against the accused-appellants. They pleaded not guilty and demanded for trial.

10. The prosecution examined nine witnesses, namely, Charat Singh (informant - P.W.1); Mathura (P.W.2);

Babita (P.W.3); Chandrabir Singh (P.W.4); Dr. G.C. Gaur (P.W.5); Dr. S.C. Nigam (P.W.6); Rangnath Pandey (P.W.7); Satyabir Singh Chauhan (P.W.8); and Shaukat Ali (P.W.9). Their testimony in brief is as follows:

P.W.1 - Charat Singh reiterated what was stated in the FIR. He proved the written report i.e. the FIR (Ex Ka 1) and stated that it was scribed by Brahmpal under his instructions. He stated that at the time of the incident, he was at the house of distant relative Ram Chandra, who was on death- bed. Ram Chandra's house was just about 25-30 paces away from his house. When he heard cries of ladies coming from his house, he and P.W.2 rushed towards the house and saw Mahak Chand and Kallia with *Bhala*, and Nand Kishore and Mahkar with *Ballam*, coming out and running away towards the west in the *Gali.* He stated that he rushed upstairs to find out that on the roof of the second floor his wife was lying dead and his wife's sister's daughter Km. Sarmoz lying unconscious in an injured condition and, from the third floor, his brother's wife Smt. Harpati (not examined) and his brother's daughter (Babita-P.W.3) shouting. After informant's arrival they came down to the second floor and informed the informant and P.W.2 that Mahak Chand; Kallia; Mahkar and Nand Kishore have killed them. Soon thereafter, on a tractor, he went to the Police Station Kithore, with Sarmoz, to lodge the FIR and secure medical attention for the injured.

11. In his cross-examination, he stated that he was in the armed forces. He retired in 1983. He has a factory in Noida where polythene bags are manufactured. His son manages the factory. He also visits Noida. His son's children had gone to their maternal grand parents home. He has 30 bighas of agricultural land in the village which is managed through servants though sometimes he manages it himself. He stated that at the time of incident there was no servant in the house though he had a servant by the name of Manoj, aged 25-30 years, who is a resident of Bihar. He admitted that his servant used to stay in his house but his family resided in the village. However, on the date of the incident he was looking after the tube well and was not present in the house. With regard to Km. Sarmoz, he stated that she is yet to get married. At the time of the incident she must have been 15-16 years old. He stated that from the police station, Sarmoz was taken to the hospital. On the next day, he met Sarmoz in the hospital but she could not speak as she was unconscious and was being taken for surgical procedure. He stated that his brother (Bharat Singh) had a licensed gun. At the time of the incident, Bharat Singh was at Noida with his son. He stated that his father Mehar Singh had contested election against Mahak Chand's brother Jai Pal. Thereafter, his brother Bharat Singh contested election against Mahak Chand and lost. He stated that his cousin Ram Chandra died on 25.09.1987, at about 6 pm. Ram Chandra had multiple civil litigation with Nand Kishore. He stated that prior to this incident Bharat Singh was shot at by the accused. The shot had hit him on or about the knee.

12. In his cross examination, he stated that his brother's house, that is Bharat Singh's house, is separate from his own and both the houses had separate staircase up to the second floor. The roofs however were joint. In informant's house

there are two floors whereas the third floor is open with grill. In between his house and Bharat Singh's house there is a partition wall, which is of full height to the extent of one-half the length of the house and of one-half height in the remaining portion. He stated that at Bharat Singh's house, informant's father, Bharat Singh's wife and two daughters were there on the date of the incident whereas Bharat Singh's sons had gone to Noida.

13. In his cross-examination, P.W.1 disclosed that the third floor of his brother's house has no staircase. To have access to it one has to use a ladder from the roof of informant's house. He stated that when he had reached the second floor of his house, there was no one next to the deceased or Sarmoz but soon after his arrival PW3 and her mother (informant's Bhabhi) had come down. He stated that the main gate of the house is at a distance of about 4 or 5 paces from the staircase and is located in the middle of the two houses. It has an iron gate which was not locked by him. He stated that in the verandah, on the ground floor of Bharat Singh's house, on the date of the incident, his father was sleeping.

14. In his cross-examination, he also stated that Nand Kishore had lodged a case against him, his brother and two others, which was pending. He denied the suggestion that the crime was the doing of some one within his own house and that he has falsely implicated the accused-appellants on account of enmity.

15. **P.W.2 - Mathura** reiterated the prosecution case as narrated by P.W.1. He admitted that he comes from the same ***'Khandan'*** (ancestry) as of Charat Singh-P.W.1.

16. In his cross-examination, he stated that he and the informant were the first to reach the spot and after they had reached, Harpati and Babita (PW3) arrived from the third floor and told them that it was the doing of the accused-appellants. He stated that after he, P.W.1, Harpati and Babita (P.W.3) had arrived, several other persons also arrived. He stated that Sarmoz was unconscious and that he has not spoken to her about the incident till date. He admitted that he knew about Manoj, the servant of P.W.1, but, at that time, Manoj was at the tube well. He stated that he did not see Manoj at the police station also. In his cross-examination, he admitted that Sarmoz had gained consciousness after two days; and that he had not spoken to her even after she gained consciousness as he did not consider it necessary to inquire from her. He denied the suggestion that on the date of the incident, the informant was at Noida and, after getting information, had rushed back. He also denied the suggestion that he is lying because he comes from the same ancestry.

17. **P.W.3 - Babita** -In her statement in chief stated that in the night of the incident, at about 11:30 pm, while she was sleeping on the the third floor of her house with her mother Harpati, she heard shrieks of her Chachi (Aunt - Smt. Kailaso - the deceased) and her Bhanji (neice - Sarmoz, the person injured) coming from the second floor of their house. Upon hearing the shrieks, she woke up and saw Mahak Chand with *Bhala*; Nand Kishore with Ballam; Mahkar with Ballam; and Kallia with *Bhala* assaulting her Aunt (Chachi) and Sarmoz with the weapons. She stated that the night was dark but a lighted lantern was hanging from the rack placed towards

the head side of the bed of the deceased. She could recognize the accused in that light. Upon witnessing the incident she raised an alarm upon which the accused ran away. Soon, thereafter, his uncle Charat Singh (P.W.1) and Mathura (P.W.2) arrived. On their arrival, she descended from the third floor to the second floor and told them about the incident.

18. A suggestion was given to her that talks regarding marriage of Sarmoz (the person injured) with Rakam Singh son of Maglesh were on but her aunt-deceased was not agreeable to the relationship. She refuted that suggestion but admitted that Rakam Singh had come to the village 2-3 days later. She also stated that she saw him in the village 2-3 months before. She, however, admitted that Sarmoz had come to the village about four days before the incident and had never come earlier. She also admitted that in the house of her uncle (P.W.1), his servant (Manoj) used to stay. Manoj used to look after her uncle's agricultural operations as well as the tube-well. She stated that her father and brother used to stay at Noida; that her father and uncle (P.W.1) had factory at Noida. But PW1 had been in the village since 5-10 days before the incident. She stated that two months after the incident, Manoj left his job and went away. She admitted that fodder for the animals of her house was brought by servants.

19. In her cross-examination, she stated that in the night of the incident, she slept at 11 pm. Like every day, she used to sleep on the third floor of her house. In the night of the incident, she had taken the bedding and a quilt to the third floor. She had a separate cot for herself whereas her mother slept on a separate cot laid just next to her cot.

20. In her cross-examination, she admitted that there is no staircase to gain access to the third floor of her house. The height difference between the third floor and second floor of her house is just 2 - 3 feet. She stated that the roof of her house and the deceased's house is joint. On that day, she had used a wooden ladder to go to the third floor. On a daily basis, she used to go to the third floor in the same manner. She stated that in the night of the incident, when she heard the noise, she peeped down to discover that the accused were assaulting the deceased and the injured. According to her the cot of the deceased and the injured were at a short distance of about two paces from her place though at a lower height on the second floor roof. When she woke up, she saw accused persons inflicting injuries on the deceased and the injured. Firstly, she stated that the accused persons' face was towards the deceased and the injured and their back was towards her but, later, she corrected herself and stated that their face was towards her. She stated that the cots of the deceased and injured were laid towards west from her position. The accused persons were seen towards north of the cots. Behind the cots there was a room and adjoining that room there was staircase which could be seen from the place from where she saw the incident, though the main gate could not be seen from that place. She stated that Charat Singh (P.W.1) and Mathura (P.W.2) had arrived soon after the accused had left.

21. In her cross-examination, she stated that the I.O. had recorded her statement in the morning itself, at about 5 am, at her house; and her mother's

statement was also recorded there. Thereafter, the I.O. had again visited the village five days later and recorded her as well as her mother's statement.

22. She stated that at the time of the incident, the deceased - Kailaso was just wearing a *Nikkar* (lower undergarment) and apart from that there was no cloth on her body. Sarmoz was wearing a *Salwar suit.*

23. She denied the suggestion that on the night of the incident, she was sleeping inside her room and that she had not seen the incident. She also denied the suggestion that the accused have not committed any offence and that she is lying.

24. **P.W.4 - Chandravir Singh** proved the G.D. entry of the first information report and the chik FIR. In his cross-examination, he stated that the Inspector had left the police station to go to the spot at about 3:30 am. He also proved that *Chitthi Majrubi* was issued to the constable for examination of the injured at PHC, Machara.

25. **P.W.5 - Dr. G.C.** Gaur proved the autopsy report. He stated that all the three injuries were by sharp edged weapon; autopsy was conducted on 25.09.1987 at about 4.30 pm; and that the death could have occurred about a day before though it is possible that the injuries could have been caused in the night of 24/25.09.1987.

26. In his cross-examination, he stated that the injuries could have been caused by a knife as well as *Ballam* if the top had sharp edges. But the injuries could not have been from a *Bhala*. He stated that there could be variation of six hours on either side in the estimated duration of death.

27. **P.W.6 - Dr. S.C. Nigam** stated that he examined Sarmoz for her injuries on 25.09.1987 at 7:15 hours. He stated that Sarmoz was aged about 15 years and was brought by constable. He proved the injury report. He stated that it is possible that the injury caused to her was by a pointed weapon. He stated that it is possible that the injuries could have been caused to her on or about midnight between 23.00-24.00 hours. He stated that the injury was grievous in nature.

28. In his cross-examination, he stated that he was not shown any report of the Primary Health Centre, Machara. He could not tell whether the injured was provided any medical aid at the Primary Health Centre. He stated that he cannot say whether any information was given for recording of the dying declaration of the injured. He stated that he has not mentioned in his report whether the injured was conscious. He also stated that he has not mentioned about the pulse rate and the blood pressure of the injured. He admitted the possibility of the injury being on account of falling over pointed object but stated that if that was the case then injuries would have been there on other parts of the body also.

29. **P.W.7 - Rangnath Pandey** stated that he took over charge of police station Kithore on 29.09.1987 and prior to his posting, the investigation of the case was conducted by Satyabir Singh (P.W.8). He stated that on 30.09.1987, he took over the investigation of the case. On 02.10.1987, he recorded statement of Mathura; Smt. Harpati; Km. Babita;

Mahkar Singh, etc. He stated that he had taken the torch from Mathura and prepared a Fard (Memo) in front of Jaikaran and Tikaram. Witness Charat Singh had also provided torch and lantern to him of which Fard (Memo) was prepared. He stated that on 06.10.1987, he recorded statement of Sarmoz and, on the same day, he also recorded the statement of her mother (Prakasho) and brother (Rajesh). He stated that on 08.11.1987, he had completed the investigation and prepared charge-sheet (Ex. Ka-8).

30. In his cross-examination, he stated that the previous Investigation Officer Satyabir Singh had filled Parchas in the case diary up to page no. 88. However, the Parchas entered by him in the case diary starts from page no. 92. He stated that probably pages 89 to 91 were filled in respect of some other case but he is not aware of that. He stated that during investigation he had heard that statement of Km. Sarmoz was recorded by the doctor as a dying declaration. He admitted that he had recorded the statement of Km. Sarmoz and had also incorporated the statement given by her to the doctor in the case diary . However, he had not recorded the statement of that doctor. He admitted that he had not put the accused for identification by Sarmoz because he had ample evidence and therefore he did not consider it necessary. He stated that he had recorded the statement of Mathura, Smt. Harpati and Km. Babita in the village itself. He had seen the house of Mathura. He does not remember as to how far it is from the place of occurrence. He stated that he did not consider it necessary to make any alteration in the site plan prepared by the first I.O. even though in the site plan prepared by the first I.O., the place from where Mathura saw the assailants was not shown. He stated that he had recorded the statement of Sarmoz at the police station and had entered her age as 15 years and, at that time, her mother and brother were there.

31. **P.W.8 - Satyabir Singh** stated that since April 1987 to 27th September 1987, he was the *Prabhari Nirikshak* at P.S. Kithore. He stated that the FIR was registered at 3:30 hours on 25.09.1987 in his presence. The Chik FIR was entered by the Head Moharir where after he recorded the statement of the informant (Charat Singh - P.W.1) and visited the spot. He proved the inquest report; recovery of blood-stained and plain floor scrapes along with bed pieces, covers etc. He proved that the body was sealed and thereafter handed over to the constable for autopsy. He stated that inquest proceedings were got over by 9 am where after he examined the site and prepared site plan (Ex. Ka 14). He also prepared the site plan for the lower floor, which was marked Ex. Ka-15.

32. In his cross-examination, he stated that within 10-15 minutes of the registration of the first information report, he had left for investigation. He stated that when he had recorded the statement of Charat Singh (PW1), at that time, no other witness was present though he had searched for the witness but they were not found and Mathura was not there at that time. He stated that the informant stayed with him in the village till 12 noon and thereafter he had left for the hospital. He stated that he had searched for Babita but she was not found in the house. He stated that he had not inquired about Harpati. Thereafter, he left in search of the accused. He stated that he had prepared

the site plan, as per the directions of Harpati. He stated that after getting the site plan prepared, he could not find Harpati as he had gone in search of the accused. He admitted that in the site plan, he had not shown the place from where the informant had seen the accused. He stated that the distance between the house of Ram Chandra and the place from where the witnesses had seen the accused must be about 65 paces. Though the distance of the place from where the witnesses saw the accused must have been 3-4 paces. He stated that Sarmoz was in a serious condition and therefore she was sent to the hospital from the police station. He stated that he neither recorded the statement of Sarmoz nor he went to the hospital. He stated that as far as he remembers he had sent a report for recording of her dying declaration. He denied the suggestion that the case was not registered in his presence and he did not visit the spot and did paper work while sitting at the table. He also denied the suggestion that he got the accused falsely implicated.

33. **P.W.9 - Shaukat Ali.** He stated that he had taken the body for autopsy and that he did not let anybody touch the body in between.

34. In his cross-examination, he stated that the body was taken in an ambassador car of which number was DEB 1202. He does not remember whose car it was. He stated that the injured was not with him.

35. The entire incriminating evidence was put to the accused at the time of recording their statement under Section 313 Cr.P.C.

36. The accused (Mahak Chand) challenged the correctness of the prosecution evidence and claimed that informant's brother Bharat Singh had contested Pradhan election against him and had lost just before the incident and, therefore, out of enmity, he has been falsely implicated. The accused (Mahkar) denied the prosecution evidence and claimed that he is a lawyer and that to prevent him from doing pairvi in the court cases and to get his arms license canceled, he has been falsely implicated along with other accused. The accused (Nand Kishore) also challenged the correctness of the prosecution evidence and claimed that the informant - Charat Singh, who is brother of Bharat Singh, had disturbed his 'barja' and that a civil litigation is pending as a result of which there is enmity and therefore he has been falsely implicated.

37. The trial court, after considering the evidence led by the prosecution, held the appellants guilty for offences punishable under Sections 302/34, 307/34 and section 449 I.P.C. The trial court took the view that the prosecution case was duly proved by the eye-witness account of Babita (PW3) and by the testimony of two witnesses of circumstance, namely, Charat Singh (PW1) and Mathura (PW2). Further, the testimony of Babita (PW3) was corroborated by the medical evidence. In respect of non-examination of the injured (Km. Sarmoz), the trial court took the view that it is quite possible that Km. Sarmoz, being new to the village, may not have been able to recognize the accused and therefore the prosecution may not have considered it necessary to examine her. Hence, no adverse inference is to be drawn on non-examination of Km. Sarmoz.

38. We have heard Sri S.C. Pandey for the appellant no.1 (Mahak Chand); Sri Jagdish Prasad Tripathi for appellant nos. 2 and 3 (Mahkar and Nand Kishore); and Sri Deepak Mishra, learned A.G.A., for the State.

39. Learned counsel for the appellants contended that admittedly the three accused, namely, Mahak Chand, Mahkar; and Kallia are real brothers; that informant's father (Mehar Singh) had contested election of Gram Pradhan against Mahak Chand's brother Jai Pal; that election was won by Jai Pal; that, thereafter, an election petition was filed, which was decided in favour of informant's father, namely, Mehar Singh; that in the subsequent election, which was just before the incident, Mahak Chand won election of Gram Pradhan against informant's brother Bharat Singh; that, according to the prosecution, the brother of the informant was shot at by the accused in connection with which another case of attempt to murder was lodged in which Mahak Chand, amongst others, was an accused; that, in that case, Nand Kishore had obtained bail but, according to the prosecution, Mahak Chand was absconding; that it has come on record that Nand Kishore was having litigation with the family of the informant and that Mathura (P.W.2) had the same ancestry as the informant; and that eye-witness Babita (P.W.3) is daughter of Bharat Singh, the brother of the informant. Thus, it is clear that all the three eye-witnesses, namely, P.W.1; P.W.2; and P.W.3 were not only inimical but highly interested in seeking conviction of the accused. Hence, their testimony ought to be considered with great caution and tested on the touchstone of probabilities.

40. It has been contended by the learned counsel for the appellants that admittedly the murder took place on the roof top of informant's house. The house of Bharat Singh, brother of informant, was separate though adjacent to the house of the informant. The deceased and the injured were sleeping on the roof of the second floor of their house in the open. The eye-witness Babita had allegedly seen the incident from the third floor of her house, namely, Bharat Singh's house. The third floor of her house was barely 2-3 feet higher than the second floor. Therefore it can not have rooms, etc. In fact, it cannot be called a third floor as it was a mere platform. This gets corroborated by the evidence that it had no staircase for access. Hence, to show that PW3 could witness the incident, the prosecution has set up an artificial and false story that like everyday Babita (PW3) used to carry her cot and bedding including quilt, etc to the third floor of her house by using a wooden staircase from the adjoining roof of deceased's house. It has been submitted that in the site plan, no cot is shown on the third floor of Bharat Singh's house from where Babita allegedly saw the incident. Even no ladder was shown and its existence has not been noticed during investigation. It has been contended that it is highly unnatural that a person would sleep on a roof which has no staircase for access, more so when the weather conditions are not so hot as would be clear from the statement of PW3 that she had carried a quilt (Rajai). Hence, the presence of Babita at the time of the incident at the place from where she allegedly saw the incident is highly doubtful. Consequently, her testimony is not reliable.

41. It has also been contended that from the testimony of Babita as well as the inquest report it is established that the deceased was just in her lower undergarment, which means that she was

naked from top. According to the prosecution case, there was a lantern lit towards the head-side of the cot of the deceased and in the light of that lantern, though the night was dark, the witness saw the incident. It has been submitted that it is highly improbable that any person who is sleeping nude would have a lantern placed on her head-side to let herself be a spectacle for others. This circumstance lends credence to the probability that P.W.3 was not at the top of the third floor and in a position to witness the incident.

42. It has been submitted that if P.W.3 had not witnessed the incident, then the testimony of PW1 and PW2 falls to the ground as they have responded to her cries. Hence, the prosecution evidence is highly unreliable and not worthy of acceptance.

43. In addition to above, it has been urged that the injuries sustained by the deceased appear to be knife injuries and not from a *Ballam* as, ordinarily, a *Ballam* has a pointed top and, therefore, when it enters the body it would leave sign of a punctured wound with laceration and not incised wound as appears to be the case. Hence the medical evidence also does not corroborate the ocular evidence of Babita. Otherwise also, two persons are stated to have carried *Bhala* whereas only a solitary *Bhala* injury has been found and that too on the body of the injured Sarmoz though, as per the testimony of PW3, all four accused were seen inflicting injuries without specifying as to who caused which injury and to whom. Hence, the possibility of over implication is also there and in absence of clear and cogent evidence which may allow the court to sift the grain from the chaff, all the accused are entitled to the benefit of doubt.

44. It has next been urged that there is no explanation for non-examination of Km. Sarmoz (injured) as a witness even though it has come in the statement of the Investigation Officer that he had recorded the statement of Sarmoz during the course of investigation after she had gained consciousness. Moreover, the prosecution has not been able to demonstrate that she was not available or was won over. The injured witness would have been the best witness in the facts of the case and withholding her evidence gives rise to an adverse inference against the prosecution case and makes a serious dent to its credibility.

45. It has also been urged that there has been no recovery of any weapon of assault. Further, no effort has been made to recover the weapon of assault which suggests that the police had made no effort to find out the truth. Hence, there is no link evidence to corroborate the testimony of highly interested witnesses.

46. It has also been pointed out that there is no cogent reason for the appellants to kill informant's wife and injure informant's wife's niece inasmuch as if they had any score to settle it was with Bharat Singh and his family. Hence, why would they attack female family members of his brother. Moreover, the allegation that threat was extended that the entire family would be eliminated, if compromise was not arrived at in the attempt to murder case, was never reported. Hence, the motive for the crime is weak though motive to falsely implicate is strong.

47. Lastly, it was contended that the crime appears to be handiwork of some

insider or servant of the house and to hide public shame, the injured witness has not been produced. It has been submitted that the nude condition in which the body of the deceased was found, particularly, when the weather was not hot, as according to witness (PW3) she had carried a quilt to cover herself, would lend credence to that kind of possibility more so when the deceased, as per autopsy report, was just aged about 40 years old. To buttress this possibility, it was argued that admittedly PW1 was not present in the house and there were no other male members in the house of PW1 to keep a check on them. To add to that possibility it has been argued that it appears that PW1 was not even there in the village and may have arrived on information which possibility gets support from use of private Ambassador vehicle to carry the body of the deceased to the mortuary. It has thus been argued that the finding of guilt returned by the court below is not sustainable and is liable to be set aside.

48. **Per contra,** the learned A.G.A. submitted that P.W.3 is a reliable witness, who stood the test of cross-examination and her presence in her own house, which adjoins the house of the deceased, is natural and therefore she cannot be discarded as a person who had not seen the incident. He also submitted that mere fact that the deceased was found only in her undergarment does not make the prosecution case unworthy of acceptance inasmuch as it is quite possible that the deceased may have been in a habit of sleeping that way by covering herself with covers etc. It has been submitted that here is a case where the time of death has been proved by medical evidence; the FIR is prompt; and the medical evidence is not in conflict with the ocular evidence. It was also submitted that where the ocular evidence is consistent and reliable, motive loses importance. It was further urged that non-examination of the injured witness would not prove fatal to the prosecution case inasmuch as in the darkness of the night Km. Sarmoz, who was hit by a *Bhala* and had become unconscious, may not have been in a position to recognize the persons who inflicted injury upon her more so because she was not a resident of that village and had come there just 4-5 days before the incident and, therefore, may not have been in a position to recognize the accused. Hence, non examination of Km. Sarmoz is not fatal to the prosecution case. Learned AGA thus prayed that the appeal be dismissed and conviction be maintained.

49. We have considered the rival submissions and have perused the record carefully.

50. Before we proceed to assess the prosecution evidence it would be apposite for us to cull out the facts as regards which there exist no dispute. The admitted position is that the informant's family and the accused family had been political rivals. The father of the informant had contested Gram Pradhan election against brother of the accused Mahak Chand, Kalia and Mahkar. The informant's father had lost the election but had filed an election petition which, according to the informant, was allowed. Likewise, informant's brother, Bharat Singh, contested election against Mahak Chand. This election of Gram Pradhan was won by Mahak Chand soon before the incident. Thereafter, there was a case registered against the present set of accused-appellants in respect of making

an attempt on the life of Bharat Singh in which Bharat Singh is stated to have received gunshot injury on or about his knee. According to the prosecution case, two of the accused persons of that case were granted bail whereas Mahak Chand was absconding. It has also come on record that there had been litigation with the other set of accused, namely, Nand Kishore. P.W.3, the alleged eye-witness, is daughter of Bharat Singh. Informant (P.W.1) is brother of Bharat Singh and Mathura (P.W.2) hails from the same ancestor. It is thus clear that eye-witness of the incident, namely, P.W.3, and the witnesses of the circumstance, namely, P.W.1 and P.W.2, are all interested witnesses and none of them have suffered injury.

51. Before we proceed further, it would be apposite for us to take notice of the law as to how the testimony of an interested witness is to be weighed and dealt with.

52. In ***Hari Obula Reddy and others v. The State of Andhra Pradesh : (1981) 3 SCC 675,*** a three-judges bench of the apex court, in paragraph 13 of its judgment, as reported, has held as follows:-

"..... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source."

53. In ***Pandurang Chandrakant Mhatre and others v. State of Maharastra : (2009) 10 SCC 773,*** the apex court, in paragraph 60 of its judgment, as reported, had observed as follows:-

"60. In cases involving rival political factions or group enmities, it is not unusual to rope in persons other than who were actually involved. In such a case, court should guard against the danger of convicting innocent persons and scrutinise evidence carefully and, if doubt arises, benefit should be given to the accused."

54. In ***Jalpat Rai and others v. State of Haryana : 2011 (14) SCC 208,*** the apex court in paragraph 42 of its judgment, as reported, had observed as follows:-

"42. There cannot be a rule of universal application that if the eye-witnesses to the incident are interested in prosecution case and /or are disposed inimically towards the accused persons, there should be corroboration to their evidence. The evidence of eye-witnesses, irrespective of their interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable could besufficient and enough to bring home the guilt of the accused. But it is reality of life, albeit unfortunate and sad, that human failing tends to exaggerate, over-implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime."

55. Having noticed the decisions of the apex court, the legal principle deducible is that the testimony of an interested witness no doubt can form basis of conviction but the same must be accepted with caution only after it is carefully scrutinized and if, on such scrutiny, is found to be intrinsically reliable or inherently probable. The first test which is to be applied is to find out whether the presence of that eye-witness at the place/scene of occurrence from where he or she has allegedly witnessed the incident at the material time was probable. Once, the witness passes that test, his or her testimony has to be tested on other parameters to rule out possibility of false implication and, at times, over implication because it is not uncommon that where there is strong enmity the entire family of the other side is roped in even though it may be the act of only one or few of them.

56. Keeping in mind the above legal principle, now we shall examine the reliability of the prosecution evidence led in the instant case. To conveniently achieve that object, it would be useful to divide the evidence led into parts:

(a) First, the occurrence was witnessed by P.W.3 and her mother Harpati (not examined), from the third floor of their house/roof top, which adjoins the house of the deceased. Upon witnessing the incident, they raise alarm.

(b) Second, upon hearing the alarm, the informant (P.W.1) and Mathura (P.W.2), who were at the house of one Ram Chandra, rush to the house of the deceased/ informant (P.W.1).

(c) Third, as P.W.1 and P.W.2 arrive near the gate of P.W.1's house they see in torch light the accused with their respective weapons making a quick exit. They, however, do not challenge them nor make any attempt to apprehend the accused, probably, because they were unarmed.

(d) Fourth, P.W.1 and P.W.2 rush upstairs to find the deceased lying dead on her cot and Km. Sarmoz lying unconscious in an injured condition on another cot.

(e) Fifth, P.W.3 and her mother (Harpati) came downstairs to inform PW1 and PW2 that the accused-appellants have done the act.

57. If the presence of eye-witness P.W.3 is found doubtful at the time and place of occurrence then the entire prosecution case crumbles because it is only after hearing the cries of P.W.3 and her mother (who has not been examined), that PW1 and P.W.2 arrived otherwise they were at another house.

58. When we carefully scrutinize the entire prosecution evidence including the statement of the witnesses examined by the prosecution, we find that the presence of P.W.3 at the top of the third floor roof of her house, at the material time, is highly improbable and, in our view, highly doubtful. It appears to us that her presence there has been shown to create an eyewitness account of the incident. The reasons for the above view are stated herein below:

(a) The house of the deceased and of PW3 is separate and there exists a partition wall as would be clear from the testimony of PW1. The third floor roof from where P.W.3 has allegedly witnessed the incident does not have a staircase to access it. According to P.W.3, she used to sleep on that roof with her mother by climbing on to that roof with the help of a wooden ladder planted on the roof of the house of the deceased. According to P.W.3 she and her mother had separate cots there and she had carried her bedding including quilt to sleep there. Admittedly, house of PW3 and PW1 was partitioned by a wall. The third floor of PW3's house was just about 3 feet higher than the second floor with no staircase to have access to it, which suggests that it would be more like an open platform built on a pedestal with no room. Why would a person sleep there on the top of the roof, which has no staircase for access, and, that too, by planting a make-shift ladder or staircase on another person's house. This doubt could have been dispelled if the Investigation officer had found a staircase or a cot on the roof of the third floor at the time of making spot inspection. The site plan (Ext. Ka-14) prepared by the Investigation officer though discloses the cots of the deceased and the injured lying adjacent to each other on the roof of the second floor of their house but no cot is shown over the third floor of the house of PW3. The place from where P.W.3 and her mother allegedly witnessed the incident is shown as a platform about three and one-half feet higher than the roof where the deceased's cot was placed. No cot or any form of bedding, to enable persons to sleep on that platform, is shown in the site plan. Even in the statement of the I.O. existence of a cot or bedding at the top of the third floor, where the witness P.W.3 and her mother slept, and from where they saw the incident, is not disclosed. Thus, what follows is that, firstly, it is highly improbable that two ladies would climb a wooden ladder planted in another person's house to sleep at the top of the roof and, secondly, if they had actually slept there with cots laid there, why the presence of the cot and the covers etc. were not noticed by the Investigation officer and noted in the site plan, particularly, when it was allegedly prepared on the directions of the mother of PW3 who was allegedly with PW3 at the time of the incident though not examined as a witness.

(b) The other circumstance which puzzles the court and lends credence to our belief that PW3 was not there from where she allegedly spotted the accused is as to why the deceased would be sleeping nude in just a lower

undergarment with a lantern lit on her head-side and thereby let herself be a spectacle to P.W.3 and her mother from the top of the third floor of their house. Normally, a person, particularly a lady, would like to cover herself if she is aware that she can be spotted by others with no clothes on. This suggests that either the deceased was aware that there was no one to see her in that state or that there was something else.

(c) Apart from above, it has come in the evidence of P.W.2 (Mathura), during his cross-examination, that when they had reached upstairs, Babita (PW3) and her mother Harpati arrived. If they had witnessed the incident they would have been the first to come and check the victims soon after the accused had left the place.

(d) If P.W.3 and her mother were present there, upon raising of their alarm, why would they be spared by the accused. More so, when their enmity with the family of Bharat Singh was greater than that with the informant and, at that moment, they were sitting ducks with no male member in the house.

59. We thus find substance in the defense argument that the presence of P.W.3 at the top of the third floor of her house, which had no access from a staircase, at the material time, appears to be highly improbable and doubtful and it appears that she has been set up as an eye-witness of the incident.

60. At this stage, we would like to notice certain other features that have surfaced during the course of cross-examination of the prosecution witnesses which throws possibility with regard to involvement of some other person in the crime. It has come on record that there had been a servant by the name of Manoj, aged about 25-30 years, who used to reside in the house of the informant. Though he was married but his family did not reside with him and after the incident he was not seen. It had come in the prosecution evidence that later he had left the job. The prosecution tried to explain this by stating that on the date and time of the incident he was at the tube-well. How far was the tube-well from the place of the incident is not disclosed. Apart from that, the main gate of the adjoining two-houses, that is of informant and his brother, was common. The father of the informant was sleeping on the ground floor of informant's brother's house. Ordinarily, when outsiders enter another person's house in the darkness of night they are likely to alert or disturb the inmates of the house. This circumstance probabilizes the involvement of some one from within. To clarify and to remove all doubts in the prosecution case as also to throw light on the genesis of the incident, the injured Sarmoz, who was sleeping next to the deceased, was a crucial and a material witness but she has not been examined.

61. We find from the prosecution evidence that Sarmoz's statement was allegedly recorded by the I.O. during investigation. But what she disclosed has not been disclosed by any of the prosecution witnesses. Admittedly, Sarmoz had gained consciousness. Further, nothing has been brought on record to demonstrate that she has expired or has been won over by the accused or for any other reason was not available as a witness. No explanation whatsoever has come in the prosecution evidence as to why she has not been produced as a witness.

62. The court below has not drawn adverse inference on account of her non-examination by observing that she was an outsider in the village and might not have been able to recognize the accused persons. This view of the court below does not appeal to us. Firstly, because even if she had been an outsider she may have been able to recognize her assailants when they were put in the dock. And, secondly, even if she had not been able to recognize the accused persons, she could have thrown light on the number of persons involved; the presence of PW3 on the spot; and whether any insider was involved. Thus, in our considered view, she was a material witness who could have unfolded the true facts. The prosecution by not examining her as a witness and by not tendering any explanation in that regard has invited an adverse inference with regard to the credibility of its case.

63. It is well settled that a material witness must not ordinarily be withheld. And, if withheld, in absence of cogent explanation, adverse inference is to be drawn, particularly, where the prosecution evidence available is coming through highly interested witnesses, who are not injured. It is equally well settled that an injured witness in terms of credibility is put on a higher pedestal than other witnesses because, firstly, his presence at the place of occurrence is guaranteed by his injuries and, secondly, why would he let off his assailants.

64. In ***Prabhat v. State of Maharastra : (2013) 10 SCC 391***, failure to examine a crucial injured witness who could have thrown light on the prosecution narrative was held to have dented the credibility of the prosecution case.

65. No doubt, non-examination of an injured witness by itself may not be sufficient to discard the prosecution case particularly when it is not shown that the witness was alive or was in a position to depose in court or where there is a plausible explanation for his non-examination or where there are more than one injured witnesses and some or one of them have already been examined. Otherwise also, by mere non-examination of a witness the entire prosecution case is not to be discarded if, otherwise, the evidence led is highly reliable and satisfactorily proves the case beyond the pale of doubt. But where the prosecution evidence is coming from highly interested witnesses and there appears a doubt with regard to their presence and there appears a possibility of false implication or over implication, non-examination of an injured person as a witness, who is the lone survivor of the incident, in absence of any explanation in that regard, would assume importance and may dent the credibility of the prosecution case.

66. In the instant case, we find that all the prosecution witnesses are inimical and highly interested. Not a single independent witness has been examined to even demonstrate that shrieks were heard at Ram Chandra' house coming from the house of the informant, which according to the I.O. (P.W.8) was 65 paces away, thereby giving opportunity to the informant (PW1) and PW2 to rush to the spot. The place from where P.W.3 saw the incident and raised an alarm is an unnatural position inasmuch as that is a place which has no permanent staircase for access. Apart from that, the deceased was found only in a lower undergarment, with no other clothes on, which throws various questions for which, in our view, the injured alone, who was lying next to the deceased, was the best person to

answer. Hence, in our considered view, non-examination of the injured witness, namely, Km. Sarmoz, in absence of any explanation offered by the prosecution for her non-examination, has seriously dented the credibility of the prosecution case.

67. There is another aspect of the matter which is with regard to strong possibility of over implication or false implication. It may be noticed that out of four accused persons, three are brothers and one, namely, Nand Kishore, is a person with whom litigation had been going on. The three injuries found on the body of the deceased could be from at the most three weapons and could also be from one, as they were all of similar nature i.e. incised wounds. Incised wound could be caused by a knife as well as Ballam, as is the case of the prosecution, provided the *Ballam* has sharp edges. The doctor (PW5) has ruled out the possibility of use of *Bhala* in causing injury to the deceased. On the body of the injured Sarmoz a solitary punctured wound, which could have been inflicted by *Bhala*, was found. Two persons are stated to have been armed with *Bhala* and two are stated to have been armed with Ballam. Under the circumstances, at least one person, who was armed with *Bhala*, has not caused injury. This gives rise to possibility of over implication.

68. Another aspect which needs to be considered is whether P.W.3 was really in a position to recognize the assailants in the light of a lantern and whether she could see as to who carried which weapon. In her testimony, P.W.3 stated that she heard mumbling sounds which woke her up. Thereafter she peeped down and could see the accused persons inflicting injuries with two types of weapon.

69. In her cross-examination, she, initially, stated that the back of the accused was towards her though, later, she corrected herself and stated that the face of the accused was towards her. The site plan prepared by the Investigation officer discloses the position of the two cots, that is of the deceased and of the injured. Both are in east-west direction. The head side of the cot is towards west. The cot of the injured is towards the south of the cot of the deceased. A lantern is shown to have been hanging from point 'G' which is at the head side of the cot of the deceased that is towards the western side. The location of P.W.3 and her mother is shown on the eastern side on the third floor of their own house. In her statement she has disclosed that she saw the accused towards the north of deceased's cot. When we see the site plan, if the accused were on the northern side of the cot of the deceased then they would have been far away from the cot of the injured, which was placed south of the cot of the deceased, and therefore they would not be at a striking distance. Hence, it appears that eye-witness may not have been able to witness the infliction of injury on the body of the injured. More over, from that position P.W.3 would get only the side view of the face of the accused as they would be looking towards the south.

70. When we take a conspectus of the entire prosecution evidence, we find that the prosecution has withheld the best evidence, namely, the person injured. They have not examined any independent witness. No recovery of any weapon of assault has been made. And above all, the place from where PW3 allegedly saw the incident is not a place where ordinarily a person would be, inasmuch as that place, firstly, was not accessible from the house of PW3 and, secondly, it had no permanent staircase access even from the

house of the deceased. To top it all the I.O. has not shown that any cot or bedding was noticed by him lying there during the course of investigation or while preparing the site plan. Once, we doubt the presence of PW3 at the place of occurrence at the material time, the credibility of the remaining two witnesses of circumstance falls to the ground as they have allegedly responded to the cries of PW3 and her mother (who has not been examined).

71. In view of the discussion made above, we are of the considered view that the prosecution evidence on the whole fails to inspire our confidence as it poses more questions than what it seeks to answer. Hence, the benefit of doubt must go to the accused. Consequently, the appeal is **allowed**. The judgment and order dated 29.06.1993 passed by Additional Sessions Judge/ Special Judge, Meerut in S. T. No.294 of 1989 is set aside. The appellants are acquitted of the charges framed against them. If they are on bail, they need not surrender.

72. Let a copy of this order be sent to the trial court for compliance.

(2019)11ILR A1063

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Appeal No. 1162 of 1993

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

Counsel for the Appellants:
Sri J.S. Kashyap.

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

A. Evidence Law-Indian Evidence Act, 1872 - Criminal appeal - Sole eyewitness if partisan or related or inimical witness, the court must be cautious, and evidence of such witness may require corroboration from independent reliable sources before making conviction. Although ocular evidence of solitary eye-witness, who is close relative of deceased, can be made basis of conviction but only after it is found to be of sterling quality, free of any blemish or suspicion, and should impress the Court as wholly truthful, natural and convincing. No recovery of the weapon of assault was made from any of the accused - The trial court did not test the prosecution evidence on all the aspects. Took the prosecution evidence as gospel truth - the presence of PW2 at the place and time of occurrence is highly doubtful - testimony is not of sterling quality as may prove the prosecution case against the accused appellants beyond reasonable doubt - Benefit of doubt must go to the appellants.(Para-7,23,26,31,33)

B. Evidence Law-Indian Evidence Act, 1872 - Section 134 - no particular number of witnesses shall, in any case, be required for the proof of any fact - Law does not require plurality of witnesses and no particular number of witness is required to prove the fact. It is the quality of the evidence that counts and not the quantity. (Para-22)

Appeal succeeds and allowed. (E-7)

Chronological list of cases cited:-

1. Vadivelu Thevar Vs St. of Mad. – AIR (1957) SC 614

2. Ramji Surjya Padvi Vs St. of Mah. AIR (1983) SC 810

3. Govindaraju @ Govinda Vs St. By Sriramapuram P.S. & anr. (2012) 4 SCC 722

4. Bhimappa Chandappa Hosamani & ors. Vs St. of Kar. (2006) 11 SCC 323

(Delivered by Hon'ble Manoj Misra, J.
Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This criminal appeal has been preferred by accused appellants Ganga Singh, Nem Singh, Hira Lal, Lalta Prasad and Udaivir against the judgment of conviction dated 03.07.1993 and the order of sentence dated 03.07.1993 passed by the Vth Additional Sessions Judge, Etah in Sessions Trial No.249 of 1991 whereby all the appellants have been convicted under section 148 IPC and section 302 read with section 149 IPC and sentenced to suffer one year R.I. and life imprisonment, respectively, for the aforesaid offences, coupled with a direction that both sentences would run concurrently.

2. During the pendency of this appeal, appellant nos. 1, 3 & 5, namely, Ganga Singh, Hira Lal & Udaivir Singh died and their appeal was declared abated by vide order dated 15.07.2019.

3. The prosecution case as narrated in the first information report (for short FIR), which was lodged by Smt. Omwati (P.W.1) wife of the deceased - Indrajeet on 27.09.1990, at 11:30 A.M., at police station Kotwali Dehat, District Etah, after discovery of dead body of her husband, is that her husband - deceased, a resident of village Nagla Hasan, was doing business in Garlic. On 26.09.2006 while he was returning from Etah to his house along with Balistar - P.W.2 (brother-in-law of deceased) and Lekhraj - DW1 (distant nephew of the deceased), at about 06:45 P.M., when they were near the road going towards village Nandgaon, the accused appellants, armed with country made pistol and knives, with whom the deceased had an altercation in connection with dispute relating to land, caught hold of the deceased and dragged him towards the fields. When Balistar (PW2) and Lekhraj (DW1) resisted they were threatened as a result they escaped. After the deceased was dragged into the crops standing in the field, soon thereafter, a gunshot was heard. P.W.2 and D.W.1 came and informed the informant about the incident, at night, in the village. Upon which, many persons went to search for informant's husband but could not find him. Next day morning, body of the deceased was found in Millets (Bajra) field. FIR was lodged naming the appellants.

4. After registration of the FIR, the Sub Inspector (S.I.) Ompal Singh (P.W.4) visited the spot, prepared the inquest report (Ex. Ka-3); collected blood stained and plain earth; prepared site plan (Ex. Ka 8); took into possession three bicycles found on the spot along with other belongings of the deceased and prepared a memo of recovery (Ex Ka 10); and, thereafter, after sealing the body of the deceased, the body was sent for post mortem. Dr. G. C. Agrawal (P.W.3) carried out autopsy at about 4 p.m. on 27.09.1990 and prepared autopsy report (Ex. Ka 2). The autopsy report disclosed: (i) Fire arm wound of entry 1.5. cm X 1 cm through and through on left temple, blackening scorching and tattooing absent, with direction left to right and slightly backward; (ii) Fire arm wound of exit 3 cm x 3 cm communicating with injury no.(i) on right side of head behind right ear; (iii) incised wound 2 cm x 1 cm

x muscle deep on left thigh upper part of outer aspect; (iv) incised wound 5 cm x 1 cm x muscle deep on inner surface of right knee joint; and (v) abrasion 3 cm x 2 cm on back of right shoulder joint. The time of death was estimated 3/4th of a day before.

5. The investigation was thereafter taken over by Aley Hasan Khan (P.W.5) who recorded the statement of P.W.2 - Balister on 30.09.1990, handed over custody of cycle of the deceased and Rs.595 of the deceased recovered from the spot to P.W.1 and prepared memo (Ex. Ka 12), recorded statement of Lekhraj (D.W.1) on 4.10.1990 and, on 08.10.1990, took possession of the torch, allegedly being with the witness at the time of the incident, and prepared memo (Ex. Ka. 13); and, thereafter, submitted charge sheet (Ex. Ka.14). The learned Magistrate took cognizance of the offence on the charge sheet and committed the case to the court of session.

6. The charge of offences punishable under section 148 IPC and section 302 read with section 149 IPC were framed against the appellants. Upon denial of charges, trial commenced. The prosecution, in order to prove its case, produced and examined five prosecution witnesses: P.W.-1 - Smt. Omwati, the first informant, who is wife of the deceased; P.W.-2 Balistar Singh, the eye witness of the incident, who is brother of P.W.-1 - Smt. Omwati and thus is brother-in-law of the deceased; P.W.-3 Dr. G.C. Agarwal, who conducted the post-mortem; P.W.-4 Ompal Singh, Sub-Inspector, who is the first Investigation Officer; and P.W.-5 Ale Hasan, Sub-Inspector, the then Station Officer, the second Investigation Officer of the case.

7. After recording of prosecution evidence, the incriminating evidence were put to the accused for recording their statement under section 313 CrPC. In their statements recorded U/s 313 Cr.P.C. all the accused appellants denied their involvement in the crime. Accused appellants Ganga Singh, Lalta Prasad & Udaivir Singh specifically stated that they have been falsely implicated in this case as they appeared as prosecution witnesses against the deceased, who was accused in murder of one Har Prasad. The accused appellant Hiralal stated that he is cousin of Har Prasad. The accused appellant Udaivir Singh denied that his cycle was recovered from the place of occurrence, when this circumstance was put to him under section 313 Cr.P.C.

8. The defense examined the alleged eye witness Lekhraj as DW1, who stated that he was not there with the deceased at the time of alleged incident. He further stated that he received the information of the incident on the next day when he was there in village Manota. Thereafter he visited the village Nagla Hasan and after about two-three hours, when he reached, P.W.-2 Balistar also reached there. Upon being confronted by his statement recorded under section 161 CrPC, he categorically denied giving of any such statement to the police.

9. The learned trial court relied upon the evidence adduced by the prosecution and convicted and sentenced the appellants for the charges framed against them. Hence, this appeal.

10. We have heard learned counsel for the surviving appellants 2 and 4; the learned Additional Government Advocate (AGA) for the State; and have perused the record.

11. It has been submitted by the learned counsel for the appellants that the

evidence adduced by the prosecution is concocted and is wholly unreliable. The first information report has been lodged with inordinate delay, without there being any plausible reason for the same. The alleged eye witness is a procured witness and is highly interested, partisan and inimical witness. The appellants had no motive to commit the offence and the motive alleged by the prosecution is false and imaginary.

12. On the other hand learned AGA has stated that the eye witness P.W.-2 Balistar is wholly reliable and his testimony is corroborated by medical evidence and recovery of the bicycle of the deceased and one of the accused appellants, namely, Udaivir Singh (since deceased), from the spot and, therefore, the conclusion drawn by the learned trial court is justified and the appeal is liable to be dismissed.

13. In the light of the aforesaid submissions, this court proceeds to examine the evidence available on record.

14. The P.W.-1 Smt. Omwati is wife of the deceased. She has stated in her examination in chief that one Master Har Prasad, resident of her village was murdered and her husband was accused in that murder case. He was prosecuted but was acquitted. The accused Lalta Prasad, Udai Singh & Hira Lal are cousins of Har Prasad and due to this reason, they bore enmity with her husband. Regarding the incident in issue, she has stated that her husband Indrajeet Singh (deceased) along with Balistar and Lekhraj were returning from Etah to his village. All of them were on bicycle. Her husband was on one bicycle and the two witnesses were on another bicycle. When all the three reached near the road going towards village Nandgaon, accused appellants, present in the court, were found having country made pistols and knives in their hands. They caught hold of her husband and dragged him towards the field and when Balistar and Lekhraj tried to intervene, they were threatened. The accused persons killed the deceased by gunshot and knives and threw the dead body into the field of pearl millets (Bajra). She has further stated that after receiving the information of the incident she, along with some other persons of the village, reached the place of occurrence but on account of darkness could not trace the dead body. Thereafter, on the next day morning, she along with co-villagers again tried to trace the dead body and the dead body was found in the field of pearl millets. She proved lodging of the FIR. She stated that one month prior to the incident, a quarrel had taken place between the accused persons and her husband.

15. In her cross-examination, she stated that Balistar and Lekhraj had informed her about the incident in the village at about 08:00 P.M. They had come on bicycles. The two witnesses (Balistar and Lekhraj) and others had accompanied her to search out the body, however they did not visit the police station with her at the time of lodging of the report. Her husband's body was discovered at 10 A.M. When she had gone to the police station to lodge the report, Balister and Lekhraj were there near the body of the deceased. Sher Singh, Jalim Singh & Talevar were present with her at the police station. She stated that the police arrived at the place of occurrence at about 12:00 noon. The Investigation Officer recorded her statement at about

11:30 A.M., near the body, at the place of occurrence, during which witnesses Balistar and Lekhraj were present there. She admitted in her cross examination that at the time when Har Prasad was murdered, the accused persons were not living with Har Prasad. With regard to the quarrel relating to land, she admitted that no report was lodged. She has also stated that the house of accused Lalta Prasad, Udai Singh and Hira Lal is situated in the eastern side of the village and the house of accused Ganga Singh is situated in the western side of the village and her house is situated in the middle of the village and the land which was subject matter of quarrel is situated in front of her house. The tube well and open land of the accused persons, namely, Lalta Prasad, Udai Singh and Hira Lal, is situated in the eastern side of their houses. She has denied the suggestion that the deceased was murdered by unknown persons and that she had lodged a false first information report against the accused appellants on account of enmity.

16. P.W.-2 Balistar, who is brother-in-law of deceased-Indrajeet and is resident of village Amapur, has stated in the examination in chief that deceased Indrajeet was his sister's husband and was doing business of garlic at Etah and he was helping him in his business. The village Nagla Hasan is situated in between his village and Etah and he used to visit village Nagla Hasan and the house of his brother-in-law. He has further stated that the accused persons were having grudge and enmity with his brother-in-law Indrajeet Singh on account of murder case of Har Prasad, in which the deceased Indrajeet was prosecuted but was acquitted. He has further stated that the accused were also bearing enmity with the deceased due to earlier incident of quarrel regarding abadi land of the deceased. Regarding the present incident, this witness has stated that he was returning from Etah along with his brother-in-law, (deceased Indrajeet) and Lekhraj to village Nagla Hasan. His brother-in-law was on one bicycle and he and Lekhraj were on another bicycle. He was having torch with him. When they reached near the way going to village Nandgaon, they saw accused persons coming from front towards them. Accused Udai Singh and Lalta Prasad were having knives, while accused appellants Hira Lal, Ganga Singh and Nem Singh were having country made pistols. The accused person caught hold of the deceased and when the witnesses tried to save him, they were threatened by showing country made pistols. All the five accused appellants dragged the deceased towards field of pearl millets (Bajra) and thereafter he heard a gun shot. After hearing the sound of gunshot, he ran towards village Nagla Hasan and informed his sister Smt. Omwati and other persons of the village about the incident. Thereafter they along with Smt. Omwati and other villagers went to the place of occurrence but as it was dark, they could not search the deceased in the field and returned to the village. Next day, his sister and other persons of the village went to the place of occurrence and found the dead body of deceased - Indrajeet Singh in the field of pearl millets (Bajra). His sister Smt. Omwati lodged the first information report regarding this incident by giving written information at the police station. He saw the incident in the light of the torch.

17. In his cross examination, P.W.-2 Balistar Singh had stated that his village is

situated at a distance of about 11-12 kms from Etah and it takes about one hour to reach his village from Etah. On the date of incident, he started from Etah at about 06:15 P.M. on separate cycle, while Indrajeet Singh was on separate cycle. He has further stated in cross examination that the accused persons were not covering their faces and two bicycles were parked there. The accused persons were hidden in bushes and crop of pearl millets (Bajra). He has also stated that near the place of incident, there is a tube well and flour mill situated on the approach road towards Nandgaon and a human habitation exists about 2-2.5 furlong away from the place of incident. He has further stated that he didn't shout at the time of incident, as no one was present there. He has further stated that the place of occurrence is situated at a distance of about four kms from Etah city and it is about 1.5 - 2 kms away from village Nagla Hasan. He has also stated that he could not go to Etah to lodge the first information report as it was quite dark at that moment. He has further stated in his cross examination that he went to village Nagla Hasan on his cycle. He came back to the place of occurrence to trace the deceased but could not find him on account of darkness and went back to village Nagla Hasan. In the morning at about 07:00-08:00 A.M., inhabitants of village Nagla Hasan again went to search the deceased and the dead body was found at about 10:00 A.M. He did not go to the police station to lodge the first information report. He admitted that the accused appellants Lalta Prasad, Udai Singh and Ganga Singh were prosecution witnesses against his brother-in-law (deceased Indrajeet Singh) in the murder case of Har Prasad.

18. P.W.-3 Dr. G.C. Agarwal had conducted the post mortem examination on the body of deceased Indrajeet Singh on 27.09.1990 at about 04:00 P.M. He has estimated that the death occurred about 3/4th of a day (i.e. 18 hours) earlier. He stated that he found five injuries on the person of the deceased, which have already been detailed above. Though he accepted that the death could have occurred at about 06:45 P.M. on 26.09.1990 but also expressed that it is possible that death may have taken place at 10 pm or up to four hours before 10 pm, on 26.09.1990.

19. P.W.-4 Sub-Inspector Ompal Singh is the first Investigation Officer of the case. He has stated that on 27.09.1990 he was posted as Sub-Inspector at police station Kotwali Dehat and the case was registered in his presence. Upon lodging of the first information report he proceeded to the place of incident and prepared the inquest report and other police papers and sent the dead body for post mortem examination. Thereafter he made recovery of three cycles, one plastic bag, one torn tehmad and slipper and Rs.595/- from the site, from where the deceased was dragged and had prepared memos of the recovery. In his cross examination, he has stated that he did not record the statement of first informant under section 161 of Cr.P.C at police station and site plan was prepared on the pointing out of first informant. On that day, he did not interrogate the eye witnesses Balistar and Lekhraj. He has also stated that the witness Balistar did not show his torch to him, when he visited the place of occurrence.

20. P.W.-5 Sri Aale Hasan Khan is the Station Officer of police station Kotwali Dehat, District Etah and has stated that on the day when the first information report was registered he was on V.V.I.P. duty and when he returned back after completing that duty, he took

over the investigation of the case from Sub-Inspector Ompal Singh and went to the place of occurrence and saw various recoveries prepared by first Investigating Officer. He recorded the statement of eye witness Balistar under section 161 of Cr.P.C. on 30.09.1990 and on the same day, he recorded the statement of first informant again and the statement of witness Lekhraj was recorded by him on 04.10.1990 and the statement of witness Duryodhan (not examined) was recorded on 26.10.1990, who identified one of the cycle found on the spot as that of accused Udai Veer Singh. He has further stated that he prepared the memo of recovery pertaining to the torch of witness Balistar on 08.10.1990. He has admitted that he did not conduct any investigation or enquiry in the small hamlet (abadi) near the place of occurrence and at the flour mill which stood near the place of occurrence.

21. From the evidence adduced by the prosecution, it is clear that the prosecution case rests on the testimony of solitary eyewitness P.W.-2 - Balistar. This witness is brother of the first informant - Smt. Omwati and is brother-in-law of the deceased Indrajeet Singh. The defense has assailed his testimony on the ground that he is an interested and partisan witness, who has not lodged the FIR despite full opportunity to him and, in fact, is a witness who has been set up. Furthermore, it is not safe to rely upon the testimony of a solitary eye witness who has himself not suffered any injury, particularly when the other eye witness named in the first information report has not supported the prosecution case and has denied the presence of P.W.-2 Balistar in the village also. On the other hand, the learned AGA has contended that this witness P.W.-2 Balistar is wholly reliable and conviction can always rest on the testimony of a solitary witness.

22. The law in this regard is well settled. Section 134 of Indian Evidence Act, 1872 provides that *"no particular number of witnesses shall, in any case, be required for the proof of any fact"*. Law does not require plurality of witnesses and no particular number of witness is required to prove the fact. It is the quality of the evidence that counts and not the quantity. In the celebrated judgment of **Vadivelu Thevar vs. State of Madras - AIR 1957 SC 614,** the Hon'ble Apex Court has discussed this aspect of law in following words: -

"Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

23. It has also been held by Hon'ble Supreme Court in many cases that when the sole eye witness is partisan or related or inimical witness, the court must be cautious and evidence of such witness may require corroboration from independent reliable sources before making conviction. In the case of **Ramji Surjya Padvi vs. State of Maharashtra, AIR 1983 SC 810,** the relevant portion of the judgment reads thus:

"There is no doubt that even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-will is suggested."

24. Like-wise, in the case of **Govindaraju @ Govinda v. State By Sriramapuram P.S. & Anr.** *(2012) 4 SCC 722,* the Hon'ble Apex Court cautioned about relying on testimony of sole eye-witness in following terms: -

"Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty."

25. Another decision in the case of **Bhimappa Chandappa Hosamani & Ors. Versus State of Karnataka, 2006**

(11) SCC 323 would be worth-while to notice, in which Hon'ble Apex Court dealt with the evidence of sole eye-witness and held as follows: -

"We have undertaken a very close and critical scrutiny of the `evidence of P.W.--1 and the other evidence on record only with a view to assess whether the evidence of P.W.--1 is of such quality that a conviction for the offence of murder can be safely rested on her sole testimony. 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."

26. The legal principle deducible from the decisions noticed above is that although ocular evidence of solitary eye-witness, who is close relative of deceased, can be made basis of conviction but only after it is found to be of sterling quality, free of any blemish or suspicion, and should impress the Court as wholly truthful, natural and convincing. As to whether the testimony is of such sterling quality would depend on the proven facts and circumstances of a case. The primary test ordinarily adopted by the court to test reliability of a witness is whether the presence of the witness on the spot has been proved beyond doubt and whether he had opportunity to witness the incident. When incident occurs inside a house, the presence of the inmates of that house would be natural. But where the incident takes place at a place where ordinarily a person may not be found present, the courts would have to closely scrutinize the evidence to find out whether the claim that the witness was present at the scene of occurrence is reliable or not. Some of the tests, inter alia, adopted by courts, to ascertain whether the witness was present at the scene of occurrence, are whether the witness has suffered any injury in the incident; and whether the conduct of the witness at the time of the incident or soon thereafter is such which is reflective of his having witnessed the incident. No doubt, there can be no golden rule that every person would react in a given manner in a given situation but broad probabilities have to be kept in mind to assess whether the conduct of the witness is in harmony with the hypothesis of his presence at the scene of occurrence. Sometimes inordinate delay in lodging the FIR, without proper explanation, is evidence of conduct which is suggestive of the fact that the witness might not have been present and, therefore, after deliberation and guesswork, on the basis of suspicion, FIR has been lodged by naming several accused persons. At times, reliability of a witness may be gauged from the conduct reflected by those who have been informed by the witness. In a nutshell each case turns on its own facts and circumstances derived from the evidence led.

27. In the light of the aforesaid principles, when we examine the evidence of the prosecution witnesses P.W.-1 Smt. Omwati first informant (not an eye witness) and P.W.-2 Balistar (claimed to be the eye witness), it transpires that their conduct is not that of a normal prudent

human being. Say, if PW2 had informed PW1 about the murder, she would not have waited till recovery of the body to lodge the FIR next day morning, particularly, when, according to her (PW1), she had collected villagers in the night and had visited the spot thereby ruling out any fear factor. Moreover, PW1 would not have waited till 8.00 AM of the next day morning to resume search for her husband, as has been stated by PW2, because, an apprehending wife would not wait till day break to find out whether her husband is dead or alive, after receipt of information that her husband has been dragged into the fields and a gun shot was heard soon thereafter. It is noteworthy that the incident is of the month of September and the morning sun is out by 6 A.M. therefore waiting till 8.00 AM to resume search does not appeal to the conscience of the court and is suggestive of the fact that there had been no information by that time with PW1. More so, when no independent witness has been produced by the prosecution to disclose that search operations were conducted in the night also. Then there is another aspect, which is, if the eye witnesses, namely, Balistar (PW2) and Lekhraj (DW1) were present at the scene of occurrence why it would take 2 hours to find out the body. It may be noticed that according to the prosecution evidence body was found at about 10 AM whereas the search began at 8 AM. More so, when from the site plan, the dead body was found just 7 paces away from the chak road, 16 paces from the drain (nali) inside the field, and in total just 77 paces from the road/ place from where the deceased was allegedly dragged by the accused. Further, the explanation given by the witnesses that in the night the dead body was not traceable on account of darkness, does not appeal to reason, particularly, when the witnesses had torch as, later, a case has been set up that the accused was spotted in the light of a torch, which was handed out to the investigation officer on 08.10.1990. Another noticeable aspect which has surfaced in the prosecution case is with regard to the absence of the eye witness (PW2) at the time of registration of FIR. In natural course of events, the first information report ought to have been lodged by the eye witnesses of the incident, who were themselves close relatives of the deceased. Not only there is delay in lodging the FIR but the same has not even been lodged by the eye witness. According to the prosecution case, P.W.-2 Balistar, the brother-in-law of deceased, and Lekhraj, nephew of the deceased (not produced by the prosecution though produced by the defense as DW1), had themselves seen the incident and were throughout available either with the P.W.-1 or at the place of occurrence, having a cycle with them yet they did not go to lodge the first information report for which no satisfactory explanation is there. In fact, they did not even accompany the first informant Smt. Omwati to the police station at the time of lodging of the first information report though it has come in the evidence that they were there with the body. If that was so, then they could have been made witness of the inquest proceeding. But neither of the two witnesses was a witness to the inquest proceeding. The said circumstances, make the presence of the solitary eye witness P.W.-2 Balistar, examined by the prosecution, at the scene of occurrence highly doubtful.

28. Another aspect of the matter is the delayed interrogation of P.W.-2

Balistar by the Investigating Officer. As per the statement of P.W.-1 - Smt. Omwati, P.W.-2-Balistar was throughout present with her, except at the police station, that is at the time of registration of the FIR. She has admitted in her cross examination that when her statement was recorded by the Investigating Officer, witnesses Balistar and Lekhraj were present there. P.W.-2 Balistar also stated in his cross examination that when the police arrived at the place of occurrence, he was present there with the dead body and had shown the torch to the Sub-Inspector and the Sub-Inspector had done a short interrogation with him. But P.W.-4 -Sub-Inspector Om Pal Singh, the Investigating Officer, has specifically stated that when he visited the place of occurrence on 27.09.1990, he prepared the site plan at the instance of first informant P.W.-1 Smt. Omwati and, on that date, he did not interrogate witnesses Balistar and Lekhraj and that the witness Balister did not show his torch to him. According to the statement of P.W.-5 Aale Hasan Khan, the second Investigating Officer, he recorded statement of eye witness Balistar on 30.09.1990 and took the torch of Balistar in his possession on 08.10.1990 and prepared the memo (Exhibit Ka-13). In the facts and circumstances of the present case, the delayed interrogation of P.W.-2 Balistar by the Investigating Officer is suggestive of the fact that, in all probability, P.W.-2 Balistar was not then available as a witness and when he was convinced to become a witness, his statement was recorded. This circumstance dents the credibility of the witness PW2 and renders him not of sterling quality.

29. The defense has also assailed the motive of the accused appellants alleged by the prosecution for committing the offence. In the first information report, the motive alleged by the first informant is with regard to an earlier incident of some quarrel in between the deceased and the accused persons over a piece of land. However in the statement of witnesses recorded during trial, an additional motive has been introduced which is that the deceased Indrajeet Singh was prosecuted in the murder of Har Prasad and accused appellants Udai Veer Singh, Lalta Prasad & Hira Lal are cousins of Har Prasad and due to that reason they were bearing enmity with the deceased Indrajeet Singh. The cross examination of P.W.-1 Smt. Omwati reveals that the deceased did not make any complaint or report against the accused persons regarding the alleged quarrel and, further, it has also been admitted by P.W.-1 Smt. Omwati that the open land, stated to be root cause of quarrel, is situated in the midst of the village while the houses and open land of accused persons are situated in the eastern and western side of the village. In these circumstances, the motive, as claimed by prosecution, generated from quarrel in between deceased and accused persons relating to a piece of land which does not appear to be accessible to the accused persons, seems to be unfounded. Moreover, PW1 and P.W.-2 have stated that though accused appellants Udai Singh, Ganga Singh & Lalta Prasad were prosecution witnesses against deceased Indrajeet Singh in the murder case of Har Prasad but they resided separate from Har Prasad. Thus, there appears no strong motive for commission of the offence.

30. Lastly, DW1, another relative of the deceased, allegedly an eye witness as per the prosecution, has taken the courage to appear as a defense witness and declare

that he has not been with the deceased and has not witnessed any such incident, as claimed by the prosecution. Though suggestion has been put to him that on account of pressure from his matrimonial home he has turned up as defence witness but there is no motive suggested as to why he would go against his relatives belonging to the family of the deceased. If prosecution had not examined him, as being won over, or if he had turned hostile, though examined by the prosecution, things would have been different. But here he appeared as defense witness and gave statement that his presence on the spot has been falsely shown by the prosecution. Under the circumstances, his testimony is of some significance so as to dent the credibility of the prosecution evidence.

31. At this stage, we may also observe that no recovery of the weapon of assault was made from any of the accused and that the alleged bicycles found on the spot were not connected, by any admissible evidence, with that of any of the accused persons or with any of the witnesses so as to demonstrate their presence at the scene of occurrence. It may be noticed that PW5 had stated that one of the bicycles was identified to be of accused Udai Veer Singh but that person who allegedly identified the cycle to be that of Udai Veer Singh was not examined whereas Udai Veer Singh, on the other hand, in his statement recorded under section 313 CrPC denied that the cycle recovered was his.

32. When we take a conspectus of the facts and circumstances emanating from the evidence led during the course of trial, it appears to us that the murder might have taken place in the dark hours of the night, which was not witnessed by any one and, therefore, after discovery of the body and deliberations, on the basis of suspicion and guess work, prosecution story was developed. This possibility gets credence from another circumstance which is that prosecution names five accused armed with two types of weapons of which injuries were found but except for showing as to which accused carried what weapon it is not disclosed as to who caused which injury. The reason for that appears to be that the injuries were much less than the number of assailants. Although specific role need not be attributed to all the accused as they could be fastened with liability by taking recourse to the provisions of section 149 IPC but what assumes importance is that this could be a ploy to add accused, on the basis of suspicion, as to form an unlawful assembly when, otherwise, the injuries suggested that there was a solitary gun shot wound of entry and exit which proved fatal and the rest were two incised wounds on non-vital part. Another aspect needs to be noticed which is that there is no blackening,tattooing or scorching found present in or around the gunshot wound of entry which suggests that the shot was not from close proximity when the accused, as per prosecution case, after over powering the deceased had all the opportunity to shoot from a close range. There is yet another aspect which is as to why would the assailants leave PW2 and DW1 escape alive on bicycles and fetch support from the nearby village or let them become a witness against them when, in the darkness of night, they had full opportunity to eliminate them as well.

33. The trial court did not test the prosecution evidence on all the aspects noticed by us and took the prosecution

evidence as gospel truth. When we take a conspectus of the entire prosecution evidence, in the light of the discussion made above, we are of the considered view that, firstly, the presence of PW2 at the place and time of occurrence is highly doubtful, and, secondly, his testimony is not of such sterling quality that proves the prosecution case against the accused appellants beyond reasonable doubt. Under the circumstances, the benefit of doubt must go to the appellants. Consequently, the judgment of conviction dated 03.07.1993 and the order of sentence dated 05.07.1993 is liable to be set-aside and is hereby set aside. The appellants are acquitted from the charges. They are on bail and they need not to surrender.

34. Thus, the appeal succeeds and is allowed.

35. Let a copy of this judgment and order be sent to the court below for compliance.

(2019)11ILR A1075

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 1405 of 1985

Goli @ Jata Shanker ...Appellant.(In Jail)
Versus
State of U.P. ...Opposite Party.

Counsel for the Appellant:
Sri S.P. Singh, Sri Rahul Pandey, Sri Rang Nath Pandey, Sri Ravindra Tiwari.

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

A. Evidence Law-Indian Evidence Act, 1872, Section 302 I.P.C. – Dying declaration - statement of the accused was recorded under Section 313 Cr.P.C.- FIR of the incident was lodged by the deceased- dying declaration of the deceased shows that it was the appellant who had shot dead the deceased with his licensee weapon - some dispute between them on the date of the incident while the deceased was irrigating his field- the version given by the deceased while he being injured and also in his dying declaration, is fully corroborated by the medical examination report as well as his post mortem report - received firearm injuries on his back and during the course of medical treatment he died after two days of the incident - finding recorded by the trial Court in convicting and sentencing the appellant appears to be correct and justified - conviction and sentence of the appellant by the trial Court – upheld. (Para 8,50,52,54)

Appeal dismissed (E-7)

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

1. The present criminal appeal has been preferred against the judgment and order dated 23.5.1985 passed by IInd Additional Sessions Judge, Mirzapur in S.T. No.59 of 1984 convicting and sentencing the appellant for life imprisonment under Section 302 I.P.C.

2. The prosecution case in brief is that on 16.8.1983 at about 7 A.M.,the complainant, namely, Kailash Nath Dubey (deceased) was irrigating his field which was situated towards South of his village Chabgehna for sowing paddy seeds. At about 7.45 A.M., on the issue of irrigation of the field, some altercation took place between the complainant

Kailash Nath Dubey and one Shree Ram, resident of village Nadhgehna. At about 8 A.M., the accused, namely, Kripa Shankar and Goli alias Jata Shankar, both sons of Shree Ram, came at the field of the complainant Kailash Nath Dubey. The accused Kripa Shankar was armed with lathi and Goli alias Jata Shankar was armed with a licensee gun. On the exhortation of accused Kripa Shankar, accused Goli alias Jata Shankar with an intention to commit murder of the complainant Kailash Nath Dubey fired a shot at him from his gun which hit on the back of the complainant. With the help of his brothers, the complainant Kailash Nath Dubey was immediately taken to the District Hospital. The incident was witnessed by Sheo Shankar Tiwari, Radhey Shyam Yadav, Sheo Shankar Tiwari son of Ram Narain and others. The complainant Kailash Nath Dubey got an FIR (Ext. Ka.3) of the incident written by Shambhoo Nath Dubey and the said FIR was lodged at the police station Padari on 16.8.1983 at 11 a.m.

3. On the basis of written report, Chik report (Ext. Ka.5) was prepared and case was endorsed in G.D. as Crime No.79/83, under Section 307 I.P.C., carbon copy of which is marked as Ext. Ka.6.

4. The Investigation of the case was conducted by S.H.O. Sri R.P. Bharti. The Investigating Officer recorded the statements of witnesses and also made spot inspection. He prepared the site plan (Ext. Ka.17). He took blood stained and plain soil from the place of occurrence, kept it in two separate sealed tins and prepared the recovery memo (Ext. Ka.18).The Investigating Officer also recovered empty cartridge, sealed it and prepared the recovery memo (Ext. Ka.19) in respect thereof. He also made a search of the house of the accused persons but could not recover the licensee gun as well as accused also. He prepared recovery memo (Ext. Ka.20) of the same. Subsequently, on 6.9.1983, Shree Ram, father of the accused persons, handed over his single barrel licensee gun bearing No.32750/1970 along with three cartridges of 12 bore at the police station Padari. The Investigating Officer prepared recovery memo (Ext. Ka.21) in this regard. The medical examination of the injuries of Kailash Nath Dubey was conducted on 16.8.1983 at 9.20 A.M. at District Hospital, Mirzapur. The injury report of the Kailash Nath Dubey is marked as (Ext. Ka.1). The condition of the complainant Kailash Nath Dubey was found serious at the District Hospital, Mirzapur, hence, his dying declaration (Ext. Ka.2) was recorded at the District Hospital, Mirzapur by the Deputy Collector/ Executive Magistrate Sri A.N. Anand. Thereafter, the injured Kailash Nath Dubey was taken to the Swaroop Rani Hospital, Allahabad (here-in-after referred to as 'S.R.N. Hospital') where he died on 18.8.1983. The inquest report (Ext. Ka.11) of the deceased Kailash Nath Dubey was prepared at S.R.N. Hospital, Allahabad on 18.8.1983 at 11.15 A.M. by the police of Police Station Kotwali, Allahabad. Photo-nash (Ext. Ka.12) was prepared and dead body was sealed and sample of seal (Ext. Ka.14) was preserved. The dead body of the deceased Kailash Nath Dubey was sent for post mortem through Constable Mohan Mishra of Police Station Kotwali, Allahabad with the letter (Ext. Ka.15) along with necessary papers. The post mortem of the dead body of the deceased Kailash Nath Dubey was conducted by Dr. K.S. Tiwari

of Moti Lal Nehru Hospital, Allahabad, which was marked as Ext. Ka.9. The plain and blood stained soil was sent for chemical examination. The report of Chemical Examiner is marked as Ext. Ka.23.

5. After completion of investigation, the Investigating Officer submitted Charge Sheet (Ext. Ka.22) against both the aforesaid accused persons for the offence under Section 302 I.P.C.

6. The case was committed to the Court of Sessions and the trial Court framed charges against both the accused for the offence under Section 302 I.P.C. The charge was read over and explained to the accused persons who pleaded not guilty and claimed their trial.

7. The prosecution in support of its case has examined PW1-Sheo Shankar, PW2-Radhey Shyam, PW3-Dr. K.D. Sharma, PW4-Shambhoo Nath Dubey, PW5 Head Constable Surya Deo Pandey, PW6-Constable Rama Shankar on affidavit, PW7-Constable Mohan Mishra on affidavit, PW8-Dr. K.B. Tiwari, PW9-S.I. Sri Ram Prakash Bajpai, PW10-Executive Magistrate-Sri Aand Narain Anand, PW11-Investigating Officer R.P. Bharti & PW12 Constable Amresh Chand Pandey.

8. The statements of the accused was recorded under Section 313 Cr.P.C. by the trial Court who denied involvement in the offence in question and denied the prosecution case. The accused declined to produce any oral evidence and relied upon the injury report (Ext. kha-1) and copy of G.D. at report No.16 at 9.45 A.M. of P.S. Parari (Ext. Kha-2).

9. PW1-Sheo Shankar, son of Sukhdev has deposed before the trial Court that he had seen the chak in Mauja Chabgehna of the deceased Kailash Nath Dubey. On the eastern side of his chak there is a nala, whereas on the wastern side there is a lane of water. On the eastern side of nala, he is also having a chak, namely Nala Badhu, which falls in mauja Baudri. This witness has also deposed that at about 7.30 or 8.00 A.M. he was at his agricultural field in mauja Baudri. The place where he was in his agricultural field, was at a distance of 100-150 paces of the chak of Kailash Nath Dubey and Kailash Nath Dubey was watering his field. While he was ploughing his agricultural field, at that time accused Kripa Shankar and Goli alias Jata Shankar had come and started abusing Kailash Nath Dubey. He did not hear Kailash Nath Dubey abusing the accused. The said two accused were carrying something in their hands but what were they carrying, he could not notice the same. Kailash Nath Dubey was empty handed. Father of the accused, namely, Shree Ram was known to him.

10. He further deposed that when quarrel took place between Kailash Nath Dubey and accused persons, then Kailash Nath Dubey ran away from his chak to his house.This witness remained at his chak and when he heard the the gunshot then he started going towards the house of Kailash Nath Dubey. When Kailash Nath Dubey ran towards his house from the chak, the accused had also followed him towards his house and when the accused chased him, he did not know what weapon they were carrying in their hands. Kailash Nath Dubey had fallen in his orchard towards western side. When Kailash Nath Dubey had fallen down, the

accused were at a distance of about 10-15 paces behind him. The accused had gone towards north. When Kailash Nath Dubey had fallen down, then other people rushed and arrived there. Radhey had also rushed from his chak and reached there. Radhey was at a distance of about 2-21/2 bighas from the place where Kailash Nath Dubey had fallen down and his chak was adjacent to the orchard of this witness. Where Kailash Nath Dubey had fallen down, the blood was also fallen there. This witness had seen the injury of gunshot at the back of Kailash Nath Dubey. When the accused had fled away, he did not chase them and also did not notice that what weapons they were carrying in their hands. In all, total three shots were fired. When the first shot was fired, this witness was at his field. The first two shots fired, did not hit Kailash Nath Dubey and the third one hit him but he did not know from whose gunshot said fire was made.

11. In his cross examination this witness has stated that the Investigating Officer had recorded his statement in the hospital between 2.00 to 2.30 P.M. He further stated that he had given statement to the Investigating Officer that accused Kripa Shankar and Goli alias Jata Shankar were armed gun, the statement given by him to the Investigating Officer was correct one. He did not remember whether he had given the statement to the Investigating Officer that accused Kripa Shankar had exhorted his brother Jata Shankar to kill the deceased and if the Investigating Officer has written the said statement then it is a correct one. He further stated that he also did not remember whether he had given the statement to the Investigating Officer that the third shot fired by Jata Shankar hit Kailash Nath Dubey at his back and if the Investigating Officer has written the statement, then it is correct. He stated that since a year has elapsed, he has forgotten, hence, he had earlier deposed that he did not know that from whose gun Kailash Nath Dubey was killed.

12. This witness has denied the suggestion that because of being relative, he has deposed that he had seen the accused at the place of occurrence. He further denied the suggestion that he had not seen Jata Shankar receiving any injury nor he is aware of the same. He denied the suggestion that he is concealing the same. He also did not know whether Jata Shankar had made any report about the incident or not. He had visited the hospital on the day of incident but he did not see whether Jata Shankar was medically examined of his injuries or not. He further denied the suggestion that on the day, he had gone to his relative at Basui. He stated that he has no relative at Basui.

13. PW2-Radhey Shyam who is neighbour of the deceased has deposed before the trial Court that he knew the accused Kripa Shankar and Goli alias Jata Shankar who were present in the Court. He further stated that at about 7.00-8.00 A.M. while he was at his field, accused Kripa Shankar and Goli alias Jata Shankar came to the deceased. Goli alias Jata Shankar was armed with gun whereas Kria Shankar was armed with lathi and there was some hot altercation took place between the accused and Kailash Nath Dubey, on which Kailash Nath Dubey ran away from there, accused also followed him and the accused Goli alias Jata Shankar fired and he saw him making the

first fire which did not hit any one and because of fear he had ran away. Thereafter, two fires were made but who had made the said fires he could not see as he had ran away and after five minutes when he came back to his field he saw that Kailash Nath Dubey had suffered injuries and had fallen down. Sheo Shankar Tiwari also arrived there and blood was also fallen there. When he reached to his field, he did not see the accused running away from the place of occurrence.

14. In his cross-examination, this witness has stated that he cannot tell that whose shot hit the deceased Kailash Nath Dubey.There was a dispute of water on the said date. Water was going in the field of Shree Ram but this witness could not see that at the time of incident whether water in the field of Shree Ram was less or not. He had seen Shree Ram at that time but there was no conversation between him and Kailash Nath Dubey. He did not see Shree Ram carrying gun at any point of time but knew that there was a licensee gun in his name. He further stated that he did not see that on the said date Goli alias Jata Shankar had received any lathi injury. This witness had gone to the hospital but he did not find Jata Shankar in the hospital. He did not know whether Jata Shankar had lodged any report against Kailash Nath Dubey and others or not. He further deposed that the house of Kailash Nath Dubey is nearby to him. Accused Kripa Shankar and Goli alias Jata Shankar live in another Purba and their Purba is towards north of the field of Sheo Shankar.

15. He denied the suggestion that he was not present at his field on the day of incident and because of being a neighbour he is falsely deposing. He stated that he had gone to see Kailash Nath Dubey at Allahabad.

16. PW3- Dr. K.D. Sharma in his deposition before the trial Court has stated that on 16.8.1983 he was posted as Medical Officer In-charge of District Hospital Mirzapur and on the said date at about 9.30 a.m. he had medically examined Kailash Nath Dubey and found the following injuries on his person:

"1. Lacerated wound 12 cm. x 6 cm. x 2 cm. deep on left side of back 23 cm. below from shoulder blade, wound bleeding profusely, blackening singing and tatooing present.

2. Swelling diffuse 28 cm. x 15 cm. on the back crossing each vertibral column, 23 cm. below root of neck. Swelling communicates with injury no.1.

17. In the opinion of the doctor, injury nos.1 & 2 were kept under observation. X-ray was advised. Injury no.1 was caused by firearm. Duration was fresh. The injured was brought by his uncle Chhavinath Dubey. This witness has proved the medical examination report under his handwriting and signature which is marked as Ext. Ka.1

18. He has further stated that the injuries caused to the injured could have been caused at 8.00 A.M. in the morning. The injured was admitted in the hospital and at that time he was speaking.On the said date, dying declaration of the deceased Kailash Nath Dubey was recorded by the Deputy Collector in his presence, which was signed by the injured as well as by the Deputy Collector after writing the same in his presence and he too had signed the same. When the said

dying declaration of the deceased was being recorded he was mentally fit and was speaking. This witness has proved his signature as well as of Kailash Nath Dubey and Deputy Collector P.A.M. Anand, which is marked as Ext. Ka.2 and has proved the same.

19. In his cross-examination, this witness has stated that on 16.8.1983 at about 1.30 p.m. in the afternoon he had medically examined Goli alias Jata Shankar and found the following injuries on his person:

"1. Contusion 4 cm. x 2 cm. on medial aspect of left leg 6 cm. above from medial malleous. Colour reddish. Diffuse swelling present around wound.

2. Contusion 1 cm. x 1 cm. on medial aspect of right leg 4 cm. above medial malleous. Colour reddish.

3. Contusion 4 cm. x 2 cm. on back of right thigh 8 cm. above knee crese. Colour reddish.

4. Complain of pain on back of elbow.

5. Complain of pain on left side of wrist.

6. Complain of pain on left shoulder joint.

7. Complain of pain in right testes.

Injuries no.1 to 3 are caused by blunt hard object. Injuries no.7 kept under observation. Rest of the injuries are simple in nature. Duration within one day."

20. This witness has further stated that the injured Goli alias Jata Shankar had complaint pain on his testicles which was kept under observation and rest of the injuries were simple in nature and the said injuries could have been caused by lathi and could have been caused within one day as he stated that the said injuries could also be caused on 16.8.1983 at 8 a.m. He has proved the injury report of Goli alias Jata Shankar under his handwriting and signatures as Ex. Kha.1

21. This witness has further deposed that when the dying declaration of the deceased was being recorded, no one was present there and prior to it the family members of the deceased and others who were present there, were asked to go out from there. When they had gone to record the dying declaration of the deceased, then the person, namely, Chhavinath who had brought the deceased, was not present there. He could not remember that how much time it took to record the dying declaration of the deceased. He further stated that when he came to know that the injured received fire injuries, whether he sent the information about the same to the police station or not he did not remember and ordinarily in such cases information is sent to the police station. The injuries of the injured was written by him in medico-legal register.

22. In the cross-examination by the prosecution, this witness has stated that Goli alias Jata Shankar himself had come to him and on his person besides the injury nos. 1 and 3 no other injuries were found and the said injuries could be caused due to impact of some blunt object and further all the injuries were superficial in nature and they can be self inflicted.The said injuries could be caused 2 hours prior to his medical examination.

23. PW4-Shambhoo Nath who is scribe of the FIR and real brother of the deceased has deposed before the trial

Court that he knows that accused Goli alias Jata Shankar and Kripa Shankar who are present in the Court. He further stated that deceased Kailash Nath Dubey was his real elder brother. On 16.8.1983, he received firearm injury. It was about 8.00-8.15 A.M. in the morning, he was in his agricultural field. The place where Kailash Nath Dubey received gun shot injuries, it is towards western side orchard of Sheo Shankar Tiwari and his field is also towards the western side of the said orchard. He further stated that when he was at his field at about 8.00-8.15 A.M. he heard the gunshot and he after hearing the same started running towards the direction from where he heard the shot being fired. When he was at a distance of 40 yard from the said orchard, he saw the two accused who are present in Court along with his brother and they were running and he saw that accused Goli alias Jata Shankar was armed with gun whereas accused Kripa Shankar was armed with lathi. He saw that accused Goli alias Jata Shankar had fired shot at the back of his brother and was running towards his house, along him accused Kripa Shankar also fled away. The place where his brother received gunshot he reached there and found his brother fallen on the ground. Sheo Shankar, Radhey Shyam, Chhavinath, father of this witness Faujdar and some labourers had also arrived there. From there he got his brother taken to the hospital at Mirzapur on a cot and on the way a tractor was arranged and the deceased was taken to Sadar Hospital from village Basuhi by a tractor. In the hospital besides the said witness, Chhavi Nath (uncle) Faujdar (father) and Sheo Shankar and Radhey etc. had also arrived. They reached the hospital at 9 A.M. in the morning where his brother was medically examined and copy of the medical examination report of his brother was being provided to him and the doctor had asked him to lodge an FIR and in the hospital he got a report written on the dictation of his brother Kailash Nath Dubey which was read over to him and after hearing the same he signed the report. The said written report is in his hand writing and signature along with the signature of his brother which is marked as Ex. Ka.3. He states that he had submitted the said report along with medical examination report at police station Padari at 11 A.M. where the FIR was registered and Sub inspector recorded his statement under Section 161 Cr.P.C. at police station and from there he reached the hospital at about 1.00 P.M. When he returned to the hospital, he saw that a vehicle was being called for taking his brother to Allahabad and while his brother was about to be taken to Allahabad, within 10 minutes the Sub Inspector of Police Station Padari had reached to the hospital and recorded the statement of his brother Kailash Nath Dubey under Section 161 Cr.P.C. and thereafter he took his brother Kailash Nath Dubey to Allahabad where he was admitted in S.R.N. Hospital and on 18.8.1983 his brother died at S.R.N. Hospital, Allahabad and on the said date panchayatnama of the dead body of the deceased was conducted, he also signed the panchayatnama as one of the panch witness. The last rites of the deceased Kailash Nath Dubey was performed in Allahabad and thereafter on return, on 26.8.1983 a written report regarding the death of the deceased Kailash Nath Dubey was given by him in his handwriting and signature, which is marked as Ext.Ka.4.

24. In his cross examination, this witness has stated that he is posted as Amin in the Tehsil Sadar Mirzapur. His agricultural field is being taken care of by

his uncle Chhavinath along with his father and also sometimes by him as well as by his brother too. He further stated that elder brother of his father, namely, Ram Nath lives in his in-laws' house and did not perform agricultural work and the said Ram Nath has given his agricultural field in favour of his brothers. On 16.8.1983 Kailash Nath Dubey had gone to the field from his house for watering his field at about 7 a.m. while the Faujdar and Chhavinath remained at the house and had not gone to the field. He further stated PW1 Sheo Shankar 's house is at a distance of about one bigha from his house and the house of Radhey Shyam is also near to his house. There was no enmity between him and the accused prior to the incident. For taking water from the canal jointly, there is always litigation took place between the land-owners (Kashtkar). In the field of deceased Kailash Nath Dubey and accused, water used to come from one canal for which there were two lanes. Father of the accused Shree Ram is having a licensee gun. He did not know whether on the day of incident there was some dispute between the Shree Ram and Kailash Nath Dubey as this witness was at a distance. He further stated that the deceased Kailash Nath Dubey himself had told him that there was dispute between him and Shree Ram in morning at about 7.45 A.M. The time by which the dispute had taken place, has been told by the deceased and at that time Faujdar and Chhavinath were not with him at the field on which the Kailash Nath Dubey was present. The house of the said witness is towards north from the field where the deceased Kailash Nath Dubey was present and his field is also straightway towards north which falls near the orchard of Sheo Shankar.

25. This witness further deposed that in the FIR he had written the fact which the deceased had dictated to him. He did not remember whether the fact regarding firing of three shots had been written by him in the FIR or not and after seeing the FIR (Ext. Ka.3), he stated that the fact regarding three fire being shot is not written. In the FIR (Ex. Ka.3), it is also not written that the accused had shot dead Kailash Nath Dubey in the orchard of Sheo Shankar, as Kailash Nath Dubey had not dictated the same, the information which he himself was having, had not been written in the FIR. In the FIR, he had not written his name as an eye witness. This witness had not shown the filed to the Investigating Officer where he was present at the time of incident. He is also not aware of the fact that accused Goli alias Jata Shankar had lodged an FIR against Chhavinath, Ram Nath and Faujdar and deceased on 16.8.1983 at 9.45 A.M. at the concerned police station and when he reached at police station Padari, he did not find accused Goli alias Jata Shankar at there. The police had also not informed him whether Goli alias Jata Shankar had lodged a report or not. The Investigating Officer did not asked this witness as to how Goli alias Jata Shankar received injuries.

26. This witness denied the suggestion that he had not seen the incident and further denied the suggestion that he was not present at the time of incident in the village. He also denied the suggestion that Kailash Nath Dubey was beating Goli alias Jata Shankar with lathi, then the father of Jata Shankar in order to save Jata Shankar had fired shot with his gun. The father of Goli alias Jata Shankar is aged about 50 to 55 years and he denied that father of Goli alias Jata Shankar is aged about 70 years.

27. PW5-Head Constable Surya Dev Pandey has deposed before the trial Court

that on 16.8.1983 he was posted as H.M. at police station Padri, District Mirzapur. At about 11 a.m. in the morning on the written report of Kailash Nath Dubey, he prepared the chik report in his hand writing and signature and proved the same as Ex. Ka.5. He endorsed the chik FIR in G.D. No.19 dated 16.8.1983 at 11 A.M. The original G.D. was before him, which was under his handwriting and signature, carbon copy of which is Ex. Ka.6.

28. The case property of the present case was submitted by the Station Officer at the police station on 17.8.1983 which was endorsed in G.D.No.19 at 19.30 hrs. in sealed condition. The original G.D. is before him and the same was in the hand writing of Ram Prasad Bhartiya, the then S.O. and proved the same, carbon copy of which is Ex. Ka.7.

29. This witness further stated that on 26.8.1983 on the written report of Shambhoo Nath Dubey, the aforesaid case was converted under Section 302 I.P.C., reference of which was made in G.D.No.25 at 18.30 hrs. on 26.8.1983. The original G.D. was before him, which was in his hand writing and carbon copy of which is Ext. Ka.8. On 6.9.1983 Shree Ram had deposited his licensee gun along with three cartridges at the police station and the gun along with one cartridge was sent to the expert.

30. On cross-examination, this witness has stated that on 16.8.1983 at 9.45 A.M., Goli alias Jata Shankar had lodged an FIR under Section 323 I.P.C. against Faujdar, Chhavinath, Ram Nath and Kailash Nath and on the basis of which a N.C.R. was registered under Sections 323, 504, 506 I.P.C. as Case No.188. He stated that he has not brought the original NCR register. On the said date the the case is registered at G.D.No.16. The said G.D. is before him which in his handwriting and signature and he proved the same, carbon copy of which is Ext. Ka.2. The injuries of Goli alias Jata Shankar was also endorsed in the G.D.

31. PW6-Constable Ram Shankar Mishra has filed an affidavit which was treated to be his statement, stating therein that the in the month of October, 1983 he was pasted as Constable at police station Padari. The case property sealed in two boxes, were taken by him for chemical analysis to Vidhi Vigyan Prayogshala, Agra and he submitted the same in sealed condition.

32. PW7- Constable Mohan Mishra also filed an affidavit and the same was treated to be his statement, in which he stated that on 18.8.1983 at 11.15 A.M. he took dead body of the deceased Kailash Nath Dubey in sealed condition, which was handed over to him by Ram Prakash Bajpai and doctor had conducted the post mortem of the dead body.

33. PW8-Dr. S.K.Tiwari, Senior Radiologist has stated that on 18.8.1983 he as posted as Senior Radiologist at Moti Lal Nehru Hospital and had conducted the post mortem of the dead body of the deceased Kailash Nath Dubey which was handed over to him in a sealed condition by Constable No.808 Mohan Mishra of Police Station Kotwali, District Allahabad and identified the same and he found the following injuries on the dead body of the the deceased:

"1. Gun shot wound of entry 9 cm. x 3 cm. back of chest collar medially,

irregular margins present, blackening present around the margins, 7 cm. below inferior angle of scapula directed medially forwards.

2 Stitched wound 12 cm. long right paramidian with 7 stitches, 2 cm. from midline, 3 cm. above umbilicus.

3. Diffused swelling around right arm and forearm with number of wounds mark of injury of injection pricks marks present. On.....fossa.

34. In the opinion of the doctor, the deceased died on 18.8.1983 at 6.20 A.M. at S.R.N. Hospital, Allahabad and he has proved the post mortem report as Ex. Ka.5.This witness denied the suggestion that because of negligence of the doctor, the deceased died.

35. PW9-Ram Prakash Bajpai has deposed before the trial Court that on 18.8.1983 he was posted as Chauki In-charge, Suraj Kund which fell under the police station Kotwali, District Allahabad and area of S.R.N. Hospital comes under the police station Suraj Kund. He further stated that on 18.8.1983 he conducted the inquest on the dead body of the deceased Kailash Nath Dubey in S.R.N. Hospital, which was conducted by him on the information of the hospital and proved the same as Ext. Ka.10. The panchayatnama was endorsed in G.D. No.15 dated 18.8.1983 at 8.45 A.M. which was written in the handwriting of Suresh Chand. Constable Moharrir and he has proved the panchayatnama in his handwriting and signature and proved the same as Ext. Ka.11. He also prepared the photo-nash (Ex. Ka.12), chalan-nash (Ex. Ka.13), sample of seal mohar (Ex. Ka.14), report regarding post mortem (Ex. Ka.15) in his handwriting and signature.

36. In cross-examination, this witness has stated that he received information regarding death of the deceased at 8.45 a.m. but as per the memo prepared by doctor, the deceased died at 6.20 a.m. He did not have any conversation with the said doctor.

37. PW10-Anand Narayan Anand, Deputy Collector, Mirzapur has stated before the trial Court that on 16.8.1983 he was posted as Deputy Collector/Executive Magistrate, Mirzapur and on the said date he had recorded the dying declaration of the deceased in District Hospital, Mirzapur at 12.45 p.m. in the afternoon and he recorded the statement whatever the deceased had stated to him. He further stated that at the time of recording the statement of the deceased, the doctor of District Hospital was also present, who had signed the same after he had taken the statement of the deceased. After recording the statement of Kailash Nath Dubey (deceased), the same was read over to him, who after listening and understanding the same, signed it and he also signed on the same. The said dying-declaration of the deceased Kailash Nath Dubey was before him and he proved the same to be under his signature as well as signatures of the deceased Kailash Nath Dubey and doctor which was marked as Ex. Ka.2. At the time of recording the said dying-declaration besides him and doctor, none was present there and Kailash Nath Dubey was in conscious state of mind when he was recording his statement.

38. In cross-examination, this witness has stated that when he reached the hospital for recording the statement of the deceased Kailash Nath Dubey, some persons were present there and he asked

them to go out. He stated that at the time of recording the statement of Kailash Nath Dubey, he had not written that the injured was in a conscious state of mind. In the dying-declaration, he has also not written that prior to recording the statement of Kailash Nath Dubey he had asked the persons sitting near the injured to go out.

39. PW11-A.P.Bhartiya has stated before the trial Court that on 16.8.1983 he was posted as Station Officer at Police Station Padari, District Mirzapur. He further stated that on 16.8.1983, the FIR was registered under Section 307 I.P.C. against two accused persons in his presence which was registered as case crime No.89 of 1983. He recorded the statement of Shambhoo Nath Dubey at police station and thereafter he proceeded towards the place of occurrence. The injured had gone to the hospital. He had recorded the statement of the the informant Kailash Nath Dubey at District Hospital Mirzapur and at that time the informant was speaking and was conscious. He further stated he had written whatever was told to him by Kailash Nath Dubey, which is marked as Ext. Ka.16. The said statement was taken by him at 1.10 P.M. in the afternoon.Thereafter, he had taken the statement of Radhey Shyam Yadav and Sheo Shankar at 1.30 P.M. in the hospital. Thereafter he reached at 2.3.0 P.M. at the place of occurrence.He inspected the place of occurrence at the instance of Sheo Shankar. He prepared the site plan of the place of occurrence and proved the same as Ext. Ka.17. The place where he had recovered the empty cartridge, he marked the same by alphabet 'F'. He prepared the recovery memo of blood stained soil and plain soil and proved the same as Ext. Ka.18. The blood stained soil and plain soil were kept in two boxes, he prepared the recovery memo and got the same signed by the witnesses. He further stated that he made search of the house of the accused but he did not find gun at there. The accused were also searched but they could not be traced out. On 19.8.1983 the accused surrendered in the Court and then he recorded their statements. On 26.8.1983 on the written report of Shambhoo Nath Dubey, the case was converted under Section 302 I.P.C. On 6.9.1983 Shree Ram Mishra brought his gun at police station and had deposited the same, for which he prepared recovery memo under his handwriting and signature and proved the same as Ext. Ka.21.

40. On 22.9.1983 he had sent the gun to the Ballistic Expert. The blood stained soil and plain soil was sent for examination to Vidhi Vigyan Prayogshala for chemical analysis. He recorded the statement of Sub Inspector Bajpai who conducted the panchayatnama of the dead body of the deceased at Allahabad and also of the Constables.After completing the investigation, he submitted the charge sheet against the accused on 23.10.1983 and proved the same as Ext. Ka.22.

41. In his cross-examination, this witness has stated that he did not call any witness while he was recording the statement of the injured Kailash Nath Dubey. He did not find the accused in the field.

42. PW12-Constable 824 Amresh Chandra Pandey has filed an affidavit which was treated to be his statement in which he stated that on 16.8.1983 he was posted as Constable at police station

Padari, District Mirzapur and he had gone with the Station Officer R.P. Bhartiya who was Investigating Officer along with the Constable Janardan Rai of village Nadighana, police station Padari. He proved the material Ex.1 & material Ex. 2 of the blood stained and plain soil which was collected in two separate boxes from the field of Sheo Shankar Tiwari. This witness further stated that from the place of occurrence, an empty cartridge was also recovered by the Investigating Officer, for which recovery memo was prepared and he deposited the case property in sealed condition at police station Padari, District Mirzapur.

43. Heard Sri Rang Nath Pandey, learned counsel for the appellant, Mrs. Archana Singh, learned AGA for the State and perused the lower court record.

44. It is contended by learned counsel for the appellant that the appellant is innocent and has been falsely implicated in the present case. He further submitted that as per the allegations made in the FIR, the appellant is said to have fired shot at the deceased which hit him on his back and he died after two days of the incident on 18.8.1983 at S.R.N. Hospital at 6.20 A.M. and on 26.8.1983 the case was converted under Section 302 I.P.C. as the same was initially lodged under Section 307 I.P.C. while the deceased was alive and he received injuries in the incident. He has drawn the attention of this Court towards the evidence of PW1-Sheo Shankar who is relative of the deceased and PW2-Radhey Shyam who happens to be a neighbour of the deceased and on the basis of their evidence he argued that none of the said witnesses have deposed that the appellant was seen by them shooting at the deceased. He further submitted that so far as PW4-Shambhoo Nath Dubey who is scribe of the FIR and real brother of the deceased, he during the course of his evidence before the trial Court, has deposed that he had seen the appellant shooting at the deceased, but from the FIR it is evident that he was not present at the place of occurrence and the incident was only witnessed by Sheo Shankar and Radhey Shyam PW1 and PW2 respectively and one of the witness, namely Sheo Shankar Tiwari son of Ram Narain was neither produced by the prosecution nor examined by the trial Court.

45. It was further argued by learned counsel for the appellant that the appellant Goli alias Jata Shankar also received injuries in the incident as there was sudden fight between the parties and the injuries of the appellant were examined by PW3-Dr. K.D. Sharma who had also examined the deceased while he was injured. He submitted that the accused appellant has also received serious injuries at the hands of the complainant party and the injuries which have been received by him though have been opined by the doctor to be simple in nature but the said injuries could not be self inflicted one. Moreover, the injuries sustained by the appellant has not been explained by the prosecution.

46. He further argued that the licensee weapon belonging to the father of the appellant was stated to be used in the incident, was recovered and sent to Ballistic Expert report, but no report was received as the same is not on record.

47. Thus, on the basis of the aforesaid arguments, learned counsel for

the appellant has vehemently argued that conviction and sentence of the appellant by the trial Court is not sustainable, liable to be set aside by this Court and the appellant be acquitted.

48. Learned AGA on the other hand has submitted that the incident had taken place on 16.8.1983 at 8.40 A.M. and FIR of the same was lodged on the same day at 11 A.M. at the concerned police station which was registered under Section 307 I.P.C. She further pointed out that the FIR was written by PW4-Shambhoo Nath who happens to be real brother of the deceased on the dictation given to him about the incident by the injured Kailash Nath Dubey, who has categorically stated that it was the appellant who had fired shot on his back and he received grievous injuries and thereafter was taken to the hospital with the assistance of his brothers and subsequently during the course of treatment on 18.8.1983 at 6.20 A.M. injured Kailash Nath Dubey died in the hospital and the case was converted under Section 302 I.P.C. accordingly. She further pointed out that there appears to be dying declaration of the deceased also which was recorded by PW10- Anand Narain Anand who was Deputy Collector on 16.8.1983 at 12.45 P.M. in the hospital and in the said dying declaration the deceased while being injured has stated that it was the appellant who had shot him at his back, whereas co-accused Kripa Shankar who was his brother, had been assigned the role of exhortation. He further submitted that as the accused has also received injuries, as has been argued by learned counsel for the appellant and his injuries were also examined by PW3, hence, his presence at the place of occurrence is also well established. Thus, the participation of the appellant in the present case cannot be ruled out and the trial Court has rightly convicted the sentenced the appellant.

49. Having considered the submissions advanced by learned counsel for the parties and perused the lower court record as well as impugned judgment and order passed by the trial Court.

50. It is admitted to the parties that the FIR of the incident was lodged by the deceased Kailash Nath Dubey while he was injured in the incident on 16.8.1983 at 8.40 A.M. and he has categorically stated that on the exhortation of co-accused Kripa Shankar who happens to be real brother of the present appellant, the appellant shot the deceased with licensee gun on his back and he received serious injuries on his person and was rushed to the hospital by his brothers where he was admitted and on the dictation of the deceased to his real brother PW4-Sambhoo Nath the FIR of the present incident was lodged on the same day at 11 A.M. naming the appellant and his brother Kripa Shankar. Moreover, there appears to be dying-declaration of the deceased which was recorded by PW10-Anand Narain Anand who was Deputy Collector on 16.8.1983 at 12.45 P.M. in which he has also narrated the prosecution case and also stated that it was the appellant shot hit at his back at the exhortation of his brother Kripa Shankar with the licensee gun, on account of which he received injuries.

51. The argument of learned counsel for the appellant that PW1 Sheo Shankar and PW2 Radhey Shyam who were examined by the trial Court, as they claimed themselves to be eye witnesses of the occurrence, stated that they did not

see the appellant shooting at the deceased does not have any substance in view of the fact that the FIR of the incident was lodged by the deceased while he being injured on his dictation given to his real brother PW4 Shambhu Nath .

52. There is also a dying declaration of the deceased which also shows that it was the appellant who had shot dead the deceased with his licensee weapon as there was some dispute between them on the date of the incident while the deceased was irrigating his field, hence, the version given by the deceased Kailash Nath Dubey while he being injured and also in his dying declaration, is fully corroborated by the medical examination report of Kailash Nath Dubey as well as his post mortem report, in which it was found that he received firearm injuries on his back and during the course of medical treatment he died after two days of the incident.

53. The appellant had also received injuries in the incident as he was also examined by PW3-Dr. K.D. Sharma who examined the injured Kailash Nath Dubey, which further goes to show that he was present at the place of occurrence and the argument of learned counsel for the appellant that the injuries sustained by the appellant has not been examined by prosecution is hardly of significance as the incident had taken place while a quarrel took place between the parties at the agricultural field and the appellant with an intention to kill the deceased had filed at him which hit him on his back, which goes to show that the appellant had an intention to kill the deceased with deadly weapon, like gun. Even if it is presumed that during the quarrel which took place between the parties, the appellant was assaulted by the accused persons with lathis and he received only simple injuries and the force which was used by him was not proportionate to the injuries received by him and he shot dead the deceased with deadly weapon, i.e., licensee gun.

54. The finding recorded by the trial Court in convicting and sentencing the appellant appears to be correct and justified which cannot be interfered with by this Court, hence, conviction and sentence of the appellant by the trial Court is hereby upheld accordingly.

55. The appeal lacks merit. It is, accordingly, **dismissed.**

56. The accused appellant is on bail, his bail bonds are cancelled and sureties are discharged. He shall be taken into custody forthwith to serve out the sentence, as has been awarded by the trial Court.

57. Let a copy of this order along with the lower court record be sent to the trial Court concerned for its immediate compliance forthwith.

(2019)11ILR A1088

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 1558 of 1990

Khania ...Appellant(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sudarshan Singh.

Counsel for the Respondent:
Sri Amit Sinha, A.G.A.

A. Evidence Law-Indian Evidence Act, 1872 - Evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity - the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased - evidence having a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon - Relationship is not a factor to affect credibility of a witness - A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness - If evidence found intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness - appellant had caused gunshot injury on the vital part of the body, i.e. chest of the deceased, resulting his instantaneous death - manner in which the deceased was done to death clearly proves the case against the appellant under Section 302 - cannot be convicted under Section 304 Part-I or Part-II of IPC. - Trial Court rightly convicted the appellant. (Para 16,17,18,20,21)

Appeal dismissed (E-7)

Chronological list of cases cited:-

1. Anil Rai Vs St. of Bihar (2001) 7 SCC 318;

2. St. of U.P. Vs Jagdeo Singh (2003)1 SCC 456;

3. Bhagalool Lodh & anr. Vs St. of U.P. (2011) 13 SCC 206;

4. Dahari & ors. Vs St. of U.P. (2012) 10 SCC 256;

5. Raju @ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701;

6. Gangabhavani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298;

7. Jodhan Vs St. of M.P. (2015) 11 SCC 52).

8. Bur Singh & anr. Vs St. of Pun. (2008) 16 SCC 65

9. Sudhakar Vs St. AIR (2018) SC 1372

10. Ganapathi Vs. St. of T. N. AIR (2018) SC 1635

11. Harbans Kaur & anr. Vs St. of Har. (2005) AIR SCW 2074

12. Namdeo Vs St. of Mah. (2007) AIR SCW 1835

13. Sonelal Vs .St. of M.P., (20080 AIR SCW 7988

14. Dharnidhar Vs St. of U.P. & ors. (2010) 7 SCC 759)

15. Lavghanbhai Devjibhai Vasava Vs St. of Guj. (2018) 4 SCC 329

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 08.06.1990 passed by Sessions Judge, Varanasi in Sessions Trial No. 2 of 1990, convicting the appellant under Sections 302/149, 307/149 and 148 of IPC and sentencing him to undergo imprisonment for life under Section 302/149, seven years rigorous imprisonment under Section 307/149 and one year rigorous imprisonment under Section 148 of IPC, with a direction that all the sentences shall run concurrently.

2. As per prosecution case, deceased Kashi was a rickshaw puller and on 11.08.1988 at about 12:00 in the afternoon, when he was returning to his house for having his meal, accused appellant Khania and the absconded

accused Munna and Radhey stopped and asked him to transport stolen railways articles, however, the deceased refused to the said request. Hearing the reply of the deceased, accused persons got annoyed with him and threatened him for dire consequences. It is said that on 13.08.1988 at about 2:00 a.m., when deceased Kashi was sleeping in his house along with his wife Dasi (PW-2), children, whereas his father Jagarnath (PW-1) was sleeping at the western side of the courtyard, accused persons including the appellant gained entry in his house, pulled the deceased out, absconded accused persons caught hold of him, whereas the accused appellant caused a gunshot injury on his chest, resulting his instantaneous death. It is said that when Jagarnath (PW-1), father of the deceased, tried to save his son, he too was subjected to firearm injury. At 6:45 in the morning, FIR (Ex.Ka.15) was lodged by PW-1 against the appellant and absconded accused persons under Sections 148, 149, 302 and 307 of IPC. Inquest on the dead body was conducted vide Ex. Ka.4 on 13.08.1988 and on the same day, injured Jagarnath (PW-1) was medically examined vide Ex. Ka.3 by Dr. Umesh Chand Sharma (PW-4).

3. Body of the deceased was sent for postmortem which was conducted on 14.08.1988 by Dr. C.B. Tripathi (PW-3) vide Ex.Ka.-2. As per Autopsy Surgeon, following injuries were found on the body of the deceased:

*"1. Gunshot wound of entrance 2cm x 2½cm over front right side of chest 12cm outer to midline and 7cm below sternal notch. Blackening and tattooing present over front of both sides of chest and front and outer aspect of right forearm, elbow and lower Lt. of arm. Margins lacerated and inverted. The Missiles had passed through chest wall fracturing third right coastal cartilage and adjacent sternal bone right border, perforated pericardium, both sides abrasion pulmonary arteries and veins and superior angle tissue over vena cava perforated both sides lungs, pleur*a pressed towards left, perforated pleura and fracture 6th and 7th left side ribs on back."

According to autopsy surgeon, cause of death of the deceased was shock and haemorrhage as a result of injuries to heart and lungs.

4. But for accused appellant, other accused persons remained absconded and therefore, after filing of charge-sheet, the accused appellant was tried for the offence under Sections 148, 302/149, 307/149 of IPC.

5. So as to hold the accused appellant guilty, the prosecution has examined seven witnesses. Statement of accused appellant was recorded under Section 313 of Cr.P.C. in which he pleaded his innocence and false implication.

6. By the impugned judgment, the trial judge has convicted the appellant under Sections 302/149, 307/149 and 148 of IPC and sentenced him as mentioned in paragraph 1 of this judgment. Hence this appeal.

7. Learned counsel for the appellant submits:

(i) that accused appellant has been falsely implicated at the instance of one Ram Dayal, who was having illicit relation with Dasi (PW-2).

(ii) that statements of Jagarnath (PW-1) and Dasi (PW-2) are not reliable and the same are self contradictory.

(iii) that as per medical report of the deceased, only one gunshot injury was found on his body and, therefore, the appellant cannot be convicted under Section 302 of IPC and, at best, he can be convicted under Section 304 Part-I or Part-II of IPC.

(iv) that no independent witness has been examined by the prosecution and Jagarnath (PW-1) and Dasi (PW-2) being interested witnesses, are required to be ignored.

8. On the other hand, supporting the impugned judgment, it has been argued by the State counsel:

(i) that there is no reason for this Court to disbelieve the statements of Jagarnath (PW-1) and Dasi (PW-2), who appear to be natural eye-witnesses.

(ii) that incident occurred at 2:00 a.m. on 13.08.1988 inside the house and in the facts and circumstances of the case, no outsider could have been present in the house and, therefore, statements of Jagarnath (PW-1) and Dasi (PW-2) alone appear to be justified.

(iii) that the manner in which the deceased was done to death clearly proves the case against the appellant under Section 302 IPC.

(iv) that the medical report of Jagarnath (PW-1) also supports the prosecution case.

(v) that the manner in which the offence has been committed, under no circumstances, it can be diluted for the offence under Section 304 of IPC.

9. We have heard learned counsel for the parties and perused the record.

10. Jagarnath (PW-1), is a father of the deceased Kashi, states that his son was a rickshaw puller, whereas accused-appellant is resident of Taranpur. A few days prior to the incident, when he was in the godown, deceased came to him and informed that accused appellant and other accused persons were asking him to transport stolen articles by offering unlimited money and when he refused to do so, he was abused and threatened by the appellant and other accused persons. He states that the deceased also informed this fact to his wife Dasi (PW-2). On the day of incident, i.e. in the night intervening 12/13.8.1988, he was sleeping in the courtyard of his house, whereas deceased was sleeping in another room along with his wife and children. In the courtyard, an earthen lamp was burning and he saw that deceased was pulled out from his room, two persons were holding the deceased and then appellant fired on his chest. He states that the incident occurred in the courtyard. He has further stated that the incident has also been witnessed by Dasi (PW-2), wife of the deceased. He has further stated that absconded accused Munna fired aiming him as a result of which he suffered pellet injury. After hearing his shout and the shout of his family members, accused persons fled away from the spot. In cross-examination, this witness remained firm and has reiterated as to the manner in which the incident occurred. He has further clarified that earthen lamp was burning and there was sufficient light.

11. Dasi (PW-2) is a wife of the deceased, who at the time of occurrence, was sleeping with him. While supporting the prosecution case, she too has stated that her husband was done to death by the appellant, who caused gunshot injury on

his chest. She has also stated that earthen lamp was burning. In cross-examination, this witness also remained very firm and has not said anything, which may be of any help to the defence. She has further clarified that she knew the appellant very well as in the same area her sister is residing.

12. Dr. C.B. Tripathi (PW-3) conducted the postmortem on the body of the deceased and has proved the gunshot injury sustained by the deceased. According to him, cause of death of the deceased was shock and haemorrhage as a result of injuries to heart and lungs.

13. Dr. Umesh Chand Sharma (PW-4) medically examined the injured Jagarnath (PW-1) vide Ex.Ka.3 and the following injuries were found on his body.

"(1) Firearm injury - wound of entry, circular in outline, two in nos. margin inverted, scorching and tattooing present with swelling around 3½ cms x 1cm around on right side of scalp front side 5cm above right eye brow, singeing of hairs present, contact wound.

(2) Firearm injury - wound of entry - circular in outline, margin inverted, scorching and tattooing present on right side face 1cm outer to lateral angle of Rt. eye.

(3) Firearm injury - wound of entry, multiple in nos. in the area 19cm x 12cm on the back of Rt. upper arm, Elbow joint and forearm circular in out line, inverted margin, scorching & tattooing present.

- injuries are simple and caused by firearm

- duration - fresh.

- X ray advised to show the presence of pellets."

14. Bankey Bihari Singh (PW-5) is an Investigating Officer, has duly supported the prosecution case. Dina Nath Sharma (PW-6) is a constable, has recorded the FIR and Rajnath Yadav (PW-7) is a constable, who had assisted during investigation.

15. Close scrutiny of the evidence makes it clear that on 11.08.1988, there was some hot talk between the deceased and the accused persons and the deceased was threatened for dire consequences. In the night intervening 12/13.8.1988, the accused appellant along with other accused persons gained entry in the house of the deceased. The other accused persons pulled out the deceased from his room, caught hold of him, and then appellant caused gunshot injury on his chest, resulting his instantaneous death. Incident has been witnessed by Jagarnath (PW-1), father of the deceased and Dasi (PW-2), wife of the deceased. Both these witnesses have duly supported the prosecution case and have categorically stated that they saw the accused appellant committing murder of the deceased. The evidence of PW-1 and PW-2 have been duly supported by the postmortem report of the deceased. Most importantly, in the incident Jagarnath (PW-1) also suffered injury and his injury has also been proved by Dr. Umesh Chand Sharma (PW-4) vide Ex.Ka.3.

16. We find no substance in the argument of the defence that the statements of Jagarnath (PW-1) and Dasi (PW-2) are not reliable and the same are self contradictory, and they being interested witnesses, their statements are

required to be ignored. As per prosecution case, both these witnesses were present in the house, there was sufficient light of earthen lamp, and they saw the accused appellant committing murder of the deceased and the evidence of both these witnesses have been duly supported by the postmortem report of the deceased. There is no reason for us to disbelieve the statements of these two witnesses, who appear to be natural eye-witnesses. They appear to be trustworthy and their statements inspire the confidence of the Court. Their testimony cannot be discarded simply on the ground that they, being the father and wife of the deceased respectively, are interested witnesses. Law in this respect is very clear.

It is well settled principle of law that the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. All that the Courts required as a rule of prudence, not as a rule of law, was that the evidence of such witness should be scrutinized with a little care. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house when the only witnesses who could see the occurrence may be the family members. In such cases, it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness was scrutinized with a little care and the Court was satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration. 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. **(See Anil Rai vs. State of Bihar (2001) 7 SCC 318; State of U.P. vs. Jagdeo Singh (2003) 1 SCC 456; Bhagalool Lodh & Anr. vs. State of U.P. (2011) 13 SCC 206; Dahari & Ors. vs. State of U.P. (2012) 10 SCC 256; Raju @ Balachandran & Ors. vs. State of Tamil Nadu (2012) 12 SCC 701; Gangabhavani vs. Rayapati Venkat Reddy & Ors. (2013) 15 SCC 298; Jodhan vs. State of M.P. (2015) 11 SCC 52).**

17. The Supreme Court in the matter of **Bur Singh and Anr. vs. State of Punjab, (2008) 16 SCC 65** has held that 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. Further, the Supreme Court in the matter of **Sudhakar vs. State, AIR 2018 SC 1372** and **Ganapathi vs. State of Tamil Nadu, AIR 2018 SC 1635** relying in its earlier judgments held as under:

"18. Then, next comes the question 'what is the difference between a related witness and an interested witness?. The plea of "interested witness", "related witness" has been succinctly explained by this Court that "related" is not equivalent

to "interested". 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. In this case at hand PW 1 and 5 were not only related witness, but also 'interested witness' as they had pecuniary interest in getting the accused petitioner punished. [refer State of U.P. v. Kishanpal and Ors., (2008) 16 SCC 73] : (2008 AIR SCW 6322). As the prosecution has relied upon the evidence of interested witnesses, it would be prudent in the facts and circumstances of this case to be cautious while analyzing such evidence. It may be noted that other than these witnesses, there are no independent witnesses available to support the case of the prosecution."

Relationship is not a factor to affect credibility of a witness. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. A witness who is a relative of deceased or victim of the crime cannot be characterized as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness. **(See- Harbans Kaur and another vs. State of Haryana, 2005 AIR SCW 2074; Namdeo vs. State of Maharashtra, 2007 AIR SCW 1835; Sonelal vs. State of M.P., 2008 AIR SCW 7988; and Dharnidhar vs. State of Uttar Pradesh and Others & other connected appeals, (2010) 7 SCC 7**59).

18. We find no substance in the argument of defence that as per medical report, only one gunshot injury was found on the body of the deceased and, therefore, the appellant cannot be convicted under Section 302 of IPC and at best he can be convicted under Section 304 Part-I or Part-II of IPC. As per prosecution case, it is the appellant, who fired gunshot injury on the appellant, resulting his instantaneous death and the manner in which the deceased was done to death clearly proves the case against the appellant under Section 302 and therefore, he cannot be convicted under Section 304 Part-I or Part-II of IPC.

19. In the case of **Lavghanbhai Devjibhai Vasava vs. State of Gujarat (2018) 4 SCC 329,** following parameters have been laid down by the Apex Court as to whether a case would fall under Section 302 or Section 304 of IPC.

(a) The circumstances in which the incident took place;

(b) The nature of weapon used;

(c) Whether the weapon was carried or was taken from the spot;

(d) Whether the assault was aimed on vital part of body;

(e) The amount of the force used;

(f) Whether the deceased participated in the sudden fight;

(g) Whether there was any previous enmity;

(h) Whether there was any sudden provocation;

(i) Whether the attack was in the heat of passion; and

(j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

20. It is not a case where appellant had caused gunshot injury on non-vital part of the body of the deceased but he chose the vital part of the body, i.e. chest of the deceased and, therefore, under no stretch of imagination, his case would fall under Section 304 of IPC.

21. Taking cumulative effect of the evidence and after due appreciation thereof, the trial Court has rightly convicted the appellant and we find no infirmity in the judgment impugned.

22. Resultantly, the appeal fails and is hereby **dismissed.** The appellant is reported to be on bail. His bail bond stands cancelled and he be taken into custody immediately to serve the remaining sentence

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(2019)11ILR A1095

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1782 of 1998

Satte @ Sattan ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Dileep Kumar, Sri Radhey Shyam Yadav(A.C.), Sri Rajeev Gupta.

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

Criminal Law-Narcotics and Psychotropic Substances Act, 1985, Section 50 r/w 8/20 and 42. *'Charas'* recovered from the shirt pocket of the accused. Personal search of accused - compliance of section 50 NDPS Act - mandatory in nature and non-compliance would entail an order of acquittal - In a crime based on recovery of illegal drugs for which stringent provision in terms of procedure and punishment has been provided in the NDPS Act, it is necessary to ensure free and fair investigation without any objectionable features and infirmities - Presumption against innocence based on possession of illegal drug and shifting the burden of proof on accused requires fair and untainted investigation without any glimpse of malice, mischief, doubt, falsity, fabrication and prejudice to the accused - Fairness and purity in investigation is so necessary for criminal justice administration that without it fair trial will become a mockery and will result in miscarriage of justice - Trial court has ignored the shortcomings and lapse in the prosecution version, recovery process and evidence - finding of the trial court is perverse and illegal - Impugned judgment convicting and sentencing the accused - not sustainable under law - liable to be set aside**.**(Para 14,16,17,18)

Appeal allowed. (E-7)

List of cases cited: -

1. Jarnail Singh Vs St. of Pun. (2011) CRLJ 1738(SC)

2. Ajmer Singh Vs St. of Har. (2010) 3 SCC 746

3. St. of Pun.Vs Baldev Singh, (1999) 6 SCC 172 (Five Judge Bench)

4. T. Hamza Vs St. of Ker. (2000) 1 SCC 300

5. Megh Singh Vs St. of Pun. (2003) 8 SCC 666

6. Ajmer Singh Vs St. of Har. (2010) 3 SCC 746

7. Jarnail Singh Vs St. of Pun. (2011) CrLJ 1738(SC)1,

8. Kulwinder Singh Vs St. of Pun. (2015) 6 SCC 674

9. St. of Raj. Vs Ram Chandra (2005) 5 SCC 151

10. Vijaychand Chandubha Jadeja Vs St. of Guj. (2011) 1 SCC 609

11. Suresh Vs St. of M.P. (2013)1 SCC 550

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

1. This Criminal Appeal has been filed against the judgement and order dated 10.08.1998 passed by Ist-Additional Sessions Judge, Etawah in S.T No. 53 of 1994 (State Vs. Satte @ Sattan) has been convicted and sentenced for the offence under Section 8/20 NDPS Act, Police Station Bharthana, District Etawah and sentenced for 10 years rigorous imprisonment and Rs. 1 lakh fine and, in default of payment of fine, for additional sentence of 3 years.

2. The brief facts of the case is that in the night of 03/04.02.1993 SI D.P. Awasthi of Police Station Bharthana was on patrolling duty along with constable Hari Shanker and Maharani Deen Mishra. On information received from a informant that Satte alias Sattan, accused of crime no. 422 of 1992 under Section 392 IPC is present along with looted tyre of bus with rim near the southern railway bridge of station and is about to carry the tyre by train to Etawah. After receiving this information, the police proceeded towards the above mentioned place and on the pointing of the informer, while the accused was trying to run away, he was arrested at about 2:30 AM at ten pace away from the bridge after using necessary force. He disclosed his name to be Satte @ Sattan and on his search 20 gm Charas was recovered from the pocket of his shirt and the tyre of Bus along-with rim and tube. He was taken into custody after informing the reason of his arrest. The recovered Charas was sealed in a clothe and recovery memo was prepared. A copy of recovery memo was given to the accused and he was brought to the Police Station Bharthana along with sealed Charas, Tyre and rim. On the basis of recovery memo, offence was registered under Section 18/20 NDPS Act. During investigation, statement of the witnesses were taken, site-map prepared and recovered Charas was sent for chemical examination for analysis. After investigation, charge-sheet was submitted against accused for the offence under Section 18/20 NDPS Act. Accused was summoned and charge was framed under aforesaid Section. Accused pleaded not guilty and claimed trial.

3. Prosecution examined only one witness SI D.P. Awasthi as PW-1 who proved recovery memo as Ex. Ka-1. Statement of accused was recorded under Section 313 Cr.P.C, who denied the recovery of Charas from his possession and stated that he has been falsely implicated on account of enmity. He also stated that he was arrested from his house. He did not adduce any evidence in defence.

4. After hearing the learned counsel for the accused and learned ADGC (Criminal) for State and perusing the evidence on record, the learned trial court by impugned judgement convicted and sentenced the accused-appellant.

5. Aggrieved by the conviction and sentence, this appeal has been filed and the impugned judgement has been

challenged to be illegal and without jurisdiction as the offence was not proved against the appellant. Evidence was wrongly appreciated to hold the appellant guilty. There was no compliance of the mandatory provisions of Section 42, 50 and 57 of the N.D.P.S Act and for that reason the whole proceeding is vitiated. Therefore, the impugned judgement is liable to be set aside and the accused-appellant is entitled for acquittal.

6. In his statement SI D.P.Awasthi has stated on oath that at the time of incident he was posted at Police Station Bharthana. On 03.02.1993 and in the night when he was on patrolling duty with constables Harishanker and Maharani Deen Mishra, he received information regarding the accused who was wanted in crime no. 422 of 1092 under Section 392 IPC reportedly sitting near the bridge of Bharthana Railway Station along with looted tyre and rim and he was likely to escape with the looted articles by train. He tried to procure public witnesses, but nobody came forward to be witness. He reached near Railway bridge at about 2:30 AM and on the pointing of the informant when accused Satte @ Sattan tried to run away from there, by using necessary force he was arrested. When search was conducted, 20 gm Charas was recovered and tyre-tube and rim were also recovered from his possession. Recovered Charas was sealed on spot and the recovery memo was prepared which is Ex. Ka-1, on which the police official signed. The recovery memo was prepared in the light of torch, thereafter, the accused was taken to Police Station and the case was registered against him. In the cross-examination the witness has stated that he did not remember by what time he went from Police Station nor he has any GD with him. At the time of patrolling he had torch, revolver and other constables were having gun with them. They were also having various instruments. He has, however, stated that weight of the recovered Charas was not taken by him and he wrote the weight of the recovered Charas just by guessing. Electricity was there on the Railway Station but they used torch for the purpose of light. There is no Police Chauki of GRP on the Railway Station.

7. It has been argued from the side of the appellant that mandatory provisions of Section 50 NDPS Act was not complied with nor there was any witness nor corroborating evidence was given from the side of prosecution. The police papers like charge-sheet, FIR and GD were not proved by any witness. The prosecution failed to establish the guilt, even though the learned trial court convicted the appellant.

8. Learned AGA has, however, submitted that on the basis of cogent evidence on record, the learned trial court has given logical finding and the accused-appellant has been rightly convicted and sentenced him.

9. The report dated 28.02.1994 of the chemical examination is on record which shows that on analysis, the recovered article was found to be Charas.

10. From the perusal of the recovery memo, which has been proved as Ex. Ka-1 by PW-1, it appears that on search Charas was recovered from the pocket of accused's shirt which was 20 gm. There is no evidence on record that the recovered Charas was measured by any weighing machine whereas it was necessary that

recovered Charas must have been measured with all exactness on a weighing machine and the sample which was taken out for chemical examination, should have been also measured with all accuracy. It has been admitted by the PW-1 that the quantity of the recovered charas and the sample has been mentioned in the recovery memo on basis of guess work and the same was not measured. A crime based on quantity of illegal contraband, requires that the recovered contraband should be weighed with all accuracy and the same should be proved before the court. Moreover, the recovered charas was not produced and proved by prosecution before the learned trial court during trial. In order to prove the offence against the accused, it was necessary and this lapse and failure is fatal for the prosecution.

11. With regards to the availability of witnesses at the time of recovery of Charas, the recovery memo contains stipulation that nobody came forward to be witness of recovery but the police witnesses who were witness of recovery have not been examined in support of the single witness of the recovery. The absence of independent public witness is also very crucial in such kind of situation where the police had the early information. It is true that it is not always necessary to have a public witness during recovery and it depends upon the facts and circumstances of each case. It has been held in **Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC) and Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746,** it has been held by the Supreme Court that *the obligation to take public witnesses(independent witness) is not absolute. If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated.* The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating their evidence. Therefore, it was incumbent for the police team to conduct search before public witness as it was having prior information and sufficient time to involve public witness during search. But it appears that serious effort was not made by police and this further makes the whole search seriously suspicious.

12. Another argument has been with regard to compliance of mandatory provision of section 50 of NDPS Act. The learned Amicus Curiae Sri Radhey Shyam Yadav for the appellant has argued that the police did not comply with the mandatory provision of section 50 of the NDPS Act.

13. Section 50 of NDPS Act is as follows:

"Section 50: Conditions under which search of person shall be conducted:-

(1) When any officer duly authorized U/s. 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazettted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he

can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

6. After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

14. Section 50 provides reasonable safeguard to the accused before search of his person is made by an officer authorised under section 42 of the Act to conduct search. In **State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172 (Five Judge Bench),** it was settled by the supreme court that search of person u/s 50 of the NDPS Act does not include search & recovery from bag, briefcase and container etc. Sec. 50 applies where personal search of a person is involved. In **T. Hamza vs State of Kerala, (2000) 1 SCC 300,** it has been clarified that section 50 has been incorporated to provide statutory safeguard to lend credibility and fairness and to avoid arbitrariness keeping in view the severe punishment prescribed in the statute. It has been further clarified in **Megh Singh vs State of Punjab, (2003) 8 SCC 666,** that section 50 applies only in case of personal search of a person and does not extend to search of a vehicle, container, bag or premises. In **Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746 and Jarnail Singh vs. State of Punjab, 2011 CrLJ 1738(SC)1,** the above view was further affirmed.

15. In **Kulwinder Singh Vs. State of Punjab, (2015) 6 SCC 674** Where bags containing poppy husk were seized from truck in his the accused were sitting, it has been held by the Supreme Court that it was not a case of personal search of the accused and Section 50 of the NDPS Act, 1985 was not attracted as Section 50 only applies in case of personal search of person and not applicable to search of vehicle, container, bag or premises.

16. In this instant case, the prosecution version is that the illegal charas was recovered from the accused from his pocket of shirt he was wearing at the time of search. PW-1 has admitted it and the same finds mention in the recovery memo. Clearly, it was a personal search of accused and therefore, compliance of section 50 NDPS Act was necessary. Neither in the recovery memo nor in the testimony of PW-1 it has been anywhere mentioned that the accused was informed about his right of being searched before a magistrate or gazetted officer. It has been held in **State of Rajasthan vs Ram Chandra, (2005) 5 SCC 151 and Vijaychand Chandubha**

Jadeja vs State of Gujarat, (2011) 1 SCC 609 that section 50 provides additional safeguard and stress is on adoption of just, fair and reasonable procedure and the first requirement is to inform the suspect about existence of such right. None of the documents prepared during search shows that the police team communicated the accused of his right to be searched before gazetted officer. In **Suresh vs State of MP, (2013) 1 SCC 550,** it has been held that section 50 is mandatory in nature and non-compliance would entail an order of acquittal.

17. In a crime based on recovery of illegal drugs for which stringent provision in terms of procedure and punishment has been provided in the NDPS Act, it is necessary to ensure free and fair investigation without any objectionable features and infirmities. Presumption against innocence based on possession of illegal drug and shifting the burden of proof on accused requires fair and untainted investigation without any glimpse of malice, mischief, doubt, falsity, fabrication and prejudice to the accused. Fairness and purity in investigation is so necessary for criminal justice administration that without it fair trial will become a mockery and will result in miscarriage of justice.

18. From the above discussion, it is clear that the police team did not inform the accused of his right to be searched before a gazetted officer or magistrate. Despite sufficient time and prior information, no serious effort was made to involve public witness in the process of search and recovery. It also appears that no witness has been examined in order to prove the site map, chick F.I.R or the charge-sheet. Thus none of the police papers which have been prepared during the course of investigation has been proved and in absence of any proof of those papers they are not admissible in evidence. It appears that proper proceeding for conducting trial in terms of adducing and proving the case by producing formal witnesses has not been followed. There is no reason in the whole judgement which can explain why this illegality took place and why the formal papers were not proved by producing any witness. I find the whole finding has been reached without observing due procedure and the findings of conviction is completely vitiated. The learned trial court has ignored the shortcomings and lapse in the prosecution version, recovery process and evidence and the finding of the learned trial court is perverse and illegal. The impugned judgment convicting and sentencing the accused is not sustainable under law and is liable to be set aside.

19. The appeal is therefore **allowed.** The judgement and order dated 10.08.1998 passed by Ist-Additional Sessions Judge, Etawah in S.T No. 53 of 1994 convicting and sentencing accused-appellant Satte @ Sattan for the offence under Section 8/20 NDPS Act, Police Station Bhathana, District Etawah is set aside and consequently, accused-appellant **Satte @ Sattan is acquitted.**

20. The Amicus Curaie Sri Radhey Shyam Yadav shall be paid Rs. Ten Thousands only for the assistance and legal service provided by him in conducting this appeal for the accused-appellant.

21. Office is directed to transmit the lower court record along with copy of this

judgment to the learned court below for information and necessary compliance.

(2019)11ILR A1101

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No.- 1832 of 1979

Raja Singh & Anr. ...Appellants(In Jail)
Versus
State Of U.P ...Opposite Party

Counsel for the Appellants:
Sri A.K. Srivastava, Sri Anoop Trivedi, Sri C.B. Singh, Sri S.N. Tewari, Sri Mahipal Singh, Sri P.N. Saxena, Sri Prashant Kumar Singh, Sri Vikrant Rana, Sri Guru Prasad Mishra.

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

A. Evidence Law-Indian Evidence Act, 1872 – Murder trial – Minor contradictions overlooked – some contradictions are bound to occur when ocular evidence is recorded after a long gap, as memory of the witnesses is bound to fade due to passage of time - P.W.1 and P.W.9 are the eye-witnesses of the occurrence - support has been found of the prosecution case which is fully corroborated by the medical evidence - trial court has given a cogent finding regarding the discrepancies in the police papers prepared during the inquest proceeding - the trial court was perfectly right in believing their evidence and coming to the conclusion that it was the accused-appellant who had shot dead the deceased who died on account of fire-arm injury - prosecution proved it's case beyond reasonable doubt against the accused-appellant.- the participation of the accused-appellant is well established by the prosecution evidence -the trial court has rightly convicted the appellant for the offences - no infirmity or illegality in it's judgment - conviction and sentence of the appellant by the trial court - upheld. (Para 29,30)

Appeal dismissed (E-7)

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

1. The present criminal appeal has been preferred by the appellants against the judgment and order dated 31.5.1979 passed by Addl. Sessions Judge, Kanpur in S.T. No.206 of 1977 convicting the appellant Raghubhushan Singh u/s 302 IPC and sentencing him to life imprisonment and to pay fine of Rs.1000/- and in default of payment whereof to undergo six months R.I and further convicting the appellant Raja Singh u/s 302 read with Section 109 IPC and sentencing him to life imprisonment and to pay fine of Rs.1000 and in default of payment of fine, he shall undergo 6 months R.I.

2. The appellant Raja Singh has died during the pendency of the present appeal and the appeal on his behalf has been ordered to be abated by coordinate Bench of this Court vide order dated 28.1.2019. Hence, the present appeal now survives with respect to appellant Raghubhushan Singh for consideration by this Court and we proceed to hear the appeal on behalf of the said appellant.

3. The prosecution case as set-up in the FIR by the informant Chandra Pal stating that there was old enmity going on between him and Raja Singh Thakur of his village. On 25.2.1977, there was a marriage ceremony of niece of one Chotey Lal Baniya of his village where he along with his father were invited. He

along with his father Raghunath had gone in the said marriage and Dwarchar was going on. At about 10 p.m. in the night Raja Singh along with his sons Raghubhushan Singh, Shiv Bhushan Singh, Shashi Bhushan Singh and younger son of Raja Singh along with Krishna Gopal Brahman and Sabal Singh came with a common object. Raghubhushan @ Bade was armed with gun and as soon as they came there, Raja Singh exhorted and stated that luckily Chandrapal and Raghunath have met and uttered *"Maar Do Saalon Ko Hamesha Ka Kanta Door Ho Jaaye"* on which Shiv Bhushan Singh, Shashi Bhushan Singh and younger son of Raja Singh caught hold of the informant Chandrapal and Krishna Gopal and Sabal Singh caught hold of his father Raghunath Singh and Raghubhushan Singh @ Bade fired by his double barrel gun which hit in Abdomen of the father of the informant who had fallen down and at that moment Raja Ram, S/o Ram Dayal, Subhash, S/o Ram Gopal Pandey, Babu Lal, S/o Badalu R/o Sakinan Tilsahari Buzurg and Babadeen, S/o Pattar Ram Ratan, S/o Surajdeen, village Subhauli who were present in the marriage and had witnessed the said incident, had challenged the accused who had fled away. He had carried his father with the assistance of the witnesses and proceeded to the hospital and at the outskirts of the village his father had died. He had brought the dead-body of his father at the doors of his house and kept the same in the night and did not go to lodge an FIR of the incident because it was night. He requested for lodging report for taking necessary action.

4. On the basis of the written report submitted by the informant Chandrapal, an FIR was registered at Police Station Maharajpur as Case Crime No.49 of 1977 under Section 147, 148, 149, 302, 323 IPC P.S. Maharajpur, district Kanpur which is Ext.Ka-4 which is at a distance of 3 miles from the place of occurrence at 6.20 a.m., the next morning. The Chik FIR Ext.Ka-11 was prepared in the presence of Banshdhari Singh, Sub-Inspector of the concerned police station. The case was registered at general diary no.7 as Ext.Ka-12 on the same day. The investigation of the case was taken over by the Station Officer S.I. Banshdhari Singh, P.W.10 who recorded the statement of Chandrapal, informant and thereafter proceeded to the place of occurrence. He was accompanied by Girja Singh Yadav, S.I. (P.W.11) and some constables. The said Girja Singh Yadav, S.I. prepared the inquest report on the instructions of P.W.10 on the dead-body of the deceased as Ext.Ka-5 and he also prepared Challan Nash as Ext.Ka-13, letter to R.I Ext.Ka-14, letter to C.M.O Ext.Ka-15. He also prepared Photo Nash as Ext.Ka-16, sample of seal as Ext.Ka-17. After sealing the dead-body, he handed over the same to constable Chhote Lal and constable Ram Raj Singh for being carried to mortuary. The dead body was taken to the headquarter at 4.10 p.m. the same day and from there to mortuary. The I.O Banshdhari Singh, P.W.10 prepared the site-plan of the place of occurrence. It took into possession the blood-stained cloth (gamcha) which was tied to the wound of Raghunath and sealed it and prepared memo Ext.Ka-8. He prepared the site-plan of the place of occurrence as Ext.Ka-6 and also recorded the statement of the witnesses present at the place of occurrence. He took into possession Petromax lanterns produced by Chhote Lal and examined them and also returned them to Chhote Lal and prepared memo Ext.Ka-1.

5. After completing the investigation, the Investigating Officer submitted charge sheet Ext.Ka-10 against the accused. The charges were framed by the trial court against the accused persons who denied the charges and claimed their trial.

6. The prosecution in support of it's case has examined Babu Lal P.W.1, Babadin P.W.2, Ram Ratan P.W.3, Subhash Chand Pandey P.W.4, Raja Ram P.W.5, Chhote Lal P.W.6, Dr. R.C. Yadav P.W.7, Dr. H.O.P. Jha P.W.8, Chandra Pal P.W.9, Banshdhari Singh S.I. P.W.10 and Girja Singh Yadav, S.I. P.W.11.

7. The accused in their statement u/s 313 Cr.P.C have denied the charges levelled against them and have stated that there was a dispute with Babu Lal with respect to a tree on account of which there was some animosity between the parties and the accused side has also supported the rival candidate Sushila Rohatgi against Chandrapal, both Babu Lal and Chandrapal were deposing against them on account of the said animosity.

8. P.W.1 Babu Lal had deposed before the trial court that he participated in the marriage of the niece of Chotey Lal Baniya. Raghunath was murdered at the doors of the house of Chotey Lal Baniya at 8.5 p.m. where the Barat of his niece had come. Raghunath was also invited in the said marriage along with his son Chandrapal and he was also present at the time of 'Dwarchar'. At that time Subhash Chand Pandey was also present along with Raja Ram, Ram Ratan who had gone in the night and he remained there till Raghunath was carried by his son on a bullock-cart and he was taking the bullock-cart to the police station but at the outskirts of the village, Raghunath had died due to fire shot which was fired in his presence. Raghunath was shot in the corridors of Chotey Lal Baniya which was at the Southern side adjacent to courtyard (angan) of Chotey Lal Baniya. In the courtyard, there was patromax light. Rajaram, Subhash Pandey, Babadeen and Ram Ratan were present when Raghunath sustained gun-shot injuries. He was at the distance of 2-3 paces North when Raghunath sustained gun-shot injuries. The person who shot at Raghunath was on the Eastern side. Prior to receiving of gun-shot injuries by Raghunath, there was scuffle between the parties. The person who has shot-dead the deceased, he was accompanied by six persons and they were also indulging in marpeet with Chandrapal and were also scuffling with Raghunath. The shot was fired by Raghubhushan. The person who had fired shot at the deceased and his companions were not in the Barat but they had come separately and all of them have come together. They had come ten minutes prior when the deceased received gun-shot injuries. Raghubhushan had come with gun and along with him Raja Singh, Shashi Bhushan Singh, Shiv Bhushan Singh, Santosh Singh, Sabal Singh, Ram Gopal had come and all of them belongs to his village and they were known to him from before. Raja Singh was carrying a wooden stick (Baint) and Raghunath was having a lathi. Chandrapal was empty handed. Raghunath could not use his lathi as he did not had a chance to use the same. When all the seven accused persons had come, then he was present. There was scuffle going on. The accused Shiv Bhushan, Shashi Bhushan, Santosh were having scuffle with Chandrapal and deceased Raghunath was caught-hold by accused Sabal and Ram Gopal and Raja

Singh exhorted and uttered *"Mauka Mil Gaya Hai Maar Do Saalon Ko"* on which Raghunath Singh was shot dead and after receiving injuries, the accused fled away. When the shot was fired then all the witnesses raised alarm and stated what has happened, has happened and nothing further should be done. The shot was fired on the right side on the abdomen of the deceased. He stated that immediately cloth (angocha) was tied on the wound. The blood had not fallen there. He further stated that he does not remember the parentage of Ram Gopal and he named the said accused to be Krishna Gopal and stated that he has wrongly stated his name to be Ram Gopal. When the police had arrived, the dead-body of the deceased was at the doors of his house and the police had come in the next morning after the sunrise and both the Sub-Inspector along with 2-3 constables and the C.O had arrived together. The inquest report was prepared at the doors of the deceased and he was also one of the Panches and he proved the Panchnama dated 26.2.1977 identifying his signatures on the same. He did not visit the place of occurrence along with Investigating Officer. The deceased was wearing Baniyan which was stitched and also dhoti/lungi and was not wearing any kurta or shirt.

9. In the cross-examination, the witness has stated that he knows Vikram Singh of his village but is not aware of the fact that Vikram Singh is a relative of accused-appellant Raja Singh as he happens to be *'Sardhu'* of Raja Singh. There is a civil litigation going on against the said witness with respect to agricultural field. He further showed his unawareness that Vikram Singh had lodged any report against him in the year 1963 for any criminal intimidation or the cutting of the crops of the agricultural field. In the cross-examination of the said witness many instances have been shown regarding the inimical relationship of the said witness with the accused persons showing that he is falsely deposing against the accused persons. Though he has denied that due to inimical relationship he is deposing against the accused. It has further been stated that the incident has taken place in the village Tilsahri Khurd and the place where the incident has taken place, his house is 1 and ½ furlong. He further stated that he could not tell whose sons marriage was being solemnized and from where Barat had come. He knows Chotey Lal Baniya and his family members who has four brothers and one has died. His three brothers are Shiv Narain, Panna Lal and Chotey Lal. He does not know name of the sons of Chotey Lal Panna or Shiv Narain. He has only formal acquaintance with Chotey Lal and there is no close relationship with him. Chotey Lal has not given any invitation to him and he had gone to the marriage just to see and the crackers which were being burnt in the marriage and because of this reason, he has gone there. He further stated that about 2000 persons had arrived at the doors of Chotey Lal Baniya of village Tilsahri Buzurg and Tilsahri Khurd and he could not tell how many Barati had come in the said marriage and he was standing 15-20 paces towards the South of the door of Chotey Lal Baniya. The deceased Raghunath had received gun-shot injury at the Southern side of the house of Chotey Lal Baniya where he was present and the said way goes towards the village Tilsahri Buzurg. The patrolling police party was not at the doors of the house of Chotey Lal Baniya and when he reached

there, he did not saw any police personnel. The dead-body of the deceased Raghunath was lying at the doors of his house throughout the night on the Chabutra under the Chappar and after keeping the dead-body there, he went back to his house. No police person had arrived till the time he had kept the dead-body and left the place. The police had arrived on the next day in the morning and like other villagers, he had also reached at the doors of deceased Raghunath and had not gone at the place of occurrence and when he reached there, he saw the police persons present and there was no Jeep standing there. He remained there for about an hour and thereafter went back to his house. He did not know that what time the dead-body of the deceased was sent for post-mortem. He again stated that the dead-body was sent on bullock-cart. When he was present at the place of occurrence, the Investigating Officer did not interrogate him and thereafter till date he did not interrogate him or made any query from him. He did not go outside the village on the same day and remained at his house o the agricultural field. When he had gone to see the Police then the son of Raghunath namely Chandrapal had met him.

10. In his further cross-examination he has stated that Raghunath was having licensee gun but he was not carrying the same at the time of the incident. When he reached the Barat was not welcomed in his presence and he had left the place before the Barat was welcomed. He had not disclosed the fact before today to any one that he had taken the dead-body of the deceased on a bullock-cart to the police station. He had further not disclosed before today to any one that Subhash Pandey, Babadeen and Ram Ratan were near to him at the time of shooting and Raja Ram, Raghunath were facing towards East and he was facing towards South and the witness was facing towards South. Today for the first time he stated the fact that at the time of shooting at Raghunath he was 2-3 paces towards North. Today for the first time he has stated that the person who has shot at the deceased Raghunath was on the Eastern side. He further deposed that he had not stated to anyone prior today that the persons were indulging in maarpit and were scuffling with him and the fact that Raja Singh was carrying wooden stick (Baint) with him, the said fact he has stated today for the first time. He has also stated the fact for the first time that Raghunath was carrying lathi. He has also stated the fact for the first time that when the deceased sustained gun-shot injury then everyone screamed and tried that whatever has happened, has happened and further nothing should be done. He denied the suggestion that all the above fact which he has narrated has been stated by him in the Court on account of tutoring. Raghubhushan Singh was at a distance of 1.5 yard at the time of firing and Chandrapal was on the North side of deceased Raghunath and Raghubhushan was on the North-Western side at about 2-2.5 yards distance. The scuffle and maarpit took place for about half an hour and the persons who were present there were trying to pacify the parties and during that period, shot was fired. The persons who have murdered the deceased had left towards East and no one had assaulted them. The accused Sabal Singh and Krishna Gopal had left the witness prior to few minutes when the deceased Raghunath was shot. When Raja Singh had exhorted by uttering *"Maar Do*

Saalon Ko" at that time Sabal Singh and Krishna Gopal had caught-hold of the deceased Raghunath and accused Raja Singh was at a distance of 2-2.5 yards to the North side and the persons who have gathered there, the accused were surrounded by them and scuffle was going on and the people were trying to separate the accused party and the deceased and the informant and other side. He further deposed that he cannot give reason as to how the Investigating Officer recorded the statement u/s 161 Cr.P.C. in the case diary and further could not tell that how in his statement u/s 161 Cr.P.C., it has been written by the Investigating Officer that Krishna Gopal and Sabal Singh had caught-hold of Raghunath and Raghubhushan Singh fired at Raghunath by his licensee gun. He deposed that he did not frequently visit at the police station and with respect to the present case he did not ever visit to the police station. He denied that he had gone to the Police Station for lodging the FIR with Chandrapal. He did not accompany the Station Officer from the Police Station. He further could not tell the reason as to how the Investigating Officer has written in his statement that he had gone along with Chandrapal for giving an information about the incident to the Police Station and thereafter he came with the police. He further deposed that at the time while coming of the Barat/Dwarchar, the persons who have licensee weapon, they celebrate by firing in air. He did not see any person carrying gun but subsequently he stated that he saw many persons with the gun and they had fired in the air. He denied that he has not seen the incident and further denied that because of enmity and party-bandi he is falsely deposing against the accused.

11. P.W-2 Babadin in his deposition before the trial court has stated that though Raghunath had been murdered but he came to know about it after about 10-12 days and does not know where Raghunath had been murdered. He denied that he participated in the Barat of at the house of Chotey Lal and he turned hostile.

12. P.W-3 Ram Ratan in his deposition before the trial court has also stated that he had heard that Raghunath has been murdered near the house of Chotey Lal but denied his presence at the place of occurrence.

13. P.W-4 Subhash Chand Pandey has also tried to conceal the fact about the murder but on persistent questioning, he stated that he was hearing for the last about one and half year that Raghunath has been murdered. He denied that he has participated in the marriage and he came to know about the murder in the morning.

14. P.W.5 Raja Ram has also deposed that he has only heard about the murder of Raghunath and denied his participation in the marriage party. He admitted that his son Braj Kishore is an accused in a murder case but he was not aware of the fact that against his son, the Thakurs of Gangaganj are witnesses and further he was ignorant about the fact that the Thakurs of Gangaganj are having some relationship with the accused Raja Singh.

15. P.W.6 Chhote Lal whose niece's marriage was being solemnized on the day of the incident has stated that it was at about 9 p.m. and his guest were gathered at his door and preparation of reception of Barat was being made. He did not see Raghunath and Chandrapal as he was busy in *'Dwarchar'* on the way towards West of his house. He came to

know in the morning next day that Raghunath has been shot dead. He further admitted that Patromax were burning at his door. He produced the said patromax in the court which are Ext.1 to V. He stated that he had not invited Raghunath and Chandrapal as he has no relation with them. He further deposed that 8-9 persons were having guns in their hand and participated in the Barat. The shot were fired at the time of reception of *'Dwarchar'*. He further stated that five police constables had come in the evening and stayed throughout night as he had made an application for police guard because of some dacoity had take place in nearby area of the village.

16. P.W.7 Dr. R.C. Yadav has deposed before the trial court that he was posted as Medical Officer in K.P.M. Hospital, Kanpur on 27.2.1977. On that day at about 1.30 p.m. in the afternoon, he had conducted the post-mortem of the deceased Raghunath whose dead-body was brought by the constable Chotey Lal and Ram Raj Singh who had identified and found following ante-mortem injuries on his person:-

One gun shot wound of cavity 3 cm. x 2 cm. on abdominal cavity deep at the right side of abdomen 7 cm. above and lateral from umbilicus through which part of loop intestine coming out. Blackening and scorching is present. Margins are inverted.

According to him, it was gun shot wound. He had found 1500 cc blood in the cavity and 200 grams semi digested food in the stomach and liver lacerated at many places. He had stated that he recovered two pieces wadding and 37 metallic pallets embaded I the liver. According to him the death had taken place near about 10 p.m. on 25.2.1977 due to gun shot wound producing shock and haemorrhage being cause of death. He corroborated by his report Ext.Ka-2.

He has proved post-mortem as Ext.Ka-2. The cause of death in the opinion of doctor was due to shock and hemorrhage as a result of gun-shot injury.

17. P.W.8 Dr. H.O.P Jha has also deposed before the trial court that he was posted as E.M.T Surgeon at H.M. Hospital, Kanpur on 26.2.1977. On the said day at 4.15 p.m. in the evening he was on emergency duty and he has performed medical examination of the injuries of the injured Chandrapal Singh, S/o Raghunath Singh and found following injuries on his person and proved the injuries as Ext.Ka-3:-

1. Abrasion linear ¼ cm. over gum margin of upper right central incisor tooth.

2. Abrasion linear over chick outer of gum left side 1 cm.

3. Abrasion two linear over neck left side upper and outer part ½ cm. deep with gap of 2.5 cm.

4. Abrasion two linear over neck left side lower front part ½ cm. deep with gap of 3 cm.

5. Laceration on neck on front part 8 cm. x 1.5 cm. below prominence of larynx vertical.

6. Abrasion linear on left ear middle ¼ cm. x ¼ cm.

7. Abrasion on left thigh on upper and outer part 1.5 cm. x ¼ cm.

Injuries simple caused by blunt object. All injuries were fresh and duration was about one day.

18. In his opinion the injuries could be self inflicted.

19. P.W.9 Chandrapal who is the informant of the case has deposed before the trial court that the deceased Raghunath was his father and there was often quarrel between him and accused Raja Singh with respect to water drainage as their agricultural field were adjacent to each other. Raghubhushan, Shashi Bhushan and Shiv Bhushan, Braj Bhushan @ Santosh are the sons of Raja Singh. Sabal Singh and Krishna Gopal are known to Raja Singh. On the day of the incident, at 9-10 p.m. in the night, there was marriage at the house of Chotey Lal Baniya. He and his father were the frequent visitors at his house and both of them had gone there on the day of the incident. There was sufficient source of light and Barat was coming from the Western side towards the house of Chotey Lal Baniya. He was standing on the Southern side of the house of Chotey Lal Baniya and his father was just near him and were watching the Barat coming and Barat was at a distance of 10-15 paces and Dwarchar was going on. From the Eastern side all the accused came and Raja Singh was carrying a wooden stick whereas Raghubhushan was armed with double barrel gun and rest of the accused were empty handed. As soon as Raja Singh seen them, he exhorted and stated that he (Chandrapal) and Raghunath have been found incidently and said that they should be killed on which Shashi Bhushan, Shiv Bhushan and Braj Bhushan @ Santosh had caught-hold him and started assaulting him with fists whereas Sabal Singh and Krishna Gopal had caught-hold of his father and entered into scuffling with him. Raja Singh again exhorted on which Raghubhushan Singh the accused-appellant had fired shot at his father which hit him in his abdomen and his father had fallen there. The shot was fired at a distance of 2-1/2 paces and the persons who had caught-hold the deceased have left him and then the fire was shot at the deceased. The said incident was witnessed by Raja Ram, Subhash, Babu Lal, Ram Ratan, Babadin and many other persons. The persons who have witnessed the incident had challenged the accused and stated not to quarrel and uttered *"Yah Kya Kar Rahe Ho Jo Kiya Ho Gaya Aur Kuch Nahi Karna"*. Thereafter the accused had fled away. Thereafter he lifted his father from there and put him on the bullock-cart and proceeded to the police station and when he reached the outskirts of the village, his father died and thereafter he returned and kept his dead-body at the doors of his house on Chabutra and before lifting his father from the place of occurrence, he had taken one Gamcha (cloth) and tied on his wound. On the next day at about 6.30 a.m., he reached the police station for lodging the report and he did not go to the police station in the night because of fear. He wrote the report at the police station himself and thereafter submitted the same on the basis of which the FIR was registered against the accused persons. Thereafter the Station Officer has recorded his statement u/s 161 Cr.P.C. at the police station and then Station Officer along with Circle Officer and police constables went to his house along with him and he has proved the written report as Ext.Ka-4 which he has written in his own handwriting and signatures. He has also received injuries in the incident and his medical examination report was conducted on the next day in the afternoon at Ursala Hospital. He has further stated that Gamcha (cloth) was taken into custody by the Investigating Officer and was sealed and a memo was also prepared. The inquest on the dead-

body of the deceased was also conducted. The place where his father had fallen, it was cleaned and water was found. No empty cartridge, pellet etc. were recovered from the place of occurrence by the Investigating Officer.

20. In his cross-examination this witness has deposed that the invitation was in the name of his father on which his name was also there. He has two brothers and the name of his brother Ram Pal was not mentioned in the card. The said card was shown to the Investigating Officer and the same was not taken in his custody but he again stated that he did not remember. He stated that he had written the FIR in short and has not mentioned about the fact of tighting the Gamcha (cloth) on the wound and has not stated about the said fact to anyone prior today. He denied that the said fact has been stated by him on account of tutoring. His father was wearing lungi and baniyan which was of cotton. Gamcha was not blood-stained fully. He did not remember the colour of the Gamcha. The said Gamcha was not produced in the Court. The dead-body of the deceased was lifted from the place of occurrence and put on the bullock-cart by Babu Lal, Raja Ram and him. He did not remember whether the persons who had lifted the dead-body, the blood was found on their cloth or not. He did not remember that who had gone with him to police station but definitely someone had accompanied him. Babu Lal had not gone to the police station. Badlu Pasi had gone or not he does not remember. The son of Badlu Babu Lal is the witness. He had gone to police station at about 5.15 hours to lodge an FIR early in the morning. The distance of the police station from the place of occurrence is five miles. He went on bicycle. The time took about half an hour or twenty minutes in writing the report and he did not remember for how long he remained at the police station. He denied that the present FIR was lodged in due consultation and deliberation with the police. The Circle Officer has seen his injuries which were abrasion and contusion. He has suffered some injuries on the neck and hip and behind the ear. He did not remember that on which hip he had suffered injuries and when he was cross-examined and asked as to why he had not written in his report about the fact that he was also assaulted then he stated that he did not remember as he was under fear and has not lodged any report earlier and whatever he remember, he had written the same and he had also informed the police that he was also assaulted and slapped and assaulted with fists and if the Investigating Officer has not written the said fact, then he could not tell reason about the same. He was assaulted for about 20-25 minutes and there were large number of people present in thousands at the place of occurrence. He was working in the Army for about four years and was working prior to the incident and he was doing the work of nursing. The persons who had caught-hold his father had also assaulted him. At the time of assault his father, his father had not fallen. He was ignorant of the fact as to what is meant by Agwani or Dwarchar (reception of Barat). When the Barat comes then the people welcome it by moving ahead from the house at about 15-20 paces and welcome them and by Dwarchar, he means that some rituals are performed at the doors. At the time when his father was caught-hold, the rituals were not started. He further stated that in his FIR he has not mentioned about the light of patromax and thereafter stated

that it might have been written. As soon as the shot was fired, people started screaming, hue and cry was made and there was chaos in the marriage party and people started running here and there. His father had fallen on the ground and the persons who have caught-hold the witness have left him and no one made attempt to catch the accused persons and they were only raising alarm. His father was not profusely bleeding and he did not remember that blood was fallen on the ground or not and he had immediately took his father in his lap and did not remember from whom he has taken the Angocha (cloth). He was wearing pant, shirt and coat. He did not see any police guard at the house of Chotey Lal. The witness along with his father was there before 8-10 minutes. Earlier the dacoity took place at the house of Chotey Lal. His father had a gun license and he did not carry the same. In both the villages, people have licensee weapon. Both the villages are big and it's population is in thousands. He did not see any other person carrying gun. He got his father's dead-body kept on the Plinth (Chabutra) of his house and covered with the bed-sheet. No policeman had arrived at his house before he left for police station. None of the witness remained at his doors throughout the night. After submitting his report to the police station, he was taken by the police to the office of Circle Officer who was in his room and he returned to his village on bicycle and the police persons have also come by bicycle and not on Jeep. They reached the village at about 9 a.m. The Investigating Officer had firstly gone to the place where the dead-body was kept and the Panchayatnama of the dead-body of the deceased was conducted. Babu Lal Pasi had come at his house at the time of Panchnama after the Circle Officer had arrived and he remained present there with the witnesses named in the FIR. The witness has not signed the Panchnama. The dead-body of the deceased was sent from the village by the police at about 11 a.m. The Investigating Officer and the Circle Officer had visited the place of occurrence and no blood was found as place of occurrence was clear and water was found there. The Investigating Officer interrogated the witnesses. From the place of occurrence he along with Circle Officer went to the police station at about 12 noon. He did not remember how long he remained at the police station but he was sent for medical examination after preparing police papers and from the police station, he came to the hospital along with two constables. He denied the fact that narration of the incident has been wrongly stated by him and further denied that no one had caught-hold him nor assaulted him. He denied the suggestion that because of the election rivalry he is falsely deposing against the accused persons.

21. P.W.10 Banshdhari Singh has stated that on 25.2.1977 he was posted as Sub-Inspector at police station Maharajpur and he started with the investigation and recorded the statement of the informant at the police station. He visited the place of occurrence along with Sub-Inspector G.S. Yadav. And Dy. S.P and the dead-body of the deceased was found by him at the doors of the house of the informant. Panchayatnama proceeding were conducted by S.I. G.S. Yadav and proved the same as Ext.Ka-5 which was in his handwriting and signatures. He recorded the statement of witnesses u/s 161 Cr.P.C at the house of Chotey Lal and made spot inspection of the place of

occurrence and prepared the site-plan as Ext.Ka-6. He also prepared Supurdaginama of the five gase light which were found at the house of Chotey Lal and took the same in his custody and prepared a recovery memo Ext.Ka-1 of the same then recorded the statement of the witnesses of Panch. He did not found any blood or empty cartridge at the place of occurrence as the place of occurrence was busy place and the incident has taken place a day earlier in the night, hence the same being cleaned. He prepared the site-plan of the place where the dead-body of the deceased was kept and proved the same as Ext.Ka-7. He has prepared the recovery memo of Gamcha which was blood-stained which he took into custody at the time of Panchnama as the same was found on the dead-body of the deceased and proved the same as Ext.Ka-8. The accused were searched but could not be traced out. After completing the investigation, submitted charge-sheet as Ext.Ka-10. He has also prepared search memo Ext.Ka-9. He has further stated that Chik FIR was prepared by Head Moharrir Laxmi Narayan and proved the same as Ext.Ka-11 and the General Diary of the FIR is Ext.Ka-12. He has denied the suggestion that the FIR was lodged in due consultation with the police at the police station and the FIR was lodged after Panchnama. The special report was sent at 7.10 a.m. by constable Ram Bahadur who did not return on the same day. He had gone to the place of occurrence by motorcycle and he did not remember regarding others but D.S.P had also gone with him. He had proceeded from the police station to the place of occurrence at 7.15 a.m. and reached within twenty minutes and Chandrapal had reached few minutes after him along with police force. On the chalan nash, the time for sending the dead-body has not been mentioned. In the Panchayatnama, the time in column no.3 has not been mentioned. He further stated in his cross-examination that after completing the investigation on 26.2.1977 at 19 hours, he did not remember whether he had remained in the village or not. Chandrapal had not accompanied him to the police station and after Panchayatnama he had been sent for medical examination. The witness Babu Lal had given him statement u/s 161 Cr.P.C stating that Krishna Gopal and Sabal Singh had caught-hold to Raghunath Singh and Raghubhushan Singh had fired with his licensee gun on the deceased Raghunath. He denied the suggestion that at the behest of Chaudhary Ram Gopal Yadav, M.P, he has submitted charge sheet in the present case.

22. P.W.11 Girja Singh Yadav has stated before the trial court that he had conducted the Panchayatnama of the deceased Raghunath and has proved the Panchayatnama as Ext.Ka-5 and he has conducted the Panchayatnama under the direction of the Station Officer. He has proved the Chalan Nash as Ext.Ka-13, report to R.I. Ext.Ka-14, report to C.M.O Ext.Ka-15, Photonash Ext.Ka-16, sample of seal Ext.Ka-17 under his writing and signatures. In cross-examination he has stated that the cloth which was tight-off from the dead-body of the deceased was handkerchief. The time for sending the dead-body in the Panchayatnama and Chalan Nash inadvertently was left by him and he denied the suggestion that no case was registered till the inquest report.

23. The trial court after considering the prosecution evidence and the defense version came to the conclusion and held

the accused-appellant guilty for the offence in question and aggrieved by the same, the accused-appellant Raghubhushan Singh has preferred the instant appeal.

24. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Vikrant Rana, learned counsel for the appellant and Sri G.P. Singh, learned AGA for the State and perused the record.

25. It has been argued by learned counsel for the appellant that there is material contradictions between the evidence of P.W.1 Babu Lal and P.W.9 Chandrapal on one hand and P.W.10 Banshdhari Singh on the other hand which goes to show that the presence of the said eye-witnesses at the place of occurrence is doubtful and they have not seen the incident and the appellant has been falsely implicated in the present case on account of previous animosity between the parties. In this regard he has pointed out from the statement of P.W.1 Babu Lal that in the marriage of niece of Chotey Lal Baniya (P.W.6), P.W.9 Chandrapal and the deceased Raghunath were invited in the marriage and they had gone in the said marriage ceremony whereas P.W.6 in his statement before the trial court has denied the fact that neither the deceased Raghunath nor his son Chandrapal were invited by him in the marriage. From the evidence of P.W.1 it is evident that he reached the house of Chotey Lal Baniya when the Barat was being received but in his cross-examination, he has stated that he left the place of occurrence i.e. house of Chotey Lal Baniya before the Barat was received. It was further pointed out that P.W.1 had deposed that soon after the incident, the deceased was taken by him on a bullock-cart after he was lifted and his dead-body was kept on the bullock-cart and the said bullock-cart was carried to the police station but he died on the outskirts of the village and thereafter he brought the dead-body of the deceased to his house and he argued that P.W.1 has stated that he did not go to the police station along with P.W.9 to lodge the FIR nor gave any statement u/s 161 Cr.P.C. to the Investigating Officer whereas P.W.10 Banshdhari Singh the Sub-Inspector/Investigating Officer has stated before the trial court that P.W.1 Babu Lal had also come to the police station along with Chandrapal to lodge an FIR and when he reached at the place of occurrence he had recorded the statement of P.W.1 Babu Lal u/s 161 Cr.P.C. in which he has stated that Krishna Gopa and Sabal Singh had caught-hold the deceased Raghunath and accused Raghubhushan Singh had fired at the deceased Raghunath with his licensee gun. It was further argued by learned counsel for the appellant that in the FIR P.W.9 Chandrapal has not stated that there was scuffle between him and the accused Shiv Bhushan Singh, Shashi Bhushan Singh, Braj Bhushan @ Santosh who slapped him and assaulted him whereas Sabal Singh and Krishna Gopal had scuffle with his father Raghunath and on the exhortation of accused Raja Singh, the accused-appellant Raghubhushan Singh had fired shot at the deceased Raghunath which hit him on his abdomen and had fallen down but it was for the first time in the Court the fact about the scuffle taken place between the accused persons and the informant and his father and the informant Chandrapal received injuries at the hands of accused is a deliberate improvement and is an afterthought just to create the evidence of P.W.9 who is also an injured against the accused

persons. Moreover he argued that P.W.9 Chandrapal is said to have sustained injuries on his person but his injuries were superficial in nature and can be self inflicted also and the said fact was also opined by the doctor P.W.8 H.P.P. Jha. He has also tried to demonstrate from the inquest report and the police papers prepared while conducting the inquest by P.W.11 Girja Singh Yadav (S.I) that FIR is an ante-timed document. He has also tried to show from the evidence of P.W.1 and P.W.9 on the one hand and P.W.10 Banshdhari Singh, the Investigating Officer, the time of arrival of the police at the place of occurrence after registration of the FIR and the time when the police left the village after conducting the inquest and sending the dead-body of the deceased for post-mortem. It was lastly argued that the place of occurrence as has been suggested by the prosecution is also doubtful as no blood was found at the place of occurrence and further P.W.1 and P.W.9 who carried the dead-body of the deceased on bullock-cart and when the deceased died at the outskirts of the village while taken to the police station, he brought back to his house by P.W.1 and P.W.9 and his dead-body was kept at the doors of the house of P.W.9. On the strength of the said arguments, he submitted that the deceased was done to death in some other manner and not as the statement of the prosecution and the presence of P.W.1 and P.W.9 at the place of occurrence appears to be doubtful and they reached after the incident had taken place. He has also drawn attention of the Court towards the statement of other eye-witnesses of the occurrence i.e. of P.W.2 Babadin, P.W.3 Ram Ratan, P.W.4 Subhash Chand Pandey and P.W.5 Raja Ram who have not stated anything against the accused-appellant that it was he who shot dead the deceased and they turned hostile. The learned counsel for the appellant doubted the place and time of the incident as it appears from the evidence of P.W.1 that the deceased was wearing baniyan and lungi which further goes to show that in a marriage party if the deceased was invited, then he would not have gone in such clothes which suggests that the deceased was done to death in some other manner and not as per prosecution lonely in the dark hours of the night and the accused-appellants have been falsely implicated in the present case. He has further drawn attention of the Court towards the evidence of P.W.6 Chotey Lal Baniya that earlier dacoity had taken place in his house and in the village, hence he had made an application for deploying the police party on his house at the time of the marriage and they were also present but P.W.1 Babu Lal and P.W.9 Banshdhari Singh have denied the fact that any such police party was deputed at the house of P.W.6 Chotey Lal Baniya. Thus the conviction and sentence of the appellant by the trial court appears to be not correct on the basis of the evidence adduced by the prosecution, hence the judgement and order passed by the trial court convicting and sentencing may be set-aside and the appellant be acquitted.

26. The learned AGA on the other hand opposed the argument of learned counsel for the appellant and has submitted that the incident was witnessed by P.W.1 Babu Lal and P.W.9 Chandrapal who is the informant of the case and son of the deceased also and they have categorically stated in their evidence before the trial court that it was the accused-appellant Raghubhushan Singh who has shot dead the deceased with his

licensee weapon on the exhortation of accused Raja Singh who was his father and the deceased after receiving gun-shot injury on his person has died on account of fire-arm injury. The accused-appellant had previous animosity with the deceased with respect to drainage of water and because of that animosity when they found the deceased at the place of occurrence, he was shot dead by the accused-appellant on the exhortation of his father Raja Singh. The other eye-witnesses mentioned in the FIR i.e. P.W.2 Babadin, P.W.3 Ram Ratan, P.W.4 Subhash Chand Pandey and P.W.5 Raja Ram were present at the place of occurrence but have turned hostile and did not support the case, goes to show that they have been won over by the accused and P.W.6 Chote Lal Baniya did not support the prosecution case and has not disclosed the participation of the accused-appellant, further goes to show that he too has sided with the accused. He further submitted that the deceased was shot dead from a very close range as has been stated by P.W.1 Babu Lal and P.W.9 Chandrapal in their evidence and blackening and scorching was present on the injuries sustained by him which goes to show that the ocular testimony corroborates the medical evidence. The trial court after going through the evidence led by the prosecution and believing the testimony of P.W.1 Babu Lal and P.W.9 Chandrapal has rightly convicted and sentenced the accused-appellants for the offence in question and prayed that the appeal of the accused-appellants is liable to be dismissed by this Court.

27. We have gone through the record as well as the impugned order passed by the trial court in the light of the submissions advanced by learned counsel for the parties.

28. The FIR of the incident was lodged by P.W.9 Chandrapal who is the son of the deceased on 26.2.1977 at 6.20 a.m. for an incident which has take place on 25.2.1977 at 10 p.m. in the night in the village Tilsahari Buzurg against seven accused persons including the appellants out of which the trial court has acquitted the five accused persons namely Shashi Bhushan Singh, Sheo Bhushan Singh, Santosh, Sabal Singh and Krishna Gopal and convicted the accused-appellants Raja Singh (now dead) and Raghubhushan Singh for the offence in question. On the day of the incident, there was a marriage ceremony of the niece of P.W.6 Chotey Lal Baniya at his house and where the deceased was also invited and he along with his son Chandrapal had gone. The accused persons had also gone at the place of occurrence and when they found the deceased present there, they shot dead the deceased Raghunath on the exhortation of accused-appellant Raja Singh with his licensee gun. The incident was witnessed by Babu Lal P.W.1, Babadin P.W.2, Ram Ratan P.W.3, Subhash Chand Pandey P.W.4, Raja Ram P.W.5 who were also present there but during the course of the trial, P.W.2 Babadin, P.W.3 Ram Ratan, P.W.4 Subhash Chand Pandey and P.W.5 Raja Ram have not supported the prosecution case and were declared hostile. It was P.W.1 Babu Lal who has categorically stated before the trial court and has narrated the prosecution case as has been stated by P.W.9 Chandrapal who is an eye-witness, informant of the case and son of the deceased and also an injured witness. P.W.1 has stated that the deceased was caught-hold of by Sabal

Singh and Krishna Gopal whereas Shashi Bhushan, Shiv Bhushan and Braj Bhushan @ Santosh had caught-hold of P.W.9 Chandrapal and had a scuffle with them. P.W.9 Chandrapal was assaulted by the accused persons who slapped him and the deceased was shot by the accused-appellant Raghubhushan Singh with his licensee gun who was immediately lifted by P.W.1 Babu Lal and his son Chandrapal P.W.9 who tied a cloth on his wounds and lifted from the place of occurrence and his dead-body was kept on a bullock-cart and P.W.1 Babu Lal along with P.W.9 Chandrapal were taking the deceased to the police station but at the outskirts, the deceased succumbed to his injuries and thereafter his dead-body was brought back to his house by P.W.9 who kept the same at the doors of his house throughout the night. P.W.9 Chandrapal has stated that all the eye-witness have left for the house and no one was present except him and in the morning he had left the village at about 5.15 a.m. and reached the police station and lodged the FIR at 6.30 a.m. in the morning and he did not go to the police station in the night apprehending danger on account of fear. Thereafter a report was written by him as Ext.Ka-1 on the basis of which an FIR was registered against the accused persons and the Investigating Officer recorded his statement u/s 161 Cr.P.C. which was recorded by the Station Officer, P.W.10 whom has narrated the incident. The FIR lodged by P.W.9 Chandrapal was also endorsed in the G.D. The police immediately thereafter went to the village of P.W.9 and found the dead-body of the deceased lying at the doors of the house of P.W.9 Chandrapal and P.W.11 Girja Singh Yadav conducted the inquest proceeding and prepared police papers which he has proved before the trial court and sent the dead-body of the deceased for post-mortem after sealing the same through police constables. The argument of learned counsel for the appellant that the presence of P.W.1 Babu Lal and P.W.9 Chandrapal at the place of occurrence is doubtful has no force as P.W.1 has categorically stated in his evidence that he had gone at the house of P.W.6 Chotey Lal Baniya to see the Barat procession meaning thereby that as the marriage ceremony was going on and fire works (Atishbaji) during the marriage was being taken and it was a marriage of the niece of P.W.6 Chotey Lal Baniya who was a reputed person then it was quite natural for P.W.1 to be present there to witness the activities and fire works during the marriage ceremony during which the incident has taken place. He has further deposed before the trial court that soon after the incident, he had lifted the dead-body of the deceased along with P.W.9 and kept it on a bullock-cart and while taking the bullock-cart along with the dead-body to the police station with P.W.9 Chandrapal, the deceased succumbed to his injuries on the outskirts of the village and thereafter brought the dead-body back to his house and kept the same at the doors of his house. Moreover though it has been stated by P.W.9 Chandra Pal that he had not signed the inquest report but from the perusal of the inquest report it is apparent that he is one of the Panch witnesses who signed the injury report of deceased. It appears that due to lapse of time and fading memory when his evidence was recorded, he could not remember the same. P.W.1 Babu Lal has further stated before the trial court that it was the accused-appellant who has shot dead the deceased and deceased died on account of fire-arm injuries sustained by

the deceased which was shot by the accused-appellant. The animosity of the said witness with the accused persons which was tried to be shown for falsely deposing against them is of no consequence as he was a natural witness of the occurrence and his testimony has been rightly believed by the trial court for recording the conviction and sentence of the accused-appellants as the trial court also found his presence well established at the place of occurrence. He too is the witness of the inquest report of the deceased and has signed the same which is also apparent from inquest report. Similarly P.W.9 Chandrapal who was accompanying his father at the place of occurrence has also categorically supported the prosecution case as has been narrated in the FIR and reiterated before the trial court that there was a scuffle between him and the accused persons as well as between the accused persons and the deceased and the accused-appellant Raghubhushan Singh has shot dead the deceased on the exhortation of accused Raja Singh because of previous animosity as luckily the deceased was found at the place of occurrence. As soon as the deceased received gun-shot injury at the hands of the accused-appellant Raghubhushan Singh, then he immediately tied Angocha (cloth) on the wound of the deceased which was on the abdomen and the said Angocha was also found by the P.W.11 Girja Singh Yadav who conducted the inquest on the dead-body of the deceased. The said witness also carried his father along with P.W.1 Babu Lal by lifting his dead-body on a bullock-cart and was taking to police station but his father succumbed to his injuries, hence he brought the dead-body back to his house and kept at the doors of his house.

29. The attention of the Court has also been drawn by learned counsel for the appellant towards the discrepancies in evidence of P.W.1 Babu Lal and P.W.9 Chandrapal on one hand and P.W.10 Banshdhari Singh Investigating Officer on the other hand, but they are not of such nature which goes to the root of the prosecution case thus it would cast doubt or demolish the prosecution case. Such contradictions are bound to occur when the evidence of the witnesses are recorded after a long gap, as memory of the witnesses is bound to fade due to passage of time. The argument of learned counsel for the appellants that no blood was found at the place of occurrence is also of no consequence as it appears from the evidence of P.W.7 Dr. R.C Yadav that 1500 ml blood was found in the cavity which is apparent from the post-mortem report of the deceased, hence no blood was found at the place of occurrence. Further it appears from the evidence of P.W.1 Babu Lal and P.W.9 Chandrapal that the place of occurrence had been cleaned off and water was lying there and P.W.10 Banshdhari Singh also stated that because the incident had taken place earlier in the last night, hence it appears to have washed away because of it's being a busy place. The argument of learned counsel for the appellant that FIR of the incident is an ante-timed document as no time was mentioned in the chalan nash as was tried to be demonstrated from the papers prepared during the inquest proceeding is also of no consequence as because in the evidence of P.W.1 and P.W.9 who are the eye-witnesses of the occurrence, support has been found of the prosecution case which is fully corroborated by the medical evidence. Moreover the trial court has also given a cogent finding regarding the

discrepancies which have been tried to be demonstrated by the learned counsel for the appellant in the police papers prepared during the inquest proceeding. The evidence of P.W.6 Chhotey Lal Baniya and other prosecution witnesses goes to show that they were witnesses of the incident but they have sided with the accused and have not supported the prosecution case in order to help the accused persons. After going through the evidence of P.W.1 Babu Lal and P.W.9 Chandrapal, it is well established that they have witnessed the incident and were present at the place of occurrence and their statements corroborate the medical evidence and the trial court was perfectly right in believing their evidence and coming to the conclusion that it was the accused-appellant who had shot dead the deceased who died on account of fire-arm injury. Thus the prosecution has proved it's case beyond reasonable doubt against the accused-appellant.

30. In view of the foregoing discussions, the participation of the accused-appellant Raghubhushan Singh is well established by the prosecution evidence and the trial court has rightly convicted the appellant for the offences, which he has been charged with and there appears to be no infirmity or illegality in it's judgment, hence the conviction and sentence of the appellant by the trial court is hereby upheld.

31. The appellant Raghubhushan Singh is stated to be on bail. He shall be taken into custody forthwith to serve out the sentence awarded by the trial court. His bail bonds and sureties are cancelled.

32. The present appeals lacks merit and is, accordingly, dismissed.

33. The copy of this judgement along with the lower court record be transmitted to the trial court concerned immediately for compliance at once.

(2019)11ILR A1117

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 2010 of 1986

Rajdeo Pandey & Ors.
...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Anoop Trivedi, Sri Abhishek Kumar Chaubey, Sri Ajay Kumar Tripathi, Sri P.N. Misra, Sri Virendra Singh.

Counsel for the Respondent:
Sri J.K.Upadhyay, A.G.A., Sri Satyawan Shah.

A. Evidence Law-Indian Evidence Act,1872 - interested and inimical witnesses - mere relationship with deceased cannot be a factor to doubt testimony of a witness - a natural witness may not be labelled as interested witness - Interested witnesses are those who want to derive some benefit out of the litigation/case - Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved - A witness is interested only if he derives benefit from the result of the case or as hostility to the accused - prosecution is not required to examine all the witnesses of incident - It is the quality and not quantity of evidence which matters - the testimony

of the injured witness is accorded a special status in law and the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein - involvement of the accused appellants in the alleged incident is established - prosecution proved motive of the alleged incident - version is consistent with medical evidence - trial court was fully justified in convicting the accused-appellant under Sections 302 and 307 of IPC. (Para 22,27,28)

Appeal dismissed. (E-7)

List of cases cited:-

1. St. of Pun. Vs Hardam Singh, (2005), S.C.C. (Cr.) 834

2. Dilip Singh Vs St. of Pun. A.I.R. (1953), S.C. 364

3. Harbans Kaur Vs St. of Har. (2005), S.C.C.(Crl.) 1213

4. Dalbir Kaur Vs St. of Pun. AIR (1977) SC 472

5. State of Gujrat Vs Naginbhai Dhulabhai Patel, AIR (1983) SC 839

6. Jarnail Singh Vs St. of Pun. (2009) 9SCC 719

7. Krishan Vs St. of Har. (2006) 12 SCC 459

8. Baleshwar Mahto & anr. Vs St. of Bihar & anr Cri. Appeal Nos. 513-514 of 2014

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

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

1. This appeal has been preferred against the impugned judgement and order dated 28.07.1986 passed by learned VIth Additional Sessions Judge, Azamgarh in Session Trial No. 194 of 1985, (State V Rajdeo Pandey and three others), under Sections 302, 307 of IPC, P.S. Mehnagar, District Azamgarh, whereby all the four accused-appellants, namely, Rajdeo Pandey, Lalji Singh, Om Prakash and Shesh Nath Pandey have been convicted under Sections 302 and 307 of IPC and sentenced to imprisonment for life and four years rigorous imprisonment respectively.

2. Accused-appellants Lalji Singh and Om Prakash expired during pendency of this appeal and thus, the appeal on their behalf was already abated by this Court vide orders dated 28.03.2018 and 17.07.2019. Now, this appeal is confined only in respect of accused-appellants Rajdeo Pandey and Shesh Nath Pandey.

3. As per prosecution version, there was a dispute between complainant Ramjeet and accused-appellant Rajdeo Pandey over a pond of village, as accused-appellant Rajdeo Pandey has got mutated pond land in his name, while way of complainant was through that pond. In that regard, a case was lodged against the complainant, but he was acquitted in that case. Deceased Jhagroo was a witness in a case initiated under Section 110 Cr.P.C. against accused-appellant Rajdeo Pandey. Proceedings under Section 107 Cr.P.C. have also taken place against the parties. Due to these reasons, accused persons were nurturing animosity against the complainant and deceased. Three days prior to the incident, accused-appellants Rajdeo Pandey, Lalji, Om Prakash and Shesh Nath Pandey have threatened the complainant and his brother Jhagroo (deceased). The incident of this case took place on 10.07.1983. On that day, complainant's brother Jhagroo was

ploughing his field, while complainant and his wife were collecting grass nearby. At around 9:00 AM, all the accused-appellants armed with clubs, came out from nearby bushes and hurling abuses they started assaulting complainant and his brother Jhagroo with clubs. Complainant and Jhagroo fell down, but accused-appellant Shesh Nath Pandey continued to assault complainant, while deceased-appellant Lalji Singh caught hold of his wife and accused-appellant Rajdeo Pandey and deceased-appellant Om Prakash assaulted Jhagroo and they even jumped at his chest. Hearing noise, Dhruv Narayan Singh, Shesh Bahadur Singh, Surendra and some other persons reached there and intervened. Thereafter, all the accused-appellants ran away from spot. Complainant and injured were taken to police station, but Jhagroo succumbed to injuries on the way.

4. Complainant/PW-1 Ramjeet submitted a written report Ex. Ka-1 at the police station and on that basis, case was registered on 10.07.1983 at 11:30 hours, under Sections 302, 307, 323/34 of IPC against all the four accused-appellants vide FIR Ex. Ka-4.

5. The inquest proceedings were conducted by PW-6 S.I. Daya Ram and inquest report Ex. Ka-7 was prepared. Dead body of the deceased was sealed and sent for postmortem.

6. Post-mortem on the dead body of the deceased was conducted on 11.07.1983 vide post-mortem report Ex. Ka.3 and following injuries have been found on the person of the deceased.

(i) Lacerated wound 4 cm x 4 cm x bone deep on the front and middle of left leg on exposure haematoma present in area of 5 cm x 4 cm. Both bone are fractured.

(ii) Abrasion 1 cm x 1 cm on right side forehead close to right eyebrow.

(iii) Abrasion 1 cm x 1 cm on tip of nose.

(iv) Contusion 8 cm x 4 cm on middle and both side front of chest in between both nipple.

(v) Contused abrasion in an area of 12 cm x 6 cm on anterio lateral aspect of right arm elbow and forearm seen above right wrist.

(vi) Lacerated wound on left side front of 3rd, 4th and 5th toe in an area of 8 cm x 2 cm x bone deep on Exposure underneath bone fractured.

(vii) Contused swelling 8 cm x 4 cm on dorsal aspect of right sole.

(viii) Contusion 4 cm x 4 cm on front of right ankle and leg.

(ix)Abrasion 1 cm x 1 cm on front of right knee.

(x) Multiple contusion in one area of 8 cm x 4 cm on outer aspect of left shoulder and arm.

(xi) Lacerated wound 1 cm x 2 cm x bone deep on the front of right 3rd toe on exposure bone fractured.

As per Autopsy Surgeon, cause of death of the deceased was due to asphyxia as a result of ante-mortem injuries.

7. PW-1 Ramjeet, who was also an injured in the incident, was medically examined by PW-3 Dr. Ram Jas Ram and following injuries were found on his person:

(i) Lacerated wound 3.5 cm x bone deep x .5 cm on the left parietal part of skull 8 cm above few centemeter uppper margin of pinna left side wound and contused by soft blood clot.

(ii) Lacerated wound 2 cm x .5 cm x bone deep on the forehead 1 cm above for the root of nose.

(iii) Lacerated wound .5 x.25 cm x bone deep posterior surface of forearm right side 10 cm above the wrist joint and lateral swelling 8 cm x 5 cm around this lacerated wound and there is suspected fracture of bone underneath. Advised x-ray for wrist right side.

(iv) Lacerated wound .5 x .5 cm deep bone dorsal surface of palm and the root of index finger blood is oozing out from the wound and swelling around this wound and whole of the palm right side dorsal surface advised x-ray palm right side.

(v) Tromated swelling whole of the upper arm left side advised x-ray. upper arm left side.

(vi) Lacerated wound 2 cm x .5 cm x muscle deep on the back of upper arm left side soft rose blood clot inside the wound.

(vii) Bruise 10 cm x 2 cm on the back of gluteal region (skin in rose in colour).

(viii) Bruise 4 cm x 2 cm on upper and lateral surface of thigh left side (skin in rose in colour).

(ix) Bruise 7 cm x 2 cm on the upper end posterior surface of thigh right side (skin in rose in colour).

(x) Bruise 15 cm x 2 cm on the posterior surface of thigh and gluteal foled (skin in rose in colour).

(xi) Bruise 4 cm x 1 cm on the lateral surface of right thigh above knee joint (skin in rose in colour).

8. During course of investigation, PW-6 Daya Ram recorded statements of the witnesses and after completion of the investigation, all the accused-appellants were chargesheeted.

9. Learned trial court framed charge under Sections 302 and 307 of IPC against all the four accused-appellants. Accused persons pleaded not guilty and claimed trial.

10. To substantiate the charges, prosecution has examined six witnesses. Accused persons were examined under Section 313 Cr.P.C., wherein they have denied the prosecution evidence and claimed false implication. In defence, accused persons have examined DW-1 Girja Prasad Yadav.

11. After hearing and analysing evidence, all the four accused were convicted under section 302 and 307 of IPC vide impugned judgment dated 28.07.1986 and sentenced, as stated in para no. 1 of this judgment.

12. Being aggrieved by the impugned judgment and order, accused-appellants have preferred the present appeal.

13. Heard Sri Anoop Trivedi, learned Senior Counsel, assisted by Sri Abhishek Kumar Chaubey, learned counsel for the accused-appellants and Sri J.K. Upadhyay, learned Additional Government Advocate.

14. Learned Senior Counsel for the accused-appellants has raised the following points:

(i) that presence of alleged eye witnesses at the scene is doubtful. There is no evidence to show that PW-1 Ramjeet and PW-4 Kulwanti were collecting grass at the spot as their position was not shown in site plan. It is also doubtful that the deceased was

ploughing his field. As per PW-1, deceased was ploughing his field by ox, but there is no evidence of presence of any ox. PW-1 Ranjeet has sustained only simple injuries.

(ii) that PW-1 Ramjeet and PW-4 Kulwanti are highly interested and inimical witnesses. As per prosecution version, one Dhruv Narayan Singh, Shesh Bahadur Singh and Surendra have reached at the spot, but none of them has been examined by the prosecution. It was submitted that in absence of evidence of any independent witness, testimony of PW-1 and PW-4 cannot be relied upon.

(iii) that prosecution could not establish spot of incident. Prosecution has changed the spot of incident from one place to another, which makes prosecution case doubtful.

(iv) that accused-appellant Rajdeo Pandey has made complaint against S.I. Hari Bhajanlal Arya, Incharge of Police Station Mehnagar, District Azamgarh and that PW-6 S.I. Daya Ram has taken charge from S.I. Hari Bhajanlal Arya on the day of the incident. It was stated that a case was also lodged against Hari Bhajanlal Arya under Section 218 IPC and one inquiry against him was conducted by the C.I.D. Leaned counsel has argued that the accused-appellants were implicated falsely in this case with connivance of said S.I. Hari Bhajanlal Arya. In this regard, learned counsel also pointed out statement of DW-1 Girja Prasad Yadabv and certain documents filed in defence evidence.

15. Per contra, learned A.G.A. for the State has supported the impugned judgment and argued that in the alleged incident PW-1 Ramjeet is an injured witness and he has made a clear statement against the accused-appellants. PW-1 Ramjeet and PW-4 Kulwanti have stated about entire incident and their version is supported by medical evidence. They have been subjected to cross-examination but no adverse fact could emerge. The fact that PW-1 was injured in the alleged incident, itself establishes his presence at the spot. It was submitted that even if there was enmity between accused-appellant Rajdeo Pandey and alleged S.I. Hari Bhajanlal Arya, it would not affect the testimony of PW-1 and PW-4. At the time of the alleged incident and when the case was lodged, the Incharge of police station Mehnagar was PW-6 S.I. Daya Ram, who has investigated the case. It cannot be believed that the Investigating Officer would implicate the accused-appellants falsely in this case at instance of his predecessor i.e. S.I. Hari Bhajanlal Arya. The FIR has been lodged by PW-1 promptly by filing written complaint Ex. Ka-1 naming all four accused persons. Learned State counsel submitted that conviction of the accused-appellants is based on evidence and the same does not call for any interference and the present appeal has no substance.

16. We have considered rival submissions and perused record.

17. In evidence, PW-1 Ramjeet stated that on the day of incident at about 9:00 AM, his brother Jhagaroo was ploughing his field, while he (PW-1) and his wife were collecting grass. Accused-appellants Rajdeo Pandey, Shesh Nath Pandey, deceased accused Om Prakash and Lalji Singh, armed with lathis appeared there and on the exhortation of accused-appellant Rajdeo Pandey to kill Jhagaroo and Ramjeet, all the four accused-appellants started attacking PW-1 complainant and deceased Jhagaroo with

lathis (clubs). Hearing noise of PW-1 Ramjeet and his brother Jhagaroo, one Dhruv Narayan Singh, Shesh Bahadur Singh and Surendra Singh reached there. When wife of the complainant Kulwanti tried to intervene, accused-appellant Lalji Singh caught hold of her. Accused-appellants Rajdeo Pandey and Om Prakash jumped on the chest of Jhagaroo and gave lathi blows at his chest. Due to injuries, Jhagaroo fell down. Accused-appellant Shesh Nath Pandey assaulted PW-1 Ramjeet. After incident, all the accused-appellants ran away from spot. While the villagers were taking away Jhagaroo and Ramjeet on cots, Jhagaroo succumbed to injuries. PW-1 Ramjeet, further stated that he got written a complaint from one Dhruv Narayan and it was sent to police station and he was medically examined. PW-1 further stated that they have initiated proceedings under Section 110 Cr.P.C. against accused-appellant Rajdeo and Jhagaroo was a witness in that case. Earlier, proceedings under Section 107 Cr.P.C. were also going on between the parties and that about 3-4 days prior of the incident, accused persons have threatened to kill complainant and his brother. It was also stated that accused-appellant Rajdeo has got mutated land of pond of village in his name, while the way of PW-1 Ramjeet was through that pond.

18. PW-4 Kulwanti, has stated that on the day of incident at about 9:00 AM, Jhagaroo was ploughing his field, while she and her husband PW-1 Ramjeet were collecting grass. All the four accused-appellants came there and started assaulting Jhagaroo and Ramjeet with clubs. When she tried to save them, accused-appellant Lalji caught hold her and accused-appellants Rajdeo and Om Prakash jumped on the chest of Jhagaroo and caused injuries on his chest. Hearing noise, Dhruv Narayan Singh, Shesh Bahadur Singh and Surendra Singh reached there and thereafter, accused-appellants ran away from there.

19. PW-2 Constable Panchu Prasad, is a formal witness, who assisted during investigation. PW-3 Dr. Ram Jas Ram, has medically examined PW-1 Ramjeet and PW-5 Dr. S.K. Gupta has conducted post-mortem on the dead body of the deceased. PW-6 S.I. Daya Ram, has investigated the case and has duly proved documents prepared during investigation of the case.

20. DW-1 Constable Girja Prasad Yadav, has stated that on 05.09.1986, on the complaint of Shambhu Prasad Singh, Satyadev and Gopal Singh, a report was lodged by C.I.D. on 24.03.1986 and its report and G.D. entry have been proved by by him as Ex. Kha-1 and Ex. Kha-2

21. So far the contention, that presence of alleged eye witnesses i.e. PW-1 Ramjeet and PW-4 Kulwanti is doubtful, is concerned, it may be seen that both theses witnesses have made clear and cogent statements about their presence at the spot and have narrated entire incident in detail. PW-1 Ramjeet is an injured witness, who has received as many as 11 injuries in the alleged incident and thus, his presence at the spot cannot be doubted. Merely because the nature of injuries was simple, it would not create any doubt about the presence of these witnesses at the spot. There is nothing to indicate that the injuries sustained by PW-1 were self inflicted. One important fact is that the FIR of the present incident has been lodged by PW-1, naming all the

accused-appellants and stating all necessary details of incident. The alleged incident took place on 10.07.1983 at 9:00 AM and the FIR was lodged on the same day at 11:30 AM and distance of the concerned police station from the spot was shown four miles. Here, it is also to be kept in mind that PW-1 has sustained several injuries and as per his statement, he as well as deceased Jhagaroo were brought from the spot by putting them on cots. In view of these facts, it is clear that prompt first information report was lodged by PW-1. Merely because location of PW-1 and PW-4 was not shown in the site plan, it would not make their presence at the spot doubtful. Similarly, the fact that no Ox was found at spot is of no consequence. It cannot be presumed that Ox would have remained at spot till the Investigating Officer reached there. Once in the FIR, PW-1 has alleged that he as well as his wife were present at the spot and he has also sustained injuries, it was for the Investigating Officer to inquire as to at which particular spot they were collecting grass and to indicate that spot in the site plan and thus, their testimony would not affect due to alleged lapse. Both PW-1 and PW-4 have been subjected to lengthy cross-examination but no such substantial fact could emerge, which may create any doubt about their presence at the spot. In view of these facts, there is no ground to doubt presence of PW-1 and PW-4 at the spot and thus, contention of learned counsel has no force.

22. It was argued that PW-1 Ramjeet and PW-4 Kulwanti are interested and inimical witnesses. It is correct that PW-1 is brother of deceased Jhagaroo, while PW-4 is wife of PW-1, but mere relationship cannot be a factor to doubt testimony of a witness, which otherwise inspires confidence. It is well settled that a natural witness may not be labelled as interested witness. 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. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of **State of Punjab Vs Hardam Singh,** 2005, S.C.C. (Cr.) 834, it has been held by the Hon'ble Apex Court that ordinarily the near relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In case of **Dilip Singh Vs State of Punjab,** A.I.R. 1953, S.C. 364, it was held by the Hon'ble Supreme Court that the ground that the witnesses being the close relatives and consequently being the partition witness would not be relied upon, has no substance. Similar view has been taken by the Hon'ble Supreme Court in case of **Harbans Kaur V State of Haryana,** 2005, S.C.C. (Crl.) 1213.

The contention about branding the witnesses as interested witness and credibility of close relationship of witnesses has been examined by Hon'ble Apex court in a number of cases. A close

relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness', as held by the Hon'ble Supreme Court in **Dalbir Kaur V. State of Punjab,** AIR 1977 SC 472. The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence straightway unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. Similar view was taken in case of **State of Gujrat v. Naginbhai Dhulabhai Patel,** AIR 1983 SC 839. Similarly, so far as question of non-examination of alleged witnesses, who have reached at the spot, is concerned, it is well settled that prosecution is not required to examine all the witnesses of incident. It is the quality and not quantity of evidence which matters. PW-1 Ramjeet was a star witness as he sustained injuries in same incident. No adverse inference can be drawn against prosecution merely on the ground that all the persons, who reached at the spot have not been examined, particularly when prosecution has produced two eye-witnesses, including the injured witness.

In the instant case, as stated earlier, there is nothing to doubt about presence of PW-1 Ramjeet and PW-4 Kulwanti at the spot of incident. PW-1 himself has sustained injuries in the very same incident, which establishes his presence at the spot. These witnesses have made clear and cogent statement and have even assigned specific role of the accused persons. The version of these witnesses is consistent with the FIR and medical evidence. The incident took place in broad day light and all the accused persons were known to these witnesses since before the incident. There are no grounds that why these witnesses would depose falsely against accused-appellants, sparing the actual assailants. Thus, the contention of learned counsel has no force.

23. It was next argued that prosecution has shifted place of incident from one place to another. In this regard, it was stated that in the FIR, the incident of alleged spot was shown at the field of deceased and complainant, but the sample of blood stained as well as simple soil collected from the spot have not been examined. It was further stated that in his cross-examination, PW-1 Ramjeet has stated that deceased had fallen in the western side of the field but this fact is not consistent with the site plan of the spot. PW-4 Kulwanti has stated in her cross-examination that when the alleged incident took place, the deceased has already ploughed four biswa field and that two biswa field was yet to be plough, but this fact is also not consistent with the site plan. Learned counsel further stated that PW-4 has stated that, at the spot, blood has fallen on the ground but no blood was found at the spot.

24. We find no force in the contention that prosecution has changed spot of incident from one place to another. It is consistent case of prosecution that at the time of the alleged incident, deceased was ploughing land belonging to him and as per complainant as well as as per site plan also, incident has been shown in the their field. In FIR as well in statements of eye witnesses, substantially, the spot of incident remained same and it also matches with spot shown in the site plan prepared by Investigating Officer. Some part of the alleged field has been shown ploughed, which further supports prosecution case. Merely because the

samples of plain and blood stained soil lifted from the spot have not been examined would not give rise to inference that prosecution has shifted or changed spot of incident. Such laxity on the part of Investigating Officer, cannot be a ground to doubt spot of incident, particularly when PW-1 Ram Jeet and PW-4 Kulwanti have made consistent and cogent statements. It has also come in evidence that blood has fallen at the spot, but PW 4 has clarified that it has diminished due to movements of persons. PW 6 SI Dyaram, who investigated the case, has also stated that there were some spot of blood at the scene of offence, however, he admitted that he has not send sample of blood stained soil to FSL. On the point of spot of incident, version of eye witnesses matches with site plan and statement of investigating officer. Merely because some minor variations in peripheral aspect of the spot of incident have emerged in statements of PW-1 and PW-4, it cannot be said that spot of the incident has been changed. Such minor inconsistencies are quite natural in every case, but such inconsistencies do not indicate that spot of incident has been changed. The contention of learned counsel for the accused-appellants has no substance.

25. A contention was raised that accused-appellants were falsely implicated in this case at the instance of S.I. Hari Bhajanlal Arya, however, there is no material in support of this allegation. It is correct that PW-6 S.I. Daya Ram, who has investigated the case, has stated that he has taken charge of police station Mehnagar from S.I. Hari Bhajanlal Arya on day of incident, but it would not mean that he has acted at the instance of S.I. Hari Bhajanlal Arya. Even if, S.I. Hari Bhajanlal Arya was residing in the premises of police station, it cannot be presumed that the Investigating Officer PW-6 Daya Ram has acted at his instance in order to falsely implicate the accused-appellants. Though it has been shown that earlier a complaint was filed against S.I. Hari Bhajanlal Arya by accused-appellant Rajdeo Pandey, but that can also not be a ground to presume that accused-appellants have been falsely implicated in this case at the instance of the said S.I. Hari Bhajanlal Arya. Here, it would be pertinent to mention that this case has been lodged on the basis of written report of PW-1 Ramjeet. It is not the case of defence that PW-1 has lodged FIR at the instance of said S.I. Hari Bhajanlal Arya. Even otherwise, in the alleged incident, PW-1 himself has sustained injuries and his brother Jhagaroo was brutally done to death, thus, it can not be imagined that he would falsely implicate the accused-appellants in the alleged incident just at the instance of one police official, who at the time of the alleged incident was even not posted in the concerned police station and that too sparing the actual assailants, who murdered his brother and caused injuries to him. The contention of learned counsel has no substance at all.

26. Close scrutiny of entire evidence on record clearly shows that testimony of PW-1 Ramjeet and PW-4 Kulwanti could not be shaken in their cross-examination. The version of PW-1 and PW-4 is consistent with the medical evidence as well as with their previous statements. Motive of the alleged incident has also been proved. No substantial reason could be shown as to why these witnesses would depose falsely against accused-appellants, sparing their actual assailants. One of the important aspects of the case is

that PW-1 himself has sustained as many as 11 injuries in the alleged incident, which establishes his presence at the spot beyond any doubt. In **Jarnail Singh Vs. State of Punjab (2009) 9SCC 719,** the Hon'ble Supreme Court reiterated the special evidentiary status accorded to the testimony of an injured accused. It was held that the fact that witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing could be elicited to discard his testimony, it should be relied upon. Similar view was expressed in the case of **Krishan v State of Haryana, (2006) 12 SCC 459.** Regarding testimony of injured witness, in Criminal Appeal Nos. 513-514 of 2014 **Baleshwar Mahto & Anr. v. State of Bihar & Anr.**, decided on 09.01.2017, Hon'ble Apex Court reiterating the law laid down in case of **Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259,** held as under :

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.

"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881:1973 SCC (Cri) 563:AIR 1972 SC 2593], Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], Mohar v. State of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] 29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. .....In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of

a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

27. When the aforesaid principles are applied in the facts of this case, it would show that the injured witness PW-1, Ramjeet has sustained as many as 11 injuries in incident and he has named all the accused-appellants in FIR, which was lodged, without any undue delay. He has made a cogent and clear statement and his testimony could not be shaken in his cross-examination. As stated earlier, the testimony of the injured witness is accorded a special status in law and the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. In the instant case, PW-1 Ramjeet has been subjected to lengthy cross-examination, but nothing adverse could come out. His version is consistent with medical evidence. No such reasons could be shown as to why he would depose falsely against appellants, sparing the actual assailants. The prosecution has also proved motive of the alleged incident. Considering entire evidence on record, the involvement of the accused appellants in the alleged incident is established. Similarly, presence of PW-4 Kulwanti is also established at the spot. She has also made cogent statement regarding involvement of accused-appellants in the incident and she remained firm in her cross-examination. The version of PW-1 Ramjeet Singh finds ample corroboration from testimony of PW-4 Kulwanti. After considering all aspects, the testimony of PW-1 Ramjeet and PW-4 Kulwanti is found credible and inspires confidence.

28. Considering all the aspects of the case, we are of the view that the trial court was fully justified in convicting the accused-appellant under Sections 302 and 307 of IPC and accordingly, conviction and sentence of accused-appellants Rajdeo Pandey and Sheshnath Pandey is affirmed. Accused-appellants are stated to be on bail. Their bail is cancelled and they be taken into custody forthwith for serving remaining sentence.

29. Appeal is, accordingly, **dismissed.**

30. Copy of this judgment be sent to Court concerned for necessary compliance.

(2019)11ILR A1128

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 2148 of 1986

Rajol And Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S. Chaturvedi, Sri Samit Gopal, Sri Babaloo, Sri Anurag Shukla, Sri O.P. Singh.

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

A. Evidence Law-Indian Evidence Act, 1872 - Child witness - the conviction of an accused can be based solely on the statement of a child witness - the Court as a rule of prudence while considering such evidence is required to make close scrutiny of the said evidence and only on being convinced about the quality thereof and reliability can record the conviction, based thereon - suspicion howsoever strong, cannot take place of evidence - weak evidence adduced by the prosecution - accused-appellants are entitled to get the benefit of doubt - Trial Court not justified in convicting the accused-appellants.(Para 15, 20,22)

Appeal allowed (E-7)

List of cases cited:-

1. Panchi Vs St. of U.P., (1998) 7 SCC 177

2. Dattu Ramrao Sakhare Vs St. of Mah. (1997) 5 SCC 341

3. Nivrutti Pandurang Kokate & ors. Vs St. of Mah. (2008) 12 SCC 565

4. Golla Yelugu Govindu Vs St. of A.P. (2008) 4 SCALE 569

5. St. of U.P. Vs Krishna Master & ors. (2010) 47 OCR (SC) 263

6. Devi Lal Vs St. of Raj. AIR (2019) SC 688

7. Kali Ram Vs St. of H.P. the Supreme Court;(1973) AIR 2773

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgement and order dated 04.08.1986 passed by II Additional Sessions Judge, Kanpur Dehat in Sessions Trial No. 292 of 1984, convicting the accused-appellants under Sections 302/34 and 201 of IPC and sentencing them to life imprisonment under Section 302/34 of IPC and further sentencing them under Section 201 of IPC for three years rigorous imprisonment.

2. As per prosecution case, about a month prior to the incident, cow of the deceased had entered the premises of accused-appellant Rajol for which he had abused the deceased and there was some verbal exchange between the two. It is said that on 14.07.1984, when deceased Gauri Shanker and his minor son Ganesh Shanker, aged 11 years were returning from their agricultural field, on the way, they saw the accused persons sitting near the 'Babool' tree and at the relevant time, accused Rajol and Mahboob were having axe with them, whereas the other accused Munia and Mukta were armed with clubs. Accused Rajol had asked the other accused persons that this is the best opportunity to ensure that the enemy may not escape from there and then all of them caused injuries to the deceased. Further case of the prosecution is that the incident has been witnessed by PW-2, Ganesh

Shanker from 20-25 steps and hearing the cries of PW-2, his uncle PW-3, Radhey Shyam, who at the relevant time had gone to attend the nature's call also reached to the place of occurrence. Another eye witness PW-6, Surendra Singh is also alleged to have seen the incident but he has not supported the prosecution case and has been declared hostile. Further case of the prosecution is that after causing injuries to the deceased, accused persons lifted him and threw him in the canal. On 17.07.1984, the dead body of the deceased was found from the canal. In the meanwhile, on the basis of written report Ex.Ka-4 prepared and lodged by PW-2, Ganesh Shanker, a child witness, on 14.07.1984, FIR Ex.Ka-1 was registered on 15.07.1984 at 00:30 a.m. against the accused-appellants under Sections 302/201 of IPC.

3. Inquest on dead body of the deceased was conducted on 17.07.1984 vide Ex.Ka-6 and the body was sent for postmortem, which was conducted on 18.07.1984 by PW-4, Dr. Shashi Kumar Singh vide Ex.Ka-5.

4. As per the postmortem report, following 13 injuries were noticed on the body of the deceased:

"1. Incised wound 7 cm x 2 cm x bone deep left cheek left side mouth to right jaw. Jaw fractured.

2. Incised wound 9 cm x 1.5 cm x bone deep left cheek upper part of left neck maxila fractured.

3. Incised wound 9 cm x 1.5 cm x bone deep left cheek under left ear. Bone found cut and brain matter coming out.

4. Incised wound 5 cm x 1 cm x muscle deep on left lower side of neck.

5. Incised wound 5 cm x 1 cm x bone deep right chin to right side mouth. Jaw found cut.

6. Abrasion 9 cm x 8 cm on right cheek front.

7. Incised wound 10 cm x 2 cm x muscle deep at upper side of right side of neck.

8. Incised wound 7 cm x 2 cm x muscle at lower side of neck.

9. Lacerated wound 5 cm x 2 cm on right side of head 7 cm above right ear.

10. Incised wound 3 cm x 0.5 cm x muscle deep right side of scapula region.

11. Incised wound 9 cm x 2 cm x muscle deep right side of scapula region 9 cm above from Iliac bone and 7 cm right from middle line.

12. Multiple contusion in an area of 25 cm x 20 cm on back of abdomen over mid line size 5 cm x 1.5 cm to 12 cm x 2 cm.

13. Contusion 9 cm x 2 cm right buttock."

According to autopsy surgeon, cause of death of the deceased was due to shock and haemorrhage as a result of ante mortem injuries.

5. While framing charge, the trial Judge has framed the charge against the accused persons under Sections 302/34 and 201 of IPC.

6. So as to hold accused-appellants guilty, prosecution has examined seven witnesses. Statements of accused-appellants were recorded under Section 313 Cr.P.C, in which they pleaded their innocence and false implication.

7. By the impugned judgment, the trial Judge has convicted all the accused

persons and sentenced them as mentioned in paragraph no. 1 of this judgment. Hence, this appeal.

8. Learned counsel for the appellants submits:

(i) that the motive has not been proved by the prosecution.

(ii) that the accused-appellants have been convicted mainly on the basis of statement of a child witness PW-2, Ganesh Shanker, who at the time of incident was 11 years of age. It has been argued that the statement of PW-2 does not inspire the confidence of this Court and he appears to be a tutored witness. Learned counsel submits that a very improbable story has been put forth by PW-2 Ganesh Shanker that he was going ahead of the deceased and after hearing the cries of deceased, when he turned back, he saw the incident from 20-25 steps. Learned counsel submits that normally in presence of a child, aged 11 years, if such brutal act is being done, instead watching the incident, he would run away from the spot.

(iii) that as per PW-2, Ganesh Shanker, he prepared FIR at his home and thereafter, he has stated that the FIR was prepared at the place of occurrence. PW-2 has categorically stated that but for him, there was no other eye witness, who could see the incident.

(iv) that the other eye witness PW-3, Radhey Shyam is a planted witness and actually, he had not seen the occurrence.

(v) that in a case of child witness, if he does not inspire confidence of this Court, normally the Court would look for a corroborative piece of evidence but in the present case, no such other evidence is there.

9. On the other hand, supporting the impugned judgement, it has been argued by State counsel that the conviction of the appellants is in accordance with law and there is no infirmity in the same. He submits that in a case of eye witness, even if motive has not been proved by the prosecution, it will not dent the case of prosecution. He further submits that PW-2, Ganesh Shanker, the child witness, appears to be a very mature witness and in the Court but for minor contradictions, he remained firm.

10. We have heard counsel for the parties and perused the record.

11. PW-2, Ganesh Shanker is the main witness of the prosecution, aged 12 years at the time of recording of his evidence, states that on the date of occurrence at about 4:00 PM, he had gone to his field along with his father and at about 06:00-06:30 p.m., when they were returning, he saw accused persons standing near the 'Babool' tree and at that time accused Rajol and Mahboob were having axe with them, whereas other two accused were carrying clubs with them. He states that he was going ahead of his father and near the 'Babool' tree, accused persons surrounded his father by saying that this is the best opportunity for them to ensure that their enemy may not escape and then they started beating his father. He immediately turned his face and then raised cries and upon hearing the same, PW-3, Radhey Shyam, Ram Swaroop (not examined), PW-6, Surendra Singh reached to the place of occurrence and they challenged the accused persons. After causing injuries to his father, accused persons dragged him to a canal and threw him in the water. After about five minutes, accused persons fled away

from the spot. He has stated that the other eye witnesses to the incident reached to the place of occurrence after the accused persons had already left the place. In the canal, dead body of his father was searched and by that time, other villagers also reached there but they also could not get him. After reaching home, in a piece of paper, he prepared written report Ex. Ka-4 and then lodged the report. In the cross-examination, he has stated that after taking his bath, deceased was wearing clothes including drawers, however, when he was lifted and dragged by accused persons, he was naked. In paragraph no. 8 he has further stated that after hearing the cries of his father, when he turned back, his father was about 30-35 steps away and by that time, he had already fallen. He has not said as to after sustaining injuries of which of the accused, his father fell nor he could see as to which weapon was used by which of the accused. He further states that after cries being raised by his father, he (this witness) also raised his cries but nobody could come near to him and his father and the other witnesses reached to the place of occurrence after the body of the deceased was thrown in the canal. He further states that before the body of his father could be thrown, no witness was present. He has again stated that he could not see as to how many injuries have been caused by the accused persons by using which weapon. He states that he saw the witness Surendra Singh from the distance of about 80-90 steps and likewise, the other eye witness to the incident PW-3, Radhey Shyam was standing about 70-80 steps from him. He further states that at the time of lodging the FIR, Surendra Singh and Ram Swaroop were with him and then he states that the FIR was reduced in writing at the place of occurrence in a lantern light. He further states that he brought pen and paper from his house and after preparing the report, he folded the same, kept in his pocket then had gone to police station on foot and it took about 2-2½ hours to him to reach the police station. He further states that after two days of the incident, he came to know that the dead body of his father has been recovered. He further states that a question was put to this witness as to why he did not reduce the report in writing in his house, he replied that his uncle PW-3, Radhey Shyam and Ram Swaroop had asked him to prepare the report at the place of occurrence.

12. PW-1, Anek Singh is a police constable, who registered FIR.

13. PW-3, Radhey Shyam is a brother of the deceased and uncle of PW-2, Ganesh Shanker, states that at the time of occurrence, he had gone to attend nature's call and saw PW-2 running towards the village by raising cries. When he reached near PW-2 and inquired from him, PW-2 informed him that his father is being assaulted and then he (this witness) also started shouting, however, he did not reach near his brother. He states that he saw the accused persons beating his brother and then they dragged him to a canal and threw him in the same. The accused persons waited there for few minutes and then fled away from the spot. He further states that after cries being raised by him and his nephew, none of the villagers reached to the place of occurrence and they reached there after the incident. He further states that he saw the faces of the accused persons after 'maar-peet' had already taken place.

14. PW-6, Surendra Singh, other eye witness to the incident, has not supported

the prosecution case and has turned hostile. PW-4, Dr. Shashi Kumar Singh conducted postmortem on the body of the deceased. PW-5, A.V. Singh took the body of the deceased for postmortem. PW-7, Aadil Raseed is an Investigating Officer.

15. Close scrutiny of the evidence makes it clear that the entire case of the prosecution hinges upon the statement of a child witness i.e. PW-2, Ganesh Shanker, who at the time of occurrence, was about 11 years. It is a settled proposition of law that the conviction of an accused c be based solely on the statement of a child witness. However, the Court as a rule of prudence while considering such evidence is required to make close scrutiny of the said evidence and only on being convinced about the quality thereof and reliability can record the conviction, based thereon.

16. In **Panchi v State of U.P.1**, the Hon'ble Supreme Court, while dealing with the issue relating to the evidence of child witness, held as under:-

".....It cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

17. In **Dattu Ramrao Sakhare v. State of Maharashtra2**, it was held as follows: (SCC p. 343, para 5)

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

18. The position of law relating to the evidence of a child witness has also been dealt with by the Apex Court in **Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra3 and Golla Yelugu Govindu v. State of Andhra Pradesh4. In the case of State of UP vs Krishna Master & Ors.5,** the Hon'ble Apex Court also has gone a step ahead in observing that a child of tender age who has witnessed the gruesome murder of his parents is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time notwithstanding the gap of about ten years between the incident and recording his evidence.

19. If the above preposition of law is considered in the present case, though in the Court, PW-2, Ganesh Shanker has deposed against the accused persons but he is not consistent and reliable to the incident, where it can be said that he is not a tutored witness. As per his own saying, he was going ahead of his father and after hearing cries of his father, he turned back his face and saw the

incident from 20-25 steps. He further says that when he saw his father, he was already lying on the ground and he could not see as to which weapon was used by which of the accused. He further states that upon hearing his cries, the other witnesses reached there but in the cross-examination, he has clarified that till the dead body of his father was thrown in the water and the accused persons fled away from the spot, no other witness reached to the place of occurrence. According to him, it is only he, who could see the incident and the other witnesses reached to the place of occurrence after the incident had already taken place. In respect of preparing the written report, he has given two different versions. At one place, he states that after the incident, he had gone to his house, which as per evidence is about 200-250 steps away from the place of occurrence, prepared the written report in his house itself and then lodged the same, whereas in other place, he states that he brought pen and paper from his house and sat at the place of occurrence and in a lantern light, prepared the written report. It is relevant to note here that at the time of preparation of written report, apart from two other eye witnesses, PW-3, Radhey Shyam and PW-6, Surendra Singh, the other village members were also present but surprisingly, a child aged 11 years was allowed to prepare a written report in presence of all these persons. Further, PW-3 himself prepared the entire report, folded it, kept in his pocket and then had gone to the police station which is about 2-2½ hours away from the place of occurrence. From the contents of the FIR, it becomes doubtful as to whether the same has been prepared by a child aged 11 years that too of a residence of a village.

20. Yet another important aspect of the case is that before recovering the dead body of the deceased, which was recovered on 17.07.1984, FIR was already registered against the accused persons under Sections 302/201 of IPC on the basis of written report Ex.Ka-4 and as per contents of FIR, after beating the deceased, accused persons lifted and dragged his body and threw him in a canal but how it was clear to the lodger of the FIR that the deceased has been killed specially when till registration of the FIR, his dead body was not recovered by the police. Contradictions in the statement of PW-2, Ganesh Shanker creates a doubt as to whether the FIR was prepared by him or not and as to whether he has been tortured or not. When the statement of PW-2 is not clinching and conclusive, we are required to see the other evidence available on record. In the present case but for statement of PW-2, there is no other evidence, which can be relied upon by the Court. PW-3 Radhey Shyam has been examined as eye witness to the incident but PW-2 has categorically stated that at the time of occurrence but for him no one else was present. Once, the presence of PW-3, Radhey Shyam has been totally denied by PW-2, we find it difficult to accept the testimony of PW-3. The other eye witness to the incident i.e. PW-6, Surendra Singh has not supported the prosecution case and has turned hostile. Though the statement of PW-2 raises needle of suspicion on the accused persons but it is a settled preposition of law that suspicion howsoever grave it is, cannot take place of evidence.

Recently in **Devi Lal vs. State of Rajasthan; AIR 2019 SC 688** the Apex Court, while dealing with a case, observed as under:

"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."

21. Taking cumulative effect of the evidence, we are of the view that the accused-appellants are entitled to get the benefit of doubt. In **Kali Ram vs. State of Himachal Pradesh, the Supreme Court; 1973 AIR 2773**, while dealing with the issue relating to withholding or affording benefit of doubt, observed as under:

"26. It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on page 3 of the book entitled "The Accused" by J.A. Coutts 1966 Edition, "When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of

ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, Second Edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahabrao Bobade & Anr. (AIR 1973 SC 2622) as is clear from the following observations:

"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 distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

22. In our considered view, on the basis of weak evidence adduced by the prosecution, the trial court was not justified in convicting the accused-appellants.

23. The appeal is **allowed.** The impugned judgement and order is set aside. The accused-appellants are reported to be on bail, therefore, no further order is required.

24. Let a copy of this judgment be sent to the concerned trial Court forthwith for compliance.

(2019)11ILR A1135

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 3084 of 1985

Munna Singh & Ors. ...Appellants(In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri T. Rathore, Sri D.B. Mishra, Sri P.C. Srivastava, Sri Jitendra Kumar Mishra, Sri Utsav.

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

A. Criminal Law-Indian Penal Code,1860 - Criminal appeal against conviction - under Sections 302/34 IPC - imprisonment for life - incident had taken place at 9.30 a.m. - FIR lodged promptly at 10.00 a.m. at police outpost - one furlong from the place of occurrence - No ambiguity in the prosecution case - deceased received several gunshot injuries - fired from a close range - blackening and tattooing found all around the wounds and margins were inverted - three accused appellants - armed with firearm weapons - fired shot at the deceased one

after other as per the evidence of PW1, PW3 and PW4 - their testimony fully corroborates the post mortem report of the deceased - act and conduct of the appellants shows that they were the aggressor and had gone with an intention to kill the deceased and had murdered him in broad day light. He died on account of ante mortem injuries received on his person which is a murder in cold blood. Finding recorded by the trial Court for conviction and sentence of the accused appellants under Section 302/34 I.P.C. is based on cogent evidence and is supported by sound reasons - upheld by this Court. (Para 59, 61,62,)

Appeal dismissed. (E-5)

List of cases cited: -

1. Suresh Singh & ors. Vs St. of Haryana. reported in 1999 SCC (Cri) 560 (distinguished)

2. Moti Singh Vs St. of Mah. (2003) SCC (Cri) 1226 (distinguished)

3. Subramani & ors. Vs St. of T.N. (2002) SCC (Cri) 659 (distinguished)

4. Darshan Singh Vs St. of Pun. & anr. (2010) 2 SCC (Cri 1037 (distinguished)

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

1. The present criminal appeal has been preferred against the judgment and order dated 16.11.1985 passed by Sessions Judge, Karvi (Banda) in S.T. No.120 of 1982 convicting the appellants under Sections 302/34 I.P.C. and sentencing them to undergo life imprisonment.

2. The prosecution case in brief is that the informant, namely, Chhatra Mohan Singh submitted a written report at police outpost Bargadh which comes under the police station Mau against five accused persons stating therein that he is a resident of village Kaniyar. He has two brothers, namely, Narayan Singh (deceased) and Madan Mohan Singh and they are also having a house at Bargadh Railway Station. On 7.3.1980 in the morning, Devendra Pratap Singh alias Chhotkawa was taking his cattles for grazing and his cattles entered in the field of the informant and started damaging the crops, on which informant's brother, namely, Narayan Singh had made complaint to Devendra Pratap Singh alias Chhotkawa, scolded and he started taking the cattles to Kanji House by droving them. On which, Sripal Singh and Hammev Singh of his village asked his brother Narayan Singh not to do so as the cattles had entered in the field unintentionally, then his brother heeded the said request, but at that time Sheo Shankar Singh, son of Vishram Singh came there and started abusing Narayan Singh, on account of which a quarrel took place between them, then Devendra Pratap Singh told Narayan Singh as to why he is abusing his father and stated that *'Tumhara Ghamand Utar Doonga'*.Thereafter, the informant and his brother went to their house which was situated near Bargadh station and his nephew Udai Veer Singh also went to traders at Allahabad. After some time, the informant and his brother Narayan Singh were going to see the stock of the ashes of coal from their house and when they reached on the road near the stock, they saw that from the opposite direction a tractor red in colour without having any number and trolley came, on which Munna Singh, Surendra Pratap Singh, Devendra Pratap Singh, all sons of Sheo Shankar Singh, resident of village Kaniyar and Balwan Singh son of Sher Singh, resident of village Gujhwar, police

station Bara, District Allahabad were sitting. Munna Singh was carrying 12 bore SBBL gun in his hand, Surendra Pratap Singh was having a country-made pistol in his hand, whereas Balwan Singh had a lathi in his hand. They alighted from the said tractor. On the exhortation of Munna Singh that the enemies should be killed and from near the tractor fired shot, which hit his brother who trembled and tried to run away, on which Surendra Pratap Singh shot with his countrymade pistol at his brother from a very close range. Devendra Pratap Singh also fired with his country-made pistol and thereafter Surendra Pratap Singh again fired, on which his brother had fallen down and thereafter Balwan Singh assaulted him with lathi, on account of the said injuries his brother died. The said incident was witnessed by Brij Mohan Singh, Rajendra Singh of Village Kaniyar, Amar Nath Brahmin of Bargadh station, Kailash Chandra Pandey of village Manka and son of the informant Balveer Singh.The informant suspected conspiracy in the murder of his brother by Mahendra Pratap Singh son of Sheo Shankar Singh. Thereafter, the accused fled away by the said tractor by which they had come towards Bargadh turning. His brother had fallen down and Balwan Singh assaulted him with the lathi and on account of the injuries his brother died on the spot. The written report which was submitted by him at the concerned police station is marked as Ext. Ka.1.

3. On the basis of written report submitted by the informant Chhatra Mohan Singh, a First Information Report was registered against the five accused as Case Crime No.29 of 1980, under Sections 302, 120-B I.P.C., Police Station Mau, District Banda on 7.3.1980 at 10.00 a.m. on the same day.

4. The investigation of the case was entrusted to Sub Inspector Asha Ram (PW7) who visited the place of occurrence and conducted the panchayatnama on the dead body of the deceased. He prepared the photo-nash, chalan-nash and other police papers etc. and sealed the dead body after panchayatnama and sent the same for post mortem through Constables Mohd. Mustafa and Om Prakash. Further, he took into custody the clothes of the deceased which were sealed and recovery memo of the same was also prepared. He took the blood stained and simple soil from the place of occurrence and sealed the same in two separate boxes. Thereafter, he prepared the site plan of the place of occurrence. He recorded the statements of the witnesses and made search of the accused. He arrested the accused persons, namely, Munna Singh, Surendra Pratap Singh, Devendra Pratap Singh and Balwan Singh along with tractor and from the possession of accused Munna Singh a single barrel gun and two cartridges were recovered and he prepared the fard recovery memo and also lodged an FIR against accused Munna Singh under Section 25 of the Arms Act. He recorded the statements of accused persons and submitted charge sheet against accused, namely, Munna Singh, Surendra Pratap Singh, Devendra Pratap Singh and Balwan Singh and in the meanwhile he was transferred and rest of the investigation was conducted by S.I. Jugal Kishore who conducted the investigation and submitted the charge sheet against Mahendra Pratap Singh.

5. The trial Court on the committal of the case, framed charges against the accused persons for the offence in question and the accused denied the charges and claimed their trial.

6. The prosecution in support of its case has examined PW1- Chhatra Mohan Singh, PW-2-Amar Nath @ Lallu, PW3-Balveer Singh, PW4-Kailash, PW5-Dr. Shiv Dayal Singh, PW6-Sripal Singh, PW7-Asha Ram.

7. The prosecution in support of its case further relied upon the documentary evidence, i.e., written report (Ext.Ka.1), recovery memo of blood stained and plain soil (Ext. Ka.2), recovery memo of blood stained clothes of the deceased (Ext.Ka.3), post mortem report (Ext. Ka.4), Panchayatnama (Ext. Ka.5), photo-nash (Ext. Ka.6), chalan-nash (Ext.Ka.7), chik report (Ext. Ka.9),chik FIR (Ext. Ka.10), G.D. report (Ext.Ka.11), site plan (Ext. Ka.12 & 14), charge sheet (Ext. Ka.15 & 16), statement of the witness Amar Nath recorded under Section 161 Cr.P.C. (Ext. ka.17) and material exhibit, i.e., clothes found on the dead body of the deceased, i.e., Baniyan and Lungi.

8. The accused in their statements recorded under Section 313 Cr.P.C. have denied the prosecution case.

9. The accused Mahendra Pratap Singh stated that at the time of the incident he was posted in the Court of A.C.O, Allahabad as 'Peshkar' and was present on his duty on the date and time of the incident. He further stated that the informant and his family members are the men of criminal antecedents, whereas the family of the accused persons are well educated and are doing jobs, on account of which they bore enmity. He further submitted that the deceased Narayan Singh and the informant had taken arms licence on forged address and were also doing the work of stolen articles, for which a complaint was made by the accused persons against them and on their complaint, licence of the deceased as well as informant was seized and due to which the accused were after them. The accused persons also refused to give Rs.5000/- to the Station Officer, Mau and being annoyed he submitted final report in the FIR which was registered from of the side of the accused of the present incident.

10. The accused Surendra Pratap Singh stated that prior to few days of the incident, Mahendra Pratap Singh had come with his children along with a gun to his house and thereafter returned back. On the day of the incident at about 10.30 a.m. or 11.00 a.m. Constables Om Prakash and Mohd. Mustafa had gone to his house and asked to see his gun and stated that Station Officer had called him. The accused went along with the said Constables along with his gun and when he reached the Bargadh turning then he came to know that Station Officer had gone to Mau, thereafter the Constables took him to Mau and locked him in jail along with his brothers.

11. The accused Munna Singh stated that on 7.3.1980 at about 10.30 a.m. he was going on his tractor to Bargadh to take sand. The tractor was being driven by Balwan Singh. As soon as the tractor had reached near Bargadh railway station then Narayan Singh, Udai Veer Singh, Chhatra Mohan Singh and Amar Nath and 14 to 15 coal persons surrounded his tractor. Narayan Singh was carrying a rifle in his hand, whereas Udai Veer Singh and Chhatra Mohan Singh were armed with 12 bore gun and 14 to 15 coal persons were having lathis and ballam in their hands. Balveer Singh wanted to take out the tractor from the side but as there was no space, hence the tractor was

parked in the middle of the market. On the right side of the tractor in the market, he along with Balwan Singh and Devendra Pratap Singh got down from the tractor and were standing there. Narayan Singh fired which hit Balwan Singh on his chin. Udai Veer Singh also fired which hit Devendra Pratap Singh on his hand and he fell down. Narayan Singh and Udai Veer Singh overpowered them and when 2-3 steps remained then in self defence Munna Singh had fired with a countrymade pistol. With the assistance of the witnesses, Munna Singh turned the tractor and went to Mau and after reaching at Mau at 1.15 p.m. he gave a written report about the incident at Police Station Mau.

12. The accused Devendra Pratap Singh stated that at the time of the incident he was studying in Allahabad University and had come to his house and he too was going on the tractor along with Balwan Singh and Munna Singh for taking the sand. He supported the statement of Munna Singh.

13. The accused Balwan Singh in his statement also supported the statement of Munna Singh and stated that when Narayan Singh stopped the tractor after abusing him, then he jumped from the tractor and tried to escape but since he was surrounded from all the sides, he could not escape. Narayan Singh had fired shot with rifle which hit him on his chin and also hit Devendra Pratap Singh who was near him to support him. On him, Uday Veer Singh also fired. Balveer Singh had fallen down when he was shot hit, he became unconscious and he was taken to the Mau Hospital where he became conscious.

14. The accused Munna Singh lodged a report with respect to the said incident against the informant Chhatra Mohan Singh, Udai Veer Singh and two other persons under Sections 307/34 & 586 I.P.C. at Police Station Mau which was registered on the same day and after investigation,the Investigating Officer submitted final report in the said case. Thereafter, accused Munna Singh on 5.11.1980 had filed a complaint in the Court of C.J.M.,Banda and on the basis of the complaint against them, S.T.No. 552 of 1982 was registered.

15. PW1-Chhatra Mohan Singh in his deposition before the trial Court has stated that on the day of the incident in the morning, he along with his brother Narayan Singh had gone to see their agricultural field and they saw that cattles of Devendra Pratap Singh were grazing in his agricultural field.The wheat crop was standing in the field and because of grazing of cattles in the field, the crops were being damaged, on which his brother Narayan Singh made a complaint about the same to Devendra Pratap Singh and asked him to drove the cattles in the Kanji House. Thereafter a quarrel took place between both the parties and at that time Sripal Singh and Hammev Singh came and stated that cattles might have come in the field unintentionally and asked him to leave them, on which his brother heeded to the request of Sripal Singh and Hammev Singh. Thereafter, the father of the accused, namely, Sheo Shankar Singh arrived and stated to his brother that *'Tum Bade Rangbaz Bante Ho, Jaanvar Hamare Kanji House Le Chalo To Dekhe"*. In the meantime, there was some hot altercation took place between his brother Narayan Singh and Sheo Shankar. Accused Devendra Pratap

Singh who came there,stated that as to why Narayan Singh was abusing his father and he uttered *'Mein Tumhara Ghamand Utar Doonga*.' On which, the informant and his brother went to their house.The said incident had taken place at 7 a.m. in the morning. They returned back from their agricultural field to their house and after a short time they came to their house near Bargadh railway station. The nephew of this witness, namely, Udai Veer Singh had gone from the house of Bargadh railway station in connection with his work of leaf to Allahabad with a trader. Thereafter the informant and his brother Narayan Singh proceeded to see the stock of ashes of coal and when they reached in front of the seed go-down, then they saw that from the western side a red tractor which was without trolley and number, was coming which was stopped at a distance of 20-25 paces from them. Thereafter, accused Munna Singh who was armed with 12 bore SBBL gun, Surendra Pratap Singh and Devendra Pratap Singh with countrymade pistols and Balwan Singh with lathi came down from the tractor and on the exhortation of Munna Singh by saying to kill the enemies and they cannot leave, accused Munna Singh fired shot at this witness and his brother Narayan Singh. The said fire hit his brother who trembled and tried to escape, on which Surendra Pratap Singh fired shot with country-made pistol from a close range. Thereafter, accused Devendra Pratap Singh also fired with his countrymade pistol from a close range. Surendra Pratap Singh again fired shot with his countrymade pistol and Balwan Singh assaulted his brother with lathi. On the alarm raised by this witness, Amar Nath, Kailash Chandra Pandey and son of this witness, namely, Balveer Singh, Rajendra Singh and Brij Mohan Singh arrived there who chased the accused who had killed his brother, but the accused fled away towards Bargadh turning on the same tractor. When the accused had gone away, he went near his brother and saw that he had received injuries and it was bleeding. The blood was also fallen on the ground and his brother Narayan Singh had died on the spot. He got a report written by Rajendra Singh which was being dictated by him about the incident and after writing the same it was read over to him and he put his signature over the same. The written report was proved by this witness under his signature as Ext. Ka.1. Thereafter, the said report was taken by this witness to police out post Bargadh and submitted the same, where the proceedings were drawn and copy of the report was also given to him from the said outpost, after getting the copy of the report he returned to the dead body of his brother and within 5-6 minutes the Station Officer had arrived at the place of occurrence who conducted the Panchayatnama on the dead body of the deceased and made spot inspection, thereafter sealed the dead body of the deceased and after inspecting the spot he went towards Bargadh turning. This witness identified the clothes of the deceased which he was wearing at the time of the incident when the same was opened in the Court. He stated that the incident had taken place in conspiracy at the instance of Mahendra Pratap Singh.

16. In cross-examination, this witness admitted that the cross case of the present case was also pending and going on in the same Court being S.T.No.552 of 1983 (State Vs. Udai Veer Singh and others. He submitted that Balwan Singh and Devendra Pratap Singh did not receive any injury in the incident. He denied the suggestion that they had received injuries in the incident.

17. This witness denied that he and his brother Narayan Singh lives separately and their houses are also separate but they both lives in one house. Both of them used to do agricultural work and business together. At the time of incident, he used to do the agricultural work and when it was necessary he used to do job. His brother Narayan Singh used to do the agricultural work and at the time of incident he along with his brother used to live at village Kaniyar and also at the house near Bargadh railway station. On the day of incident he had gone to village Kaniyar. On 6.3.1980, he had gone to village Kaniyar from Bargadh and he reached village Kaniyae on 6.3.1980 at about 2-3 p.m. and both of them had gone together. It takes 20-25 minutes from going Bargadh to Kaniyar. He is also having another brother, namely, Madan Mohan who was living at village Kaniyar at the time of the incident and Madan Mohan used to live in village Kaniyar only and he live with them.This witness further stated that he did not show the Investigating Officer his agricultural field. He did not remember that when the Investigating Officer had gone to see his field and when the Investigating Officer had gone to see his field then crops were not cut. The crops were ripe and were standing in the field. Hammev Singh and Sripal Singh had come towards north.

18. This witness denied that he along with his brother had not gone to see the agricultural field nor his field was grazed nor any quarrel took place. He does not remember the khasra number of the filed which was grazed.

19. He further stated that when he had gone to Bargadh police outpost to lodge the report, the Sub Inspector was not present there.The Investigating Officer had come to the place of occurrence at 10.00-10.30 a.m. and first seen the dead body and inspected the spot and it took him about one hour for the same and after inspecting the spot, the dead body was sealed. At about 12.00 in the afternoon the dead body was sent from the place of occurrence which was being sent by tractor. He did not accompany the dead body nor any one of his family had gone with the dead body. The tractor by which the dead body was taken, he does not remember to whom it belonged and no person of his village or relative had gone with the dead body. After the dead body was sealed, he returned to his house. He is not aware of the fact that who was the constable, chaukikar or Sub Inspector or how many people had gone with the dead body.

20. This witness denied that along with him many persons had gone to police outpost Bargadh. He also denied that Santosh Kumar, Surendra Bahadur Singh, Chhatra Mohan Singh and Madan Mohan Singh had gone with him to lodge the report. He further denied that written report was lodged after due consultation at the police outpost. He also denied that his report was lodged after the report of Munna Singh. He did not know where Mahendra Pratap Singh was posted.The deceased Narayan Singh was a licensee of a rifle prior to the incident and he had a rifle with him and this witness was also a licensee of one SBBL gun of 12 bore prior to the incident. Udai Veer Singh was also a licensee of SBBL 12 bore gun prior to the incident and Rajendra was also having a licence of 12 bore SBBL gun prior to the incident. The licence of the witness along with Udai Veer and Rajendra were issued from the office of

District Magistrate, Allahabad. He was ignorant of the fact that on 21.7.1977, Mahendra Singh had given an application to S.S.P., Allahabad or not that they got the licence from the Allahabad by giving a wrong address. The licence of the deceased Narayan Singh was issued from the office of District Magistrate, Lucknow prior to the incident and he did not know whether the accused persons had given an application against him also that he had taken the licence by showing wrong address. No official had come to him to enquire regarding complaint in connection with the licence of the weapon issued to them. The gun of Udai Veer Singh was deposited at police outpost Bargarh by the Sub Inspector. The notice was also received for cancellation of gun licence to this witness but he had taken a stay from the High Court, Allahabad. The order for cancellation of gun license was passed, against which he preferred an appeal, which was dismissed by the Court of Commissioner and he cannot tell about the licence of Rajendra Singh. Whether the licence of the gun of Lal Sahab was cancelled or not he is not aware of the same.

21. This witness denied that the accused Mahendra Pratap Singh had made a complaint against the witnesses and their family members for getting the licence of firearm by showing wrong address due to which their weapons were deposited and notice for cancellation of their firearm licence was received by them, on account of which he along with family members bore enmity with the accused and their family members. He does not know whether the accused Munna Singh was having a contract of bricks in the range of Bargadh. He is also not aware of the fact that Munna Singh used to supply the mud outpost side of Bargadh or not. He denied the suggestion that he does not have a contract of the ashes of coal.

22. He further in his cross-examination has stated that at the time of the incident he was not having his gun nor Narayan Singh was carrying his rifle and when he saw tractor, the accused got down from the tractor and exhorted to kill the enemy and when the accused exhorted, he did not run away and Munna Singh fired. All the accused were standing near Munna Singh and his brother Narayan Singh was standing on the north side of Munna Singh when he received gunshot injury. As the first shot which was fired by Munna Singh, his brother trembled and tried to run away, then Surendra Pratap Singh fired and thereafter Devendra Pratap Singh also fired and the fourth fire was made by Surendra Pratap Singh again, on which his brother had fallen down and accused Balwan Singh assaulted his brother with lathi. Surendra Pratap Singh and Devendra Pratap Singh were close to his brother and fired at him. This witness was at a distance of 8-10 paces from his brother. He further stated that the accused Devendra Pratap Singh and Balwan Singh had not received any injuries. Neither this witness nor his brother Narayan Singh had made fire on them. He had not given any statement to the Investigating Officer under Section 161 Cr.P.C. that he fired a shot with his licensee gun on the accused which hit the accused Devendra Pratap Singh on his hand and if the Investigating Officer has written the said fact then he cannot give any reason for the same. He stated that Surendra Pratap Singh was driving the tractor and when the accused fled away on the tractor, the same was also being

driven by Surendra Pratap Singh.This witness denied the suggestion that on 7.3.1980 at 10.30 a.m. when accused Munna Singh, Balwan Singh and Devendra Pratap Singh were going on tractor for taking sand, then he along with Udai Veer Singh, Narayan Singh (deceased) and Lallu son of Nana @ Ramesur and 14-15 persons surrounded the accused and indulged in altercation with them. He also denied the suggestion that the fire which was made by Narayan Singh hit the chin of Balwan Singh and Udai Veer Singh with his 12 bore gun fired at Devendra Singh which also hit him. He further denied the suggestion that accused fired at him and the deceased in their self defence. He has shown his ignorance that the accused had gone to police station Mau for lodging a report. He was also ignorant of the fact that on the report of the accused persons, this witness and his family members after due consultation and deliberation had lodged the report thereafter. He did not know whether the people of Kol caste had assaulted with lathis, due to which his brother also received lathi injuries. He also showed his ignorance whether Munna Singh was carrying gun or not.

23. PW2-Amar Nath @ Lallu who was examined as prosecution witness was declared hostile by the prosecution.

24. PW3-Balveer Singh who is the son of PW1 Chhatra Mohan Singh has reiterated the prosecution case as has been stated by PW1 before the trial Court and has supported the same, hence, for the sake of brevity the same is not being repeated.

25. In his cross-examination, this witness has stated that the Station Officer had come at the place of occurrence at 9.45 a.m. and he was also present there when the Investigating Officer had come. The Investigating Officer remained at the place of occurrence for about 1½ hours and thereafter he left. This witness left the place of occurrence immediately the Investigating Officer had arrived. He remained at his house at Bargadh and he did not met the Station Officer nor the Investigating Officer had come for interrogation and on the day of incident the Station Officer did not make any query from him and he is narrating about the incident for the first time before the trial Court. At the time of incident, he was studying in class 8th at Bargadh. He stated that he cannot tell the names of those persons who had witnessed the incident. He did not see any injuries on the accused Devendra Pratap Singh and Balwan Singh. His father was not carrying a gun or had fired at the accused. He had not given any statement to the Investigating Officer and if any such statement has been written then he cannot tell any reason for the same. If the Investigating Officer had written in his statement that his father had fired shot with his SBBL gun then he also cannot tell any reason and if the Investigating Officer also written in his statement that shot hit at the hand of accused Devendra Pratap Sigh then he also cannot tell any reason for the same. Kailash and Rajendra were standing at a distance of 10 paces from the tractor at the place of occurrence and both of them did not come to his house after the incident nor he met them after the incident.

26. PW4-Kailash who also claims himself to be an eye witness of the incident has narrated the prosecution case as has been stated by PW1, hence, for the

sake of brevity the same is not been repeated.

27. In his cross-examination, he has stated that he was a resident of village Manka and distance of village Manka from Bargadh is about 6 Kms.His house is at Bargadh railway station adjacent to the police outpost. He further stated that in the year 1968 his father was murdered and Brij Mohan was the witness in the murder case of his father. He deposed that as soon as the Station Officer had reached at the place of occurrence, he got a report written by the informant but he was not dictating the report and along with the Station Officer, there was one Diwan and a Constable. The Investigating Officer recorded his statement on the third day of the incident. He stated that PW1 Chhatra Mohan had not fired shot nor he was carrying gun and he has not given any such statement to the Investigating Officer that Chhatra Mohan Singh had fired at Devendra Pratap Singh which hit his hand and if the Investigating Officer had written the same he cannot tell any reason about the same.

28. This witness denied the suggestion that he did not see the incident nor he was present at the place of occurrence. He denied the suggestion that since Chhatra Mohan Singh was known to him, hence, he is falsely deposing against the accused.

29. PW5-Dr. Sheo Dayal Singh Chauhan who was examined by the trial Court has deposed that on 8.3.1980 he was posted as Superintendent in District Hospital Karvi and on the said date at 1.15 p.m. he had conducted the post mortem on the dead body of the deceased Narayan Singh who was sent by S.I. of police outpost Bargadh through Constable Mohd. Mustafa and Om Prakash of Chawki, who identified the dead body and brought the same in sealed condition. The deceased was aged about 40 years and duration of death was one day. He found the following ante-mortem injuries on his person:-

"1. Gunshot wound 5 cm. x 2 ½ cm. x muscle on abdomen just right to umbilicus. Blackening present around margins, margins inverted.

2. Contusion 11 cm.x 2 cm. obliquely 1 cm. above umbilicus both sides.

3. Contusion 3 cm. x 2 cm. obliquely across abdomen in epigastrium.

4. Gunshot wound 3 cm. x 2 cm. x chest cavity 3 cm. above right nipple. Blackening and tattooing present on margins. Margins inverted.

5. Gunshot wound 1/2 cm. diameter x chest cavity 8 ½ cm. above right nipple. Margins inverted.

6. Gunshot wound 1/2 cm. diameter x bone on middle of left clavicle. Left clavicle fractured underneath. Margins inverted.

7. Gunshot wound 1/2 cm. diameter x bone at outer end of left clavicle. Margins inverted. Left scapula fractured underneath.

8. Gunshot wound 1 cm. diameter x bone on back of left shoulder lower part. Margins averted. It communicates with injury no.7.

9. Abraded contusion 4 cm. x 1.5 cm. on back of left forearm 7 cm. below left elbow with fracture of alna underneath.

10. Gunshot wound 1 ½ cm. x bone on middle part of left index back. Margins inverted and blackened.

11. Gunshot wound 2 ½ cm. x 1 cm. x bone in front of middle of left index. Margins averted. Second phalanx

fractured. This injury communicated with injury no.10.

12. Gunshot wound 1 ½ cm. x 1 cm.x muscle on back of right thumb root. Margins inverted and blackened.

13. Gunshot wound 2 cm. x 1 cm. x muscle on outer aspect of root of right index.Margins averted. This injury communicates with injury no.12."

30. In the opinion of the doctor, the deceased died on account of shock and hemorrhage as a result of ante mortem injuries and he has proved the post mortem report as Ext. Ka.4.

31. In his cross-examination, this witness has opined that the death could have occurred within 6 hours on either side.

32. PW6-Sripal Singh (witness of panchayatnama) has stated that on 7.3.1980 at about 10.30 a.m. the Sub Inspector had gone to conduct the inquest proceedings and inquest on the dead body was performed. Dev Narayan, Maharaj Singh, Raja Singh, Badri Prasad along with him were made panch and they also made signature on the panchayatnama and he has proved the panchayatnama of the deceased Narayan Singh as Ext. Ka.5.

33. In his cross-examination, this witness has stated that he was present upto 11 a.m. at the place where the panchayatnama of the deceased was conducted. The dead body was sent in his presence and after 11 a.m. he had gone his village Kanihar. All the panch witnesses of the panchayatnama including him did not write anything except making signature on it. He had come to village Bargadh between 9.00-9.30 a.m. In village Kaniyar he received information that the deceased Narayan Singh had been killed. The distance of village Kaniyar from the place of occurrence is about 1-1/2 miles and he had gone to the village on foot. From the Bargadh railway station a call was made at his village that Narayan Singh had been killed, the said information was received by telephone. At that time it was about 8.00-8.15 a.m. and as soon as he received information, he proceeded to Bargadh which took time of about ½ hours to reach Bargadh from his village. Rajendra is the nephew of this witness, earlier Rajendra had a licencee gun and he is not aware of the fact whether the licence of Rajendra was suspended prior to the incident or not. Once an application was given prior to the incident for suspending the licence of Rajendra. On the application which was given by the accused for suspending the licence of Rajendra, a query was made but thereafter the licence was reinstated. Chhatra Mohan Singh, Narayan Singh (deceased) and this witness, they all belong to Baghel Thakur. The ancestors of this witness as well as of Narayan Singh were the resident of village Manquar, Tehsil Mau, hence, this witness and deceased Narayan Singh belong to one 'Khandan'. From village Kaniyar he along with Hammev Singh had come together.

34. This witness denied that he had made signature at police outpost. He further denied that being relative of the deceased, he is falsely deposing.

35. PW7-Asha Ram has deposed before the trial Court that he was In-charge of the police outpost Bargadh. On 7.3.1980 at 10.00 a.m. the present case was registered at police out post Bargadh.The FIR was registered by Head

Moharrir Chandra Pal Singh and he is acquainted with his hand writing and signature. The chik report which was prepared by H.C. Chandra Pal Singh in his hand writing and signature which is proved by him as Ext. Ka.10. H.C. Chandra Pal Singh also endorsed the chik report in G.D. No.12. The original G.D. dated 7.3.1980 which was in front of him and G.D. No.12 was written H.C.Chandra Pal Singh in his writing and signature and its carbon copy available on the record, was proved as Ext. Ka.11.

36. He further stated that he took over the investigation of the case and reached the place of occurrence and conducted the panchayatnama on the dead body of the deceased Narayan Singh. He prepared photo-nash,chalan-nash and other police papers for post mortem, sealed the dead body of the deceased and sent the same for post mortem through Consstables Mohd. Mustafa and Om Prakash. He proved the panchayatnama as Ext. Ka.4, photo-nash Ext. Ka.6, chalan-nash Ext. Ka.7 and report regarding post-mortem Ext. Ka.8 which was in his hand writing and signature. He also sent copy of the chik Ext. Ka.9 along with a Constable. During panchayatnama, he took into custody blood stained Baniyan, blood stained white Lungi and sealed the same and prepared its material Ext. Ka.3 in the presence of the witness and got their signatures on the same and he has proved the same to be in his hand writing and signature. He further recovered blood stained soil and simple soil from the place of occurrence and kept them in two separate boxes in front of the witnesses and prepared the recovery memo Ext. Ka.2 and got their signatures on the same. He prepared the site plan Ext. Ka.12. He also made search of the accused and arrested the accused at the side of Allahabad road. The accused Munna Singh, Surendra Pratap Singh, Devendra Pratap Singh and Balwan Singh were on tractor. He took into custody a gun from the accused Munna Singh and sealed the same. After arresting the accused persons, he took them to Police Station Mau and registered a case under Section 25 Arms Act against accused Munna Singh. He prepared the recovery memo of gun at Police Station Mau and further conducted the investigation under Section 25 of Arms Act also. Along with the gun two cartridges were also recovered.

37. He further submitted that he took statements of witnesses of panchayatnama and also inspected the field where the animals had entered and were grazing, on account of which quarrel took place. He prepared the site plan of the said place and proved the same as Ext. Ka.13. He took the statements of witnesses, namely, Hammev Singh, Rajendra Singh, Brij Mohan Singh on 13.3.1980. He also took statement on 21.3.1980 of the witnesses of recovery of the gun, i.e., Umesh Kumar, Indra Kumar, Narendra Singh, Surendra Singh, Balveer Singh, Udai Veer Singh and Chhatra Mohan Singh. He prepared the site plan of the place of occurrence from where the gun was recovered and proved the same as Ext. Ka.14 and on 2.6.1980 after completing the investigation he submitted charge sheet against accused Munna Singh, Surendra Pratap Singh, Devendra Pratap Singh and Balwan Singh. Investigation against accused Mahendra Pratap Singh was pending and thereafter he was transferred. He proved the charge sheet dated 2.6.1980 which was before him and proved the same as Ext. Ka.15. Against accused Mahendra Pratap Singh,

charge sheet was submitted by S.I. Jugal Kishore Tripathi, who has died and this witness was conversant with his hand writing and signature and he proved the charge sheet dated 16.7.1980 as Ext. Ka.16.He further stated that witness Amar Nath had supported the prosecution case and he has recorded his statement under Section 161 Cr.P.C. and proved the same as Ext. Ka.17.

38. In cross examination, this witness has stated that he had proceeded from the police outpost on 7.3.1980 at 10 a.m. and reached at the place of occurrence at 10.30 a.m. The place of occurrence from the police outpost was about 2 furlong. He did not record the statement of Head Moharrir of police outpost. The informant was present at the police outpost for about 20-25 minutes.The informant remained present at the place of occurrence till the other witnesses were present. The informant was present with him at the place of occurrence for about 1 ½ hours. The witnesses remained present at the place of occurrence till the informant was present. Prior to the spot inspection, he did not record the statements of the informant or the witnesses as he did not think it proper to record the same. He did not meet the informant after the spot inspection on 7.3.1980 and 8.3.1980 respectively. On 9.3.1980 and 10.3.1980 he did not record the statement of the informant.

39. This witness denied the suggestion that he had prepared the case diary of the present case in one day and further denied that in collusion with the informant, he lodged a false prosecution against the accused and also denied the suggestion that all the papers which were prepared, have been fabricated.

40. DW1-Dr.Shyam Lal Gupta has stated that on 7.3.1980 he was posted as Medical Officer, PHC, Mau. He further stated that on 7.3.1980 at 1.30 p.m. he conducted the medical examination of accused Devendra Pratap Singh at who was brought to him by Constable Gulab Singh and he found the following injury:-

"1. Gunshot wound of entry ½ cm. diameter x 2 cm. on the back side of left forearm 13 cm. below the wrist joint. Redness in margin present. Blood was oozing out of wounds. Margins inverted. There was no exit wound present. Swelling was present around the wounds which was extended from wound towards elblow.

2. Abrasion 2 cm. x 1 cm. on the phalanx of the middle finger of right palm."

41. Injury no.1 was kept under observation and was advised X-ray. Injury no.2 was simple in nature and was caused by some hard and blunt object. Both the injuries were 6 hours old.

42. On the same day at 2.10 p.m. he also examined the accused Balwan Singh who was also brought by Constable Ram Khelawan Mishra and identified him. He found the following injuries on his person:-

"1. Abraded contusion 6 cm. x 4 cm.x 2 cm. towards the 3 cm. below the inner base of chin and 4 cm. above the Thyroid bone. Blood was oozing out of the wound."

43. He has proved injury report Ext. Kha.4 & 5. Both the injured could have receive the injuries on the said date, i.e., on 7.3.1980 at 10.30 a.m. The injury

which was caused to accused Balwan Singh could be caused if the shot goes raising through the wound. He denied that injury no.1 could be caused by gun or countrymade pistol and injury no.2 could be caused by fall. He denied that the injury which has been caused to accused Balwan on his chin could be caused by rifle.

44. DW2-Om Prakash has stated before the trial Court that on 7.3.1980 Ram Gopal Tiwari was Head Constable of police station Mau and posted there, he was acquainted with his hand writing and signature. On 7.3.1980 Zild chick and Zild G.D. which was put to him of police station Mau dated 7.3.1980 at 13.20 p.m., written report of Munna Singh, son of Sheo Shankar was registered against Narayan Singh and others, on the basis of which chik FIR was prepared by Ram Gopal Tiwari and has proved the same as Ext. Kha.6 and on the basis of the FIR, Ram Gopal Tiwari, Head Moharrir, had endorsed the same in G.D.No.18 on 7.3.1980 at 13.20 p.m. against Narayan Singh, Chhatra Mohan Singh and Udai Veer Singh under Sections 147, 148, 307 I.P.C. and has also proved the copy of G.D. No.18 in his hand writing and signature which is the copy of original G.D. and has proved the same as Ext. Kha.7. He is not aware of the fact that whether Ram Gopal Tiwari has been transferred to another District.

45. In his cross-examination, he has stated that G.D.Rapat No.17, there is a report under Section 25 Arms Act against Munna Singh son of Sheo Shankar Singh and he has filed copy of G.D. No.17 and proved the same as Ext. Ka.18 and the said G.D. has been written by H.M.Ram Gopal Tiwari who is known to him.

46. DW3-Kuber Singh has stated that he knows Chhatra Mohan Singh, Udai Veer Singh and Lallu of his village. Lallu is also known as Amar Nath. The incident had taken place five years ago and he was at the seed go-down of the railway station at 3.25 p.m. A tractor was coming from the western side and on the said tractor accused Munna Singh Devendra Pratapk Singh and Balwan Singh were sitting. Accused Munna Singh and Devendra Pratap Singh were the resident of village Kaniyar whereas the accused Balwan Singh was of Allahabad. Balwan Singh and Munna Singh are cousin brother. When the tractor reached in front of seed go-down, then Narayan Singh, Chhatra Mohan Singh Udai Veer Singh, Amar Nath and 10-15 persons of coal had arrived there. Narayan Singh was carrying a rifle, Chhatra Mohan and Udai Veer Singh were carrying SBBL gun of 12 bore and others were with lathi and ballam. The said persons were abusing Munna Singh and other. Narayan Singh shot at Balwan Singh which hit his chin, whereas Udai Veer Singh shot fire from his gun which hit Devendra Pratap Singh in his hand and blood was oozing out from the wounds of the two persons who received injuries. When they proceeded towards Munna Singh, then Munna Singh fired from his country-made pistol. The incident was witnessed by him along with Ram Krishan and the shot which was fired by Munna Singh hit the Narayan Singh and he had fallen down, then Munna Singh seated on the tractor and took Devendra Pratap Singh and Balwan Singh and thereafter this witness returned without taking medicine.

47. In his cross-examination, this witness has stated that he remained at the seed go-down up to 10.45 a.m. He did not

go near Narayan Singh. Narayan Singh was palpitating but not died. Narayan Singh had fallen on the ground by the side of the tractor and this was at a distance of 10-15 from Narayan Singh. He did not ask him to indulge in marpeet or not to fire from gun and pistol. No other person also objected to it. When Devendra Pratap Singh and Balwan Singh received fire shot, they were standing on the ground by the side of the tractor. Narayan Singh fired shot by rifle at Balwan Singh from a distance of 4-6 paces. Narayan Singh fired shot at Balwan Singh from its front. Balwan Singh was wearing pant and the shot of rifle hit his pant and shirt. A little bit blood was coming out. The place where Balwan Singh was standing, whether blood was fallen on the ground or not he could not see. On the right side of Balwan Singh at a distance of 4 paces, Munna Singh was standing. Devendra Pratap Singh was in between the Balwan Singh and Munna Singh. When Devendra Pratap Singh was hit by a shot then the person who had fired shot at Devendra Pratap Sigh was at a distance of 2-4-6 paces and the shot was fired from front at Devendra Pratap Singh. Devendra Pratap Singh was wearing shirt and pant and the shirt was half sleeves. The pant and shirt of Devendra Pratap Singh was blood stained but he could not see whether the blood was fallen on the ground or not. He saw Munna Singh firing shot once. When Munna Singh was returning by taking tractor till then no one else had fired at Narayan Singh and thereafter on the same day he came to know that Narayan Singh had died. He further stated that a sale deed was executed between him and Brij Mohan of a land.

48. He denied that at the instance of Munna Singh he is falsely deposing. He further denied the suggestion that on the day of incident at 9.30 a.m. Munna Singh and others had murdered Narayan Singh by firing shot by country-made pistol and also assaulted him with lathis. He further denied the suggestion that Munna Singh and others were not assaulted by any one and their injuries were fabricated.

49. Heard Sri P.C.Srivastava, learned counsel for the appellants and Sri Irshad Hussain, learned AGA for the State and perused the impugned judgment and order as well as lower court record.

50. Learned counsel for the appellants has vehemently argued that the presence of PW1, PW2 & PW3 at the place of occurrence is highly doubtful. He further submitted that the prosecution has suppressed the origin of the incident and has not come with the clean hands. Moreover, the injuries which have been sustained by the accused Devendra Pratap Singh and Balwan Singh have also not been explained by the prosecution. He next submitted that it was the complainant party and the deceased who had assaulted with firearm weapon on the accused persons, on account of which the accused Devendra Pratap Singh received injuries on his hand and accused Balwan Singh also received injuries on his chin and they both were medically examined by DW1-Dr. Shyam Lal on the same day.

51. It was further pointed out that the cross report of the incident was lodged against Udai Veer Singh and others of the complainant side under Section 307 I.P.C. in which final report was submitted by the police and thereafter a complaint was filed which was registered as S.T.No.552 of 1983 against Udai Veer Singh and others who belong to

the complainant party which was tried by the present trial Court and has ended in acquittal, but on the non-explanation of the injuries on the side of the accused Devendra Pratap Singh and Balwan Singh goes to show that the incident had happened in some other manner and not as stated by the prosecution.

52. He has further pointed out that there was animosity going on between the accused side and complainant party as accused Mahendra Pratap Singh had made several complaints against the deceased and complainant for getting the arm license cancelled, for which some proceedings were initiated for cancellation of their firearm licence and on account of which the complainant party has assaulted the accused persons in which they received injuries and in self defence the accused Munna Singh fired with his gun on the deceased Narayan Singh to save himself and his family members.

53. He next submitted that the trial Court has misread the evidence on record and convicted the appellants, namely, Munna Singh, Surendra Pratap Singh, Devendra Singh and Sheo Shankar Singh, who are real brothers, whereas the accused Mahendra Pratap Singh against whom allegation of conspiracy was levelled, has been acquitted by the trial Court and accused Balwan Singh was convicted under Section 323 I.P.C. but he too was convicted but he was released from jail on the basis of period undergone. The impugned judgment and order passed by the trial Court, thus, is liable to be set aside and the the appellants be acquitted.

54. Learned counsel for the appellants has lastly argued that even if the prosecution case is taken to its own face value, it can be a case of exceeding the right of private defence, hence, the case would not travel beyond Section 304 Part-I I.P.C.

55. In support of his argument, learned counsel for the appellants has placed reliance upon the judgement reported in ***Suresh Singh and Others Vs. State of Haryana,reported in 1999 SCC (Cri) 560, Moti Singh Vs. State of Maharashtra, 2003 SCC (Cri) 1226, Subramani and Others Vs. State of Tamil Nadu, 2002 SCC (Cri) 659 & Darshan Singh Vs. State of Punjab and Another, (2010) 2 SCC (Cri 1037***

56. Learned AGA on the other hand, has vehemently argued the submissions advanced by learned counsel for the appellants and submitted that as per the defence taken by the appellants for their presence at the place of occurrence has been admitted as they have stated that in self defence they shot dead the deceased as the two persons from the side of the accused appellant, i.e.,Devendra Pratap Singh and Balwan Singh also received injuries in the incident. He next argued that the defence which has been taken by the accused appellant, was found to be false as cross case which was registered from the side of the accused against the complainant party has resulted into their acquittal and no appeal was preferred by the accused persons against the judgement and order passed by the trial Court. He argued that the injuries which have been sustained by the accused Devendra Pratap Singh and Balwan Singh were simple in nature and no X-ray was performed due to which the trial Court disbelieved the same as it could be self inflicted also.

57. He further stated that as per the prosecution case, the deceased received gunshot injuries made by the three accused persons with their respective firearms and the deceased received as many as 13 injuries on his person which included 8 gunshot injuries and the injuries sustained by the deceased also goes to show that the injuries which were sustained by the deceased were fired from close range as blackening and tattooing was present around the wounds margins were inverted. Moreover, the deceased also received contusions including abraded contusions which could be the result of blunt object also. The ocular testimony completely corroborates the post mortem report of the deceased, hence, conviction and sentence of the appellants by the trial Court is fully testified and may not be interfered with by this Court.

58. We have considered the submissions advanced by learned counsel for the parties and have also perused entire evidence along with the lower court record as well as the impugned judgement and order passed by the trial Court.

59. It appears from the prosecution case that the deceased received several gunshot injuries on his person which were fired from a close range also as blackening and tattooing was found all around the wounds and margins were inverted. The three accused appellants who were armed with firearm weapons are stated to have fired shot at the deceased one after other as per the evidence of PW1, PW3 and PW4 and their testimony fully corroborates the post mortem report of the deceased.

60. Learned counsel for the appellant has tried to dislodge the presence of PW1, PW3 and PW4 demonstrating from the evidence but the said argument of learned counsel for the appellants is not at all acceptable for the simple reason that the accused appellants in their statements under Section 313 Cr.P.C. have categorically taken the defence that they fired shot at the deceased in their self defence as they apprehended danger to their lives as two accused Devendra Pratap Singh and Balwan Singh received injuries at the hands of the complainant party but the injuries sustained by the two accused persons were not found to be proved to have been received in the said incident and cross case which was lodged by the accused party, also found to be not proved and resulted into acquittal of the complainant party. The injuries which have been sustained by the accused Devendra Pratap Singh and Balwan Singh shows that they were simple in nature and could easily be manufactured and they are superficial injuries. Moreover,no X-Ray was also performed of the injuries of the said two accused Devendra Pratap Singh and Balwan Singh. The PW1, PW3 and PW4 have categorically stated that neither the deceased nor PW1 were carrying firearm weapon nor they fired shot on the said two injured, which goes to show that PW1 and deceased Narayan Singh were empty handed and because of quarrel which had taken place in the morning on the day of incident where the cattle of the accused had gone in the field of the complainant, on which the deceased Narayan Singh objected and tried to drive away the cattle to the Kanji House and father of the accused appellant, namely, Sheo Shankar intervened and there was some altercation took place between the complainant and the deceased. The said dispute was settled by Hammev Singh

and others and thereafter the complainant and the deceased Narayan Singh went to their house at Bargadh near railway station from village Kanihar and the accused came there and assaulted the deceased with firearm weapons, on account of which he succumbed to his injuries and died on the spot.

61. PW1 immediately lodged a report at police outpost Bargar under the jurisdiction of police station Mau, FIR was registered and police arrived at the place of occurrence and panchayatnama of the deceased was conducted and dead body was sent for post mortem by the Station Officer after completing the other formalities. The incident had taken place at 9.30 a.m. and FIR was lodged promptly at 10.00 a.m. at police outpost which was only one furlong from the place of occurrence, hence, there appears to be no ambiguity in the prosecution case in which the real culprits, i.e., the accused appellants who are involved in the incident and named FIR was lodged against them by PW1.

62. The last contention of learned counsel for the appellants that even if the prosecution case is taken at its face value, it can be a case of exceeding right of self defence by the appellants and the case would not travel beyond Section 304 Part-I I.P.C., is also not acceptable as it was the accused appellants who had gone to the house of the complainant and the deceased near Bargadh Railway Station, while the two were going to see their stock of ashes of coal and when they reached on the road near the stock, on the exhortation of appellant Munna Singh that the enemies should be killed he fired shot which hit the deceased on which he trembled and tried to run away, on which Surendra Pratap Singh shot with his countrymade pistol at his brother from a very close range. Devendra Pratap Singh also fired with his countrymade pistol and thereafter Surendra Pratap Singh again fired at the deceased, on which he had fallen down and subsequently he was assaulted by lathi by the accused Balwan Singh. Thus, the said act and conduct of the appellants shows that they were the aggressor and had gone with an intention to kill the deceased and had murdered him in broad day light who died on account of ante mortem injuries received on his person which is a cold blooded murder and they have been rightly convicted under Section 302/34 I.P.C. by the trial Court.

63. The case laws which have been relied upon by learned counsel for the appellants are distinguishable on the facts and circumstances of the present case and cannot be made applicable in the present case in view of the incident being admitted by the appellants.

64. The finding recorded by the trial Court for conviction and sentence of the accused appellants is based on cogent evidence and is supported by sound reasons, which does not require any interference by this Court. Hence, the conviction and sentence of the appellants awarded by the trial Court requires to be upheld by this Court, which is hereby upheld accordingly.

65. The appeal lacks merit. It is, accordingly, **dismissed.**

66. The accused appellants Munna Singh, Surendra Pratap Singh and Devendra Pratap Singh are on on bail, their bail bonds and sureties are cancelled.They shall be taken into custody forthwith to serve out the

sentence, as has been awarded by the trial Court.

67. Let a copy of this order along with the lower court record be sent to the trial Court concerned for its immediate compliance forthwith.

(2019)11ILR A1153

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

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

F.A.F.O. No.- 2723 of 2006

Tahsin ...Appellant/Claimant
Versus
Yogesh Kumar & Anr.
...Respondents/defendants.

Counsel for the Appellant:
Anju Shukla, Sri Nigamendra Shukla.

Counsel for the Respondents:
Sri J.N. Singh, Sri Sunil Kumar Mishra, Sri V.C. Dixit, Sri Vipin Chandra Dixit, Sri J.N. Nigam.

A. Civil Law-Motor Vehicles Act, 1988 - Section 167 - Claimant cannot be non-suited if his earlier claim filed under the Workman Compensation Act, 1923 had been dismissed as not-maintainable when as a fact the claimant was injured and he died due to use of a motor vehicle. (Para 11)

There is no bar for a claimant to file an application under Section 163-A of the Act, 1988, if the earlier claim petition filed under the Workman Compensation Act, 1923 was dismissed upon a finding that the claimant was not an employee or a workman of the owner of the motor vehicle involved in the accident. Even if he had the status of an employee, he would have had an option to either file a claim petition under the Motor Vehicle Act or the Workman Compensation Act, but not both, for the same amount. However, if the amount is awarded under the Workman Compensation Act, 1923 was less, a claim petition for remaining amount would remain maintainable under the Motor Vehicles Act, 1988. (Para 12)

Petition under Section 163-A, of the Motor Vehicles Act, 1988. Even if it is held that he deceased was a third party and not a labourer then also his claim petition ought to have been allowed. There cannot be bar under Section 167 even if it is held that he was not an employee on the truck, the involvement of two vehicles will give a rise to claim under section 163 A of the Act, 1988. (Para 16)

B. Motor Vehicles Act, 1988 - Section 163-A - Negligence is not required to be decided in a claim petition preferred under section 163-A. (Para 15)

First Appeal partly allowed (E-5)

List of cases cited: -

1.Raja & anr Vs Ajay & anr 2007 (2) ACCD 1008 (MP).

2. Deepal Girishbhai Soni & ors Vs United India Insurance Co. Ltd. Baroda (2004) 5 SCC 385.

3. United India Insurance Company Vs Sunil Kumar 2018 ACJ 1.
4.Shivaji Vs Divisional Manager 2018 AIR SC 3705.

5. Smt. Bitti & ors. Vs Abdul Farooq @ Kallu & ors. (F.A.F.O. No. - 3189 of 2003).

6. Bithika Mazumdar Vs Sagar Pal (2017) 2 SCC 748.

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

1. Heard Sri Nigamendra Shukla, learned counsel for the appellant and Sri

V.C. Dixit, learned counsel for the New India Insurance Company and Sri Sunil Kumar Mishra, learned counsel for the respondent no.3.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 06.07.2006 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.4, Meerut (hereinafter referred to as 'Tribunal') in M.A.C. No. 902 of 2004.

3. The brief facts of the ligation are accident took place between truck bearing No. HR38D-2694 and bus bearing No. U.P. 15 E9712. The claimants are the parents of the deceased who claimed to be a labourer on the said truck. The accident is not in dispute. The truck being insured by the insurance company is not in dispute, the insurance company and nor the U.P.S.R.T.C. have disputed the accident having taken place even before this court. The claimants who are the parents of the deceased had first filed the claim before the Workmen Commissioner on the stand taken by the owner that they had not engaged Taufik as a workmen, the said claim petition was dismissed. Instead of challenging the said order the claimants preferred claim petition before the Motor Accident Claims Tribunal. Unfortunately, the Motor Accident Claims Tribunal also dismissed the claim petition filed under Section 163-A of the Motor Vehicle Act,1988 holding that the claim petition was barred by section 167 of the Motor Vehicles 1988 (hereinafter, referred as the "Act, 1988"). The Claims Tribunal came to the conclusion that though the vehicles were involved in the accident but as the Workmen Commissioner was first approached the claim petition was barred under Section 167 of the Motor Vehicle Act, 1988.

4. The accident policy, death of the deceased, involvement of vehicles are not in dispute. The Motor Accident Claims Tribunal non-suited the appellants holding that the claim petition was barred under Section 167 of the Motor Vehicles Act, 1988. It is this rejection which is assailed by the claimants.

5. The Tribunal could not have decided the issue of negligence as it was a petition under Section 163 of the Act, 1988.

6. It is submitted that all issues are wrongly decided by the Tribunal. it was a petition under Section 163-A of the Motor Vehicle Act, 1988. The Workmen Commissioner held that the deceased was not a workman but it is nobodies case that accident did not take place and the claimant was injured and died due to use of Motor vehicle Act.

7. Learned counsel for the appellant has relied on judgment in the case of **Raja and another Vs. Ajay and another** reported in **2007 (2) ACCD 1008 (MP)** to contend that as the claim under Workman Compensation was dismissed as not maintainable, the rejection petition under section 167 of Motor Vehicle act is bad.

8. The grounds urged are that:-

"(a). The learned Tribunal grossly erred in law in dismissing the claim petition because the correct interpretation of Section 167 of the MV Act is that simultaneous claims on the ground of the applicability of Section 167 of the Motor Vehicle Act, 1988 and workman compensation Act are not maintainable.

(b). The correct interpretation of Section 167 of MV Act is that simultaneous claims cannot be laid both under Workmen's Compensation Act and

under Motor Vehicles Act. The language of Section 167 is quite clear and unambiguous and it cannot be consitite that if any claim petition has been filed under the Workmen's Compensation Act and has been dismissed on any ground not available under that Act, the claim petition filed under the Motor Vehicles Act on any ground available there under is also liable to be dismissed on the technicality without adverting to the merits of the case but the learned tribunal badly filed to appreciate this position of law.

(c). The sine qua non of the availability of relief under the Workmen's Compensation Act is the employer employee relations and it this relationship is not established, any claim petition under the said Act is liable to be dismissed as in the instant case. But it does not fallow there from on the language of Section 167 of MV Act that dismissal of the claim petition under the Workmen's Compensation Act will render the claimants remediless and they cannot lay claim under the Motor Vehicles Act when the claim is otherwise admissible under the Motor Vehicles Act. The learned tribunal badly failed in law to apply his mind to the correct legal position.

(d). The insurance under the Motor Vehicle act covers the third party risks and if the third party becomes the victim of an accident caused by a motor vehicle, the insurer of the vehicle becomes automatically liable and it cannot escaped the liability on the ground that the claim petition under the Workmen's Compensation Act was dismissed.

(e) In view of the above, it is clear that what is prohibited by Section 167 of the Motor Vehicles Act is the simultaneous laying of the claim petition under both the Acts. This is quite reasonable and rational. The under lying policy is that a person cannot claim two remedies simultaneously. Naturally therefore, when one remedy is refused, there is no bar in claiming an other remedy if it is available in terms of the statute. The learned tribunal dismissed the claim petition filed by the appellant on a wrong premise and lost sight of the correct legal position that what is prohibited by Section 167, MV Act is simultaneously laying of the claims under the both statues.

(f). If section 167 is correctly construed, it will be clear that the object of prohibition there under is that a claimant cannot be doubly benefited. Clearly, therefore. there is no bar when there is no chance of double benefits. It is well settle that the law gives relief and does not do injustice. Any other interpretation of Section 167, MV Act will be nothing but to deny justice not permitted by law."

9. Section 167 of The Motor Vehicle Act reads as follows:-

"167. ***Option regarding claims for compensation in certain cases.-*** *Notwithstanding anything contained in the Worker's Compensation Act, 1923 (8 of 1923), where the death of, or bodily injured to, any person gives rise to a claim for compensation under this Act and also under the Worker's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."*

Section 167 in The Motor Vehicle Act, 1988 gives option to the claimants to seek compensation either under workman Compensation Act, 1923

or The Motor Vehicle Act, 1988. They cannot file a claim petition under the provision of both the Acts and the benefit under both legislation.

There have been few cases where applicant first claimed the compensation under one act and then tried to be compensated again under another act for same mishap. Karnataka High Court authority, and appealed for compensation under Section 173(1) of Motor Vehicle Act, and the Judge B. Manohar, J. held that a claimant can only seek compensation either under Employees Compensation Act, 1923 or Motor Vehicle Act, they cannot claim petition under both the provisions. The claimant was found to have claimed his compensation under Employees Compensation act and was awarded the compensation for the death of his family in a road accident while he was proceeding on a motorcycle. Then again he was trying to claim compensation under Section 163 A of the motor vehicle act.

In Civil Appeal No.937 of 2013 ***(Insurance Company Limited vs. Dyamavva & Ors) decided on*** *5th February, 2013. Here Yalgurdappa B. Goudar died in a road accident after he left for his home completing his office work. The accident occurred when he was riding on the pillion of a motor cycle and was hit by a tripper. He was compensated by his company an amount of INR 3,26,140/- under workman compensation Act, 1923. Besides his claim under workman compensation Act, 1923, Dyamavva Yalgurdappa, also raised a claim under section 166 of Motor vehicles act 1988 in Bagalkot and was awarded a compensation of INR 11,44,440/- But however the Motor Accident Tribunal ordered a deduction of compensation amount paid by his employer from this compensation amount stating that one could not ask for compensation under both the acts.*

10. While interpreting the provision of section 167 of the Act no doubt any option is given to the claimant to file petition under any of the Act, in our case the Workman Commissioner rejected the claim petition of the claimant parent and it held that the deceased was not an employee. The respondent no.1 did not appear before the Workman Commissioner. The parent had the elected the forum of W.C. but the W.C. Commissioner rejected the same holding that deceased Taufik was not proved to be a helper and therefore the claim is not maintainable before him. The employer refused to accept that Taufik was not a helper on his this statement the claim petition was dismissed by the workman Commissioner.

11. A question arises as to whether for the death of a person where a motor vehicle is involved can be non suited by both the forum namely the Workman Commissioner and the Motor Vehicle tribunal established under Act, 1988. The answer would be a no as if both the remedies are barred. The principle of *Ubi jus ibi remedium* will be frustrated as from the facts it is clear that the accident has taken place it is proved that the deceased was in the truck. It has been denied that it was not a driver. The driver has not been stepped into witness box. his dead body was found from the place of accident and his claim petition was not allowed by the Commissioner on the ground that factum of employment was denied by the owner . The Section 167 of Motor Vehicles Act, 1988 has been

interpreted time and again by the apex court and the claim petition would not have been dismissed . The claim before the workman commissioner was incompetent and therefore it cannot be said that the claimants had opted a forum. In this case, even if, we go by the principle of Section 167 of the Motor Vehicle Act, 1988 the judgment in **Raja and another Vs. Ajay and another reported in 2007 (2) ACCD 1008 (MP),** paragraphs 4 and 5 read as follows:-

"4. In the appeals in hand, it is clear, that the claim of the workmen that he was employee of respondent No.1 was not accepted in view of the preliminary objection raised by the employer to the effect that the claimants as workmen of respondent no.1, had never been engaged by the said respondent for any work, whatsoever. However, in such a situation where the person has been non-suited on the ground that the basic foundation on which he had proceeded was non-existent, we are of the view that even after dismissal of their case on the technical ground, they cannot be derived of the remedy of approaching the Tribunal under the Motor Vehicles Act against the torfeasor. under these circumstances, it cannot be inferred that the claimant has availed both the benefits under the Workmen's Compensation Act and also under the Motor vehicles Act. Had it been a case where compensation was granted, the other remedy would have been barred but in this case the claim itself has been dismissed as not maintainable and, therefore, the invoking of the proceedings was without jurisdiction ab initio. in this view of the matter we are of the considered view that the appellants in the present case can still approach the Tribunal under the Motor Vehicles Act, 1988.

5. In view of the above discussion, we allow these appeals to the extent that notwithstanding the order passed by the Workmen's Commissioner, the appellants shall be free to approach the Tribunal under the Motor Vehicles Act. With the above liberty to the appellants, these appeals are disposed of with costs. Counsel Fee Rs.500/- shall be payable to the counsel for each of the respondents."

12. And the latest judgment of the Apex Court in this case even if very strict view is taken, it cannot be said that the claim petition was not maintainable against the driver, owner and Insurance Company of the vehicle involved in the accident. In this case, it is an admitted position of fact that two vehicles were involved in the accident. Even if, it is held that Section 167 of the Motor Vehicles Act, 1988 to be applicable. The claim against the other owner and driver would not have been dismissed. The fundamental question and requirement the use of motor vehicle irrespective of the factum of employment and therefore invoking the bar of Section 167 is perverse. In light of the fact that it was a case of torturous Act involving more than one vehicle, the provisions of Section 167 of the Act would not have been made applicable as no compensation was paid under the Workmen Compensation Act, 1923. The Apex Court in **2004 ACJ 934** has held that there is no bar for claimant to file an application under Section 163-A of the Act, 1988, if no compensation was granted where third party risk is involved the claimant who has been held not to be the employee or a workmen can file claim under Motor vehicle Act **AIR 2013 ACJ 709** Supreme Court has considered and even amount is awarded under W.C. a claim petition for remaining amount is sustainable. In that view of the matter the claim petition could not have been dismissed by the Motor Vehicles Tribunal.

13. The jurisdiction of the Tribunal is to do justice and both the legislations are meant for doing justice and the cause of action arose when the accident occurred and that the deceased was held not be a cleaner.

14. It is submitted by Sri V.C. Dixit, learned counsel for the New India Insurance Com. Ltd. that he was labour. If this fact is accepted by the Insurance Company the dismissal of the claim petition by the Workmen Commissioner is bad in eye of law and that if W.C. is rejected, the claim petition was maintainable before the Motor Accident Claims Tribunal. The reasons being two vehicles were involved the deceased was a non tort-fessor and that it was a claim petition filed under Section 163-A of the Motor Vehicles Act, 1988 which is clear pleadings of the parties. The F.I.R. proved the accident which has been accepted by the tribunal. The accident also proved before the tribunal. The ownership is proved. The owner now before the tribunal in paragraph 23 that he has not received any compensation before W.C. Commissioner and that the tribunal should have granted compensation to the claimants just by holding that he was a labourer on a different vehicle general truck. Having held that the claim petition was maintainable after 19 year should this court remand the matter to the tribunal or as the record is before this court decide the quantum in its jurisdiction under Section 173 of the Act, 1988. The manner in which a claim petition under Section 163-A of he Motor Vehicles Ac,t 1988 has to be decided as per the ratio laid down in the case of **Deepal Girishbhai Soni and others Vs. United India Insurance Co. Ltd, Baroda (2004) 5 SCC 385** and therefore the claims tribunal could not have even frame the issue of negligence it is Section 163-A reads as follows:-

"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. "

15. **2018 ACJ** page 1 **United India Insurance Company Vs. Sunil Kumar** lays down the ratio that point of negligence is not required to be decided in a claim petition preferred under section163-A. In **Shivaji Vs. Divisional Manager, 2018 AIR SC 3705** raising the issue of negligence itself is inconsistent with legislative object in introducing the

provision for final compensation on structure basis, hence, 163-A does not contemplate deciding issue of negligence hence the issue no. 1 and 4 raised by the tribunal could not have been raised and they were in fact wrongly raised. The tribunal over looked the fact that it was an application under Section 163-A and not 166 of the M.V. Act, 1988, hence framing of issue no. 1 and 4 itself caused illegality. Recently this court in **F.A.F.O. No. - 3189 of 2003 (Smt Bitti And Others vs. Abdul Farooq @ Kallu And Others)** Paragraphs 15 and 16 reads as follows:-

"15. It is submitted by the counsel for the appellant that in view of the judgment in the case of F.A.F.O. No.534 of 1995 ***(Brahma Dutta Sharma Vs. Umesh Sharma and Others)*** *decided on 30.01.2019 wherein para 14, it has been held as follows:*

"14. The finding of the Tribunal are perverse. The tempo being a bigger vehicle as no legal evidence has been produced to show that the claimant had contributed to the accident. Tribunal has not given proper reasons for holding him negligent whether he had taken permission to come Jhansi or not is of no relevance and it has not been brought on record that because he has left place of service, he was negligent. The conclusive proof of against the tempo driver, therefore, the tribunal committed manifest error in holding the appellant first contributory negligent and coupling with no proper reply for leaving the head quarter. There is no evidence about the motorcycle being driven negligently by the appellant at the time of accident. The Respondent did not produce any such evidence and there is a charge sheet against the tempo driver which prima-facie pointed towards the negligence of the appellant. Thus the finding of contributory negligence cannot be sustained. I am supported in my view in Mangla Ram Versus Oriental Insurance Company Limited, (2018) 5 SCC 656. "

16. ***Bithika Mazumdar Vs. Sagar Pal (2017) 2 SCC 748*** *wherein it has been held that compensation claim petition which remained undecided for nine years and the record was before the Apex Court, the Apex Court decided the quantum.*

Similarly, this court feels that as sixteen years have elapse from filing of claim appeal and that the record is before this court instead of directing the parties to go before the tribunal only for the assessment of compensation which could cause further delay and will also cause further loss to the destitute family. This court in ***Brahma Dutta Sharma Vs. Umesh Sharma and Others*** *(supra) has taken similar view and therefore I without remanding the matter as the principles for determination of compensation are well settled venture to decide the compensation here."*

Hence I propose to decide the matter on merit for compensation also.

16. It was a petition under Section 163-A even if it is held that he was a third party and not a labourer then also his claim petition ought to have been allowed. There cannot be bar under Section 167 even if it is held that he was not an employee on the truck the involvement of two vehicles will give a rise to claim under section 163 A of the Act, 1988.

17. It is submitted by learned counsel for the appellant that the Tribunal has not considered issue no.5 in his

proper perspective holding that he could avail of only one forum. This issue has been wrongly decided. The findings are quashed for thus the compensation payable to the claimants who are the parents of deceased who was 21 years of age will have to be decided.

18. The income of the deceased in the year 2000 can safely be considered to be Rs.2000/- per year as he was a labourer. 40 % of Rs.2000/- will have to be added as per judgment in the case of National Insurance Company vs. Pranay Sethi and others. Counsel for the appellant has relied on the decision of the Division Bench of this Court in **First Appeal From Order No. 2548 of 2013 (Ravi Shanker Tiwari and another Vs. Praveen Kumar Jain and others)** decided on 2.2.2018. It is further submitted that the interest also requires to be awarded as per the provision of Act and multiplier should be applied on the basis of age of the deceased.

19. As against this, it is submitted by learned counsel for the respondent that the income which has not been proved cannot be granted and amount has rightly not been awarded by the Tribunal.

20. After hearing the learned counsel for the parties and perusing the judgment and order impugned, this Court feels that the income of the deceased, in the year of accident, should have been at least Rs.2,000/- per month namely Rs.24,000/- per year, to which as the deceased was 21 years of age, 40% of the income requires to be added as future income which would come to Rs.24,000+9,600= 33,600/-. The deduction of 1/2 towards personal expenses of the deceased will have to be made. Hence, after deduction of 1/2, the annual datum figure available to the family would be Rs.16,800/-. The multiplier of 18 will have to be granted. Rs.30,000/- for filial consortium to the parents. Hence, the claimants are entitled to a total compensation of Rs.16,800 x 18+ 30,000= 3,32,400/-.

21. However, the rate of interest which is 6% would be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

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

22. In this case the rate of interest should be 7.5% from the date of filing of the claim petition till the amount is deposited by all the respondent jointly and severely as it was proved that vehicles was involved in the accident.

23. While going through the cover note, it is covering the person in the truck. The respondents have not examined anybody despite that dismissing the same on the ground that it is barred by under

Section 167 of the Motor Vehicle Act is bad in eye of law.

24. The judgment is quashed. The respondents shall indemnify jointly and severely under Section 163-A of the Motor Vehicle Act,1988. The appeal is partly allowed.

(2019)11ILR A1161

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE PANKAJ BHATIA, J.

FAFO No. 2801 of 2007
connected with
FAFO Cases No. 2911 of 2007, 2912 of 2007 & 3007 of 2007

Smt. Anita & Ors. ...Appellants
Versus
Jaipal Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Nigamendra Shukla, Anju Shukla

Counsel for the Respondents:
Sri Kuldip Shanker Amist

A. Civil Law-Motor Vehicles Act, 1988 - Section 168 - Just and fair compensation - Future prospects in cases of self-employed persons - In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income is warranted 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.

Held: - Tribunal erred in granting compensation without considering the question of future prospects of the self-employed deceased. Court below ought to have considered the question of future prospects of the deceased while awarding the "just compensation". (Para 18)

First Appeal partly allowed (E-5)

List of cases cited: -

1.National Insurance Company Limited vs. Pranay Sethi, (2017) 16 SCC 680

2. Sarla Verma vs. Delhi Development Corporation, 2009 (6) SCC 121

3. U.P.S.R.T.C. vs. Additional District Judge/Special Judge Civil Misc. Writ Petition No. 9020 of 2007, decided on 01.03.2019

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Nigamendra Shukla, learned counsel for the claimants/appellants in First Appeal From Order No. 2801 or 2007, Sri K.S. Amist, learned counsel for the respondents, Sri K.S. Amist, learned counsel for the claimants-appellants and Sri Nigamendra Shukla, learned counsel for the respondents in the connected appeals.

2. All the present four appeals arises out of the same accident and as such they are being disposed off by means of common judgement. The FAFO Nos. 2911 of 2007, 2912 of 2007 and 3007 of 2007 have been filed by the Insurance Company challenging the awards passed by the Motor Accident Claim Tribunal in three claim petitions being Claim Petitions No. 02 of 2003, 03 of 2003 and 08 of 2003. The FAFO No. 2801 of 2007 has been filed by the claimants-appellants seeking enhancement of the award passed by the Motor Accident Claim Tribunal in

Claim Petition No. 03 of 2003. For the sake of convenience, the facts are being narrated from the Award dated 18.7.2007 passed by the Motor Accident Claim Tribunal/Special Judge (SC/ST) Act, Bulandshahar in Motor Accident Claim Petition No. 03 of 2003.

3. The Motor Accident Claim Petition No. 03 of 2003 was filed by the claimants, being the dependents of the deceased Rajendra Singh claiming compensation under section 166 of the Motor Vehicle Act. The submissions in brief made in the claim petition, filed on 09.11.2002,were that three persons, namely, Rajendra Singh, Sunil Kumar and Nigam alias Gullu, who were going on their motorcycle Hero Honda No. H.R. 30-2520, when the motorcycle reached at Bulandshahar, Gulawati Road, situated at Police Chauki near Yadav Hotel about 11.00 A.M. in the morning, a Vehicle bearing No. U.P. 81-C 3949 coming from Bulandshahar, suddenly, turned towards the right on the pavement and hit the motorcycle which resulted into grievous injuries to all the three persons. In the said accident, Rajendra Singh and Nigam alias Gullu died on the spot whereas Sunil Kumar was taken in a serious condition to the Government Hospital, Bulandshahar where he was referred to All India Institute of Medical Sciences, New Delhi where he, unfortunately, died on the next day i.e. 10.11.2002. In the said claim petition, it was alleged that the accident occurred on account of rash and negligent driving of Vehicle No. U.P. 81-C 3949. It was also stated that the FIR, with regard to the said accident, was registered as Case Crime No. 420 of 2002, under sections 279, 338, 304-A and 427 IPC.

4. In the claim petition filed by the dependents of Rajendra Singh, it was stated that at the time of the accident, the age of Rajendra Singh was 28 years. He was working as a mason and earned Rs. 4500/- per month. It was claimed that the claimants were dependent of Rajendra Singh and thus claimed an amount of Rs. 19,15,000/- as compensation from the owner and the Insurance Company of the vehicle.

5. The owner of the Vehicle, Jaipal Singh, filed his written statement, however, he denied the accident. He further took a defence that the vehicle in question was insured with the National Insurance Company, Aligarh and, at the time of the accident, the driver had a valid driving licence. He also took a plea that the insurance of Hero Honda motorcycle has not been impleaded and, as such, the claim petition was liable to be dismissed.

6. The Insurance Company, opposite party no. 2, before the Tribunal, filed a separate written statement and denied all the averments made on the ground of lack of knowledge. They also pleaded that the liability of the Insurance Company is confined to the terms of the policy. It was stated that the compensation sought is excessive, at the time of the accident, the driver did not have valid driving licence and also the fact that the Insurance Company of Hero Honda motorcycle was a necessary party. It was also pleaded that the deceased in himself responsible for the accident and that the petition was a collusive petition.

7. The Motor Accident Claim Tribunal entertained the claim and after exchange of pleadings framed as many as five issues. The first issue pertained to the factum to the accident. The Tribunal, after considering the evidence, adduced before the Tribunal held that the accident had

occurred as was pleaded by the claimant and recorded a categorical finding that the accident took place with the Vehicle No. U.P. 81-C 3949 and also recorded that the accident took place on account of rash and negligent driving of the Vehicle No. U.P. 81-C 3949 resulting into the death of three persons.

8. The second issue was with regard to the fact that whether the vehicle was duly insured with the Insurance Company. The Tribunal placed reliance upon the insurance policy filed as Paper No. 13-C showing that the vehicle in question was duly insured with the Insurance Company and held that the vehicle was duly insured.

9. The third issue framed was with regard to the fact that whether the driver in question had a valid driving licence, the Tribunal held that the burden of discharging the fact that the driver in question did not have a valid driving licence, had to be discharged by the Insurance Company, who had pleaded the said fact, however, the Insurance Company failed to produce any evidence in support of their contention that the vehicle in question was being driven by a person not having a valid licence and thus proceeded to hold the issue against the Insurance Company.

10. The next issue being Issue no. 4 pertained to the non-impleadment of Insurance Company of the motor vehicle. The Tribunal decided the said issue against the Insurance Company mainly on the ground that he has already recorded that the accident had occurred on account of rash and negligent driving by the Vehicle No. U.P. 81-C 3949.

11. With regard to the 5th issue being the quantum of compensation payable to the dependents of Rajendra Singh, the Tribunal, after appreciating the evidence, held that the age of the deceased was 28 to 30 years. The Tribunal further held that as per the evidence and the pleadings, the deceased used to earn Rs. 150/- per day and used to work as mason and there was evidence on record to suggest he used to get work for 20 to 25 days in a month, on that basis the Tribunal held the income of the deceased at Rs. 3,000/- per month. The Tribunal placing reliance on a precedent held that even as per the notional income the income of the deceased has to be assessed at Rs. 36,000/- per year and after deducting of the one third amount, the amount for the purpose of determining of compensation, comes to Rs. 24,000/- per year and applied in multiplier of 18. The Tribunal held that the claimants of the deceased were entitled to a compensation of Rs. 4,32,000/-. The Tribunal also awarded Rs. 2000/- towards funeral expenses, Rs. 2500/- towards loss of consortium, Rs. 2500/- towards loss of estate and Rs. 5000/- towards loss of matrimonial life and thus awarded a sum of Rs. 4,41,500/- along with interest at the rate of 6% per annum. It was specifically held that the said amount, as awarded, will be payable by the Insurance Company.

12. Learned counsel for the Insurance Company-appellants has argued that the Tribunal has erred in awarding the compensation as the accident did not take place with the Vehicle No. U.P. 81-C 3949. It was further argued by learned counsel for the claimants-appellants that the FIR in question was lodged at 12.30 P.M. on 10.11.2012, whereas the accident had taken place at 11.00 A.M. on 09.11.2002. The counsel for the

appellants has also argued that the informant was not brought to the witness box and the eye witnesses to the accident were not named in the FIR and their statements were not recorded in the criminal investigation by the police authorities, as such, no reliance could be given to the oral evidence of the two eye witnesses. It was also argued that even the said two witnesses did not give the type of vehicle and only stated about the number of vehicle. In sum and substance, it was argued that it was a case of hit and run accident and, thus, the award deserves to be set aside.

13. The counsel for the claimant-appellant in FAFO No. 2801 of 2007 has addressed this Court on the question of compensation and has placed reliance on the judgement of the Apex Court in the case of **National Insurance Company Limited vs. Pranay Sethi, (2017) 16 SCC 680**. He has also placed reliance upon a judgement of this passed in **Civil Misc. Writ Petition No. 9020 of 2007 (U.P.S.R.T.C. vs. Additional District Judge/Special Judge), decided on 01.03.2019,** to argue that the compensation awarded by the Tribunal cannot be termed as "just compensation" and thus prayed that the amount so awarded by the Tribunal be modified and enhanced, keeping in view the law laid down by the Apex Court in the case of ***Pranay Sethi (supra)***.

14. After hearing the counsel for the parties, the questions that arises for decision of the present appeals are:

(i) whether the accident took place with the Vehicle No. U.P. 81-C 394 and ;

(ii) whether the compensation awarded can be termed as "just compensation".

15. Reverting to the first issue as to whether the accident took place with the vehicle in question or not I have gone through the findings recorded by the Tribunal while deciding the Issue No. 1 wherein the two witnesses to the accident had specifically deposed that at the time of the accident they were getting their engines repaired and had witnessed the accident. They had also stated that they tried to chase the vehicle, however, they were not successful in chasing the vehicle. They had specifically deposed that they had read a number of vehicles and had also told the others present there. In fact, the PW-3 had specifically stated that the Vehicle No. U.P. 81-C 3949 had hit the motorcycle. Placing reliance upon the said two witnesses, the court arrived at a finding that the accident took place on account of rash and negligent driving bearing Vehicle No. U.P. 81-C 3949 .In the cross examination also the testimony of the two witnesses could not be discredited. It is essential to note that before the Tribunal no evidence was led by either of the opposite parties i.e. owner of the vehicle or the Insurance Company to establish that the accident did not take place on account of accident with the Vehicle No. U.P. 81-C 3949. Even in the present appeal there is nothing on record to suggest or to demonstrate that there was any error committed by the Tribunal in recording the finding of fact with regard to accident in question. Thus, I have no hesitation in holding that the Tribunal has rightly recorded a finding of fact that the accident took place on account of rash and negligent driving of Vehicle No. U.P. 81-C 3949. There is no other argument advanced by the counsel for the claimants-appellants in FAFO Nos. 2911 of 2007, 2912 of 2007 and 3007 of 2007, as such, the said appeals are liable to be dismissed.

16. Now, reverting to the question of adequacy of compensation, as argued by

the counsel for the claimants-appellants, the Hon'ble Apex Court in the case of **National Insurance Company Limited vs. Pranay Sethi** extensively dealt with the question of '"just compensation" and while dealing with the question of awarding compensation for future prospects in cases of self-employed persons held as under:

"Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular

pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."

17. In conclusion, the Hon'ble Apex Court held as under:

"In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi 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, 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.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) 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.

(iv) 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.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) 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."

18. Relying on the said decision, I am of the view that the Tribunal has erred in granting compensation without considering the question of future prospects of the self-employed deceased. I am of the specific view that the court below ought to have considered the question of future prospects of the

deceased while awarding the "just compensation".

19. The evidence, on record, clearly establishes that the deceased used to earn Rs. 3,000/- per month. Thus, on the basis of the judgement of ***Pranay Sethi (supra)***, I deem it appropriate that an addition of 40% should be made on the said established income of Rs. 3,000/- as the deceased was below the age of 40 years. Thus, I determine the salary of the deceased Rajendra Singh for the purposes of calculating the compensation at Rs. 3000+1200 (40% of Rs. 3,000/-) at Rs. 4200/-month

20. There being no dispute that the age of the deceased was 28 to 30 years. The multiplicand applicable would be 18. Thus, the compensation payable to the claimants on account of death of Rajendra Singh would be 4200 x 12 x 18. Out of the said compensation, one fourth is to be deducted towards personal expenses as laid down in paragraph no. 30 of the judgement in the case of **Sarla Verma vs. Delhi Development Corporation, 2009 (6) SCC 121**. Thus, the claimants are entitled to the following amounts 9,07,200-2,26,800= Rs 6,80,400/-

21. Over and above the said amount, the claimant would also be entitled to the expenses of Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively towards conventional heads namely loss of estate, loss of consortium and funeral expenses as held by the Hon'ble Supreme Court in the case of ***Pranay Sethi (supra).***

22. Thus, the claimants are entitled to get Rs. 6,80,400+70,000=7,50,400/-. The said amount shall be paid to the claimants along with interest at the rate of 8% per annum from the date of filing of the claim petition up to the date of actual payment. The amount already deposited and paid by the Insurance Company shall be deducted from the total amount to be paid to the claimants as directed above. The Insurance Company shall pay the amounts as directed above within a period of two months from today.

23. Accordingly, the First Appeal From Order No. 2801 of 2007 is **partly allowed** by modifying the compensation payable, whereas the First Appeal From Order Nos. 2911 of 2007, 2912 of 2007 and 3007 of 2007 are **dismissed.**

24. The Registry is directed to communicate a copy of this order to the District Judge, Bulandshahar for compliance and payments to the claimants in accordance with law.

(2019)11ILR A1167

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2019

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

F.A.F.O. No.- 3313 of 2017

Rinki Devi & Ors. ...Appellants/Claimants
Versus
Jamuna Prasad & Ors.
..Respondents/Defendants

Counsel for the Appellants:
Sri Kuldeep Kumar Dixit, Sri Prem Prakash.

Counsel for the Respondents:
Sri Om Prakash Mishra, Sri Atul Pandey.

A. Civil Law-Motor Vehicle Act, 1988 - Uttar Pradesh Motor Vehicles Rules, 1998 - Motor Accident Claim Tribunal - Nature of proof required - Preponderance of probability - Prima facie evidence

Held:– Strict proof of evidence is not required to be applied either in determining the negligence of driver or involvement of offending vehicle. The standard of judging the evidence, required in accident claim case, is preponderance of probability. In such case, only prima facie evidence involving the alleged vehicle is required. It has to be seen whether, or not there is a prima facie evidence available on record, whereby it can be held that the alleged accident occurred. (Para 15,16)

B. Civil Law-Motor Vehicle Act, 1988 - Delayed FIR - Reliable Eye witness

Held: - It is settled principle of law that if the presence of eye witness at the place of occurrence is proved and his statement is reliable; delay in lodging F.I.R; any infirmity in police papers; even any defect in medical evidence; and also non-production of other eye witnesses will be immaterial in evaluation of evidence of the said eye witness.(Para 18)

C. Civil Law-Motor Vehicle Act, 1988 - Testimony of Relative/close witness - cannot be disbelieved

Held:- It is settled principle of law that only on the ground that the witnesses are relatives of the deceased or informant, their testimonies cannot be disbelieved. If it is alleged by the opposite parties i.e driver, owner and insurer of the offending vehicle it must be proved by cogent evidence regarding the non-involvement of their vehicle, where it has been proved by claimants that death of deceased was caused by the offending vehicle. (Para 21)

D. Civil Law-Motor Vehicle Act, 1988 - Just Compensation - Various points that are essential for determination of just compensation are (a) deduction towards personal and living expenses to determine multiplicand; (b) selection of multiplier depending upon age of the deceased; (c) basis for applying multiplier as age of the deceased; (d) compensation permissible for conventional head for example loss of state, loss of consortium and funeral expenses; (e) addition of income as a future prospect for both whether the deceased was a permanent employee or self employed person. (Para 34)

First Appeal allowed. (E-5)

List of cases cited: -

1. N.K.V. Bros. (P) Ltd. Vs M. Karumai Ammal 1980 ACJ 435 (SC).

2. Bimla Devi Vs Himachal Road Transport Corp. & ors. (2009) 13 SCC 530.

3. Kusum Lata Vs Satbir 2011 ACJ 926 (SC).

4. Bimala Devi Vs Satbir Singh (2013) 14 SCC 345.

5. National Insurance Co.Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

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

1. This first appeal from order has been preferred under section 173 of Motor Vehicle Act, 1988 (in short M.V.Act), against the award and order dated 31.8.2017, passed by Motor Accident Claim Tribunal/ Additional District Judge, Court No.6, Shahjahanpur, (in short 'Tribunal') in M.A.C.P. No. 172 of 2016 (Smt. Rinki Devi and others Vs. Jamuna Prasad and others), whereby the claim petition filed by the appellants-claimants (in short claimants) has been dismissed.

2. Brief facts, arising out of this appeal, are that the deceased Raj Pal s/o Natthu Lal, husband of claimant No.1, Smt. Rinki Devi r/o village- Ram Nagar

Colony South, P.S Katra Bazar, District Shahjahanpur, was going on 22.3.2016, at 3.00. p.m from his house to Katra Bazar. When he was passing through Mohalla Ram Nagar Colony on Jalalabad road, a Maruti WagonR Car No. U.P.-74-K 8724, which was being driven by respondent No.2, Man Singh, rash and negligently, dashed him from back, whereby severe injuries were caused on his head and legs. Deceased Raj Pal was carried to Siddh Vinayak Hospital, Bareilly for treatment. First Information Report (in short F.I.R) was lodged on 29.3.2016 by the claimant No.1, Smt. Rinki Devi, but during treatment the deceased died on 31.3.2016 due to injuries caused in the said accident.

3. A claim petition, for compensation of Rs.24,90,000/-, was filed by the claimants against respondent-owner No.1, Jamuna Prasad, respondent No.2, driver Man Singh and respondent No.3, National Insurance Company-Insurer of the aforesaid car before the Tribunal. The Tribunal, after considering the evidence produced by the claimants, dismissed the claim petition vide aforesaid award and order. Aggrieved by the aforesaid impugned award and order, this appeal has been preferred.

4. Heard Sri Prem Prakash, learned counsel for the claimants, Sri Atul Pandey, learned counsel for respondents No.1 and 2 and Sri Om Prakash Mishra, learned counsel for the respondent No.3.

5. Learned counsel for claimants submits that the alleged accident has been caused due to rash and negligent driving by respondent No.2 of vehicle WagonR Car No. U.P.-74-K 8724, wherein deceased Raj Pal received severe injuries and died later on, during treatment on 31.3.2016. Place of accident lies between headquarters of both districts Shahjahanpur and Bareilly. Deceased was admitted in Siddh Vinayak Hospital Bareilly for better treatment. The Tribunal, without applying its judicial mind, improperly and illegally assessed the evidence on record, produced by both the parties, whereas involvement of alleged vehicle has been proved not only by oral evidence of P.W-1 Rinki Devi, P.W-2 Rishi Pal, but also proved by documentary evidence i.e F.I.R, charge sheet, site plan and the bill voucher of medical treatment. The impugned award and order is based on surmises and conjencture which is liable to be set aside and the appeal is liable to be allowed.

6. Learned counsel for the respondent Nos. 1 and 2 (owner and driver) and learned counsel for respondent No. 3 (Insurer) have vehemently opposed the submissions made by the learned counsel for the claimants and submitted that the alleged injuries due to which the deceased died, had not been caused in any accident caused by the driver of the alleged vehicle Maruti WagonR Car No. U.P.-74-K 8724; deceased had received injury in any other occurrence/incident at unknown place; he had been admitted in hospital situated at Bareilly which is more than 70-80 kilometers away from the place of accident as alleged by the claimants and F.I.R was lodged after 8 days of the accident. It has further been submitted that P.W-1 Rinki Devi is not an eye witness, P.W-2 Rishi Pal is not the resident of the nearby place of the occurrence; he is brother-in-law of the deceased; his presence, all of a sudden, at the place of occurrence is not natural, and his evidence has also not been supported

and corroborated by other evidence available on record. It has also further been submitted by the learned counsels that independent witness, whose presence has been shown in the F.I.R and is the resident to the nearby place of the accident, has not been produced by the claimant, the impugned order is legal and requires no interference.

7. I have considered the submissions made by learned counsels of both the parties and perused the record.

8. Section 168, Section 169 and Section 176 of M.V. Act provides a procedure for determination of just compensation. According to Section 168 of M.V. Act, for determination of compensation, the Tribunal is required to hold an inquiry into the claim, section 169 provides that in holding such inquiry, the Claim Tribunal shall follow such summary procedure as it thinks fit, whereas Section 176 empowers the State Government to make rules. Sections 168, 169 and 176 are reproduced as under:

"168. Award of the Claims Tribunal -

(1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of sections of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or person or person to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

169. Procedure and powers of Claims Tribunals-

(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf follow such summary procedure as it thinks fit

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a

Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purposes of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

176. Power of State Government to make rules. *- A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely :-*
(a) the form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;

(b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;

(c) the powers vested in a Civil Court which may be exercised by a Claims Tribunal;

(d) the form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and

(e) any other matter which is to be, or may be, prescribed.

9. State Government, in exercise of power conferred under section 176 MV Act, has framed the Uttar Pradesh Motor Vehicles Rules, 1998 (in short Rules). Rule 203-A, and 203-C read with Rule 211-A are relevant at this juncture, which declare the presumption of certain document prepared by Investigating Officer. These rules are as follows:-

Rule 203-A. Duties of investigating Police Officer - (1) The investigating Police Officer shall prepare a site plan, drawn on scale as to indicate the layout and width etc. of the road / roads or place as the case may be, the position of Vehicle / Vehicles, or persons involved and such other facts as the case may be relevant, authenticated by the witnesses and in case no witness is available same shall be recorded, so as to preserve the evidence relating to accident. He shall also get the scene of accident photographed from such angles as to clearly depict the accident, as above, **inter alia** for the purposes of proceeding before the Claims Tribunal.

(2) The investigating Police Officer shall get full particulars of the Insurance Certificate / Policy in respect of the motor vehicle involved in the accident, and to require the production of documents mentioned in sub-section (1) of Section 158, and thereupon either to take the same in possession against receipt, or to retain the photocopies of the same, after attestation thereof by the person producing them.

(3) The investigating Police Officer may verify the genuineness of the documents gathered under sub-rule (2) by obtaining confirmation in writing from the authority purporting to have issued the same.

(4) The investigating Police Officer shall submit detailed report regarding the accident to the Claims Tribunal, alongwith site plan and photographs prepared under sub-rule (1), documents gathered and verified under sub-rules (2) and (3) or action taken in case of documents found forged, copies of report under Section 173 of the Code of Criminal Procedure, medico legal reports and post-mortem report (in case of death),

First Information Report, by not later than fifteen days of receipt of order / requisition issued by the Claims Tribunal:

Provided that such information may also be furnished to the Insurance Company if requested by or through its agent or by the injured / sufferer or next of the kin or legal representatives of the deceased of the accident.

The investigating Police Officer shall submit report under this rule to the Claims Tribunal in Form SR 48-A.

(5) Duties of investigating Police Officer, enumerated in sub-rules (1) to (3) shall be construed as if they are included in Section 23 of U.P. Police Act, 1861 and any break thereof, shall entail consequences envisaged in that law.

Rule 203-C. Duties of Registering Authority - (1) The registering authority of motor vehicles and licensing authority, issuing driving license, shall submit a report or issue a certificate relating to verification of registration and other documents with complete details and of driving license of the driver of the vehicle involved in accident when directed by the Tribunal or asked by the Insurance Company.

(2) The Registering Authority of motor vehicles and licensing authority shall also provide information mentioned in sub-rule (1) to the person / persons who wishes or have filed petitions for compensation or who is involved in an accident or his next of kin, or to the legal representative of the deceased as the case may be.

Rule 211-A *"The reports, certificates and papers submitted or issued under Rules 203-A, 203-C and 203-D shall be presumed to be correct and shall be read in evidence without formal proof, unless proved contrary."*

10. Since the proceeding for determination of compensation is an inquiry, the principle of law applicable in criminal trial as well as civil suit is not applicable in such proceeding. It should also be kept in mind that after causing accident, driver of vehicle makes every effort to flee from the place of occurrence, leaving the injured in critical condition. In such situation passers-by or onlookers come forward to help. They also try to chase the offending vehicle and to note its registration number, as well as make efforts to catch the driver of the offending vehicle and disclose the same to claimant/informant or person available on spot. It has been seen that in some cases, in order to avoid to attend the Court proceeding or further inquiry made by Police, eye witnesses do not come forward to disclose their names. In addition to above, Rules framed by Government clearly provides that F.I.R and certain documents prepared by Investigating Officer of the accident for ex. site plan, photograph of place of occurrence shall be read without formal proof unless proved contrary.

11. Hon'ble Supreme Court in **N.K.V. Bros (P) Ltd. Vs. M. Karumai Ammal, 1980 ACJ 435 (SC)**, holding that Tribunal is duty-bound to be vigilant that due to technicalities of procedural law, the innocent victim do not suffer, has held as under:-

"Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa

loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving."

12. In **Bimla Devi Vs. Himachal Road Transport Corporation and Others, 2009 (13) SCC 530**, Hon'ble Supreme Court while discussing the nature of evidence required for proof of accident and determination of compensation before the Tribunal, has held as under:-

14. "Some discrepancies in the evidences of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying the burden of proof in terms of the provisions of Section 106 of the Evidence Act,1872 as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by Respondents 2 and 3."

15".In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

13. In **Kusum Lata Vs. Satbir, 2011 ACJ 926 (SC),** the Supreme Court while holding the nature of evidence required before Trial Court, again has held as under:-

"8. Both the Tribunal and the High Court have refused to accept the presence of Dheeraj Kumar as his name was not disclosed in the FIR by the brother of the victim. This Court is unable to appreciate the aforesaid approach of the Tribunal and the High Court. This Court is of the opinion that when a person is seeing that his brother, being knocked down by a speeding vehicle, was suffering in pain and was in need of immediate medical attention, that person is obviously under a traumatic condition. His first attempt will be to take his brother to a hospital or to a doctor. It is but natural for such a person not to be conscious of the presence of any person in the vicinity especially when Dheeraj did not stop at the spot after the accident and gave a chase to the offending vehicle. Under such mental strain if the brother of the victim forgot to take down the number of the offending vehicle it was also not unnatural.

9. There is no reason why the Tribunal and the High Court would

ignore the otherwise reliable evidence of Dheeraj Kumar. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of Dheeraj Kumar. The so-called reason that as the name of Dheeraj Kumar was not mentioned in the FIR, so it was not possible for Dheeraj Kumar to see the incident, is not a proper assessment of the fact-situation in this case. It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind."

14. In **Bimala Devi Vs. Satbir Singh (2013) 14 SCC 345,** the Supreme Court has again reminded the nature of proof, required in determining the compensation in claim petition and has held as under:-

"10. In claim cases, it is difficult to get witnesses, much less eye witnesses, thus extremely strict proof of facts in accordance with provisions of the Evidence Act may not be adhered to religiously. Some amount of flexibility has to be given to those cases, but it may not be construed that a complete go by is to be given to the Evidence Act.

11. From the facts as unfolded hereinabove, it is clear that appellants have been callous and negligent in prosecuting the matter and did not do so in right earnest. We cannot take a pedantic view of the matter so as to shut the doors of justice to the appellants. The Motor Vehicles Act is social piece of legislation and has been enacted with the intent and object to facilitate the claimants/victims to get redress for the loss of loosing of family members or for injuries in an early date. In any case, money cannot be any substitute for it, but in the long run it

may have something soothing effect. Thus, it is desirable to adopt a more realistic, pragmatic and liberal approach in these matters....."

15. Thus, it is also settled principle of law that the law relating to compensation, awarded due to motor accident, is beneficial legislation. Strict proof of evidence is not required to be applied either in determining the negligence of driver or involvement of offending vehicle. The standard of judging the evidence, required in accident claim case, is preponderance of probability. In such case, only prima facie evidence involving the alleged vehicle is required.

16. Thus, it has to be seen whether, or not there is a prima facie evidence available on record, whereby it can be held that the alleged accident occurred on 22.3.2016 at 3.00 p.m, within the area of mohalla Ram Nagar colony, Jalalabad Road, P.S. Katra, District Shahjahanpur, wherein the deceased Raj Pal received severe injuries and died later on during treatment on 31.3.2016.

17. From perusal of the impugned award, it is clear that the learned Tribunal has not relied on sole testimony of eye witness of the accident, P.W-2 Rishi Pal, who is real brother-in-law of the deceased, because his presence at the place of accident was not natural; because according to him, the deceased was admitted by police in hospital and his statement was not supported by the police report; deceased was not admitted for treatment in any hospital in district

Shahjahanpur; injury report, site plan of the accident and post mortem report were also not corroborating the version of P.W-2 Rishi Pal; because no ante-mortem injuries were found on the head of deceased.

18. It is settled principle of law that if the presence of eye witness at the place of occurrence is proved and his statement is reliable; delay in lodging F.I.R; any infirmity in police papers; even any defect in medical evidence; and also non production of other eye witnesses will be immaterial in evaluation of evidence of the said eye witness.

19. P.W-1 Rinki Devi is not an eye witness. P.W-2 Rishi Pal has been produced by the claimants as eye witness of the occurrence. Thus, it has to be seen whether, the presence of P.W-2 Rishi Pal at the place of accident is proved and his statement is trustworthy or not. He is resident of village Isura, P.S.-Faridpur, District Bareilly whereas the alleged accident took place at mohalla Ram Nagar Colony, Jalalabad Road, police station Katra Bazar, District Shahjahanpur. He is real brother-in-law of the deceased Raj Pal. According to him, at the time of accident he was going to the house of the deceased with mataka (ritual on eve of Holi festival). As he proceeded on foot from Katra Bazar crossing through Jalalabad Road towards his Sasural, reached two hundred meters away from the crossing, he saw that his brother-in-law (Sala) was coming on foot towards Katra crossing for marketing and as he was 50 meters away from him, a white colour Maruti WagonR Car No. U.P.-74-K 8724, driven by its driver, rash and negligently, dashed Raj Pal from back and fled away from the place of incident. In cross examination, he has admitted that at the place of incident, crowd had gathered and an unknown person called the police, thereafter the police reached there. He has further stated that the deceased was admitted by the police in hospital. He has also admitted that the alleged accident took place in front of house of Jai Narain. According to him the road, where the incident occurred, is north to south and accident took place to western side of the road. In cross examination, he stated that he had not carried the deceased Raj Pal to any hospital in Katra Bazar, but he has specifically stated that he had seen the registration number of the offending vehicle from the front and back side both. He further stated that deceased had been carried in Ambulance to Siddh Vinayak hospital, Bareilly by him along with police. P.W-1 Rinki Devi also stated that deceased had been admitted in hospital by police and P.W-2, Rishi Pal.

20. In this case, F.I.R of the accident was lodged after 8-9 days of the accident wherein it has been specifically mentioned that the alleged accident was seen by one Viresh Kumar Mishra and Rishi Pal (P.W-2).

21. It is settled principle of law that only on the ground that the witnesses are relatives of the deceased or informant, their testimonies cannot be disbelieved. If it is alleged by the opposite parties i.e driver, owner and insurer of the offending vehicle it must be proved by cogent evidence regarding the non involvement of their vehicle, where it has been proved by claimants that death of deceased was caused by the offending vehicle.

22. Death information report was sent from Siddh Vinayak Hospital to Inspector P.S. Kotwali, District Bareilly,

which shows that the deceased Raj Pal was admitted by a helping ambulance. This document has been filed by the claimants, wherein it has been mentioned that the deceased Raj Pal was admitted in hospital in unconscious condition on 22.3.2016 at 3.10 p.m and he had died on 31.3.2016 at 6.00 p.m, due to severe injuries on the head and both legs of the deceased, caused in accident at Jalalabad Road. Although in the site plan of the occurrence, the presence of witness has not been shown but it is clear from the perusal of this document that alleged accident took place on western side of the road from back side of the deceased. In F.I.R, the registration no. of the aforesaid vehicle has been specifically mentioned and after investigation the charge sheet was also filed under sections 279, 338 and 304-A I.P.C against respondent No.2, Man Singh, driver of the aforesaid car.

23. Neither P.W-2, Rishi Pal, brother-in-law of deceased Raj Pal, nor P.W-1, Rinki Devi, wife of deceased, has stated that Siddh Vinayak Hospital is situated 70-80 kilometers away from the place of occurrence but the Tribunal has recorded this fact without any evidence of non applicants i.e insurer, driver or owner on record that Bareilly is 70-80 kilometers away from the place of accident.

24. Shahjahanpur and Bareilly are adjoining districts. Neither P.W-1, Rinki Devi nor P.W-2 Rishi Pal was cross examined by the insurance company before Tribunal as to why the deceased was taken away for treatment to Siddh Vinayak Hospital, Bareilly. Record shows that deceased Rajpal was in critical position at the time of accident. Thus, if the helping ambulance, on the advise of police, took away the deceased to Siddh Vinayak Hospital, Bareilly for better treatment and P.W-2 Rishi Pal did not resist, his evidence cannot be treated as unreliable.

25. In my view, the finding recorded by the learned Tribunal regarding non-reliability of evidence of P.W-2 Rishi Pal, on the ground, that police got the deceased admitted in hospital Bareilly or he had not admitted the deceased in any hospital in Shahjahanpur or the police had denied its role in getting the deceased admitted in hospital at Bareilly, is not justifiable in this accident claim petition because these irregularities or inconsistencies are either superficial or immaterial in the facts and circumstance of this case.

26. It is also pertinent to note at this juncture that Tribunal has disbelieved the evidence produced by the claimants because no injury report of deceased was produced and in postmortem report no ante-mortem injuries were found on the head of deceased whereas, according to Rishipal (P.W-2), head injuries were caused to deceased in the alleged accident.

27. From perusal of the record, it transpires that due to severe injuries, caused in the alleged accident, the condition of deceased Rajpal was critical at the time of accident, hence in my view if the deceased was not carried to any Government Hospital and no injury report was either prepared or filed before the Tribunal, it will not effect the veracity of evidence, produced by the claimants.

28. So far as the presence of ante-moterm head injury in the postmortem

report is concerned, from perusal of the postmortem report, it is clear that three ante-mortem injuries have been noted in postmortem report wherein injury no.1 was stitched wound 2cm with 3cm and injury no.2 was stitched wound of 3 cm, both were on above right eye brow whereas injury no.3 was fracture in both legs. In addition to it, it has also been noted that haemotoma was present in the brain of the deceased and in column of opinion, regarding cause and manner of death, it has been specifically mentioned in the post-mortem report that the death of deceased was caused due to ante-motem head injury. Thus, the finding of Tribunal that according to postmortem report no head injury was caused or injury report was not produced, is against the evidence available on record.

29. From perusal of the record, it further transpires that only copies of registration certificate, insurance policy of the offending vehicle and driving license of respondent No.2, Man Singh, were filed by the respondent-owner whereas only copy of accidental investigation report was filed by the Investigator of respondent-Insurance Company wherein Rs.69,808/- has been verified as expenses incurred in treatment of the deceased. In this report, no fact has been mentioned, which creates any doubt in the alleged accident caused by offending vehicle. No evidence has been produced by the respondent-owner, driver or insurer of the alleged vehicle to controvert the documentary and ocular evidence produced by the claimants.

30. In view of the above, I am of the view that the alleged accident was caused due to rash and negligent driving of offending vehicle No.U.P.74-K-8724 on 22.3.2016 at 3.00 p.m, wherein the deceased Raj Pal received severe injuries and died on 31.3.2016 during treatment. The finding of learned Tribunal in this case is against the settled principle of law as well the evidence and material available on record.

31. So far as question regarding determination of compensation or liability to payment is concerned, in claim petition six dependents on the deceased have been shown. Appellant/claimant No.1 is wife of the deceased and other five claimants are the children of the deceased. Age of the deceased, at the time of accident has been shown as 40 years, which is also verified from the post mortem report as well as the death information report of the deceased available on record. Thus, for the purpose of determination the multiplier, age of deceased is determined between 40 years to 45 years.

32. In claim petition, monthly income of deceased has been alleged Rs.15,000/- per month and his profession has been shown as mason *"Raj Mishtri"* but no documentary proof has been submitted by the claimants in this regard. P.W-1, Smt. Rinki Devi, wife of deceased, in her cross examination has stated that her husband used to do the job of labourer as mason but he did not get it regularly. Looking into the facts and circumstance of this case, as no documentary proof has been placed on record by the claimants, regarding the income of the deceased and deceased was an unskilled labourer belonging to rural area, his monthly income is assessed as Rs.3000/- (three thousand) per month.

33. In addition to above, deceased was admitted for treatment in Siddh

Vinayak Hospital, Bareilly on 22.3.2016 where his treatment was continued up to 31.3.2016 i.e till his death. Various bill vouchers of amount spent on treatment of deceased, filed by claimants are available in lower court record. In claim petition, it has been specifically stated that Rs.1,00,000/- were spent on treatment of the deceased. The said bill vouchers have not been authentically proved by the claimants, but the same were verified by the respondent-insurer as transpires from the verification report of Investigator, appointed by the Insurer. In this report the bill voucher of Rs.69,808/- was verified and found genuine by the said Investigator. In view of the above, the claimants are entitled to Rs.70,000/- as medical expenses.

34. Law regarding determination of just compensation has now been settled by the Constitutional Bench of Hon'ble Supreme Court in **National Insurance Company Ltd. Vs. Pranay Sethi and others (2017) 16 SCC 680,** wherein, Hon'ble Court while discussing the law in **Sarla Verma Vs. Delhi Transport Corporation (2009) 6 SCC 121; Reshma Kumari Vs. Madan Mohan (2009) 13 SCC 422; Rajesh Vs. Rajbeer Singh (2013) 9 SCC 54; Santosh Devi Vs. National Insurance Company Ltd. (2012) 6 SCC 421; Munna Lal Jain vs. Vipin Kumar Sharma (2015) 6 SCC 347; UPSRTC vs. Trilok Chandra (1996) 4 SCC 362; National Insurance Company Ltd. Vs. Pushpa (2015) 9 SCC 166** and various case laws relating to determination of just compensation, has settled down the law regarding various topics which are essential for determination of just compensation i.e. (a) deduction towards personal and living expenses to determine multiplicand; (b) selection of multiplier depending upon age of the deceased; (c) basis for applying multiplier as age of the deceased; (d) compensation permissible for conventional head for example loss of state, loss of consortium and funeral expenses; (e) addition of income as a future prospect for both whether the deceased was a permanent employee or self employed person. Hon'ble Supreme Court in Pranay Sethi (supra) has held as follows:-

59. In view of the aforesaid analysis, we proceed to record our conclusions:-

59.1 The two-Judge Bench in Santosh Devi 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, 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 has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh 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 paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

59.6 The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 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.

35. Thus it is clear that Hon'ble Supreme Court not only permitted for addition in the determined income / salary of the deceased whether he was self employed or a permanent employee, towards future prospect at the different rate according to age of deceased, but also approved the rate of deduction of personal and living expenses, and selection of multiplier as propounded in para 30 to 32 and para 42 of Sarla Verma case (supra).

36. In Sarla Verma (supra), Hon'ble Supreme Court in para 30 to 32 and para 42 has held 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, the general practice is to apply standardized 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 dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed 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 dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant 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 family of the bachelor is large and dependant 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.

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, 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.

37. In view of the law laid down by Hon'ble the Supreme Court the compensation payable to the appellants/claimants is assessed as follows.

Sl. No.	Head	Calculation	Amount
1	Per annum income.	Rs.3000 x12	**Rs.36,000/-**
2	25% to be added in annual income(1) as future prospect.	Rs.36000+Rs.9000/-	**Rs.45,000/-**
3	1/5 of income assessed in column number(2), deduction towards personal and living expenses.	Rs.45000-Rs.9000/-	**Rs.36,000/-**
4	Multiplied by 14 as deceased was between 40-45 years at the time of accident.	Rs.36,000 x14/-	**Rs.5,04000/-**
5	Compensation in the head of non-pecuniary loss (Loss of estate, loss of consortium and for funeral expenses).	Rs.15000+Rs.15000+Rs40000/-	**Rs.70,000/-**
6	Compensation in lieu of medical expenses.	Rs.70,000/-	**Rs.70,000/-**
	Total (4+5+6)		**Rs.6,44,000/-**

38. So far the interest on the aforesaid compensation is concerned, it has been settled that the annual interest payable on compensation should be at par with prevailing price index as well as rate of Bank Interest. Thus, looking into the present price index and rate of bank interest on deposit, the claimants are entitled 8% annual interest on the aforesaid compensation from the date of filing of the claim petition.

39. So far as regard the liability to pay the above compensation is concerned, respondent No1, Jamuna Prasad is owner of the offending vehicle No. U.P.70 K 8724; respondent No.2, Man Singh, is driver of the offending vehicle at the time of accident whereas the respondent No.3

has been shown as insurer of the said vehicle and alleged accident, wherein deceased Raj Pal had died was occurred on 22.3.2016.

40. From perusal of paper no.22-G to 24-G, filed by respondent No.1, Jamuna Prasad, before the Tribunal, it transpires that the said offending vehicle is LMV(car), was registered in the name of Jamuna Prasad and ensured by respondent No.3, Insurance Company from 31.10.2015 to 30.10.2016. The driving license of respondent no.2, Man Singh, was issued on 15.9.2012, was valid up to 22.5.2017. The said driving license was also forwarded for verification to Regional Transport Officer (R.T.O), Kanpur, who vide his letter dated 11.7.2017 (available on record) has informed that as per record, the driving license issued in favour of Man Singh, respondent No.2, for motor cycle and LMV car was valid and effective from 15.9.2012 to 3.7.2016.

41. Thus, in view of the above, all the documents of the alleged vehicle including driving licence were valid and effective and the said vehicle was insured with Respondent No.3 on the date of accident. Although, the primary liability for the payment of compensation lies on the shoulder of the respondents no.1 and 2 who are owner and driver of the offending vehicle, but as the said vehicle, at the time of accident, was insured with respondent No. 3, Insurer, and there is no breach of policy, the actual liability to pay the aforesaid compensation along with interest is fixed on respondent no.3 (Insurer).

42. In view of the above, respondent no.3, National Insurance Company Ltd. is directed to deposit Rs. 6,44,000/-(Six lacs forty four thousand only) along with 8% annual interest from the date of claim petition before the tribunal, within a period of one month from the date of receipt of the copy of this judgment. Out of the said compensation, Rs.1,00,000/- (Rs. One Lacs) will be payable to each claimant No.2 to 6 and shall be deposited in any Nationalized Bank till their age of majority. The rest amount of compensation, along with interest accrued on the aforesaid whole amount, will be payable to appellant No.1.

43. In view of the aforesaid discussion, the impugned order and award dated 31.8.2017 passed by Tribunal is hereby set aside. Appeal is **allowed** and claim petition filed by claimant is allowed to the extent of compensation along with interest as above.

44. Office is directed to send back the Lower Court Record to the Tribunal, along with the copy of judgement forthwith for information and compliance.

(2019)11ILR A1181

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No.- 413 of 2017

Smt. Vimla Devi ...Petitioner
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioner:
Sri Ambrish Singh, Sri Alok Kumar Yadav, Sri Manoj Kumar

Counsel for the Respondents:
C.S.C., Sri Mani Shanker Pandey

A. Civil Law-Essential Commodities Act, 1955 - Fair Price Shop – change of premises made without prior intimation - Licence cancelled without enquiry - punishment of termination of license - too grave - Impugned order quashed.

Writ Petition allowed (E-9)

List of cases cited : -

1. Puran Singh Vs St. of U.P. & ors. (2010) (3) ADJ 659 (FB)

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

1. On 12.05.2016, the District Supply Officer took cognizance of a complaint given by one Dharmendra Kumar dated 11.05.2016. On 18.05.2016, the Supply Inspector entered into a preliminary enquiry and submitted a report that the licence of the petitioner to run the fair price shop be suspended. On the very same day the District Supply Officer suspended the licence of the petitioner. On 28.05.2016, a show cause notice was issued to which the petitioner replied on 17.06.2016. Thereafter, the order dated 08.08.2016 was passed. The Appellate Court on 13.12.2016 affirmed the order of the Sub-Divisional Officer dated 08.08.2016.

2. The contention of the learned counsel for the petitioner is that if the order dated 08.08.2016 is perused then it becomes abundantly clear that the enquiry was not conducted by the Enquiry Officer, but it was infact handed over to the Supply Inspector and on the comments given by the Supply Inspector, the licence to run the fair price shop of the petitioner was cancelled. If a proper enquiry had taken place only then a proper conclusion could have been drawn by the enquiry officer regarding the charges against the petitioner and since, the Enquiry Officer had only depended on the comments of the Supply Inspector, the Enquiry was absolutely vitiated in the eyes of law. Learned counsel submits that neither a place nor a date was fixed. No time for the enquiry was also fixed. Had a time, place and date been fixed the petitioner would have cross-examined the witnesses who had deposed against her. Still further, learned counsel for the petitioner submits that if the premises from which the petitioner was distributing the essential commodities was changed by her on account of the fact that the premises had fallen down because of inclement weather then the petitioner ought to have been excused for doing that. In fact no punishment should have been given to her.

3. Learned counsel for the petitioner further submits that for not informing the authorities about the change of the business premises the punishment ought not to have been as grave as had been awarded.

4. Learned Standing Counsel, however, in reply submits that when the enquiry as was conducted by the Supply Inspector was available on the record then no enquiry infact ought to have been further undertaken again by the Enquiry Officer. Further he submits that the admission made by the petitioner in her reply that she had infact changed the premises from which essential commodities were being distributed itself was ground enough for the cancellation of the licence.

5. Learned Standing Counsel further submits that if because of the falling

down of the premises on account of heavy rains, the petitioner was changing her premises then an information ought to have been sent to the higher authorities.

6. Having heard the learned counsel for the petitioner and the learned Standing Counsel, this Court is definitely of the view that the orders impugned cannot be sustained in the eyes of law. Firstly, there was no enquiry as is contemplated under the various Government orders and as per the law laid down in the Full Bench decision of this Court in **Puran Singh vs. State of U.P. and others (2010 (3) ADJ 659 (FB)** and, secondly if the petitioner had, to save her essential commodities, changed the premises then a punishment as grave as the termination of the licence ought not have been awarded. A lesser punishment of imposition of some penalty could have been imposed. The orders dated 08.08.2016 and 13.12.2016 passed by the respondents No. 3 and 2, Sub-Divisional Magistrate/Up-Ziladhikari Chayal, District Kaushambi and Joint Commissioner (Food) Allahabad Division, Allahabad are set aside.

7. The respondents shall be at liberty to proceed in accordance with law.

8. Accordingly, the writ petition is allowed.

(2019)11ILR A1183

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2017

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE SIDDHARTHA VARMA, J.

Writ C. No. 611 of 2017

Smt. Kamla Tomar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

A. Land Law- Land Acquisition Act, 1894 - Section 28 -A - Award u/s 28-A-is made by Reference Court and not by High Court in the First Appeal. Application filed after three months from the date award was passed - cannot be condoned.

Writ Petition dismissed (E-9)

List of cases cited : -

1. Babua Ram & ors. Vs. St. of U.P. & anr., (1995) 2 SCC 689

2. UOI & anr. Vs Pradeep Kumari & ors., (1995) 2 SCC 736

3. Bhagti (Smt.) (deceased) through her Lrs. Jagdish Ram Sharma Vs St. of Haryana, (1997) 4 SCC 473

4. St. of A.P. Vs Marri Venkaiah, (2003) 7 SCC 280

5. Harish Chandra Raj Singh Vs Land Acquisition Officer, AIR (1961) SC 1500

6. UOI Vs Mangtu Ram, (1997) 6 SCC 59

7. St. of Orissa & ors. Vs Chitrasen Bhoi, (2009) 9 SCC 74

8. Popat Bahiru Goverdhane & ors. Vs Special Land Acquisition Officer & anr.,(2013) 10 SCC 765

(Delivered by Hon'ble Dilip Gupta, J.
Hon'ble Siddhartha Varma, J.)

1. The issue that arises for consideration in this petition is whether

the delay in filing an application under Section 28-A of the Land Acquisition Act 18941 can be condoned.

2. Learned counsel for the petitioner has submitted that the delay can be condoned and, therefore, the application that had been filed beyond the time prescribed under Section 28-A of the Act was required to be decided on merits after condoning the delay.

3. Learned Standing Counsel, on the other hand, has submitted that the time period provided for under Section 28-A of the Act for filing the application cannot be extended and, therefore, the application filed by the petitioner which was admittedly beyond the time prescribed cannot be entertained.

4. We have considered the submissions advanced by the learned counsel for the parties.

5. It is alleged that land admeasuring 78 acres situated in Village-Arthala, District Ghaziabad, including the land belonging to the husband of the petitioner, was acquired in 1960 by the State Government. The award was made by the Special Land Acquisition Officer under Section 11 of the Act on 28 September 1977 by adopting the belting system. The market rate of the land falling in the first belt was determined at Rs. 2.08/- per square yard, while that of the land falling in the second belt was determined at Rs. 1.04/- per square yard. Some of the tenure-holders covered by the same notification issued under Section 4(1) of the Act filed an application under Section 18 of the Act and the Reference Court by award dated 31 March 1987 enhanced the compensation by determining the market rate of the land to be Rs.8.50 per square yard. The First Appeal filed by the State of Uttar Pradesh was allowed in part on 14 October 2003 and the market rate of the land was determined at Rs.6.80/- per square yard.

6. It is on 14 May 2012 that the petitioner filed an application before the Collector, Ghaziabad under Section 28-A of the Act claiming that the petitioner should also be awarded Rs.6.80 per square yard as the market rate of the land. This petition has been filed for a direction upon the Collector to decide the application filed by the petitioner under Section 28-A of the Act.

7. Section 28-A of the Act requires that the application should be filed within three months from the date of the award of the Court. It is reproduced :-

"Re-determination of the amount of compensation on the basis of the award of the Court. - (1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court:

Provided that in computing the period of three months within which an

application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of Sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under Section 18.

8. As noted above, in the application filed by the petitioner on 14 May 2012, reference was made to the judgment delivered by the High Court on 14 October 2003 in the First Appeal that was filed by the State against the award of the Reference Court in references filed by some other tenure-holders.

9. The **first issue** that would arise for consideration is whether the award referred to under Section 28-A of the Act is the award made by the Reference Court or the High Court in the First Appeal.

10. This issue arises for consideration because a perusal of the application filed by the petitioner under Section 28-A of the Act reveals that it had been filed claiming redetermination of the compensation on the basis of the judgment rendered by the High Court on 14 October 2003 in the First Appeal and not on the basis of the award made by the Reference Court. Section 28-A of the Act provides that where in an award under Part-III (containing Sections 18 to 28-A of the Act), the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the land covered by the same notification under Section 4(1) of the Act and who are also aggrieved by the award of the Collector may, by written application to the Collector within three months from the date of the award of the Court, require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the Court. 'Court' has been defined in Section 3(d) of the Act to mean a Principal Civil Court of original jurisdiction. It is, therefore, clear that the award that is referrable to under Section 28-A(1) of the Act is the award made by the Reference Court alone. This is also clear because Section 28-A of the Act begins with "where in an award in this Part, the Court allows to the applicant" and ends with "may be redetermined on the basis of the amount of compensation awarded by the Court".

11. An application under Section 28-A of the Act cannot, therefore, be filed for redetermination of the compensation by treating the award as that made by the High Court in the First Appeal or by the Supreme Court. This view finds support from the decision of the Supreme Court in **Babua Ram and Ors. Vs. State of U.P. and Anr.2.** The observations are :

"19. The next question is as to when the period of limitation of three

months begins to run under Section 28-A and whether successive awards made by Civil Court at different times in respect of the land covered by the same Notification furnish separate causes of action for making applications under Section 28A. **Let us consider the meaning of the words "an award under this part" referred to in Section 28-A(1) which is Part III of the Act.** The heading to that part begins by reference to court and its procedure. The "court" means a principal civil court of original jurisdiction or a special judicial officer appointed to perform the functions of the court under the Act as becomes clear as is noticed already. What are the matters to be considered in determining the compensation on a reference made to it under Section 18, is detailed in Section 23 while matters to be neglected in determining such compensation are indicated in Section 24. By operation of Sub-section (2) of Section 26, the award made determining the amount of compensation shall be deemed to be a decree while the statement of the grounds of every such award is deemed to be the judgment, for the purpose of Code of Civil Procedure. **The above perspectives from Part III make it clear that the award of the court is that of the civil court of original jurisdiction in that part.** It is a decree for the purpose of an appeal under Section 54 which falls in part VIII of the Act (Miscellaneous). The decree as defined in Section 2(2) C.P.C. is the decree of the High Court, which shall be appealable to the Supreme Court under Articles 132, 133 and 136 read with Order 45 C.P.C, **Hence, the award of the court referred to in Sub-section (1) of Section 28-A is only the award of the civil court of original jurisdiction or of judicial officer performing the functions of such court under the Act on reference received by it under Section 18 and an award and decree pronounced under Section 26 of the Act. Since, the judgment and decree of the High Court under Section 54 or of this Court do not come in Part III of the Act, they stand excluded from an award envisaged under sub- section (1) of Section 28-A. The aggrieved interested person, therefore, is entitled to the right and remedy of making an application under Section 28A for redetermination of compensation for his acquired land only on the basis of the award of the civil court or judicial officer which is a judgment and decree under Section 26 when such award grants compensation in excess of the amount awarded by the Collector under section 11.** When such an application is made in writing by the aggrieved person, notwithstanding the fact of his having received compensation under Section 31 without protest and of not availing the right and remedy of the reference under Section 18, the redetermination of the compensation under Section 28A(1) is required to be done."(emphasis supplied)

12. It needs to be stated that in **Union of India & Anr. Vs. Pradeep Kumari and Ors.3,** the Supreme Court disagreed only with the view taken in **Babua Ram** that the period of limitation for making an application under Section 28-A of the Act is not restricted to the earliest award that is made by the Court after coming into force of Section 28-A of the Act.

13. The view that the award referred to in Section 28-A(1) of the Act is the award of the Reference Court was

reiterated by the Supreme Court in **Bhagti (Smt.) (deceased) through her Lrs. Jagdish Ram Sharma Vs. State of Haryana4,** and the observations are :

"6. ..... **Equally, the right and remedy of redetermination would be available only when the reference Court under Section 18 has enhanced the compensation in an award and decree under section 26.** Within three months from the date of the reference court excluding the time taken under proviso, the applicant whose land was acquired under the same notification but who failed to avail the remedy under Section 18, would be entitled to avail the right and remedy under Section 28A. **The order and judgment of the High Court does not give such right. Thus, this Court held that Section 28-A does not apply to an order made by the High Court for redetermination of the compensation.** Thus, we hold that the question of reference to the Constitution Bench does not arise. **The claimants are not entitled to make an application for redetermination of compensation under Section 28-A(1) after the judgment of the High Court;** nor are the claimants entitled to avail of that award which is more beneficial to the claimants, i.e., the High Court judgment."
(emphasis supplied)

14. Thus, the application filed under Section 28-A of the Act for claiming the enhancement of the compensation was not maintainable.

15. The **second issue** that arises for consideration is whether the application filed under Section 28-A of the Act can be entertained if it is filed beyond the time prescribed in the Section.

16. The Reference Court made the award on 31 March 1987. The application was required to be filed within three months from the date of the award of the Reference Court. However, it was filed only on 14 May 2012 after a lapse of almost twenty-five years.

17. This issue was examined by the Supreme Court in **State of Andhra Pradesh Vs. Marri Venkaiah5** and it was held that time cannot be extended on the ground of knowledge of the award. The relevant observations are :

"7. "Plain language of the aforesaid section would only mean that the period of limitation is three months from the date of the award of the court. It is also provided that in computing the period of three months, the day on which the award was pronounced and the time requisite for obtaining the copy of the award is to be excluded. **Therefore, the aforesaid provision crystallises that application under Section 28-A is to be filed within three months from the date of the award by the court by only excluding the time requisite for obtaining the copy. Hence, it is difficult to infer further exclusion of time on the ground of acquisition of knowledge by the applicant."**

(emphasis supplied)

18. The Supreme Court clarified that the limitation of three months would not commence from the date of the knowledge of the award but from the date of the award and in this context, distinguished the earlier decision of the Supreme Court rendered in **Harish Chandra Raj Singh Vs. Land Acquisition Officer6** since that related to

limitation provided for under Section 18 of the Act. In this connection, the relevant paragraphs are as follows:

"11 .....In that case, the Court interpreted the proviso to Section 18 of the Act and held that clause (a) of the proviso was not applicable in the said case because the person making the application was not present or was not represented before the Collector at the time when he made his award. The Court also held that notice from the Collector under Section 12(2) was also not issued, therefore, that part of clause (b) of the proviso would not be applicable. The Court, therefore, referred to the second part of the proviso which provides that such application can be made within six months from the date of the Collector's award. **In the context of the scheme of Section 18 of the Act, the Court held that the award by the Land Acquisition Officer is an offer of market price by the State for purchase of the property. Hence, for the said offer, knowledge, actual or constructive, of the party affected by the award was an essential requirement of fair play and natural justice.** Therefore, the second part of the proviso must mean the date when either the award was communicated to the party or was known by him either actually or constructively.

12. **The aforesaid reasoning would not be applicable for interpretation of Section 28-A because there is no question of issuing notice to such an applicant as he is not a party to the reference proceeding before the court.** The award passed by the court cannot be termed as an offer for market price for purchase of the land. There is no duty cast upon the court to issue notice to the landowners who have not initiated proceedings for enhancement of compensation by filing reference applications; maybe, that their lands are acquired by a common notification issued under Section 4 of the Act. As against this, under Section 18 it is the duty of the Collector to issue notice either under Section 12(2) of the Act at the time of passing of the award or in any case the date to be pronounced before passing of the award and if this is not done then the period prescribed for filing application under Section 18 is six months from the date of the Collector's award."

(emphasis supplied)

19. The Supreme Court referred the earlier decisions rendered by it in **Union of India Vs. Mangtu Ram7** and **Tota Ram Vs. State of U.P.8** wherein the same issue was dealt with.

20. In **State of Orissa and Ors. Vs. Chitrasen Bhoi9,** the Supreme Court also observed that the limitation for filing the application under Section 28-A of the Act would commence from the date of the making of the award by the Reference Court and the delay in filing the application cannot be condoned.

21. In **Pradeep Kumari,** the Supreme Court clarified that the limitation would not apply from the date of the first award of the Reference Court and that it was permissible to even make an application to the Collector on the basis of a subsequent award made by the Reference Court but that application had to be made within the limitation from the date of the subsequent award.

22. The Supreme Court in **Popat Bahiru Goverdhane and Ors. Vs.**

Special Land Acquisition Officer and Anr.10 again reiterated that the period of limitation cannot be extended and the relevant observations are :

"8. The sole question for the consideration of the Court is whether limitation for filing the application for re-determination of the compensation under Section 28A of the Act would commence from the date of the award or from the date of knowledge of the court's award on the basis of which such application is being filed?.

.....

10. The issue involved herein is no more res-integra. The appellants' case before the High Court as well as before us has been that the limitation would commence from the date of acquisition of knowledge and not from the date of award. Though, Shri Gaurav Agarwal, learned counsel for the appellants, has fairly conceded that there is no occasion for this Court to consider the application of the provisions of the Limitation Act, 1963 (hereinafter called the "Act 1963') inasmuch as the provisions of Section 5 of the said Act.

.....

13.This Court in Union of India & Ors. v. Mangatu Ram & Ors.; and Tota Ram v. State of U.P. & Ors. dealt with the issue involved herein and held that as the Land Acquisition Collector is not a court and acts as a quasi judicial authority while making the award, the provisions of the Act 1963 would not apply and, therefore, the application under Section 28-A of the Act, has to be filed within the period of limitation as prescribed under Section 28-A of the Act. The said provisions require that an application for re-determination is to be filed within 3 months from the date of the award of the court. The proviso further provides that the period of limitation is to be calculated excluding the date on which the award is made and the time requisite for obtaining the copy of the award.

.....

16. 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. 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. "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."

23. In the instant case, the Reference Court gave the award on 31 March 1987. The application under Section 28-A of the Act was filed on 14 May 2012. It was clearly beyond three months from the date of the award of the Reference Court. It was, therefore, barred by limitation.

24. No relief, therefore, can be granted to the petitioner.

25. The writ petition is, accordingly, dismissed.

(2019)11ILR A1190

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 780 of 2017

M/S King Star Handicraft & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kshitij Shailendra

Counsel for the Respondents:
A.S.G.I., S.C., Smt. Raj Kumari Devi

A. Administrative Law - The Customs Act, 1962 - Section 110, 124 (A) – Natural Justice - No show cause notice u/s 124 (A) - no step taken u/s 110(2) - Bank Account cannot be frozen during investigation - Authority to defreeze the bank Account of Petitioner.

Writ Petition allowed (E-9)

List of cases cited referred: -

1.RaghuramGrahPvt.Ltd.Vs.Commissioner of C. Ex. & Service Tax, reported in (2005) (186) E.L.T. 50 (All.) (D.B.).

2.Veritas Exports Vs UOI, reported in (2005) (184) E.L.T. 341 (Bom.) (D.B.).

3.Am Overseas Vs UOI, (2006) (194) E.L.T. 267 (Guj.)

4.Multitek Engineer Vs UOI, reported in (2012) (05) JEE(E) page 1458

5. CivilMisc. Writ Petition No. 17424 of 2015 (M/S M.Z. Handicraft & anr. Vs UOI, & 4 ors.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Kshitij Shailendra, learned counsel for the petitioners and Smt. Raj Kumari Devi, learned counsel appearing on behalf of respondent nos. 1 to 3.

2. Notices were issued to the respondent nos. 2, 3 and 4 by this Court vide its order dated 11.01.2017. As per the office report dated 10.02.2017 notices were issued to the aforesaid respondents by RPAD fixing on 13.02.2017. Neither acknowledgment nor undelivered cover has been returned back. As such in view of provision chapter VIII Rule XII of Allahabad High Court Rules notices are deemed to be served upon the aforesaid respondents.

3. The petitioners have preferred the present writ petition interalia with the prayer to issue a mandamus commanding the Senior Intelligence Officer, Directorate of Revenue Intelligence, Nahva Sheva Unit, First Floor, Port Users Building (PUB), Nhava Sheva Uran, Raigard, Maharashtra/respondent no. 2 as well as Federal Bank Limited, Ground Floor, Gandhi Nagar, Rampur Road, Moradabad/respondent no. 4 to defreeze the Current Account No. 16250200002619 held at Fedral Bank Limited, Ground Floor, Gandhi Nagar, Rampur Road, Moradabad.

4. The facts in brief as contained in the writ petition are that petitioner no. 1 is a proprietorship concern which is engaged in the activities of manufacturing and export of Brass Artwares. The petitioner no. 2 is its proprietor. The firm of the petitioners' was duly registered with the department of commercial taxes

and it is also registered under the Central Taxation laws as well as with the Expert Promotion Council for Handicrafts, New Delhi.

5. In the month of August 2014, Federal Bank Limited/respondent no. 4 freezed the Bank account of the petitioners and the petitioners were restrained from operating the bank account maintained by them in the aforesaid Bank. It was informed to the petitioners that the department of Revenue Intelligence in the proceedings initiated under Customs Act, had directed the bank not to allow operation of the Bank account.

6. Summons were issued to the petitioner no. 2 on 14.08.2014 under section 108 of the Customs Act, 1962 whereby Senior Intelligence Officer Directorate of Revenue Intelligence Maharashtra/respondent no. 3 asked the petitioner to submit documents in respect of petitioners' business activities in connection with some inquiry. The petitioners sent an application dated 21.08.2014 to the Directorate of Revenue Intelligence assailing the freezing of bank account with request to permit the petitioners to operate the said bank account. A reply in response to the summons dated 14.08.2014 was also duly submitted by the petitioners through their authorized representative, on 05.09.2014. Without passing any order on the aforesaid reply another summon dated 11.09.2014 was issued under section 108 of the Customs Act, 1962 requiring personal appearance of the petitioner no. 2 in the Maharashtra office of the respondents. Petitioners duly submitted their reply on 06.11.2014. Petitioner no. 2 appeared before respondent no. 3 on 07.11.2014 along-with all the requisite documents and got her statement recorded. Thereafter another summon was issued on 19.10.2015 under section 108 of Customs Act, 1962 against which petitioners duly submitted their reply on 17.11.2015. The authorized representative of the petitioners also appeared before the respondents and produced all the relevant documents. It is contended that the petitioners have completed all the formalities regarding proceedings pending against them under section 108/110 of the Customs Act and they have produced all the necessary documents as required under the different summons issued to the petitioners. It is contended that till date no orders were passed permitting the petitioners to operate their bank accounts.

7. It is argued by Sri Kshitij Shailendra, learned counsel for the petitioners that respondents have no power, authority or jurisdiction to freeze the account pending investigation under sections 108/110 of the Customs Act, 1962. For a ready reference, Sections 108 and 110 of the Customs Act, 1962 are being quoted herein-below:-

"Section 108 - Power To Summon Persons To Give Evidence And Produce Documents

[(1)) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act]

(2) A summons to produce documents or other things may be for the production of certain specified documents or thing or for the production of all

documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorized agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)

Section 110 - Seizure Of Goods, Documents And Things

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

[(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under Sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or Magistrate, and certifying the correctness of any list of samples so drawn.

(1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.]

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the [Principal Commissioner of Customs or Commissioner of Customs] for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his

opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extract therefrom in the presence of an officer of customs."

8. It is contended that except the issuance of summons to the petitioners a reply to which were duly submitted by the petitioners, no other show cause notice has been issued to the petitioners under any provisions of the Customs Act. It is further contended that no notice under section 124 of the Customs Act, 1962 has been issued to the petitioners, as such, assuming without admitting that the notices issued under section 110(2) was valid notice, it automatically stands lapsed after a period of six months, immediately in the first quarter of July 2015 itself and as such there is no justification to continue with the seizure. In this background of the matter it is argued by Sri Kshitij Shailendra that impugned action is violation of principles of natural justice. It is further argued that on account of unwarranted and illegal action of the respondents the entire business operations of the petitioners have come to stand-still and as such there is a violation of Article 19 (1)(g) of the Constitution of India. Learned counsel for the petitioners also relied upon a following judgments:-

(i) Raghuram Grah Pvt. Ltd. Vs. Commissioner of C. Ex. & Service Tax, *reported in* ***2005 (186) E.L.T. 50 (All.) (D.B.).***

(ii) Veritas Exports vs. Union of India, reported in 2005 (184) E.L.T. 341 (Bom.) (D.B.).

(iii) Am Overseas vs. Union of India, *2006 (194) E.L.T. 267 (Guj.) (D.B.);*

(iv) Multitek Engineer vs. Union of India, reported in 2012 (05) JEE(E) page 1458.

(v) Judgment and order dated 07.05.2015 passed in ***Civil Misc. Writ Petition No. 17424 of 2015 (M/S M.Z. Handicraft and another Vs. Union of India and 4 Others).***

9. In the short counter affidavit filed on behalf of the respondents it is stated that:-

(i) the office of the respondent no. 2 is investigating a case of fraudulent drawback claim by a group of firms by exporting cardboard waste in place of 'Brass Artware' declared in the shipping bills filed for such exports.

(ii) The exporters adopted an ingenious modus operandi to defraud the Government. They carted into the Container Freight Station (CFS, in short) a consignment containing genuine brassware which was presented to the customs officers for examination. However, after verification by Customs and after obtaining the mandatory permission to export (Let Export Order or 'LEO'), they filed fresh shipping Bills and on such Shipping Bills carted into the CFS fresh consignments of similar looking cartons that contained waste such as shredded paper/ cardboard. Then, while stuffing the container for shipping bill where LEO had been obtained, instead of stuffing the cargo which had been examined by the customs staff, the subsequently carted consignment containing waste was stuffed and exported. This cycle was repeated numerous times and, in the process, waste

was exported while drawback was claimed on the value of the non-existent Brass Artware declared in the respective shipping bills.

(iii) During investigation, 13 containers stuffed with goods covered under 47 shipping bills were intercepted at various points (CFS, Docks and also at the port of destination) and 1281 loose packages, pertaining to 17 shipping bills, lying in the Export Shed of CFS Forbes & Co. Ltd were detained. These goods were examined and seized by officers of DRI during the period 04.06.2014 to 28.06.2014 as there was reason to believe that they were liable to confiscation under provisions of the Custom Act, 1962. Based on their contents, the packages were broadly of three different types: (1) Those containing only waste paper/cardboard shredding and pieces of what appeared to be scrap metal foil (2) Those containing waste paper/cardboard shredding and metal plates and (3) Those that did contain some pieces of the declared brass items, however in very low quantity in comparison to the declared quantity. Total drawback claimed under the said 64 shipping bills is about Rs. 1.71 crore and the total declared (FOB) value is about Rs. 14.27 crores. A total number of 16 firms were shown as exporter (as per the shipping bills) in the said seized consignments, however not a single firm came forward to claim the goods under seizure. Of the said total number of subject 16 firms, Proprietors of only four firms appeared before DRI in response to summonses issued to them and gave their statements. However, the said proprietors, in statement given by them claimed ignorance about nature of the exports carried out in the name of their respective firms and named Mohd. Asad Ali as the person responsible for the exports. A show cause notice proposing, inter alia, confiscation of goods, denial of drawback and penalty on those concerned was issued on 01.12.2014.

(iv) A total no. of 29 suspect firms are under investigation and besides the drawback claimed in case of consignments seized by DRI, the said firms have, collectively claimed drawback amount of around Rs 13 crores in respect of consignments already exported by them in the past of a total declared FOB value of about Rs. 120 crores.

(v) The petitioner no. 1, is one of the 29 firms under investigation, and freight forwarding work of the petitioner in respect of export from Nhava Sheva Port was handled by Pandurang Bajirao Dere, also known as Adinath Dere, proprietor of M/s Emmar Logistics, who is one of the two prime suspects in the case (the other being Mohd. Asad Ali.

(vi) That Pandurang Bajirao Dere, in his statement, recorded under section 108 of the Customs Act, 1962, admitted, inter alia, that he had handled freight forwarding work of 15 firms, including M/s King Star Handicraft, the Petitioner no. 1; that he did not know the proprietors of any of the said 15 firms; that the said 15 firms were operated by a trio of Moradabad based persons, namely Nasir Khan, Bobby Khan and Rahat Khan; that the modus operandi adopted by the said trio was 'Adjustment Method', wherein the quantity of goods declared in the shipping bills would be much higher, up to 5 to 6 times than what was packed in the cartons; there would be no problem with their Customs clearance as the packing would be done in such a manner that it would not be detected easily; that he (Dere) was promised 22% of the drawback sanctioned to the party and that

the operator of M/s King Star Handicraft, the Petitioner no. 1 was Bobby Khan.

(vii) The said Pandurang Bajirao Dere and three other persons involved in the case were arrested by DRI on 21.08.2014) (Mohd Asad Ali) and 22.08.2014 (Pandurang Bajirao Dere and others) and are presently released on bail.

(viii) Petitioner no. 1 had exported goods declared as 'brass artware' under three shipping bills filed during May 2014 involving a total declared value of Rs. 51,64,816/- and drawback claim of Rs. 6,19,779/-. The remittance received in bank accounts of all of the 29 firms under investigation is suspected to be arranged by a syndicate and not relatable to the exports done by the firms.

(ix) As the petitioner firm appeared to be one of the firms operated by a syndicate engaged in such fraudulent exports, further sanction of drawback to petitioner was put on hold vide letter dated 05.06.2014 issued to drawback section, JNCH. The petitioner's impugned bank account no. 16250200002619 with Fedral Bank Ltd, Moradabad Branch shows credit of Rs. 12,94,971/- which relates to receipt of foreign inward remittance and is suspected to be arranged by a syndicate and not relatable to the exports done by the firm. Hence, a letter dated 05.06.2014 was also issued to Fedral Bank Ltd, Moradabad Branch requesting, inter alia, not to allow withdrawal from the current account of the petitioner no. 1.

10. It is stated in the prayer clause of aforesaid short counter affidavit that "however, the department has no objection to the petitioner operating their account for transactions other than those related to the exports under investigation."

11. In the rejoinder affidavit filed on behalf of the petitioners, the facts as narrated in the short counter affidavit were denied and again it is stated that procedure as prescribed under sections 108/110 of the Customs Act 1962 was not complied with and as such the petitioners are entitled for the reliefs as claimed in the present writ petition.

12. Heard learned counsel for the parties.

13. With the consent of learned counsel for the parties, the writ petition is being disposed of at the admission stage itself.

14. From perusal of the facts as sated above, it is clear that as many as three summons were issued by the respondents under sections 108/110 of the Customs Act 1962. No proceedings whatsoever has been initiated at any point of time as provided under Sub-section 2 of Section 110 of the Customs Act 1962. It is provided Sub-section 2 of Section 110 of the Customs Act 1962 that where any goods are seized under sub-section (2) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

15. It is clear from perusal of the record that no proceeding has been initiated by the respondents by issuing notice as provided under clause (a) of Section 124 of the Customs Act 1962 within six months.

16. In the case of **Raghuram Grah Pvt. Ltd (Supra)** it was held by Division

Bench of this Court that *"As we find no provision nor any authority under which the bank account can be freezed pending investigation we are left with no option but to quash the order dated 16th January, 2004 (Annexure 17 to the writ petition) and direct the Respondent No. 1 to forthwith release Current Account Nos. 28430 and DRCs Account Nos. 7538 to 7541 with the Union Bank of India, Banda Branch, Banda. As the action of the respondent in freezing the bank accounts have been set aside the petitioner shall be entitled to operate them."*

17. In the case of **Veritas Exports (Supra),** a Division Bench of Bombay High Court was pleased to hold in paragraph 6 that it is necessary for the Customs authority to take appropriate steps for confiscation of goods within a period of 6 months from the date of seizure in accordance with the provisions contained in Section 124(c) of the said Act and in case no such steps are taken then to proceed in accordance with Sub-section 2 of Section 110 of the said Act.

18. Paragraph nos. 6, 7 and 8 of the aforesaid judgment is produced below:-

"6. Obviously once the goods are seized in exercise of powers under Section 110(1) of the said Act, it is necessary for the Customs authority to take appropriate steps for confiscation of goods within a period of 6 months from the date of seizure in accordance with the provisions contained in Section 124(c) of the said Act and in case no such steps are taken then to proceed in accordance with Sub-section 2 of Section 110 of the said Act. Undoubtedly, proviso to Sub-section 2 of Section 110 provides that the period of months may be extended by the Commissioner of Customs, on sufficient cause being shown, for a period not exceeding six months. We are fully aware that in a given case where the delay is occurred on account of acts on the part of owners of the goods then such period can even be excluded from the period of six months as was held by the Apex Court in the case of Poolpandi v. Superintendent, Central Excise . Nevertheless, the authorities under the said Act have no power to continue to keep the goods seized under Section 110(1) after the expiry of period of 6 months unless they follow the procedure prescribed under Section 124 and/or 110(2) of the said Act, as the facts and the circumstances of the case may warrant. The provisions of law contained in Section 110 read with Section 124 are to be followed by the authorities and the goods cannot be detained without complying the said provisions of law. The law in this regard is well settled by the decision of the Apex court in Harbans Lal v. Collector of Central Excise & Customs read with I.J. Rao, Asstt. Collector of Customs and Ors. v. Bibhuti Bhushan Bagh and Anr. and The Asstt. Collector of Customs v. Charan Das Malhotra as well as Lokenath Tolaram Etc. v. B.N. Rangwani and Ors.

7. In the case in hand, though the respondents have filed two affidavits in the course of the hearing of the matter, the same nowhere discloses any action having been taken by the respondents in accordance with the provisions of law contained in Section 124 or 110(2) in relation to the goods in question i.e. the said bank accounts which have been frozen by the respondents. Apart from giving a lame excuse that the investigation is not yet complete and the freezing has been done as a precautionary

measure, no justification has been given for not taking steps in accordance with the provisions contained in Section 110(2) and the proviso thereto, in case the petitioners have not been able to take appropriate steps in accordance with Section 124. It is to be noted that the accounts have remained frozen atleast from 1998 onwards and till this date there has been no action on the part of the respondents in accordance with the provisions of law. There is also no explanation for such inaction on the part of the respondents. Inspite of repeated querry being made, the Advocate for the respondents, apart from submitting that the said amount is seized for other investigation either under the Income Tax Act or some other Act and that too without making good by producing documentary evidence in that regard, no explanation is forthcoming to justify continuation of the accounts in frozen condition. In the circumstances, therefore, we are left with no alternative than to allow the petition and to order the release of the accounts in accordance with the prayer Clause-b(i) of the petition."

8. The petition therefore, succeeds and the same is allowed in terms of prayer Clause-b(i) and the rule is made absolute accordingly with no order as to costs."

19. A Division Bench of the Gujrat High Court in the case of **Am Overseas (Supra)** had an occasion to examine this controversy. The Division Bench held that the provisions of Section 110 of the Act cannot restrict the petitioner from operating the Bank account. The relevant portion of the judgement is quoted below:-

"6. Coming to Section 110(3) of the Act, it permits the authority to exercise power on seizure of any document or thing which, in the opinion of the authority, will be useful for, or relevant to, any proceeding under the Act. Emphasizing the use of the term `things' in the provision, it was submitted that when the same is read with definition of `goods' under Section 2(22) of the Act, as also the definition of the term `things' from the Black's Law Dictionary, it would also take within its sweep `currency', and in the circumstances, the action of the respondent authorities was required to be upheld. The said submission, though attractive at first blush, does not hold ground when the same is examined in light of the scheme of the Act. One cannot lose sight of the fact that the provision is part and parcel of a statute which deals with import and export of goods. In other words, permitting such transactions of goods in accordance with law. The term `currency' is used in the definition of the term `goods' in the context of either importing the currency or exporting the currency through legal channels or illegally. In violation of the requisite law in relation to such transactions of currencies, the authority would be empowered to take appropriate action under the Act. In the present case, it is not the case of respondent authorities that the petitioner is either dealing in currency or is charged with illegally transacting in currency by way of import or export. Therefore, even this provision cannot support the action of respondent authorities.

7. Though Mr. Oza has addressed the Court in relation to various facts narrated in the affidavit in reply, it is not necessary to deal with the same at this stage, for the simple reason that the investigation which is in progress should not be affected by any observation or finding which the Court may record in

relation to the facts and evidence which is in the stage of being ascertained, collated and brought on record. Therefore, without entering into any discussion on merits of the facts and evidence, suffice it to state that the averments made in the affidavit in reply do not carry the case of revenue any further."

20. In the case of **Multitek Engineers (Supra)** a Division Bench of the Karnataka High Court was pleased to hold that, from a bare perusal of the provisions contained under section 110 of the Customs Act, 1962 shows that the statutory provision does not expressly enable an Investigating Officer to attach the Bank account.

21. In the case of **M/S M.Z. Handicraft (Supra)** it was held by Division Bench of this Court that "power under section 110 of the Customs Act 1962 could not have been exercised for passing an order that the petitioners should not be permitted to make any withdrawal from the account. Relevant paragraphs of the aforesaid judgment is reproduced below:-

"The submission of learned Senior Counsel for the respondents that even if the account is permitted to be operated by the petitioners, a direction should be issued to provide the security for the amount in view of the judgements relied upon cannot also be accepted in view of the provisions of Section 110 A of the Act. Section 110 A of the Act provides that any goods, documents or things seized under Section 110 may pending order of the Adjudicating Authority be released to the owner on taking a bond from him in the proper form with such security and conditions as the Adjudicating Authority may require. Thus the precondition stipulated under Section 110 A is that goods, documents or things must have been seized under section 110 of the Act. We have already held that the power under section 110 of the Act could not have been exercised for passing an order that the petitioners should not be permitted to make any withdrawal from the account. In such circumstances, the respondents cannot insist that the petitioners should furnish adequate security bond.

Thus for all the reasons stated above, the impugned order dated 5 June 2014 passed by Senior Intelligence in the Directorate of Revenue Intelligence cannot be sustained and is, accordingly, set aside. The respondent shall forthwith permit the petitioner to operate the Account No. 019005500238.

The writ petition is allowed to the extent indicate above."

22. From perusal of the provisions contained under sub-section (2) of Section 110 of the Customs Act, 1962, it is clear that the customs authority must have issued a show cause notice under section 124 of the Customs Act, within a period of 6 months from the date of order of the seizure and in case no such notice is issued within 6 months, the said period of 6 months may be extended on sufficient cause being shown by the Principal Commissioner of Customs or Commissioner of Customs as provided in proviso to sub section (2) of section 110 of the Customs Act. Thus, in no case the seizure of goods and documents may continue for a period of more than 1 year, if no show cause notice as contemplated under section 124 of the Customs Act is issued. In the present case, it is clear that the accounts were freeze in August 2014.

The writ petition was filed in 2017. **In the short counter affidavit filed on behalf of the respondent nos.1, 2 and 3 on 10.2.2017** it is not at all stated that any show cause notice as contemplated under clause (a) of section 124 of the Customs Act has been issued. It is only alleged in the counter affidavit that the investigation with regard to the fraudulent drawback is being going on. Even no justification has been given for not taking steps in accordance with the provisions contained in Sub Section (2) of Section 110 and proviso thereto, as such, it is obligatory on part of the respondent customs authority to defreeze the bank account of the petitioner but the respondents customs authority have not yet defreeze the bank account of the petitioner.

23. In view of the facts stated above, it is clear that the bank account cannot be remained freeze during investigation for the period as contemplated under Sub-section (2) of Section 110 of the Customs Act, 1962. The respondents have failed to pass appropriate order for defreeze of the bank account of the petitioner, therefore, a mandamus is issued directing the respondent nos. 3 & 4 to defreeze the bank account of the petitioner being Account No. 16250200002619 at Federal Bank Ltd., Ground Floor, Gandhi Nagar, Rampur Road, Moradabad.

24. In the facts and circumstances of the case a mandamus is issued to the respondents to permit the petitioners forthwith to operate his current account no. 16250200002619 held at Fedral Bank Limited, Ground Floor, Gandhi Nagar, Rampur Road, Moradabad.

25. With the aforesaid observations, the writ petition is allowed to the extent indicated above.

(2019)11ILR A1199

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 8225 of 2019

New Tech Imports Pvt. Ltd. ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan, Sri Udayan Nandan, Sri Sondhi Narula Dalal

Counsel for the Respondents:
Sri Rajnish Kumar Rai

A. Constitution of India, Article 226 - Scope; Indian Contract Act, 1872 – Private Contract - Principles of Natural Justice do not apply to termination. It is not a quasi-judicial Act. Contract cannot be enforced by Writ Court.

Writ Petition dismissed (E-9)

Cases referred: -

1.Bareilly Development Authority Vs Ajai Pal Singh, AIR (1989) SC 1076

2.Kerala St. Electricity Board & anr. Vs Kurian E. Kalathil & ors., (2000) (6) SCC 293

3.St. of U.P. & anrs. Vs Bridge & Roof Co. (India) Ltd., AIR (1996) SC 3515

4.The Rajasthan St. Industrial Development & Investment Corp. & anr. Vs Diamond & Gem Development Corporation Ltd. & anr., (2013) (5) SCC 470

5. Zonal Manager, Central Bank of India Vs Devi Ispat Ltd. & ors., (2010) (11) SCC 186

6.St. of Gujarat & ors. Vs Meghji Pethraj Shah Charitable Trust & ors., (1994) (3) SCC 552

7. Pimpri Chinchwad Municipal Corp. & ors. Vs Gayatri Construction Co. & anr., (2008) (8) SCC 172

8.Michigan Rubber (India) Ltd. Vs St. of Karnataka & ors. (2012) 8 SCC 216

9. MAA Binda Express Carrier Vs North East Frontier Railway (2014) 3 SCC 760

(Delivered by Hon'ble Sudhir Agarwal, J)

1. Heard Sri Shashi Nandan, Senior Advocate assisted by Sri Udayan Nandan, learned counsel for petitioner and Sri Rajnish Kumar Rai, learned counsel for respondents.

2. This writ petition under Article 226 of Constitution of India has been filed by sole petitioner M/s New Tech Imports Pvt. Ltd, registered Office at 1/778 Nicholson Road, Kashmere Gate, Delhi praying for issue of writ of certiorari to quash order dated 15.01.2019 which is a counter offer (Annexure-18 to the writ petition) and also to quash order dated 22.01.2019 (Annexure-22 to the writ petition) whereby Purchase Order dated 24.12.2018 for supply of "Turbo Wheel Impeller Balance Assembly" has been cancelled. Petitioner has also prayed for issue of writ of certiorari to quash E-tender No.101810202 dated 22.02.2019 (Annexure-25 of the writ petition) issued by respondent 3 , Principal Chief Materials Manager (hereinafter referred to as "PCMM"), at Diesel Locomotive Works, Varanasi (hereinafter referred to as "DLW"). Lastly, a writ of mandamus has been prayed for commanding respondents to strictly comply with terms and conditions of Purchase Order no.101810201.18115719 dated 24.12.2018 and to issue Modification Advice for 116 units in Purchase order no.101710860.17119450 dated 14.10.2017.

3. Facts in brief giving rise to present writ petition are, that, petitioner is a Private Limited Company registered under the provisions of Companies Act, 1956 (hereinafter referred to as "Act, 1956") vide certificate of Incorporation dated 19.04.1995 issued by Additional Registrar of Companies, National Capital Region of Delhi and Haryana. Petitioner 2, Manish Gupta has been authorized by Board of Directors of Company to file and pursue this litigation vide Resolution dated 27.02.2019.

4. DLW, Varanasi is a production unit owned by Union of India and Ministry of Railways. It manufactures Diesel-Electric Locomotives and its spare parts. For the aforesaid production it needs various materials and goods and for purchase thereof it issues tenders for various services, supply of spare/goods of different description and quantities, from time to time. Respondent 3 is the Officer of DLW authorized for procurement and supply of goods, works and services, sale of materials and leasing of items etc, for the purpose of production and manufacture of Diesel-Electric Locomotives. Respondent 3 is Tender Accepting Authority (hereinafter referred to as "TAA"). Respondent 3 heads the Material Management Department (Stores Organization) of respondent 2 assisted by Chief Materials Manager (hereinafter referred to as "CMM"), Deputy Chief Materials Manager (hereinafter referred to as "Dy.CMM"), Senior Materials Manager (hereinafter referred to as "SMM")), Assistant Materials Maintenance (hereinafter referred to as "AMM")) and Secretary to PCMM at SMM level. Additionally, Stores Headquarters discharges function of overseeing the administration of Stores set up in the field units

and purchase function on behalf of Office of respondent 2.

5. Respondent 3, on 26.04.2018, at 16.33 hours, invited E-bids against Tender no.101810200 with closing date/time 27.06.2018 till 15.00 hours for procurement of supply of "Turbo Wheel Impeller Balance Assembly". During subsistence of E-tenders closing date/time was extended till 02.08.2018, 15.00 hours and same was published on website. Later on tender was cancelled by order dated 21.07.2018. This was done by office of respondent 4 (i.e. Dy. C.M.M.) to benefit unduly and unjustly to M/s Bharat Forge Ltd. which was making attempt to become a vendor at the relevant time.

6. Another E-tender was floated by respondent 3 on 16.10.2018 at 15.45 P.M. vide Tender no.101810201, with closing date/time on 23.11.2018 at 15.00 hours for procurement and supply of 551 numbers of 'Turbo Wheel Impeller Balance Assembly'. One of the vital condition to tender E-bids/quotation was that builder must be an 'approved vendor' in 'Part-1 category' on the date of opening of E-tenders. Relevant Clause 1.26 of tender document reads as under :

"1.26 Items sourced from RCF/ RDSO/ ICF/ CLW/ DLW/ DLMW/ CORE approved vendors.

1.26.1. Wherever necessary as per policy of procurement and is so indicated in the tender schedule, regular purchase order for bulk quantity ***will be normally placed only on those firms who have been approved in Part-I category*** *by the* ***authorised vendor*** *approving unit for respective items viz.:-*

a. DLW,
b. RDSO,
c. DLMW,
d. CLW,
e. RCF/KXN,
f. ICF,
g. CORE

1.26.2. The ***approval status of the firm will be reckoned as on the date of the tender opening and not thereafter*** except in case of downgrading/removal/suspension/banning etc. after opening of tender, when changes shall be taken into account while considering the offer."

(emphasis added)

7. M/s Walbar LLC, Mexico (hereinafter referred to as "Principal Vendor") is an "Approved Vendor" in Part-1 Category. The Principal Vendor appointed petitioner, M/s New Tech Imports Pvt. Ltd. (hereinafter referred to as "petitioner-agent") as its Exclusive Tender Specific Authorized Vendor/Supplier vide letter dated 17.10.2018, and authorized petitioner to tender bid to the subject tender dated 16.10.2018. Petitioner submitted digitally signed indigenous E-bid dated 22.11.2018. M/s Bharat Forge Ltd. was not an 'Approved Vendor' as per Clause 1.26.1 of bid document on the date of opening of tender hence, its bid was rejected by respondent 2. The bid of petitioner-agent was accepted. During negotiation petitioner also discounted its bid by 1 % on the insistence by respondents. Respondent 2 issued Purchase Order dated 24.12.2018 (Annexure-7 to the writ petition) for supply of 529 units of 'Turbo Wheel Impeller Balance Assembly' and rate per unit was Rs.987525.00. The delivery was to start by 14.01.2019 and to be completed by 31.12.2019. On 26.12.2018,

however, petitioner received an E-mail from respondent 4 instructing it not to take any action on the basis of Purchase Order dated 24.12.2018 as the same was a 'System Generated E-mail' and petitioner was directed to wait till 'Ink Signed Purchase Order' was received by him. Petitioner sent E-mail dated 27.12.2018 acknowledging thanks with respect to issue of Purchase Order and protesting against E-mail dated 26.12.2018. It requested to withdraw E-communication dated 26.12.2018. Respondent 4 again issued another E-mail on 28.12.2018 reiterating that Purchase Order being a 'System Generated E-mail' sent on 24.12.2018 is not to be accepted open, since, it has no legal validity. Petitioner sent letter dated 31.12.2018 claiming that Purchase Order dated 24.12.2018 was legally valid executed instrument/document. Petitioner then sent a letter dated 08.01.2019 for immediate resolution of the matter.

8. Thereafter respondent 4 issued counter offer on 15.01.2019 (Annexure-18 to the writ petition) reducing quantity to 423 and per unit rate as Rs.829540.00. Petitioner got aggrieved and disgraced by counter offer and sent letter dated 17.01.2019 requesting urgent hearing and meeting with officials of respondent 3. It also sent letter dated 24.01.2019 seeking time till 11.02.2019 to reply counter offer. This time was allowed by respondent 4 vide letter dated 25.01.2019. However, without waiting to the extended time i.e. 11.02.2019, Modification Advice dated 22.01.2019 was issued in which Purchase Order dated 24.12.2018 was shown as cancelled. Against above illegal action, petitioner protested vide letter dated 18.02.2019 but unilaterally respondent 3 proceeded to float fresh tender notice inviting E tenders against Tender no.101810202 with closing date/time dated 25.03.2019 at 15.00 hours vide tender notice dated 22.02.2019.

9. The counter offer, cancellation order and fresh tender notice have been challenged by petitioner on the ground that on issue of purchase order dated 24.12.2018, contract was concluded and it could not have been cancelled or modified; the entire exercise is malicious to give benefit to M/s Bharat Forge Ltd; it has never been the practice of respondents to issue Purchase Order/Acceptance Orders in Ink Signed letters, but same were always issued digitally signed and for the first time exception has been made showing apparent malice on the part of respondents; Petitioner has already acted upon purchase order and shipment of goods had commenced, therefore, respondents cannot withdraw the same; without addressing petitioner's representation and grievance, it was not open to respondents to cancel purchase order and thereafter proceed for fresh tender exercise; the entire exercise is in utter violation of principles of natural justice, malafide and discretionary to favour M/s Bharat Forge Ltd. and even otherwise illegal; act of respondents is against contractual principles and there is no justified ground either to modify earlier purchase order or to cancel the same.

10. On behalf of respondents a short counter affidavit sworn by Mohammad Hussain, Senior Material Manager D.L.W., Varanasi on 12.03.2019 has been filed stating that Global Tender No.101810201 opened on 23.11.2018 for procurement of Turbo Wheel Impeller to DLW Part No.16080385 for quantity 515.

On tender opening date, following approval sources were available in the item :

(i) M/s Walbar Inc./USA

(ii) M/s Electro Motive Diesel Inc./USA

(iii) M/s GE Transportation Parts LLC/USA

(iv) M/s Walbar Engine Components LLC/Mexico

11. Details of offers received against aforesaid tender shows 6 tenderers, out of which 3 were unapproved/unsuitable and one was unapproved/suitable for extended trial order and rest 2 were approved/suitable. Details given in para 5 of Supplementary Counter Affidavit are as under :-

Sl. No.	Name of Tenderer (M/S)	All incl. unit rate	Approval Status/Technical Suitability.
L-1	Flesh Forge Pvt. Ltd./Raigarh	Rs.682500.80	Unapproved/Unsuitable
L-2	Press Comp. International Pvt. Ltd./Banglore	Rs.698250.00	Unapproved/Unsuitable
L-3	Shakthitech Manufacturing India Pvt. Ltd. Coimbatore	Rs.749700.00	Unapproved/Not suitable for further ordering
L-4	Bharat Forge Ltd./Pune	Rs.829540.00	Unapproved/Suitable for Ext. Trial order
L-5	New Tech Imports Pvt. Ltd./Delhi (On behalf of M/s Walbar Engine Component/USA)	Rs.1047375.00	Approved/Suitable
L-6	EMD Locomotive Technologies Pvt. Ltd./Noida	Rs.1067561.39	Approved/Suitable Subject to confirmation of various point.

12. The matter was considered by SAG level Tender Committee and recommendation was accepted by 'Tender Acceptance Authority' on 22.12.2018, as follows :

"(i) To place extended trial order for 106 nos.(20 % of NPQ) inside tendered quantity on M/s Bharat Forge Ltd./Pune at their quoted rates i.e. 703000.00+ GST@ 18%, TUR Rs.829540.00 each.

(ii) To place regular order for 423 nos.(80 % of NPQ) on M/s New Tech Imports Pvt. Ltd./Delhi at their negotiated rates i.e. @ Rs.987525.00 each +GST @ 5 % TUR Rs.1036901.25 each."

13. Accordingly, purchase orders were prepared on 24.12.2018. It is said that after generation of purchase order in MMIS, as per existing scheme of things, System Generated mail along with soft copies of these unsigned purchase orders were automatically sent to vendor's mail box (through e-mails by MMIS), the purpose of which is just to give advance intimation to the vendor. It was not signed or digitally signed document since it was issued just for information. It did not result in concluded contract. There has to be a signed hard copy of purchase order issued by Purchase Officer and send

through normal channel of communications. Chief Design Engineer/DLW (CDE/DLW) vide note no.CDE/DLW dated 22.12.2018, received on 24.12.2018 informed that M/s Bharat Forge Ltd. Pune has been enlisted as 'Approved Vendor' for this item in DLW Composite Vendor Director. Thereafter, 'Tender Accepting Authority' on 24.12.2018 instructed to review the case in the light of Chief Design Engineer/DLW's note dated 22.12.2018. Subsequently, both vendors were intimated on 26.12.2018 (25.12.2018 being a gazetted holiday) directing not to take any action against these System Generated E-mails till formal Ink Signed Purchase Orders is not received by them. Tender Committee thereafter has reviewed the case and recommended to cancel purchase order. It issued counter offer to petitioner for the price quoted by M/s Bharat Forge Ltd., Pune. Counter offer, consequently, was issued to petitioner on 15.01.2019. Modification/amendment for cancellation of both purchase orders were issued on 22.01.2019. Petitioner by letter dated 24.01.2019 requested to extend time for submission of their reply to counter offer up to 11.02.2019 which was accepted vide office letter dated 25.01.2019. Petitioner against requested to extend time up to 18.02.2019 vide letter dated 11.02.2019 with a clear stand that they shall not seek any further extension. Again this request was accepted by respondent vide letter dated 14.02.2019 and petitioner was informed that if no reply is received by 18.02.2019, it will be treated as non-acceptance of counter offer. Petitioner did not submit reply by 18.02.2019, hence, case was discharged and Global Tender has been re-invited for above item. Basic reason for cancellation of Global Tender was huge difference in rates of petitioner and M/s Bharat Forge Ltd., Pune. Decision was taken by Tender Committee in the best interest of Railways to protect loss to Government Exchequer to the extent of Rs.15 crores, approximately, and also keeping in view Government of India's policy giving boost to "Make in India".

14. Petitioner has filed a short rejoinder affidavit wherein it has reiterated its stand as pleaded in the writ petition. It is also reiterated that once offer was expected and purchase order was issued, thereafter Tender Committee had no power to review the case or modify any terms of already concluded contract. It is also said that on 18.02.2019 a meeting was held and petitioner found that some more matter needs to be discussed and therefore, sent letter dated 18.02.2019 informing that petitioner shall come to DLW on Thursday/Friday to meet Chief Material Manager subject to his availability, and therefore, contention that petitioner did not submit reply on 18.02.2019 is not correct. It is also said that M/s Bharat Forge Limited, Pune being ineligible on the date of opening of tender, could not have been brought in and for its benefit earlier contract could not have been cancelled.

15. Respondents have filed a short counter affidavit which is also sworn by Mohammad Hussain, Senior Material Manager. It is said therein that Global Tender No.101810201 was opened on 23.11.2018. Tender Committee held its meeting on 05.12.2018 to consider offers received against Global Tender opened on 23.11.2018. The recommendation of minutes were signed on 06/07.12.2018 and recommendation of Tender

Committee was approved on 07.12.2018. A Supplementary Tender Committee's meeting was held on 10.12.2018 and 20.12.2018 to discuss the final negotiated offer of petitioner i.e. M/s New Tech Import Pvt. Limited submitted on 08.12.2018. Supplementary Tender Committee's minutes were put up to Tender Accepting Authority, which approved the same on 21.12.2018 with certain modifications. As per decision of Tender Accepting Authority an extended trial order of 106 number was to be placed on M/s Bharat Forge Ltd., Pune and regular order of 529 numbers on petitioner i.e. M/s New Tech Import Pvt. Limited. In the light of new development of enlistment of M/s Bharat Forge Limited (hereinafter referred to as "BFL") as an Approved Source for subject item on 22/24.12.2018, supplementary Tender Committee meeting held on 28.12.2018 and 07.01.2019. Tender Committee submitted its revised recommendations for issue of counter offer to petitioner i.e. M/s New Tech Import Pvt. Ltd. for 423 units at the rate of Rs.8,29,540/- per unit at all-inclusive rate of M/s BFL, in super-session to its earlier recommendation. Counter offer issued vide letter dated 15.01.2019 to petitioner Company. Petitioner visited DLW on 23.01.2019 and submitted a letter on 24.01.2019 requesting respondent for extension of time limit for submitting reply against counter offer by 11.02.2019. Petitioner failed to take final decision on counter offer and again vide letter dated 11.02.2019 requested for further extension in time up to 18.02.2019 and this was also accepted. Since, up to 18.02.2019 petitioner did not submit any reply earlier counter offer was cancelled. With regard to purchase order it is said that purchase order was neither Digitally Signed nor Ink Signed, therefore, no valid purchase order was communicated to petitioner, hence, question of any concluded contract does not arise. It is also said that enforcement of contractual obligation in a writ petition under Article 226 of the Constitution, does not lie. Reliance has been placed on Supreme Court's judgment in **Michigan Rubber (India) Ltd. vs. State of Karnataka and Ors. (2012) 8 SCC 216** and **MAA Binda Express Carrier Vs North East Frontier Railway (2014) 3 SCC 760.** It is reiterated that decision has been taken in public interest to protect public revenue and also to give boost to "Make in India" policy and, therefore, no interference would be justified under Article 226 of the Constitution.

16. On behalf of respondents preliminary objection has been raised and submitted that it is a pure and simple case of enforcement of contract, by means of writ petition under Article 226 of the Constitution, hence, it is not maintainable. Petitioner has remedy in common law. It is also contended that there was no 'concluded contract' and in any case even if there is concluded contract and the same has been wrongly cancelled, by way of writ petition under Article 226 of the Constitution, petitioner cannot seek enforcement of contract and remedy lies, at the best, for claiming damages for alleged breach of contract. Lastly, it is contended that respondents were well within their rights to modify their offer so long as contract has not concluded, also since petitioner did not respond within time which was duly extended twice as per own case of petitioner himself, and thus it has rightly been cancelled.

17. First question up for consideration is "whether present writ petition for enforcement of a simple

commercial contract be entertained under Article 226 of Constitution or be declined so as to relegate petitioner to avail remedy in common law".

18. It is true that remedy under Article 226 of the Constitution of India is not absolutely barred but it has been held repeatedly that in the matter of pure and simple commercial contract, extraordinary constitutional remedy under Article 226 is not a substitute for getting the contract executed or for allowing damages to a party for alleged breach of contract since remedy lies in common law by filing suit for enforcement of contract wherever it is permissible or for damages/ compensation for alleged wrongful breach of contract. Reason being that such matters involves recording of evidence, oral and documentary, and remedy under Article 226 of the Constitution cannot be made a substitute of common law civil proceedings and parties must avail such remedy.

19. An exception has been carved out however in cases where contract is "statutory contract" but it has not been disputed before us by counsel for parties that agreement/ contract, in the case in hand, is not a statutory contract.

20. In **Bareilly Development Authority vs. Ajai Pal Singh, AIR 1989 SC 1076** Court held that if a person is aggrieved in respect of non statutory and purely contractual rights flowing from a contract, remedy under Article 226 of the Constitution is not available. Court said that no writ or order can be issued under Article 226 so as to compel the authorities to remedy a breach of contract, pure and simple.

21. In **Kerala State Electricity Board and another Vs. Kurian E. Kalathil and others, 2000(6) SCC 293** Court said that if a term of contract is violated, ordinarily remedy is not the writ petition under Article 226. Disputes arising out of terms of such contract or alleged breaches have to be settled by ordinary principles of law of contract. Court said that such case is a matter for adjudication by a Civil Court or in arbitration if provided for in the contract.

22. Referring to **Bareilly Development Authority vs. Ajai Pal Singh (supra),** and **State of U.P. and others vs. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515,** Court in **The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr., 2013(5) SCC 470** observed as under:

"There can be no dispute to the settled legal proposition that ***matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution.*** *Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties."* (Emphasis added)

23. In **Rajasthan State Industrial Development and Investment Corporation (supra)**, Court further said:

"It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose

a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justiceiae). The grant or refusal of the writ is at the discretion of the court. The ***writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the Respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established.*** *While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal. " (Emphasis added)*

24. In **State of U.P. and others vs. Bridge & Roof Co. (supra)** Court said:

"Firstly, the ***contract between the parties is a contract in the realm of private law. It is not a statutory contract.*** *It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act.* ***Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition.*** *That is a matter either for arbitrat*ion as provided by the contract or for Civil Court, as the case may be."
(Emphasis added)

25. In **Zonal Manager, Central Bank of India vs. Devi Ispat Ltd. and Ors., 2010(11) SCC 186** Court said:

"It is settled law that the disputes relating to interpretation of terms and conditions of a contract could not be examined/challenged or agitated in a petition filed under Article 226 of the Constitution. It is a matter for adjudication by a civil court or in arbitration, if provided for in the contract or before the DRT or under the Securitization Act. "

26. Counsel for petitioner further contended that fault entirely lay upon respondents without giving any opportunity of hearing and notice to parties neither any condition of contract could have been changed nor contract/offer could have been cancelled and it is in violation of principles of natural justice.

27. We find that Railway issued contract on certain conditions wherein it also offers some changes to which petitioner did not agree. Firstly, in these circumstances cannot be said that any concluded contract has come into existence and in any case in the matter of termination of contract, principles of natural justice, are not applicable.

28. It has been held time and again that principles of natural justice are not applicable when a contract in private law is terminated. Cancellation of contract in private law is not a quasi judicial act hence observance of principles of natural justice are not required and atleast cancellation of contract by either party cannot be challenged on the ground that it is in violation of principles of natural justice.

29. In **State of Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552,** it has been held:

"We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. ***The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice.*** *It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties.* ***If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field,*** *e.g., where the matter is governed by a non-statutory contract." (emphasis added)*

30. Following aforesaid decision in **Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172** Court has held that in the matter of non-statutory contract, High Court should not have entertained writ petition under Article 226 of the Constitution.

31. Counsel for petitioner has vehemently contended that a concluded contract has come into existence and thereafter it was not permissible for respondents to change or alter the same. This fact has been denied by respondents on the ground that E-mail communication did not result in a concluded contract, particularly since petitioner was informed immediately thereafter that unless an Ink Signed communication is given, contract is assumed in the realm of consideration, petitioner should not act upon communication made through on-line communication. What was the condition subject whereof the contract could have been said to be a concluded contract, is disputed fact requiring investigation into facts relating to terms and conditions and communication between parties with respect to contract in question.

32. We assume that a concluded contract came into existence after On-line communication by respondents, still no appropriate provision has been shown to us whether a party can cancel or modify such a contract. At the best such an attempt on the part of a party modifying or terminating a concluded contract may come within mischief or illegal termination of contract or breach of contract, but under the provision of "The Contract Act, 1872" (hereinafter referred to as "Act, 1872") in such a case, affected party is entitled for damages, for which remedy in common law is available. The enforcement of contract have been allowed only in cases where such a contract prevails into realm of statutory contract and not otherwise. Respondents have pleaded that conditions were amended for the reason that there was a huge gap in the prices offered by petitioner and same offered by indigenized namely, M/s BFL, hence for protecting huge amount of public revenue and also with an intention that policy of Government i.e. "Make In India" to the extent it is practicable to be followed, action in question has been taken by respondents. Above averments, ex facie, cannot be said to be wholly impermissible in law and in our view, has some merit, but for the purpose of present case, we are not expressing any definite opinion on the matter, since in our view, enforcement of contract by way of writ petition, is not an appropriate remedy but petitioner must

avail remedy in common law by filing a suit with appropriate relief.

33. In view of above, we are clearly of the view that it is not a fit case where this Court must exercise its public law remedy available under Constitution which is extraordinary, discriminatory remedy and instead petitioner must be relegated to avail its alternative remedy by invoking arbitration clause in the agreement or avail common law remedy in Civil Court.

34. Writ petition is, accordingly, dismissed.

(2019)11ILR A1209

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ C No. 9013 of 2003

Katwaru ...Petitioner
Versus
Addl. Commissioner Administration & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Prakash Mishra

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar, Sri D.D. Chauhan, Sri M.S. Haq, Sri Pradeep Narain Pandey, Sri Ramanand Pandey

A. U.P. Zamindari Abolition & Land Reforms Act, 1950 - Section 117, 122-B (4-F) - land of Gaon Sabha - possession of agricultural labourer of SC or ST class since 30.06.1985 i.e. before the cut-off date u/s 122B(4F) – Rights are bhumidhari with non-transferable rights - No need to get declaration from the competent authority - private respondents do not claim benefit of sub Section (4F).

Held: - Viewed in light of the above, it is manifest that the Additional Commissioner has clearly erred in holding that the petitioners were liable to obtain a declaration from a competent court in respect of their status or their eligibility to the benefits introduced by sub-section (4F). The findings as returned by the Additional Commissioner on this aspect clearly run contrary to the principles enunciated by the Supreme Court in Manorey. (Para 13)

Writ Petition allowed (E-9)

List of cases cited : -

1. Barendra & anr. Vs St. Of U.P. & 3 ors. - W.P. No.-29430/2018 (distinguished)

2. Manorey@ Manohar Vs Board of Revenue (U.P.) & ors., (2003) 5 SCC 521

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

1. Heard learned counsel for the petitioner, the learned Standing Counsel for the State respondents as well as Sri Ramanand Pandey, who has appeared for the respondents 2 to 5. Although the Gram Panchayat is represented, none has appeared on its behalf even in the revised call.

2. This petition impugns the orders dated 7 April 1999 and 23 December 2002. In terms of the order of 7 April 1999, the Additional Commissioner has set aside the orders dated 4 December 1992 and 22 December 1995 in terms of which the petitioner was extended the benefits comprised in Section 122-B(4-F) of the **U.P. Zamindari Abolition and Land Reforms Act, 1950** [hereinafter to be referred as "**the Act**"]. The petitioner

asserting that the aforesaid order was *ex parte,* filed an application for recall. That recall application came to be dismissed on 23 December 2002 with the Additional Commissioner holding that he had no jurisdiction to recall a final order passed. He further observed that since the petitioners had failed to participate in the original proceedings as a consequence of which they were taken *ex parte* it would be open to them to establish their rights before a competent authority.

3. During the pendency of the present petition, the original petitioner died. His heirs were substituted in the writ petition on 25 September 2013. The essential facts which would be relevant for the purposes of disposal of the writ petition are noted hereunder.

4. The petitioners claim to be members of the Scheduled Castes and landless agriculturists in possession of the land in dispute since 1975. According to the case set up in the writ petition, the father of the respondents 2 to 5 instituted proceedings before the Sub Divisional Officer for recordal of his name over the land in dispute claiming rights thereon by virtue of possession. That case was contested by the original petitioner before the Sub Divisional Officer who ultimately by his order of 4 December 1992 held that the petitioner fulfilled the conditions as placed by Section 122-B(4-F) and the land in dispute consequently was liable to be settled in his favour. The Sub Divisional Officer proceeded to frame directions for recordal of his name over the land in dispute. The father of the respondents 2 to 5 is stated to have filed an application for recall and restoration. That application came to be dismissed by the Sub Divisional Officer on 22 December 1995. Aggrieved by that order, the father of the respondents preferred a revision which ultimately came to be allowed on 7 April 1999, the order impugned in the instant writ petition.

5. As is evident from the facts as recorded by the Sub Divisional Officer both the petitioner as well as the respondents asserted rights over the land in dispute by virtue of possession. It appears that initially the land had come to be recorded in the name of the father of the respondents 4 to 5. There were thus competing claims in respect of the land in question with both sides asserting rights thereon by virtue of possession. The Sub Divisional Officer in the order dated 22 December 1995 has noted that on due scrutiny of the revenue record it was evident that the land in question was the property of the *Gaon Sabha*. He further noted the assertion of the petitioner that he had been in possession of the land from prior to 30 June 1985. It was also noted that the petitioner belonged to the Scheduled Castes and was in possession of the land prior to the cut off date prescribed in Section 122 B(4F) of the Act. It was also noted that the father of the respondents could claim no rights over the land since it belonged to the *Gaon Sabha*. He further noted in this order that even if it were assumed that the petitioner came to possess the land after 30 June 1985, he was evidently in possession of the same from prior to 3 June 1995 [the amended cut off date prescribed in Section 122 B (4F)] and consequently there was no justification to recall the order dated 4 December 1992.

6. The Additional Commissioner, the first respondent herein, while allowing the revision preferred by the father of the

respondents has held that that the original order of 4 December 1992 had come to be passed without the Gaon Sabha having been put to notice or made a party. According to the first respondent, the Gaon Sabha was a necessary party and since the proceedings culminating in the order of 4 December 1992 was *ex parte* the Gaon Sabha it was liable to be set aside. The first respondent then referring to certain decisions rendered by this Court proceeded to hold that in case the petitioner were claiming benefits of the provisions made in Section 122-B (4-F), it was incumbent upon them to establish their rights before a competent court and obtain a requisite declaration in that respect. According to the said respondent, in the absence of any such declaration existing, the petitioners could not have been extended the benefits of the provision aforementioned. He consequently, proceeded to allow the revision preferred by the respondents and further directed the revenue records to be corrected in order to reflect the position as it existed prior to 4 December 1992. He further left it open to the parties to establish their rights before a court of competent jurisdiction.

7. Assailing the order counsel for the petitioner has submitted that the benefit of Section 122-B (4-F) was liable to be extended to the petitioners who were landless agriculturist and belonged to the Scheduled Castes. According to the learned counsel, the benefits flowing from sub-section (4-F) were not dependent upon a declaration in that respect being obtained from a competent court. Learned counsel submitted that the language of sub-section (4-F) itself obviates the necessity of an eligible person instituting a suit for declaration of his rights.

8. Refuting those submissions, learned counsel for the private respondents contended that the provisions of sub-section (4-F) can have no application where competing claims on the basis of possession are raised. According to the learned counsel, the benefits of that provision cannot have automatic application in a case where two parties assert possessory rights over the land in dispute. Learned counsel would submit that the order dated 4 December 1992 had come to be passed without the concerned Gaon Sabha having been provided an opportunity to place its side and version and therefore the Additional Commissioner has correctly set aside the orders made in favour of the petitioners. Learned counsel in support of his submissions has additionally placed reliance upon a decision rendered by a learned Judge of the Court in **Barendra And Another Vs. State of U.P. And 3 Others1** and particularly to the following observations as made therein:

"Having heard the learned counsel for the petitioners, learned Standing Counsel, Sri Rajesh Kumar and the learned counsel for the Gaon Sabha, I am of the considered view that when two tenure holders claim that they were in possession illegally over certain plots of land which belonged to the Gaon Sabha then Administrative Authorities had no power to adjudicate upon the matter. When a person claims to be in possession from before a certain cut off date which had been provided by the provisions of Section 122-B (4F) of the U.P.Z.A. & L.R. Act then it is to be deemed that he is a *Bhumidhar* with non-transferable rights as per the provisions of the Section 122-B(4F) of the U.P.Z.A. & L.R. Act. The Supreme Court in ***Manorey @ Manohar***

vs. Board of Revenue (U.P.) and others (JT 2003(3) SC 538) has stated that no formal declaration is required when the benefit of Section 122-B (4F) of the U.P.Z.A. & L.R. Act is to be extended to a person who had been in possession from before a cut off date which is provided under Section 122-B(4F) of the U.P.Z.A. & L.R. Act. That villager becomes a *Bhumidhar* with non-transferable rights automatically. However, when two residents of the same village begin to claim ownership over the land then under Section 122-B(4F) of the U.P.Z.A. & L.R. Act, no machinery has been provided for an adjudication as to who exactly was in possession over the property in question. In ***2011 (2) ADJ 878 (Ram Das and Others vs. Munna Lal and Others)*** when accrual of rights under the Indian Forest Act, 1914, of various settlers/occupiers of forest land was being considered, this Hon'ble Court observed that if a right of certain occupier vis-a-vis the forest authority was concerned then the forest authorities could have looked into the matter but if two individuals claimed right over some forest land then they had to approach the proper court, either under the general law or under the relevant land law.

The relevant paragraph of the judgement and order dated 28.01.2011 is being reproduced here as under:-

"I am of the considered opinion that since there is an inter se dispute of title between two private persons over a plot of land, qua which an order under Section 11(2)(i) (2) has been passed by the Forest Settlement Officer, there can be no adjudication of title dispute on an appeal under Section 17 of the Act, 1927.

The parties have to be relegated to the remedy available under the U.P.Z.A. & L.R. Act or under the common civil law. The Act, 1927 cannot be extended to include within its ambit title dispute over the property which are excluded from the Act only because at a particular point of time a notification under Section 4 was issued qua the plots.

It may be clarified that inter se dispute of title claimed in respect of land which continues to be covered under notification under Section 4 can always be adjudicated by the Settlement Officer Consolidation and thereafter in appeal under Section 17. The judgment in the case of Hon'ble Supreme Court in the case of Mahendra Lal Jaini (supra) is applicable in such cases only.

In view of the aforesaid, this Court finds that it is not necessary to enter into the issues, as to whether a review application was maintainable or not or as to whether the first order of the Appellate Authority declaring one of the parties as *Bhumidhar* was legally justified or not, inasmuch as *Bhumidhar*i rights in respect of a plot of land, which is excluded from the notification under Section 4 of the Act, 1927 vide an order under Section 11(2)(i), can only be agitated and examined by the competent revenue court under the U.P.Z.A. & L.R. Act or by the competent civil court, as the case may be.

Accordingly, this Court feels that setting aside of the order passed on review application, under challenge in the present writ petition, would have the effect of restoring another illegal order of the Appellate Authority declaring the petitioner as the *Bhumidhar*. Therefore, in the larger interest of justice it is provided as follows:

The petitioner and respondents are at liberty to get their rights declared over the plots by approaching the revenue court under the U.P.Z.A. & L.R. Act or the competent civil court, as they may be

advised. Order passed under the Act by the Appellate Authority or for that purpose by the Forest Settlement Officer, insofar as it pertains to the inter se dispute of *Bhumidhar*i rights over the plot in question, shall not be binding upon any of the parties.

Writ petition is disposed of subject to the observation made above."

In the instant case also when two villagers were claiming possession over Gaon Sabha land then the Administrative Authorities could not have adjudicated as to who was in possession and, therefore, the proper course open for the petitioners was to approach the Civil Court or the relevant Court under the Land Laws for getting their rights adjudicated. Thus, the petitioners cannot be given any relief by this Court and therefore the instant writ petition, so far as it concerns petitioner, is being **dismissed.**

9. Learned Standing Counsel has supported the impugned order by submitting that the benefits of sub-section (4-F) could not have been extended to the petitioners without notice to the *Gaon Sabha.* It is these rival submissions which fall for determination. Before proceeding further it may only be noted that although this petition has been pending on the board of this Court since 2003 and the concerned Gaon Sabha duly put to notice, counter affidavits have been filed only by the private respondents and no Affidavit has been filed by the Gaon Sabha in these proceedings.

10. Since the submissions addressed before this Court would have to be tested in the backdrop of the special provisions made in Section 122B (4F) of the Act, it would be apposite to extract it hereunder:

"**Section 122B (4F):-** Notwithstanding anything in the foregoing sub-section, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under section 117 (not being land mentioned in section 132) having occupied it from before [May 1, 2002], and the land so occupied together with land, if any, held by him from before the said date as *bhumidhar*, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and [he shall be admitted as *bhumidhar* with non-transferable rights of that land under section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as *bhumidhar* with non-transferable rights in that land."

11. Sub-section (4F) firstly protects the possessory rights of an agricultural labourer belonging to the Scheduled Castes or Scheduled Tribes who may be in occupation of any land vested in the Gaon Sabha under Sections 117 of the Act. The cut off date as prescribed in sub-section (4-F) has been amended from time to time. Insofar as the present proceedings are concerned indubitably the relevant date for the purposes of considering the eligibility of an agricultural labourer was 30 June 1985. Consequently, an agricultural labourer belonging to the Scheduled Castes or Scheduled Tribes in occupation of any land vested in the Gaon Sabha from a date prior to 30 June 1985 is protected from the perils of dispossession. The provision however does not rest here. It proceeds further to confer on such an agricultural labourer *bhumidhar*i rights albeit on a non-

transferable basis. The provision, in essence fulfils the twin objectives of firstly protecting the possession of an eligible agricultural labourer and further confers on him the status of a *bhumidhar* with non-transferable rights. The legislative ethos underlying that provision was eloquently explained by the Supreme Court in **Manorey @ Manohar Vs. Board of Revenue (U.P.) And Others2** in the following terms:

"8. First, the endeavour should be to analyze and identify the nature of the right or protection conferred by sub-section (4-F) of Section 122-B. Sub-sections (1) to (3) and the ancillary provisions upto sub-section (4-E) deal, inter alia, with the procedure for eviction of unauthorized occupants of land vested in *Gaon Sabha.* Sub-section (4-F) carves out an exception in favour of an agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe having land below the ceiling of 3.125 acres. Irrespective of the circumstances in which such eligible person occupied the land vested in the Gaon Sabha (other than the land mentioned in Section 132), no action to evict him shall be taken and moreover, he shall be deemed to have been admitted as a *bhumidhar* with non-transferable rights over the land, provided he satisfies the conditions specified in the sub-section. According to the findings of the Sub-Divisional Officer as well as the Appellate Authority, the appellant does satisfy the conditions. If so, two legal consequences follow. Such occupant of the land shall not be evicted by taking recourse to sub-sections (1) to (3) of Section 122-B. It means that the occupant of the land who satisfies the conditions under sub-section (4-F) is entitled to safeguard his possession as against the *Gaon Sabha.* The second and more important right which sub-section (4-F) confers on him is that he is endowed with the rights of a *bhumidhar* with non-transferable rights. The deeming provision has been specifically enacted as a measure of agrarian reform, with a thrust on socio-economic justice. The statutorily conferred right of *bhumidhar* with non-transferable rights finds its echo in clause (b) of Section 131. Any person who acquires the rights of *bhumidhar* under or in accordance with the provisions of the Act, is recognized under Section 131 as falling within the class of *bhumidhar*. The right acquired or accrued under sub-section (4-F) is one such right that falls within the purview of Section 131(b).

9. Thus, sub-section (4-F) of Section 122-B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of *bhumidhar* on the occupant of the land satisfying the criteria laid down in that sub-section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned Single Judge of the High Court had taken the view in *Ramdin V. Board of Revenue* (followed by the same learned Judge in the instant case) that the *bhumidhari* rights of the occupant contemplated by sub-section (4-F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-section (4-F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of *bhumidhar*. In other words, the view of the High Court was that a

person covered by the beneficial provision contained in sub-section (4-F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-section (4-F) of Section 122-B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as *bhumidhar* with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the sub-division, shall have the right to admit any person as *bhumidhar* with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the *Gaon Sabha.* Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-section (4-F) of Section 122-B confers by a statutory fiction the status of *bhumidhar* with non-transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized *bhumidhar* should be as good as a person admitted to *bhumidhar*i rights under Section 195 read with other provisions. In a way, sub-section (4-F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-section (4-F). We find no warrant to constrict the scope of the deeming provision.

10. That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-section (4-F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned Revenue Authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-section (4-F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of Gaon Sabha had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the statutory right of the appellant, is non est in the eye of law and is liable to be ignored."

12. In **Manorey** the Supreme Court explained the provisions made in sub-section (4-F) by stating that its provisions not only entitled such an agricultural labourer to safeguard his possession as against the Gaon Sabha but also conferred

the more important right of being recognised as a *bhumidhar* with non-transferable rights of that land. It further held that the conferment of status of *bhumidhar* with non-transferable rights on an eligible occupant extends by way of a statutory fiction. It was held that once the eligible occupant was found to satisfy the preconditions enumerated for the applicability of sub-section (4-F), there would be no further obligation upon him to seek a declaration from any competent Court. In **Manorey,** the Supreme Court further held that sub-section (4-F) entitled the eligible occupant to consequently apply by way of an application to the competent authority for extension of benefits under that provision. Significantly the Supreme Court in **Manorey** also specifically overruled the view taken by this Court that an agricultural labourer was liable to obtain a declaration with respect to the extension of benefits conferred by Section 122B (4F).

13. Viewed in light of the above, it is manifest that the Additional Commissioner has clearly erred in holding that the petitioners were liable to obtain a declaration from a competent court in respect of their status or their eligibility to the benefits introduced by sub-section (4-F). The findings as returned by the Additional Commissioner on this aspect clearly run contrary to the principles enunciated by the Supreme Court in **Manorey.** While it may be true that the Gaon Sabha was not made a party to the proceedings which culminated in the passing of the order of 4 December 1992, it is evident that the respondents do not hold that the petitioners were otherwise ineligible to be extended the benefits of sub-section (4-F). It is not their case that the petitioners were not eligible occupants on the relevant date. Neither the fact of the petitioner belonging to the Scheduled Caste being in occupation of the land in question from prior to the cut off date nor of the land belonging to the Gaon Sabha is disputed by the respondents before this Court. In view thereof, this Court is of the considered opinion that the mere absence of the Gaon Sabha would not fundamentally detract from the right of the petitioners to be accorded the benefits of sub-section (4-F).

14. That only leaves the Court to consider the contention of a competing claim of the private respondents on the basis of possession. It is pertinent to note that the private respondents do not claim the benefit of sub-section (4-F). They do not assert their rights on the strength of being agricultural labourers belonging to the Scheduled Castes or Scheduled Tribes. It is in that backdrop that the objection as taken by them to the conferment of benefits of sub section (4F) must necessarily be tested. It must at the outset be noted that the Additional Commissioner himself has recorded that the land in dispute was the property of the *Gaon Sabha.* The private respondents have not demonstrated or established before this Court their right or status to lawfully occupy the land in dispute. The do not claim to have been admitted upon the land in dispute by virtue of a lawful settlement made in their favour under the relevant provisions of the Act. It becomes pertinent to note that the provisions of the Act lay down a detailed machinery for settlement of land vesting in the *Gaon Sabha.* The respondents have woefully failed to establish their possessory right either on the strength of a lawful

settlement or on any other basis. The land of the Gaon Sabha cannot be occupied otherwise than in accordance with a procedure established by law. In absence of any evidence being placed or relied upon in this respect, the Court cannot possibly recognise the existence of a legal right inhering in the respondents to occupy the land.

15. The reliance placed by learned counsel on **Barendra** is also misconceived since the observations as entered there would only have application where competing claims under sub-section (4F) are placed for the consideration of the State respondents. In the absence of one of the claimants being entitled to the benefits of sub-section (4-F) and having failed to establish a lawful right to possess the land belonging to the Gaon Sabha, the principles as enunciated in **Barendra** would have no application. In fact and as is evident from the observations made by the learned Judge in Barendra, the necessity to obtain a formal declaration would arise only when competing sides claim to be in possession from before the cut off date prescribed in sub-section (4-F). The decision in **Barendra** must therefore necessarily be understood in that context.

16. In any case, this Court finds itself unable to extend the principles propounded therein to the facts of the present case where the private respondents neither claim the benefits of sub-section (4F) nor have they established any lawful or legal right to be in occupation of land belonging to the Gaon Sabha.

17. Accordingly and for the reasons aforenoted, this writ petition is **allowed.** The impugned orders dated 7 April 1999 and 23 December 2002, are hereby quashed and aside.

(2019)11ILR A1217

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No.- 13179 of 2016

C/M Pt. Janardan Mani Sri Krishnadeo Mani Sri Durga Maa ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kushmondeya Shahi

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

A. Committee of Management- Petitioner institution recognized -approved by respective universities - rejection of grant in aid - for clerical defects - bad-information to remove defects - received by Petitioner college after cut-off date- impugned order quashed.

Writ Petition allowed (E-9)

List of cases cited : -

1.Committee of Management, Shri Dravi Nath Purva Madhyamik Vidyalaya & anr. Vs St. of U.P. & Ors., (2019) (1) ADJ 513

2.St. of U.P. & ors. Vs Pawan Kumar Divedi & anr., (2014) (9) SCC 692

3.Paripurna Nand Tripathi & ors. Vs St. of U.P. & ors., (2015) (3) ADJ 567 (DB)

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

1. As per the Government Orders dated 7.2.2014 and 11.2.2014, the petitioner applied for grant-in-aid. After the applications were received by the State Level Committee, the Deputy Director of Education (Sanskrit), Uttar Pradesh, Allahabad referred the matter on 19.1.2015 to the Registrar of Sampurnanand Sanskrit University, Varanasi for the verification of the recognition etc. of the petitioner-institution. It may be noted that the Government Orders dated 7.2.2014 and 11.2.2014 were with regard to such institutions which were involved in the teaching of Sanskrit and were approved by their relevant Universities. On 24.3.2015, the State Level Committee after getting the certificates of the approval from the University forwarded the list of such institutions which according to it were qualified for getting grant-in-aid. This list was published on 1.4.2015 but the name of the petitioner-institution did not find place in it. On 1.4.2015 itself another list was published which displayed the names of such institutions which had though been recommended had to provide certain further data and the list was called a "restricted recognition list". The petitioner had throughout been under the impression that it had fulfilled all the conditions which were required by the Government Orders dated 7.2.2014 and 11.2.2014 and, therefore, it represented its case to the Member Secretary, Secondary Education, Uttar Pradesh, Lucknow. When no action was taken on the representation, the petitioner filed a writ petition being Writ Petition No.45483 of 2015 which was disposed of on 13.8.2015 with a direction that the representation filed by the petitioner be decided. Ultimately in compliance of the order of the High Court dated 13.8.2015, the representation of the petitioner was rejected after a decision was taken on 4.3.2016. Aggrieved thereof, the petitioner has filed the instant writ petition.

2. Learned counsel for the petitioner has submitted that if the impugned order dated 4.3.2016 is perused, it showed that as per the Government Order dated 7.2.2014 : (i) the applicant-institution had to be a recognised institution; (ii) it had to see that the endowment fund with the recognising University was there; and (iii) the Committee of Management which was running the institution had given its consent that the college be included in grant-in-aid. As per the order dated 4.3.2016 the endowment fund was not to be found and also the consent of the Committee of Management was not on record. The order also discloses, learned counsel for the petitioner states that the institution was informed before the "Restricted List" was published on 1.5.2015 that the deficiencies had to be rectified by 31.1.2015. However, he stated that as the communication by which the deficiencies were informed to the petitioner itself reached the petitioner-institution on 12.2.2015, the deficiencies could not have been cured by the fixed cut-off date of 31.1.2015.

3. So far as the recognition part is concerned, learned counsel for the petitioner states that the University had in its verification informed the State Government that the petitioner-institution was recognised and this was clear from the list which the University had sent on 12.3.2015. The name of the petitioner-institution was found at Serial No.39.

4. So far as the defect with regard to the endowment fund was concerned, learned counsel for the petitioner submits

that the College had submitted the endowment fund of Rs.3000/- and, therefore, the defect had very much been removed. Further the consent of the Committee of Management of the institution was also very much there on record.

5. The ground taken in paragraph 9 of the Counter Affidavit filed by respondent no.5 that the defect was not removed has been repelled in paragraph 7 of the Rejoinder Affidavit dated 18.2.2016 and it has been submitted by the learned counsel for the petitioner that wrongly the petitioner-institution was placed in a category of schools which had not fulfilled the conditions of the Government Orders dated 7.2.2014 and 11.2.2014. Learned counsel for the petitioner further states that the ground taken in the impugned order dated 4.3.2016 that none of the institutions which were placed in the list of schools which had defects in their applications were taken in the grant-in-aid list was also not available to the respondents as the record showed that many other institutions were taken in the grant-in-aid list which were in fact earlier in the list which had the names of such institutions whose applications had defects. Learned counsel further states that the petitioner could not remove the defects before the cut-off date i.e. before 31.1.2015 as the information given to the petitioner to remove the defects itself was received by the communication dated 12.2.2015. Learned counsel, therefore, submitted that the grounds taken in the impugned order dated 4.3.2016 were not tenable in the eyes of law and, therefore, the same be quashed and the respondent no.1 be issued a writ of mandamus to include the name of the petitioner-institution in the list of institutions which were to be granted aid.

6. Learned counsel for the petitioner also relied upon a decision of this Court in **Committee of Management, Shri Dravi Nath Purva Madhyamik Vidyalaya & Anr. Vs. State of U.P. & Ors**. reported in **2019 (1) ADJ 513** and submitted that when the petitioner-institution was recognised and all the other formalities were completed by the petitioner-institution then the grant-in-aid should not have been denied. Learned counsel further submitted that only to deprive the petitioner-institution of the right to get aid and for certain other oblique reasons, the aid was denied and the impugned order was thereafter passed.

7. Learned Standing Counsel, however, submitted that the petitioner did not fulfill the requirements of the Government Orders dated 7.2.2014 and 11.2.2014 at the relevant point and subsequently also when the defects were removed, they were so done after the cut-off date.

8. Having heard learned counsel for the petitioner and the learned Standing Counsel, I am of the considered view that when the institution was recognised and the other formalities namely the submission of endowment fund and the submission of the consent of the Committee of Management of the institution were there then the State Authorities should not have deprived the petitioner-institution of the grant-in-aid. The rejection on the ground that the defects were removed after the cut-off date i.e. 31.1.2015 appears to be irrelevant for two reasons : (i) the defects were clerical in nature and should not

have weighed on the minds of the Authorities; and (ii) as has been stated by the petitioner, the information to remove the defects itself was received by the College on 12.2.2015, then under no circumstances, could the petitioner-institution have removed the defects before the cut-off date i.e. before 31.1.2015. What is more, the endeavour of the State Government should be to grant aid to the institutions which are recognised and running classes properly and also taking examinations of the students who were studying therein.

9. Right to education is a fundamental right as has been enshrined under Article 21-A of the Constitution of India. Instead of boosting education, the State Government appears to be behaving in a most arbitrary manner to deprive institutions of the aids which are due to them. In **State of U.P. & Ors. Vs. Pawan Kumar Divedi & Anr.** reported in **2014 (9) SCC 692** and in **Paripurna Nand Tripathi & Ors. Vs. State of U.P. & Ors. reported in 2015 (3) ADJ 567 (DB)** it has been held that it was the fundamental right of every child to get proper education.

10. Under such circumstances, the order dated 4.3.2016 passed by the State of Uttar Pradesh is quashed and a writ of mandamus is being issued that the petitioner-institution be brought in grant-in-aid list forthwith and the grant be provided to the College within three months from the date of presentation of a certified copy of this order.

11. The writ petition is, accordingly, allowed.

(2019)11ILR A1220

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ C No. 14817 of 1998

Jawahar Lal Jaiswal ...Petitioner
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Awasthi, Sri Ashish Jaiswal, Sri Mansoor Ahmad, Sri Rahul Sripat, Sri Sandeep Saxena

Counsel for the Respondents:
C.S.C., Sri Shashi Prakash Rai

A. Land Law-Urban Land (Ceiling & Regulation) Act, 1976 - Section 10 - no documents to prove -Petitioner's possession on excess land ever taken-neither voluntary surrender u/s 10 (5) nor forceful possession u/s 10 (6); only District Magistrate authorized-to take possession-proved possession of Petitioner-benefit of Section 3 (a) of Repeal Act, 1999.

Writ Petition allowed (E-9)

List of cases cited: -

1. Shiv Ram Singh Vs St. Of U.P. & ors., (2015) (5) AWC 4918

2. St. Of Assam Vs Bhaskar Jyoti Sharma & ors., (2015) (5) 321

3. St. Of U.P. Vs Hari Ram, (2013) (4) SCC 280

4. Mohd. Suhaif & anr. Vs St. Of U.P. & ors., (2019) (5) ADJ 764 (DB)

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

1. Petitioner Jawahar Lal Jaiswal has filed present writ petition challenging order dated 18.09.1985 passed by respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad in Case No. 452 of 1976 (State Vs. Jawahar Lal), the order dated 14.07.1997 passed by Respondent No.3, District Judge, Allahabad in Urban Ceiling Appeal No.228 of 1994 (Jawahar Lal vs. State of U.P. & another) dismissing appeal filed by Petitioner under Section 33 of Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter referred to as Act 1976) and also order dated 23.03.1998 passed by Respondent No.3, District Judge, Allahabad dismissing review application filed by Petitioner against order dated 14.07.1997. Apart from aforesaid, Petitioner has also prayed for issue of appropriate direction to Respondent No.3 to decide appeal filed by Petitioner and further not to give effect to order dated 18.09.1985 and also restrain Respondents from interfering with possession of Petitioner over land in dispute.

2. It transpires from record that Petitioner is lease holder of premises No. 4 (Old No.) now premises no. 6 (New No.) Drummond Road, Allahabad.

3. Act of 1976, came into force on 17.2.1976. By means of Act 1976, a ceiling limit regarding land which can be held by a Tenure Holder was provided. Section 4 of Act 1976 provided for different ceiling limits in different Urban Agglomerations falling in different categories. Section 6 mandates that every person who is holding land in excess of concerned ceiling limit shall file an statement before competent authority regarding land held by him. After the statement has been filed by Tenure Holder, competent authority under section 6 of Act 1976 after such survey, as it may deem fit to make, shall prepare a draft statement in respect of person who has filed the statement. Thereafter in compliance of section 8 of Act 1976, Competent Authority is required to issue a draft statement to Tenure Holder as regards vacant land held by him in excess of ceiling limit. In turn by virtue of sub section (4) of section 8, Tenure Holder is required to file his objections to draft statement within a period of 30 days from date of service of draft statement/notice under section 8 of Act 1976. After disposal of objections preferred by Tenure Holder, Competent Authority is required to decide the same. Thereafter as per section 9 of Act 1976, Competent Authority is required to prepare final statement determining vacant land held by a Tenure Holder in excess of ceiling limit. Section 9 further provides that final statement shall be served on Tenure Holder as per the procedure provided under section 8 (3) of Act 1976. Section 10 of Act 1976 contemplates that after service of final statement prepared under section 9 of Act 1976, Competent Authority shall cause a notification to be published in Official Gazette of the State concerned regarding land held by such person in excess of ceiling limit. The notification is to further state that such vacant land is to be acquired by concerned State Government and claims of all person interested in such vacant land may be made by them personally or by an Agent giving particulars of the nature of their interests in such land. Sub section (2) of section 10 provides for disposal of objections preferred by such person who claims interest in the land proposed to be acquired. Sub section (3) of section 10 contemplates deemed

acquisition of excess vacant land of Tenure Holder and vesting of same in the State Government, free from all encumbrances. Sub section (4) of Section 10 puts a rider on the Tenure Holder whose land has been declared as excess vacant land or any other person not to transfer any excess vacant land or part thereof by way of sale, mortgage, gift, lease or otherwise. Sub section (5) of section 10 provides that after the land declared as excess-vacant land has vested in State Government, Competent Authority may by notice in writing order any person who may be in possession of excess-vacant land declared surplus, to surrender or deliver possession thereof to State Government or to any person duly authorised by State Government in this behalf within 30 days from the date of service of notice issued under section 10 (5). Thus, section 10 (5) of Act 1976 contemplates voluntary surrender of possession upon notice by a Tenure Holder. Sub Section (6) of section 10 provides that upon failure to comply with an order made under sub section (5) of section 10 i.e. failure to surrender possession voluntarily, Competent Authority may forcibly take possession of land declared as excess-vacant land. Section 11 of Act 1976, provides for payment of compensation in lieu of land acquired upon declaration as excess-vacant land. Section 12 provides for the constitution of Urban Land Tribunal and an appeal to Urban Land Tribunal against an order passed by Competent Authority under section 11 of Act 1976. Section 33 of Act 1976 provides for an appeal against an order passed by competent authority except an order passed under section 11 or under sub-section (1) of Section 30.

4. Accordingly, as per mandate of Act 1976, Petitioner submitted a draft statement dated 30.09.1976 before Respondent No.2, Competent Authority, Urban Land Ceiling, Allahabad, in respect of land held by him. Petitioner also filed an objection dated 30.09.1976 stating therein that no part of land held by petitioner can be declared surplus. However, after filing draft statement and objections referred to above, petitioner appears to have abandoned the proceedings pending before respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad. As a result of the aforesaid, respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad passed an ex-parte order dated 26.04.1984 whereby 6181.37 sq. mtrs. of land belong to petitioner was declared, excess vacant land. At this state, one Rajendra Prasad filed an application dated 25.07.1984 praying for recall of order dated 26.04.1984 on the ground that he has interest in land declared as excess vacant land. The aforesaid application dated 25.07.1984 came to be rejected vide order dated 25.07.1984 passed by respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad. Feeling aggrieved by aforesaid orders dated 26.04.1984 and 25.07.1984, petitioner filed an application dated 23.02.1985 praying for recall of ex-parte orders dated 26.04.1984 and 25.07.1984. Subsequently petitioner filed an application dated 06.09.1985 supported by an affidavit purported to be under Order IX Rlue 13 CP.C praying for recall of ex-parte orders dated 26.04.1984 and 25.07.1984 and also for restoration of case to its original number and status. Respondent No.2, Competent Authority, Urban Land Ceiling, Allahabad, passed order dated 09.09.1985 whereby ex-parte orders dated 26.04.1984 and 25.07.1984 were recalled and Ceiling Case was fixed for 18.09.1985 for objection and evidence. Again, petitioner did not appear before respondent no.2 and consequently,

respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad passed order dated 18.09.1985 whereby earlier order dated 25.07.1984 was again affirmed and restored. Consequently respondent no.2, Competent Authority, Urban Land Ceiling, Allahabad issued final statement dated 18.11.1988 whereby 6181.37 sq. mtrs. of land belonging to Petitioner was declared as excess-vacant land. Against order dated 25.07.1984, Petitioner preferred an appeal before Appellate Authority i.e. Respondent No.3, District Judge, Allahabad. Same was registered as Appeal No. 228 of 1994 (Jawahar Lal Jaiswal Vs. State of U.P. and another). Respondent No.3, District Judge Allahabad vide order dated 14.07.1991 dismissed appeal filed by Petitioner. Being aggrieved by order dated 14.07.1991 Petitioner filed a review application dated 05.08.1997 in terms of Section 151 C.P.C. before Appellate Authority/respondent no.3. The review application filed by petitioner came to be dismissed as not maintainable vide order dated 23.03.1998 passed by Appellate Authority, i.e., Respondent No.3, District Judge, Allahabad. Being aggrieved by orders dated 18.09.1985, 14.07.1991 and 23.03.1998 referred to above, petitioner has now come to this Court by means of present writ petition.

5. Instant writ petition came up for admission on 02.05.1998 and a learned Single Judge passed following interim order:

" Sri H. P. Tripathi, learned Standing Counsel prays for and is granted one month time to file counter affidavit. Learned counsel for the petitioners prays for and is granted two weeks time to file rejoinder affidavit. List the petition for final hearing / disposal if possible on 21.07.1998.

Till further orders of this Court, if the petitioner is still in possession over the plots in dispute, he shall not be dispossessed."

(Emphasis added)

6. A counter affidavit dated 11.05.2018 was filed on behalf of Respondents Nos. 1 and 2. In paragraph 8 of counter affidavit it has been pleaded that notification under Section 10 (1) was made on 06.05.1989 followed by notification dated 23.02.1991 under Section 10 (3) of Act 1976. It is thus submitted that land of petitioner declared as excess-vacant land got vested in State Government without any encumbrance. Notice under Section 10 (5) of Act 1976 was issued to petitioner on 23.03.1993. In view of Government Order dated 11.12.1996 land of petitioner declared as excess-vacant land is alleged to have been handed over to Respondent No.4, Allahabad Development Authority, Allahabad. In Paragraph 12 of the counter affidavit, it has been averred that a letter dated 17.11.2017 has been written by District Magistrate, Allahabad to the State-Government to give instructions for taking action under Section 10 (6) of Act, 1976.

7. Writ petition again came up for admission on 18.05.2018 and this time a Division Bench passed the following order:

"This writ petition remained pending for 20 years and on the last occasion when it came up before this Bench on 04.05.2018, we issued a direction to produce the original record

and show cause as to why the counter affidavit had not been filed by the respondent-State till date.

Today a counter affidavit on behalf of the respondent-State has been filed through the Tehsildar Sadar, Allahabad which makes a very peculiar discloser in paragraph-12 to the effect that the District Magistrate, Allahabad has sent a letter on 17.11.2017 to the State Government to give instructions for taking action under Section 10(6) of the Urban Land Ceiling Act, 1976.

The written instruction produced by the learned Standing Counsel also indicates that such files where action had not been taken under the provisions of Section 10 (6) of the Act, instructions have been sought from the State Government for taking possession.

We are surprised at the functioning of the District Magistrate, Allahabad under whose signature such instructions have been dispatched to the learned Standing Counsel, inasmuch as once the Act has been repealed in the year 1999, prima facie we fail to understand as to under which law and provision the District Magistrate has now sought permission from the State Government to take possession.

The learned Standing Counsel submits that there is a stay order in the present writ petition since in the year 1998, which recites till further orders, if the petitioner is in possession, then he shall not be dispossessed. The writ petition was dismissed for want of prosecution on 23,03.2009 and the interim order was vacated and the petition was restored on 08.04.2009. It was again dismissed in default on 29.06.2009 and was restored on 25.11.2009. It is after almost 9 years when the writ petition came to be listed in the year 2018.

There is one interesting fact which is disclosed from an abatement application filed by the petitioner himself being application no. 343024 of 2011. In this application it is disclosed that the appeal filed against declaration of surplus by the Prescribed Authority before District Judge was dismissed as the delay condonation application was rejected on 14th July, 1997.

Prior to this, it is not understood as to how the State Government issued a letter on 21.12.1994 for grant of free hold rights over the land in question to the petitioner presumably under the impression that the land was not declared surplus. It is further disclosed in the said affidavit appended to the said application that the petitioner's request for renewal of the lease was recommended by the Prabhari Adhikari (Nazul), Allahabad on 01.03.1995.

It is in continuity of these proceedings that the appeal of the petitioner had been dismissed by the learned District Judge, where after the present writ petition has been filed and an interim order was passed on 02.05.1998 referred to herein above.

The petitioner was again put to notice of resumption on 9th September, 2005 against which the petitioner filed Writ Petition No. 76849 of 2005 in which an observation was made through an interim order that in the circumstances, the State Government may take a decision but actual possession will not be disturbed on the spot pursuant to this order till the next date of listing. The said writ petition is stated by the learned counsel for the petitioner to have been dismissed in default.

We are surprised that the instructions of the District Magistrate, Allahabad which is countersigned by the Authority Urban Land Ceiling, Allahabad, nowhere indicates any of these proceedings and orders referred to herein above.

We are therefore satisfied that the counter affidavit has been filed in a cavalier fashion and therefore it requires the Court to call upon the District Magistrate to file his personal affidavit in this regard explaining the circumstances in which the instructions have been sought from the State Government and also ensure that the records are produced before this Court by the next date fixed.

The matter shall come up on 23rd May, 2018. "

8. In the light of facts stated in the counter-affidavit referred to above and observations made by Division Bench, District Magistrate, Allahabad filed his personal affidavit. In paragraph 5 of personal affidavit of District Magistrate, Allahabad, it has been stated that after Repeal Act of 1999 proceedings under Section 10 (6) of the Act of 1976 cannot be undertaken. In respect of letter dated 17.11.2017 sent by District Magistrate, Allahabad to State-Government for seeking instructions to take action under Section 10 (6) of Act, 1976, it was stated in paragraph 7 that District-Magistrate Allahabad vide letter dated 17.11.2017 intended to seek instructions/guidelines from State Government in those cases where documents pertaining to voluntary possession transfers are not available and proceedings under Section 10 (6) of Act of 1976 have not been undertaken. In paragraph 10 of the aforesaid affidavit, it is stated that after Repeal Act of 1999, proceedings under Section 10 (6) of Act of 1976 cannot be undertaken. However, in paragraph 15 of aforesaid affidavit, it is stated that possession of excess-vacant land belonging to Petitioner has been given to Allahabad Development Authority and possession of Allahabad Development Authority, Allahabad over land of petitioner declared as excess-vacant land is evident from letters of the Secretary, Allahabad Development Authority, bearing Nos. 16, 17, 18 dated 14.05.2018. Reliance was also placed upon judgement of this Court in **Shiv Ram Singh Vs. State of U.P. And others, 2015 (5) AWC 4918** and that of Apex Court in **State of Asam Vs. Bhaskar Jyoti Sharma and others, 2015 (5) 321,** in support of the proposition that once possession has been taken, then tenure-holder cannot seek benefit of Repeal Act, 1999. It is immaterial whether such possession has been taken lawfully or not. Since petitioner is not in possession over land declared as excess-vacant land, petitioner is not entitled to the relief prayed for in present writ petition.

9. A counter-affidavit dated 10.01.2019 has been filed by Respondent no.4, Allahabad Development Authority, Allahabad. However, in the entire counter-affidavit which is of nine paragraphs, no categorical averment has been made that land of petitioner declared as excess-vacant land has been handed over to Allahabad Development Authority, Allahabad and consequently, aforesaid authority is in possession over the land of Petitioner declared as excess-vacant land under Act, 1976.

10. Petitioner has filed rejoinder affidavit categorically denying the averments made in counter-affidavit dated

11.05.2018 filed by State-Respondents no. 1 and 2.

11. Pursuant to order dated 18.05.2018, the matter came up before the Bench on 23.05.2018 and Bench passed following order:

"The District Magistrate has filed his personal affidavit today. Learned counsel for the petitioner may file a reply to the same. Further from the affidavit of the District Magistrate we find that instructions were sought from the State Government vide letter dated 17th November, 2017 from the Principal Secretary, Housing and Urban Development, Government of Uttar Pradesh (Anubhag-6) Lucknow.

Learned Standing Counsel shall directly communicate with the said Principal Secretary calling upon him to inform the Court as to what response has been given by him to the District Magistrate. The District Magistrate may also inform the Court as to what response has been received by him in this regard and appropriate affidavit to that effect shall be filed by the next date fixed.

List in the next cause list.

The record of the case shall be produced whenever the matter is listed next."

(Emphasis added.)

12. In compliance of order dated 23.05.2018, original record has been produced by Miss. Subhash Rathi, Additional Chief Standing Counsel in Court on 06.08.2019.

13. We have heard Mr. Mansoor Ahmad, learned counsel for petitioner, Miss. Subhash Rathi, learned Additional Chief Standing Counsel for respondent nos. 1, 2 and 3 and Mr. S. P. Rai, learned counsel representing Respondent No. 4.

14. From the facts as noted herein above only two questions arise for determination in this writ petition.

I. Whether possession of land of petitioner declared as excess-vacant land was ever taken by Prescribed Authority and thereafter transferred to Respondent no.4, Allahabad Development Authority, Allahabad and consequently, the aforesaid authority is in actual physical possession of the same.

II. Whether Petitioners are entitled to the benefit of Repeal Act of 1999 as possession of land of petitioners declared as excess-vacant land was never taken by District-Magistrate Allahabad under Section 10 (5) or Section 10 (6) of Act of 1976.

15. With regard to the first question, we find that there are contradictory pleadings on record. As noted above, District-Magistrate, Allahabad in his personal affidavit dated 23.05.2018 has stated that possession of excess-vacant land of petitioner has been given to Allahabad Development Authority, Allahabad. It has further been stated that possession of Allahabad Development Authority, Allahabad over land of petitioner declared as excess-vacant land is evident from the letters of Secretary, Allahabad Development Authority bearing nos. 16.17 and 18 dated 14.05.2018. However, personal affidavit of District-Magistrate does not mention the date on which possession over land of petitioner declared as excess-vacant land was taken by him nor the same contains a recital whether possession was voluntarily

surrendered by petitioners in terms of section 10 (5) of Act of 1976 or it was forcibly taken under Section 10(6) of Act 1976. In the counter affidavit filed by Respondent No.4, Allahabad Development Authority, Allahabad it has nowhere been stated that possession of land of petitioners declared as excess-vacant land, was handed over to Allahabad Development Authority, Allahabad and consequently, they are in possession over the same. Thus, we have no hesitation to hold that in absence of any categorical recital in the personal affidavit of District-Magistrate, Allahabad in the light of facts noted above, possession over land of petitioner declared as excess-vacant land was never taken by voluntary surrender of possession by petitioner in terms of section 10(5) of Act 1976 nor the same was forcibly taken over in terms of section 10(6) of Act 1976 and hence its transfer to Allahabad Development Authority is out of question.

16. With regard to second point of determination, it may be stated here that this controversy is no longer res-integra and stands concluded by judgement of Apex Court in **State of U.P. Vs. Hari Ram, 2013 (4) SCC 280.** Court in paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 42 has said:

21. Let us test the meaning of the expressions "deemed to have been acquired" and "deemed to have been vested absolutely" in the above legal settings. The expressions "acquired" and "vested" are not defined under the Act. Each word, phrase or sentence that we get in a statutory provision, if not defined in the Act, then is to be construed in the light of the general purpose of the Act. As held by this Court in Organo Chemical Industries v. Union of India [(1979) 4 SCC 573 : 1980 SCC (L&S) 92] that a bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficial legislation to futility. Reference may also be made to the judgment of this Court in Directorate of Enforcement v. Deepak Mahajan [(1994) 3 SCC 440 : 1994 SCC (Cri) 785] . Words and phrases, therefore, occurring in the statute are to be taken not in an isolated or detached manner, they are associated on the context but are read together and construed in the light of the purpose and object of the Act.

22. This Court in S. Gopal Reddy v. State of A.P.[(1996) 4 SCC 596 : 1996 SCC (Cri) 792] held: (SCC p. 607, para 12)

"12. It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary."

23. In Jugalkishore Saraf v. Raw Cotton Co. Ltd. [AIR 1955 SC 376] , S.R. Das, J. stated: (AIR p. 381, para 6)

"6. ... The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the court may adopt the same. But if no such

alternative construction is possible, the court must adopt the ordinary rule of literal interpretation."

24. The expression "deemed to have been acquired" used as a deeming fiction under sub-section (3) of Section 10 can only mean acquisition of title or acquisition of interests because till that time the land may be either in the ownership of the person who held that vacant land or to possess such land as owner or as a tenant or as mortgagee and so on as defined under Section 2(1) of the Act. The word "vested" has not been defined in the Act, so also the word "absolutely". What is vested absolutely is only the land which is deemed to have acquired and nothing more. The word "vest" has different meaning in different context; especially when we examine the meaning of "vesting" on the basis of a statutory hypothesis of a deeming provision which Lord Hoffmann in Customs and Excise Commissioners v.Zielinski Baker and Partners Ltd. [(2004) 1 WLR 707 : (2004) 2 All ER 141 (HL)] , All ER at para 11 described as "heroic piece of deeming".

25. The word "vest" or "vesting" has different meanings. Legal Glossary, published by the Official Language (Legislative) Commission, 1970 Edn. at p. 302:

"Vest.--(1) To give a person a legally fixed, immediate right or personal or future enjoyment of (an estate), to grant, endow, clothe with a particular authority, right of property, (2) To become legally vested; (TP Act)

Vesting order.--An order under statutory authority whereby property is transferred to and vested, without conveyance in some person or persons;

26.Black's Law Dictionary (6th Edn.), 1990 at p. 1563:

"Vested.--Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not continue 'vested right'. Vaughn v. Nadel [228 Kan 469 : 618 P 2d 778 (1980)] . See also Accrue; Vest, and specific types of vested interests, infra."

27.Webster's Third New International Dictionary, of the English Language unabridged, Vol. III S to Z at p. 2547 defines the word "vest" as follows:

"'vest' vest ... To place or give into the possession or discretion of some person or authority [the regulation of the waterways ... to give to a person a legally fixed immediate right of present or future enjoyment of (as an estate) (a deed that vests a title estate in the grantee and a remainder in his children)

(b) to grant, endow, or clothe with a particular authority right or property ... to put (a person) in possession of land by the feudal ceremony of investiture ... to become legally vested (normally) title to real property vests in the holder of a property executed deed.]"

28. "Vest"/"vested", therefore, may or may not include "transfer of possession", the meaning of which depends on the context in which it has been placed and the interpretation of various other related provisions.

29. What is deemed "vesting absolutely" is that "what is deemed to have acquired". In our view, there must be express words of utmost clarity to

persuade a court to hold that the legislature intended to divest possession also, since the owners or holders of the vacant land are pitted against a statutory hypothesis. Possession, there is an adage is "nine points of the law". In Beddall v. Maitland[(1881) 17 Ch D 174 : (1881-85) All ER Rep Ext 1812] Sir Edward Fry, while speaking of a statute which makes a forcible entry an indictable offence, stated as follows: (Ch D p. 188)

"... This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance."

30. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in the hands of a few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary surrender

31. The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v.State of U.P. [(1977) 1 SCC 155] , while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meanings and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan [(2000) 8 SCC 99] held as follows: (SCC p. 114, para 28)

"28. ... We do find some contentious substance in the contextual facts, since vesting shall have to be a 'vesting' certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton [(1878) 4 QBD 104 (CA)] :Stroud's Judicial Dictionary, 5th Edn., Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorisation cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executory devise. Be it noted however, that 'vested' does not necessarily and

always mean 'vest in possession' but includes 'vest in interest' as well."

32. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

33. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

34. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says that where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorised by the State Government.

35. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) of Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) of Section 10. Surrendering or transfer of possession under sub-section (3) of Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) of Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualises a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) of Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force--as may be necessary--can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted to only in a situation which falls under sub-section (6)

and not under sub-section (5) of Section 10. Sub-sections (5) and (6), therefore, take care of both the situations i.e. taking possession by giving notice, that is, "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), then "forceful dispossession" under sub-section (6) of Section 10.

37. The requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may" has been used therein, the word "may" in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result in the landholder being dispossessed without notice, therefore, the word "may" has to be read as "shall".

39. The abovementioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, if the landowner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, under Section 10(5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land.

42. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18-3-1999. The State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the landowner or holder can claim the benefit of Section 4 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 4 of the Repeal Act."

17. However, Mrs. Subhash Rathi, learned Additional Chief Standing Counsel has tried to urge that under Scheme of Act 1976 once vesting has taken place in favour of State-Government under Section 10(3) of Act 1976 then in that event by operation of law State-Government becomes absolute owner of land declared as excess-vacant land free from all encumbrances. In such eventuality question of possession is only symbolic. She further submits that part of land belonging to petitioner was declared as excess-vacant land vide order dated 26.04.1989/18.09.1985 passed by Respondent no.2, Competent Authority, Urban Land Ceiling Allahabad. Against order dated 18.09.1985, petitioner preferred an appeal which was dismissed by Appellate Authority, i.e. Respondent NO.3, District Judge, Allahabad vide order dated 14.07.1997. Against order dated 14.07.1997, Petitioner filed a review application which was also dismissed vide order dated 23.03.1998. Thereafter, the present writ petition was filed. There is nothing on record to show that Petitioner was in actual physical possession over land declared as excess-vacant land from 1989 to 01.05.1998. She further submits that once land declared as excess-vacant land, has vested in State

free from all encumbrances, possession if any of petitioner over the land already declared as excess-vacant land will be in the nature of adverse possession. It is well settled that plea of adverse possession cannot be pleaded against State. As such, petitioner is not entitled to relief prayed for in the writ petition. Placing reliance upon a Division Bench judgement of this Court in **Shiv Ram Singh Vs. State of U.P. And others, 2015 (5) AWC 4918,** she submits that irrespective of the fact whether possession has been taken rightfully or wrongfully, it will make no difference. Once petitioner whose land has been declared as excess-vacant, is dispossessed from the same as per personal affidavit of District Magistrate, Allahabad, he cannot claim benefit of section 3 (2) (a) of Repeal Act, 1999. As such petitioner is not entitled to any relief prayed for.

18. We have examined the original record to test correctness of submission urged Mrs. Subhash Rathi, learned Additional Chief Standing Counsel. A notice dated 30.09.1993 under Section 10 (5) of Act 1976 was issued to petitioner to hand over peaceful possession of land declared as excess-vacant land. The process server has submitted a report dated 17.12.1993 mentioning therein that original petitioner Jawahar Lal refused to accept notice. There is also no document that thereafter, original petitioner or his heirs have ever handed over possession of land declared as excess-vacant land to District Magistrate, Allahabad, as he alone is competent to take possession of excess-vacant land under Act 1976. As per Division Bench Judgement of this Court in case of **Mohammad Suhaif and Another. V/s. State of U.P. And Others, 2019 (5) ADJ 764(DB),** it is only District Magistrate who has been authorized to take possession of excess-vacant land as per Rules framed under Act 1976. It is further an admitted position that no proceedings were initiated under Section 10 (6) of Act 1976 as District-Magistrate, Allahabad has himself sent a letter dated 17.11.2017 to the State-Government to give instructions for taking action under Section 10 (6) of Act 1976. Thus inevitable conclusion from aforesaid discussion is that possession of land of petitioners declared as excess-vacant land was never taken either under Section 10 (5) of Act 1976, i.e. voluntarily surrender of possession by tenure-holder or under Section 10 (6) of Act 1976, i.e. forceful possession of land declared as excess-vacant land.

19. In view of proved possession of petitioner over his land declared as excess-vacant land, he is clearly entitled to the benefit of Section 3 (a) of Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as "Act, 1999"). Accordingly, present writ petition succeeds and is allowed. The ceiling proceedings initiated against petitioner stood abated ans so declared. Part of land of petitioner declared as excess vacant land would continue to belong to petitioner. Respondents are restrained from interfering with possession of petitioner over land declared as excess-vacant land and also from dispossessing petitioner from disputed land.

20. In the facts and circumstances of the case, petitioner is also entitled to cost which we quantify at Rs. 50,000/- payable by respondent nos. 1 and 2, within a period of one month from today.

(2019)11ILR A1233

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No.- 21342 of 2019

Reeta Singh **Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Subhash Chandra Yadav

Counsel for the Respondents:
C.S.C., Sri Dhirendra Kumar Srivastava

A. Cancellation - Fair price shop - No independent enquiry after suspension - Enquiry before passing of suspension order is not sufficient enquiry - When stigma is cast and charges have been leveled, it became imperative to hear petitioner in a proper enquiry. (Para 8 & 9)

B. Constitution of India - Articles 14 and 226 - Maintainability of writ - Alternative remedy - No enquiry - Gross violation of principle of natural justice - No useful purpose be served by relegating petitioner to avail alternative remedy of appeal. (Para 9)

Writ Petition allowed. (E-1)

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

1. The petitioner's Fair Price Shop situate in Village - Tanda Kalan, Block - Chahaniyan, Tehsil - Sakaldiha, District - Chandauli, was suspended on 4.4.2019. Thereafter on 16.4.2019, the petitioner denied the charges and filed her reply. On 4.6.2019, the licence to run the Fair Price Shop was cancelled. Aggrieved thereof, the petitioner has filed the instant writ petition.

2. The petitioner has submitted that initially when the order of suspension was passed there was enquiry contemplated in it and subsequently thereafter no fresh charges were issued and no enquiry as is contemplated under the Government Orders dated 29.7.2004 and 16.10.2014 was undergone.

3. Learned Standing Counsel, in reply, however, submitted that prior to the issuing of the suspension order, notices were issued and the charges were known to the petitioner. He submits that these charges were issued on 18.2.2019 and 12.3.2019.

4. Learned Standing Counsel further submitted that when the petitioner was appointed as a Fair Price Shop Dealer it was a contract between the State and the Fair Price Shop Dealer and as per the paragraph no. 15 of the agreement, the contract would be terminated at any time without giving any reason. Learned Standing Counsel pointed out to Clause 15 of the agreement between the Government and the Fair Price Shop Licencee which is being reproduced here as under:-

"जिला मजिस्ट्रेट / जिला पूर्ति अधिकारी (आपूर्ति), उप–जिलाधिकारी तथा ग्राम सभा को इस, अनुबन्ध–पत्र को किसी समय बिना कारण बताए हुए समाप्त करने का अधिकारी होगा।"

5. Learned Standing Counsel only pointed out to the instructions which had been received by him and did not file any counter affidavit.

6. Learned counsel appearing for the respondent no. 6 who was the

complainant in the case stated that since the charges which were made against the petitioner were clear from the charge sheet itself, no further enquiry was required.

7. Upon hearing the learned counsel for the petitioner, the learned Standing Counsel and Sri Dhirendra Kumar Srivastava appearing for the respondent no. 6, this Court is of the definite view that the order impugned cannot be sustained in the eyes of law.

8. A perusal of the impugned order dated 4.6.2019 definitely shows that no independent enquiry was ever conducted after the suspension order dated 4.4.2019 was passed. The enquiry which is on the record appears to be put on the basis of the charges and the replies which were there on the record before the suspension order was passed. A perusal of the order dated 4.6.2019 also shows that the enquiry conducted on 2.1.2019 by the Supply Inspector was only depended upon by the Sub Divisional Officer, Tehsil - Sakaldiha.

9. Having found that the enquiry was not done in compliance of the order dated 29.7.2004 and 16.10.2014, this Court is of the view that no useful purpose would be served by relegating the petitioner to file an appeal when no enquiry whatsoever was undergone. There was definitely a gross-violation of principles of natural justice. The contention of the learned Standing Counsel that as per the Clause 15 of the agreement the contract could have been terminated without any show cause notice is also not tenable. Had there been no stigma or allegation against the petitioner and contract had been terminated simplicitor then no enquiry was required. However, when a stigma was being cast upon the petitioner and charges were being levelled then it becomes imperative that the petitioner should have been heard in a proper enquiry.

10. Under such circumstances, the order dated 4.6.2019 and the order dated 4.4.2019 cannot be sustained in the eyes of law and, thus, the same are quashed.

11. The writ petition is allowed.

12. The petitioner's Fair Price Shop Licence would be restored and the shop which the petitioner was running would also be restored to her.

(2019)11ILR A1234

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ C No. 21947 of 2019

Sunil Kumar Tripathi ...Petitioner
Versus
High Court of Judicature At Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Tripathi (In Person)

Counsel for the Respondents:
Sri Ashish Mishra

A. Advocates Act, 1961 - Section 16(2) - Designation of Senior Advocates Rules, 2018 - notification u/s 16(2) -Designation of Senior Advocates-conferment of status of 'Senior Advocate' is not a matter of

right-it is recognition by court -manner of assessment -subjective- do not involve any principles of natural justice -but assessment by Committee.

Held :- Every person who has passed L.L.B. and enrolled with Bar Counsel concerned, becomes an Advocate and this does not require any recognition by Court as such but to cross the level from Advocate to 'Senior Advocate', it requires an appreciation and recognition by Court to the eminence, learnedness, depth of legal knowledge, Court craft and conduct, manner and purity demonstrated by an Advocate in his practice at the Bar, not only towards the client but to the Court also and similar other aspects. (Para 19)

Writ Petition dismissed (E-9)

List of cases cited: -

1. Indira Jaising Vs Supreme Court of India (2017) 9 SCC 766

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

1. Heard Sri Sunil Kumar Tripathi, Advocate in person and Sri Ashish Mishra, learned counsel for respondents.

2. Petitioner, a practicing Advocate in this Court, has filed this writ petition under Article 226 of Constitution of India challenging notification dated 20.05.2019 issued by Registrar General of this Court under Section 16(2) of Advocates Act 1961 (hereinafter referred to as 'Act, 1961') designating 75 'Advocates' as 'Senior Advocates' with effect from 18.05.2019.

3. Facts, in brief, giving rise to the present writ petition are that petitioner obtained degree of L.L.B. from Banaras Hindu University and thereafter registered with Bar Counsel of Uttar Pradesh vide Enrollment No. U.P. 607 dated 12.03.1977. He claims that since then he is continuously practicing in this Court. However, he was registered as Member of High Court Bar Association on 15.01.2001.

4. Issue with regard to designation of Senior Advocates under Section 16 of Act, 1961 came up before Supreme Court in **Indira Jaising Vs Supreme Court of India (2017) 9 SCC 766,** Court laid down certain norms/guidelines with a direction to modify Rules relating to designation of 'Senior Advocates' by respective Courts. Directions/guidelines contained in para 73 of judgment read as under:-

"73. It is in the above backdrop that we proceed to venture into the exercise and lay down the following norms/guidelines which henceforth would govern the exercise of designation of Senior Advocates by the Supreme Court and all High Courts in the country. ***The norms/guidelines, in existence, shall be suitably modified so as to be in accord with the present.***

73.1 ***All matters relating to designation of Senior Advocates*** *in the Supreme Court of India and in all the High Courts of the country* ***shall be dealt with by a Permanent Committee*** *to be known as "Committee for Designation of Senior Advocates";*

73.2 The Permanent Committee will be headed by the Hon'ble the Chief Justice of India and consist of two senior most Judges of the Supreme Court of India [or High Court(s), as may be]; the learned Attorney General for India (Advocate General of the State in case of a High Court) will be a Member of the Permanent Committee. The above four

Members of the Permanent Committee will nominate another Member of the Bar to be the fifth Member of the Permanent Committee;

73.3 ***The said Committee shall have a permanent Secretaria****t, the composition of which will be decided by the Chief Justice of India or the Chief Justices of the High Courts, as may be, in consultation with the other Members of the Permanent Committee;*

73.4 ***All applications including written proposals by the Hon'ble Judges will be submitted to the Secretariat.*** *On receipt of such applications or proposals from Hon'ble Judges, the* ***Secretariat will compile the relevant data and information with regard to the reputation, conduct, integrity of the advocates(s) concerned including his/her participation in pro bono work; reported judgments in which the advocate(s) concerned had appeared; the number of such judgments for the last five years.*** *The source(s) from which information/data will be sought and collected by the Secretariat will be as decided by the Permanent Committee*

73.5 ***The Secretariat will publish the proposal of designation of*** *a particular advocate* ***in the official website*** *of the Court concerned* ***inviting the suggestions/views of other stakeholders in the proposed designation;***

73.6 ***After the database in terms of the above is compiled and all such information as may be specifically directed by the Permanent Committee to be obtained in respect of any particular candidate is collected, the Secretariat shall put up the case before the Permanent Committee for scrutiny;***

73.7 ***The Permanent Committee will examine each case in the light of the data provided by the Secretariat of the Permanent Committee;*** *interview the advocate concerned; and* ***make its overall assessment on the basis of a point based format indicated*** **below:-**

S.No.	***Matter***	***Points***
1.	*Number of years of practice of the Applicant Advocate from the date of enrollment* *[10 points for 10-20 years of practice; 20 points for practice beyond 20 years]*	*20 points*
2.	*Judgments (Reported and unreported) which indicate the legal formulations advanced by the advocate concerned in the course of the proceedings of the case; pro bono work done by the advocate concerned; domain expertise of the applicant advocate in various branches of law, such as Constitutional law, Inter-State Water Disputes, Criminal law, Arbitration law, Corporate law, Family law, Human Rights, Public Interest Litigation, International law, law relating to women, etc.*	*40 points*
3.	*Publications by the applicant advocate*	*15 points*
4.	*Test of personality and suitability on the basis of interview/interaction*	*25 points*

73.8 All the ***names that are listed before the Permanent Committee/cleared by the Permanent Committee will go to the Full Court.***

73.9 ***Voting by secret ballot will not normally be resorted to by the*** *Full Court* ***except when unavoidable****. In the event of resort to secret ballot, decisions will be carried by a majority of the Judges who have chosen to exercise their preference/choice.*

73.10 ***All cases that have not been favorably considered by the Full Court*** *may be reviewed/****reconsidered after expiry of a period of two years*** *following the manner indicated above as if the proposal is being considered afresh;*

73.11 In the event a Senior Advocate is guilty of conduct which according to the Full Court disentitles the Senior Advocate concerned to continue to be worthy of the designation, the Full Court may review its decision to designate the person concerned and recall the same."
(emphasis added)

5. Accordingly, this Court, in exercise of powers under Article 225 made amendment in Allahabad High Court Rules, 1952, Volume 1, (hereinafter referred to as 'Rules, 1952') by publishing Allahabad High Court (Amendment) Rules, 2018 and thereby Chapter XXIV of Rules, 1952 was substituted by a new set of Rules called as "Designation of Senior Advocates Rules, 2018". It contains 12 Rules. Rule 1 talks of "Short title, extent and commencement"; Rule 2 provides "Definitions"; Rule 3 to Rule 7 contain the Constitution of Permanent Committee, the procedure for inviting applications or recommendation of Advocates as Senior Advocates and procedure for their designation. Rule 8 imposes certain restrictions on designated Senior Advocates; Rule 9 prohibits canvassing in any manner in designation of Senior Advocate and Rule 10 provides that if any question relating to interpretation of Rules arises, it shall be referred to the Chief Justice whose decision thereon shall be final. Rule 11 confer powers upon Court to review or recall any Senior Advocate after he has been designated i.e. withdrawal of designation as Senior Advocate and Rule 12 provides that repeal and saving.

6. For the purpose of present writ petition, Rules 3 to 7 of Rules, 2018 are relevant and reproduced as under:-

*"****3. Permanent Committee for designation of Senior Advocates:-*** *(1) All* ***the matters relating to designation*** *of Senior Advocates in the High Court* ***shall be dealt with by the Permanent Committee,*** *which will be headed by the Chief Justice and consist of the two Senior-most Judges of the High Court; (ii) the Advocate General of the State of Uttar Pradesh; and (iii) a designated Senior Advocate of the Bar to be nominated by the members of the Committee.*

(2) The ***Committee*** *constituted under sub-rule (1)* ***shall have a Secretariat,*** *the composition of which will be decided by the Chief Justice of the High Court, in consultation with other members of the Committee.*

(3) The Committee may issue such directions from time to time as deemed necessary regarding functioning of the Secretariat, including the manner in which, and the source/s from which, the necessary data and information with regard to designation of Senior Advocates are to be collected, compiled and presented.

4. ***Designation of an Advocate as Senior Advocate:-*** *(1) The* ***High Court may designate an Advocate as a Senior Advocate,*** *if* ***in its opinion****,* ***by virtue of his/her ability and standing at the Bar,*** *the said Advocate* ***is deserving of such distinction.***

Explanation: *The term* ***"standing at the Bar" means position of eminence attained by an Advocate at the***

Bar by virtue of his/her seniority, legal acumen, and high ethical standards maintained by him, both inside and outside the Court.

(2) ***An advocate who has put in at least ten years of actual practice as an advocate shall be eligible*** *to be designated as Senior Advocate.*

Provided that a retired Judge of any High Court, who is qualified to practice in the Allahabad High Court may also be recommended for being designated.

5. ***Motion for Designation as Senior Advocate:- Designation*** *of an Advocate as Senior Advocate by the High Court* ***may be considered:***

(a) ***on the written proposal made by the Chief Justice or any sitting Judge*** *of the High Court of Judicature at Allahabad.*

Provided that a sitting Judge will not make a proposal for more than two Advocates in a calendar year; or

(b) on the ***written application submitted by an Advocate, recommended by two designated Senior Advocates.***

Provided further that such designated Senior Advocates will not recommend the names of more than two Advocates in a calendar year.

6. Procedure for Designation:- *(1)* ***All the written proposals and applications*** *for designation of an Advocate as a Senior Advocate* ***shall be submitted to the Secretariat.***

Provided that every application by an advocate shall be made in Form No. 1 of ***APPENDIX-A*** *appended to these Rules.*

Provided further that in case the proposal emanates from a Judge it need not be submitted in the prescribed form. However once the proposal is received, the Secretariat shall request such advocate to submit form No. 1 duly filled in within such time as directed by the Committee and in such a case the requirement of having recommendation of two Senior Advocates would stand dispensed with.

(2) On receipt of an application or proposal for designation of an Advocate as a Senior Advocate, the ***Secretariat shall compile the relevant data*** *and the* ***information with regard to the reputation, conduct, integrity of the advocate concerned including his participation in pro bono work, reported judgments of the last five years in which*** *the concerned advocate has appeared* ***and has actually argued.***

(3) The ***Secretariat will notify the proposed names of the advocates to be designated as Senior Advocates on the official website*** *of the High Court of Judicature at Allahabad,* ***inviting suggestions and views within such time as may be*** *fixed by the Committee.*

(4) After the ***material in terms of the above is compiled and all such information,*** *as may be specifically required by the Committee to be obtained in respect of any particular candidate, has been obtained and* ***the suggestions and views have been received, the Secretarial shall put up the case before the Committee for scrutiny.***

(5) Upon submission of the case by the Secretariat, the ***Committee shall examine the same in the light of the material provided and, if it so desires, may also interact with the concerned advocate(s) and thereafter make its overall assessment on the basis of the point based format provided in APPENDIX-B to these Rules.***

(6) ***After the overall assessment by the Committee, all the names listed***

before it will be submitted to the Full Court along with its Assessment Report.

(7) Normally voting by ballot shall not be resorted to unless unavoidable. The motion shall be carried out by consensus, failing with voting by ballot may be resorted to. In the event of voting by ballot, the views of the majority of the Judges present and voting shall constitute the decision of the Full Court. In case the Judges present be equally divided, the Chief Justice or in his absence the Senior Judge present shall have the casting vote.

(8) The cases that have not been favorably considered by the Full Court may be reviewed/reconsidered after the expiry of a period of two years, following the same procedure as prescribed above as if the proposal is being considered afresh.

7. ***Designation of Advocates as Senior Advocates by the Chief Justice:-*** *(1) On the approval of the name of the Advocate by the Full Court, the Chief Justice shall designate such an advocate as a Senior Advocate under Section 16 of the Advocate's Act, 1961.*

(2) The Registrar General shall notify the designation to the Secretary General of the Supreme Court of India, the Bar Council of Uttar Pradesh, Bar Council of India and also to all the District and Sessions Judges subordinate to the High Court.

(3) A record of the proceedings of the Committee and the record received from the Full Court in this regard shall be maintained by the Permanent Secretariat for further reference."

(emphasis added)

7. It may be noted here that Rule 6(5) talks of assessment about the concerned Advocate on the basis of point based format provided in Appendix-B and, therefore, Appendix-B is also relevant. The same reads as under:-

S.No	Matter	Points
1.	Number of years of practice of the Applicant Advocate from the date of enrollment [10 points for 10-20 years of practice, 20 points for practice beyond 20 years]	20 points
2.	Judgments (Reported and unreported) which indicate the legal proceeding formulations advanced by the concerned Advocate in the course of the proceedings of the case; pro bono work done by the concerned Advocate; domain Expertise of the Applicant Advocate in various branches of law, such as constitutional law, Inter-State Water Disputes, Criminal law, Arbitration law, Corporate law, Family law, Human Rights, Public Interest Litigation, International law, law relating to women, etc.	40 points
3.	Publications by the Applicant Advocate	15 points
4.	Test of Personality & Suitability on the basis of interview/interaction	25 points

8. In response to Rules 4 and 5, by notice, application from Advocates were invited for consideration for designation of Senior Advocates. Petitioner submitted his application dated 19.07.2018. Names of about 100 Advocates were received by Secretariat.

9. These names were uploaded on website inviting suggestions and views of other stakeholders within 4 weeks.

10. Petitioner who has appeared in person, contended that procedure

prescribed in Rules 6(4), 6(5) and 6(6) of Rules, 2018 has been violated and also the directions contained in paras 73, 74 and 75 of Supreme Court's judgement in **Indira Jaising (supra)** have been contravened, therefore, notification, impugned in the present writ petition, designating 75 Advocates as Senior Advocates, is illegal. Petitioner contended that Secretariat was required to collect all relevant materials with respect to Advocates who have submitted their details for designation as Senior Advocates and to place it before Permanent Committee for scrutiny. Thereafter, Permanent Committee shall examine the case in the light of material provided and if so desires, may also interact with individual Advocate and, thereafter, make its overall assessment on the basis of point based format as provided in Appendix-B. Overall assessment report of all names listed before Committee has to be submitted to Full Court and thereafter Full Court shall consider the matter for designation of Senior Advocates under Rule 6(7). Our attention is drawn to averments made in para 14 to the writ petition which reads as under:-

"14. That procedure prescribed under Rules 6(5) and 6(6) has been completely overlooked as per following detail.

(i) The Secretariat failed to submit point based format provided in Appendix-B before the Committee for overall assessment of the Advocate. Relevant to mention that there are 4 parameters in the Appendix-B to the Rule of 2018 and the Secretariat by not furnishing list of marks of all the Advocates Applicants on 4 parameters, grossly violated the directives in Rule 6(5) of the Rule of 2018. ***The Committee failed to prepare the overall assessment report as per Appendix-B.***

(ii) The Committee in the absence of complete marking on the 4 parameters, in prescribed format provided in Appendix-B, could not submit "overall assessment report" before the Hon'ble Full Court for overall assessment of the Advocate and as such Rule 6(6) has been violated. Impugned notification issued, without considering the overall assessment report is not only arbitrary & illegal but also violative of Article 14 of the Constitution of India."

11. It is said that procedure prescribed in Rules 5 and 6 has been completely overlooked, therefore, designation of 'Senior Advocates' is bad. Petitioner claimed that details given by him in respect of himself, if considered in the light of point based format for assessment, he is likely to secure 65 marks out of 75 (excluding 25 marks meant for interaction/interview) and, therefore, deserves to be designated as Senior Advocate but has been denied the same illegally.

12. When we questioned as to how petitioner knows that no assessment has been made by Permanent Committee as contemplated under Rule 6(5) of Rules, 2018, he contended that a Senior Advocate who is member of Permanent Committee, informed him about this fact and also that he has submitted a dissenting note. He contended that no such point based format of Advocates prepared by Committee was placed before Full Court and, therefore, Rule 6(5) has not been complied with. What he contended is that point based assessment of all the advocate was required to be

placed before Full Court. This argument we find has no substance. A careful reading of Rule 6(5) shows that after material or information collected by Secretariat is placed before Permanent Committee, it shall examine the same in the light of such material. The question of interaction with concerned Advocate is optional and not mandatory. Therefore, whenever interaction is considered to be necessary by Committee, the marks provided for interaction will have to be awarded otherwise marks provided for interaction will be of no consequence. Where Committee decided not to have any interaction, Item-4 in Appendix-B will become inapplicable and, thereafter assessment shall be only on the basis of item nos. 1, 2 and 3.

13. So far as item 1 is concerned, it is correlated with the number of practice and, therefore, can be assessed by every person including concerned Advocate, looking into account his number of practice in Court.

14. So far as items no. 2 and 3 are concerned, the same have to be judged by Permanent Committee concerned and no one can adjudge himself or his performance from the judgments he has relied and the publications he has supplied. On items 2 and 3, it is decision of Permanent Committee and cannot be self assessed by any individual.

15. Then coming to Rule 6(6), we find that after making overall assessment by Permanent Committee as per point based format provided in Appendix-B, the Committee shall prepare its report and thereafter names listed before it shall be placed before Full Court along with "assessment report". Rule 6(6) talks of "assessment report" and not the "actual assessment" made as per Appendix-B. Committee shall make its assessment as per Appendix-B and thereafter it shall submit "assessment report" to Full Court.

16. Petitioner appeared in person, did not dispute and it is also evident from pleadings in writ petition that in all, there were 100 Advocates whose names were placed before Permanent Committee but ultimately only 75 Advocates have been designated as Senior Advocates. Learned Counsel appearing for High Court pointed out that in the "assessment report" submitted by Committee, it has given its recommendation for not designating 22 Advocates as senior who were not found fit according to Committee. It recommended 78 Advocates, fit/suitable for designation as Senior Advocates. Even Full Court has not mechanically designated all such Advocates who were recommended by Permanent Committee but has considered the matter objectively and out of 78 so recommended, only 75 have been designated and 3 more Advocates have not been found suitable or fit for designation as Senior Advocates. These facts as stated by Learned Counsel appearing for High Court are not disputed by petitioner. In our view, it clearly shows that requirement of Rules has been complied with, inasmuch as, Permanent Committee was required to submit its 'assessment report' which it had submitted to Full Court. It was considered by Full Court and thereafter it also applied its mind and designated only 75 Advocates as Senior Advocates. It was always open to Full Court to seek point based assessment made by Permanent Committee as per Appendix-B for its consideration if found necessary but to suggest that such format was necessary to

be supplied to Full Court otherwise 'assessment report' was not in consonance with Rule 6(6), we find difficult to accept. Hence, it cannot be said that procedure prescribed in Rules 6(4)(5)(6) has not been followed.

17. Petitioner then contended that making interaction optional is contrary to direction issued by Supreme Court. We may notice hereat that validity of Rules is not under challenge and, therefore, issue of designation of Senior Advocate was to be considered by this Court in the light of Rules notified. Unless we find any patent illegality by infringing the procedure prescribed in Rules, we do not find that exercise undertaken by Court for designation of 'Senior Advocates', consistent with Rules, would justify any interference.

18. We can appreciate that petitioner has a long experience of 41 years of practice and in his own assessment, his performance and level of practice is also quite high but for designation of Senior Advocate, it is not the individual's self assessment which is material but it is the assessment of work and performance of Advocates in the opinion of Court which is of ultimate importance. Mere publication of some articles does not mean that an Advocate can claim highest marks assigned for publication of articles irrespective of quality of articles, the material contained therein, information it is conveying to readers and other relevant factors. Similarly, an Advocate may have appeared in a number of cases decided by Court but still the nature of issue raised therein, the complexity of the matter in which concerned Advocate has appeared and the adjudication by this Court considering the level of assistance provided by Advocate are all relevant factors for making assessment in respect of judgments i.e. Item no. 2 of Appendix-B. For example, if an Advocate has appeared in hundreds of bail applications decided by Court, the same cannot be equated with the cases where issues of vires of statutes are raised and decided by Court. Importance of issues and decision by Court involved in a particular case in which Advocate concerned appeared, has to be considered and appreciated from case to case basis and that is why Item- 2 of Appendix-B provides marks in respect to judgments. It is not number of judgments irrespective of other relevant considerations which will entitle an Advocate to claim maximum marks provided for Item-2 in Appendix-B. In fact it is the objective consideration by Committee, in respect of assessment under items 2 and 3. Though the manner of assessment to some extent is also subjective since it does not involve any principles of natural justice but assessment has to be made by Committee on its own on the basis of material collected by it.

19. Conferment of status of 'Senior Advocate' to an 'Advocate' is not a matter of right. It is a recognition by Court to the legal knowledge, high degree of Advocacy, manner of presentation in Court and other relevant considerations which are cumulatively considered to confer the status of 'Senior Advocate' upon an Advocate. Every person who has passed L.L.B. and enrolled with Bar Counsel concerned, becomes an Advocate and this does not require any recognition by Court as such but to cross the level from Advocate to 'Senior Advocate', it requires an appreciation and recognition by Court to the eminence, learnedness,

depth of legal knowledge, Court craft and conduct, manner and purity demonstrated by an Advocate in his practice at the Bar, not only towards the client but to the Court also and similar other aspects.

20. We do not intend to delve into matter further to the self-assessed merit of petitioner as it may prejudice his matter in future also but so far as the present writ petition is concerned, we are satisfied that there is no illegality in the procedure followed by Court in designating 75 'Senior Advocates' by notification in question and apparently there is substantial compliance of rules, therefore, no interference is called for.

21. Writ petition is accordingly dismissed. No costs.

(2019)11ILR A1243

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No.- 23031 of 2019

Vivek Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anjali Sinha, Sri Krishna Kant Dwivedi

Counsel for the Respondents:
C.S.C.

A. Civil Law-The Indian Stamp Act, 1899 - Section 56 (1A) - Stay Application u/s 56 (1-A) in Appeal - disputed amount to be paid is - 1/3rd of deficiency assessed along with interest u/s 40 (1-A)-and not 1/3rd of penalty imposed which will be excessive-will become difficult to file Appeal. Proviso to move stay Application in Appeal-misinterpreted.

Writ Petition disposed of (E-9)

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

1. This writ petition has been filed with a prayer that the recovery citation issued on 10.6.2019 by the Tehsildar, Tehsil - Anupshahar, District - Bulandshahar, in pursuance of the order dated 30.5.2019 passed by the District - Magistrate, District - Bulandshahar, in Case No. D201911170000833 (State of U.P. vs. Vivek Kumar) under Section 33/47A of Indian Stamp Act 1899, passed on 20.4.2010 be quashed.

2. The learned counsel for the petitioner assailed the recovery certificate on the ground that the amount which was payable by the petitioner under order dated 30.5.2019 could not be made payable by the petitioner as it was excessively high. He submits that not only was the deficiency of stamp calculated wrongly but the penalty of Rs. 18,00,000/- was calculated in a most malafide manner.

3. Learned counsel for the petitioner further stated that when he had filed the appeal before the respondent no. 2, the Deputy Commissioner (Stamp), Meerut Division, Meerut, then the recovery ought to be stayed. He further submits that the Stay Application as is conceived under Section 56(1A) of the Indian Stamp Act, 1899, could not be filed by him as the Appellate Court was demanding 1/3rd of the total amount which was recoverable under the order dated 30.5.2019.

4. Learned counsel for the petitioner referred to Section 56 of the Indian Stamp Act, 1899, alongwith all its U.P. Amendments and stated that the proviso under which a Stay Application had to be moved was being misinterpreted by the Appellate Court and the Appellate Court was demanding 1/3rd of the total payable amount under the order passed by the Collector on 30.5.2019, alongwith the Stay Application. Since, at this juncture, learned counsel referred to Section 56 of The Indian Stamp Act, 1899, the same is being reproduced here as under:-

"56. Control of, and statement of case to, Chief Controlling Revenue authority. - (1) The powers exercisable by a Collector under Chapter IV and Chapter V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue authority.

[(1-A) Notwithstanding anything contained in any other provisions of this Act, any person including the Government aggrieved by an order of the Collector under Chapter IV, Chapter V or under Clause (a) of the first proviso to Section 26 may, within sixty days from the date of receipt of such order, prefer an appeal against such order to the Chief Controlling Revenue Authority, who shall, after giving the parties a reasonable opportunity of being heard consider the case and pass such order thereon as he thinks just and proper and the order so passed shall be final:

Provided that no application for stay or recovery of any disputed amount of stamp duty including interest thereon or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one-third of such disputed amount:

Provided further that where the Chief Controlling Revenue Authority passes an order for the stay of recovery of any stamp duty, interest thereon or penalty or for the stay of the operation of any order appealed against and such order results in the stay of recovery of any stamp duty, interest thereon or penalty, such stay order shall not remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the Collector concerned for the payment of the outstanding amount];

(2) If any Collector, acting under Section 31, Section 40 or Section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue authority.

(3) Such authority shall consider the case and a copy of its decision to the Collector who shall proceed to assess and charge the duty (if any) in conformity with such decision."

5. Learned counsel stated that if the proviso under Section 56 (1A) of the Indian Stamp Act, 1899, which provides for the filing of a Stay Application is perused, he submits, that only 1/3rd of the disputed amount which included the interest payable on it alone had to be paid alongwith the Stay Application. Learned counsel further submitted that when the 1/3rd amount had to be paid for moving the Stay Application then the amount had not to include the penalty which was imposed. Learned counsel for the petitioner stated that if the disputed amount was to include the penalty also

then it would become very difficult for an ordinary citizen to file an Appeal. Learned counsel submitted that any provision of law ordinarily should be so read that it best harmonizes the object of the statute. He submitted that the object of the statute was that when an Appeal was filed then the assessee should deposit a certain amount so that if he eventually loses the appeal the financial burden upon the assessee should be minimal. Learned counsel, therefore, submits that even though the statute was very clear that before the staying of the recovery of any amount which was being made from an assessee under an order passed under Section 47 (A), 1/3rd of the amount had to be paid of the disputed amount, the appellate courts, many a time, directed for the depositing one third of the amount which was a total of the deficiency alongwith the interest and the penalty amount.

6. Learned counsel submitted that disputed amount only included the deficiency which was assessed alongwith the interest which was imposed under Section 40 (1-A) of the Indian Stamp Act. Learned counsel submitted that definitely the 1/3rd of the penalty had not to be paid.

7. Learned Standing Counsel, however, in reply, submitted that when the petitioner had not moved any Stay Application then it was but natural that the recovery in pursuance of the order dated 30.5.2019 had to be made.

8. Learned Standing Counsel further submitted that a bare perusal of the proviso under which the Stay Application was moved in Section 56 (1-A), the 1/3rd of the disputed amount had to be paid which according to him was 1/3rd of the deficiency amount, the interest imposed upon it and the penalty. He submits, therefore, that the petitioner when had not moved the Stay Application then he had to bear the consequences.

9. Having heard the learned counsel for the petitioner and the learned Standing Counsel, this Court is of the view that the Stay Application under the proviso to Section 56 (1-A) could be moved if the petitioner deposited 1/3rd of the deficiency assessed by the Collector alongwith the interest imposed upon it under Section 40 (1- A) of the Indian Stamp Act. The petitioner had not to deposit the 1/3rd of the penalty imposed.

10. If the statute was to be interpreted in the manner the learned Standing was interpreting, then it may become very difficult for an individual to file an appeal. Penalty definitely did not form a part of the disputed amount. Disputed amount was only such an amount which included the deficiency calculated alongwith the interest imposed upon it under Section 40 (1-A) of the Indian Stamp Act.

11. Under such circumstances, if the petitioner moves an application alongwith the 1/3rd of the deficiency calculated by the District Magistrate within a period of two weeks from today then the Appellate Court shall pass orders on the Stay Application within a period of three weeks thereafter.

12. For a period of five weeks, no coercive action shall be taken against the petitioners.

13. With the above observations, the writ petition is disposed of.

(2019)11ILR A1246

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2019

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 23672 of 2019

Bharat Bhushan Thapar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hridesh Batra, Sri Anurag Khanna, Sri Himadari Batra

Counsel for the Respondents:
Sri Sabhajeet Singh

A. Right to Privacy - Aadhar (Targeted Delivery of Financial & other Subsidies, Benefits & Services) Act, 2016 - Section 33 - prohibits discloser of information-without prior order of Judge of High Court- even individual can oppose discloser.

B. Aadhar (Targeted Delivery of Financial & other Subsidies, Benefits & Services) Act, 2016 - Section 47 - individual can make complaint.

Writ Petition disposed of (E-9)

List of cases cited: -

1. K.S. Puttaswamy (Rtrd) & anr. Vs UOI & ors (2019) 1 SCC 1

(Delivered by Hon'ble Shashi Kant Gupta, J. &
Hon'ble Saurabh Shyam Shamshery, J.)

1. Facts of the present case as narrated in the writ petition are as follows:-

(i) Respondent nos.4 and 5 were husband and wife and they brought a plot no.869, measuring area of 521 square yard, situated at Colony known as Shalimar Garden, Extention-1, Village Pasonda, Loni, District Ghaziabad, through a sale deed dated 19.02.1981 from company known as Mahalakshmi land & Finance Pvt Ltd.

(ii) As per the petitioner's case, Shri Jai Prakash Gupta (respondent no.4) and Smt Kiran Bedi Gupta (respondent no.5) died on 12.12.1984 and 22.12.2001 respectively.

(iii) The said plot was sold to Smt. Raksha Devi Thapar (mother of the petitioner) and Kumari Madhu Thapar (sister of the petitioner) by a registered sale deed dated 12.02.1990 by the eldest son of Shri Jai Prakash Gupta through power of attorney.

(iv) One Shri Pramod Kumar Singh Chauhan along with some anti social persons when tried to disposses the petitioner from the said plot an FIR was also lodged against him on 04.11.2012.

(v) The petitioner also filed a suit bearing Suit no.2603 of 2012 against Shri Pramod Kumar Singh Chauhan for seeking permanent injunction for restraining him from interfering in the peace full possession of the petitioner on the said plot and the Additional Civil Judge (Senior Division) Ghaziabad granted permanent injunction against him on 13.12.2012. Hence Shri Pramod Kumar Singh Chauhan challenged the same, by way of filling FAFO No.97 of 2014 and the court below vide order dated 09.01.2014, stayed the order dated 13.12.2012. The FAFO is still pending for adjudication before the Court.

(vi) During the pendency of the said FAFO, Shri Pramod Kumar Singh Chauhan, being hand in glove with Shri

Anil Kumar Agarwal by setting up some imposters as Shri Jai Prakash Gupta (respondent No.4) and Smt Kiran Devi Gupta (respondent No.5) sold the plot-in-question to one Smt Rekha Agarwal wife of Shri Anil Kumar Agarwal.

(vii) As soon as the petitioner came to know about the aforesaid fraud, he lodged an FIR dated 02.03.2015 bearing no. 222 of 2015, under Sections 420, 467, 468, 471, 506 and 120B of IPC against Shri Pramod Kumar Singh Chauhan, Anil Agarwal, Rekha Agarwal, Suresh Chand Mittal and Km. Disha Srivastava alleging that these accused have fraudulently executed the sale deed by posing them as Jai Prakash Gupta and Kiran Gupta.

(viii) After investigation, charge-sheet was submitted on 11.06.2015 and the charges were framed under Sections 420, 467, 468, 471, 120-B of IPC.

(ix) Respondent nos. 4 and 5 had filed a Criminal Revision before this Court, which is still pending. The petitioner came to know that while filling the said criminal revision, the respondent nos. 4 and 5 had attached the copy of Aadhaar Card bearing no. 642116310070 in the name of Shri Jai Prakash Gupta and Aadhaar Card No. 3259534296 in the name of Shri Kiran Bedi Gupta.

(x) On inquiry, petitioner came to know that the Aadhaar Card No. 3259534296 was issued to one Smt. Roshanara, however, during upgradation it was fraudulently made in the name of Smt. Kiran Prakash Gupta. Similarly, the other Aadhaar Card No.642116310070 was earlier issued to one Ashok son of Rampal however, during upgradation, name on the Aadhaar Card was changed to Jai Prakash Gupta. Hence, the present writ petition.

2. Shri Anurag Khanna, Senior Advocate assisted by Shri Himadari Batra, learned counsel for the petitioner submitted that although respondent nos. 4 and 5 have already died, still the, Aadhaar Cards were fraudulently prepared/upgraded in the name of the respondent nos. 4 and 5 in order to execute a sale deed. Learned Senior Counsel further submitted that the petitioner has approached the Aadhaar Authority to give details of the abovementioned two Aadhaar Cards, however, Aadhaar Authority have refused to supply the same as being barred by Section 33 Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred as Aadhaar Act). Learned Senior Counsel has also relied upon certain informations received from Election Commission of India regarding voter identity card of respondent nos.4 and 5.

3. Learned Senior counsel further submitted that prior to the amendment in the Aadhaar Act, word "District Judge" was mentioned in Section 33 of the Aadhaar Act which is now substituted by "Judge of High Court", therefore, the petitioner has no other remedy to file the present writ petition before this Court in order to seek direction from this Court for calling the records of these Aadhaar Cards from the Aadhaar Authority in order to ascertain the correct fact.

4. Learned Senior Counsel further submitted that Section 47 of the Aadhaar Act dealing with cognizance of offence has also been amended and now even "Individual' is also authorised to file complaint before the competent court. He has also relied upon the judgment passed by Hon'ble Supreme Court in the matter

of ***K.S. Puttaswamy (Retired) And Another Vs. Union of India and others reported in (2019) 1 SCC 1,*** in order to show that certain modifications were recommended by the Hon'ble Supreme Court to make this Act more transparent. Learned Senior Counsel has vehemently argued that it is a fit case where this Court could call the records and verify the allegations made by the petitioner and on the basis of said verification, the petitioner could lodge a complaint.

5. On the other hand, learned counsel appearing on behalf of the respondents submitted that in pursuance of the judgment passed by Hon'ble Supreme Court ***K.S. Puttaswamy (Supra),*** certain amendments have been placed before the Parliament through the Aadhaar and other Laws Amendment Act, 2019 which has been passed by both the Lok Shabha and Rajya Sabha and the President have given accent on 23.07.2019, and as such, now an "individual' can also make a complaint before the competent court for any offence punishable under Sections 34 or 35 or 36 or 37 or 40 or 41 of the Aadhaar Act. Therefore, there is no need to exercise the powers conferred by this Court granted under Section 33 of the Aadhaar Act to summon the records as presently allegations made by the petitioner are not established even prima facie and there is no material to substantiate the averments mentioned in the writ petition.

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

7. In order to appreciate the rival submissions advanced by learned counsel for the parties, relevant provisions of the "Aadhaar Act' as amended are mentioned hereinafter;-

"28. Security and confidentiality of information-

(1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to sub-sections (1) and (2), the Authority shall--

(a) adopt and implement appropriate technical and organisational security

measures;

(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

(5) Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:"

"Section 33. Disclosure of Information in certain Cases:- *((1) Nothing contained in sub-section (2) or sub-section (5) of section 28 or sub-section (2) of section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge:*

Provided that no order by the court under this sub-section shall be made without giving an opportunity of hearing to the Authority.

(2) Nothing contained in sub-section (2) or sub-section (5) of section 28 and clause (b) of sub-section (1), sub-section (2) or sub-section (3) of section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government:

Provided that every direction issued under this sub-section, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect:

Provided further that any direction issued under this sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee.

Provided further that any direction issued under this sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee."

Amended provision:-

12. In section 33 of the principal Act,--

(i) in sub-section (1),--

(a) for the words "District Judge", the words "Judge of a High Court" shall be substituted;

(b) in the proviso, after the words "hearing to the Authority", the words "and the concerned Aadhaar number holder" shall be inserted;

(c) after the proviso, the following proviso shall be inserted, namely:--"Provided further that the core biometric information shall not be disclosed under this sub-section.".

(ii) in sub-section (2), for the words "Joint Secretary", the word "Secretary" shall be substituted.

34. Penalty for impersonation at time of enrolment.- *Whoever impersonates or attempts to impersonate another person, whether dead or alive, real or imaginary, by providing any false demographic information or biometric information, shall be punishable with imprisonment for a term which may extend to three years or with a fine which*

may extend to ten thousand rupees or with both.

***47. Cognizance of offences**-(1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorised by it.*

(2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act."

Amended provision-

18. In Section 47 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely:-

"Provided that the court may, on a complaint made by an Aadhar number holder or individual take cognizance of any offence punishable under Section 34 or 35 or 36 or 37 or 40 or Section 41."

8. The Hon'ble Supreme Court in the matter of ***K.S. Puttaswamy (Supra)*** upheld the constitutional validity of Aadhaar Act however, some of the provisions were struck down/read down and clarified. For the purpose of the present case. Following excerpts of the judgment are relevant from the judgment passed by the Apex Court :-

Dr. A.K. Sikri, J:-

"513.5. Section 33(1) of the Act prohibits disclosure of information, including identity information or authentication records, except when it is by an order of a court not inferior to that of a District Judge. We have held that this provision is to be read down with the clarification that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing. If such an order is passed, in that eventuality, he shall also have right to challenge such an order passed by approaching the higher court. During the hearing before the concerned court, the said individual can always object to the disclosure of information on accepted grounds in law, including Article 20(3) of the Constitution or the privacy rights etc.

513.6. Insofar as Section 33(2) is concerned, it is held that disclosure of information in the interest of national security cannot be faulted with. However, for determination of such an eventuality, an officer higher than the rank of a Joint Secretary should be given such a power. Further, in order to avoid any possible misuse, a Judicial Officer (preferably a sitting High Court Judge) should also be associated with. We may point out that such provisions of application of judicial mind for arriving at the conclusion that disclosure of information is in the interest of national security, are prevalent in some jurisdictions. In view thereof, Section 33(2) of the Act in the present form is struck down with liberty to enact a suitable provision on the lines suggested above

513.7. Insofar as Section 47 of the Act which provides for the cognizance of offence only on a complaint made by the Authority or any officer or person authorised by it is concerned, it needs a suitable amendment to include the provision for filing of such a complaint by an individual/victim as well whose right is violated."

Ashok Bhushan, J:-

"789. Section 47 provides as follows:

"47. Cognizance of Offence (1) No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorised by it.

(2) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act."

798. The limitation as contained in Section 47 in permitting taking cognizance of any offence punishable under the Aadhaar Act only on a complaint made by the authority or any officer or person authorised by it, has legislative purpose and objective, as noticed above. We thus do not finnd any unconstitutionality in Section 47 of the Aadhaar Act."

9. The modifications/suggestion suggested by the Supreme Court has been taken care by the amendments made through Amendment Act 2019 which has been passed by the Parliament and thereafter assented by the President.

10. The Right of Privacy is one of the inherent rights granted by Part III of the Constitution. Privacy is the element of human dignity. Right of Privacy cannot be abridged without just, fair and reasonable law. The Hon'ble Supreme Court has opined that the Aadhaar Act has satisfied the triple test laid down in order to adjudge the reasonableness of the invasion to to privacy.

11. From the facts as narrated in the writ petition, it is evident that the submissions made in the writ petition are not sufficient to make out a case under Section 33 of the Aadhaar Act. Submission are not even substantiated by any documentary evidence. The only averments mentioned in the writ petition on the issue is in paragraph 19, 20 and 21, which are mentioned hereinafter:-

"19. That it is appropriate to mention here that respondent no.4 and 5 in the aforementioned criminal revision has attached Aadhaar Card No.642116310070 in the name of Shri Jai Prakash Gupta and Aadhaar Card No.325953054296 by the name of Shri Kiran Bedi Gupta.

20. That it is further submitted that the petitioner his personal contacts came to know that the Aadhaar Card No. 325953054296 was issued to Smt. Roshanara w/o Abdul Jabbar having date of birth shown as 1.1.1968 in the year 2011, the said Aadhaar Card was thereafter updated and the name of Shri Roshanara was changed to Shri Kiran Bedi Gupta and the name of her husband was changed to Shri Jai Prakash Gupta and even the date of birth was changed from 1.1.1968 to 17.5.1963.

21. That it is relevant to mention here that the Aadhaar Card No.325953054296 updated to Smt. Kiran Bedi Gupta is being used by her to represent herself as Smt. Kiran Devi Gupta wife of Shri Jai Prakash Gupta."

The averments made in the aforementioned paragraphs are only bald allegations and cannot be considered to be sufficient for the purpose of Section 33 of the Aadhaar Act.

12. The discloser of information in certain cases, as provided under Section 33 of Aadhaar Act which has now been made more reasonable by recent amendment is based on the reasoning that the discloser of the such information can be objected by the person concerned and no order could be passed without hearing the Aadhaar Authority. Aadhaar Act provides "protection of information', restriction of sharing information under Sections 28 and 29 respectively. Section 30 provides that biometric information shall be deemed to be "sensitive

information'. Therefore, these provisions shall be taken into consideration before passing any order under Section 33 of the Aadhaar Act. In order to exercise power under Section 33 of Aadhaar Act, strong case has to be made out by the aggrieved person. However, in the present case, the petitioner has not able to made out a case for calling the record under Section 33 of the Aadhaar Act. The bald allegations made in para 19, 20 and 21 of writ petition are not sufficient for the purpose. Therefore, we are of the view that in the present facts and circumstances, jurisdiction under Section 33 of Aadhaar Act cannot be exercised by this Court at this stage.

13. Section 33 of the Aadhaar Act prohibits discloser of information without prior order of "Judge of High Court' and now even an individual has a right to be heard and he can oppose discloser on certain grounds including Article 20(3) of the Constitution of India. These strict provisions are for keeping information secret and to upheld the Right of Privacy. Therefore, before an exercise of power under Section 33 of the Aadhaar Act, the Court has to ascertain whether in the facts and circumstances of the case there exists a very strong case to exercise such power.

14. It is also relevant to note here that Shri Jai Prakash Gupta and Shri Kiran Bedi Gupta, who are since deceased as per the case of the petitioner, have been made party in the present writ petition as respondent Nos. 4 and 5 respectively therefore, the petition is also defective on the ground of misjoinder.

15. It may be further noted that amended Section 47 of the Aadhaar Act now provides right to even an "individual' to make a complaint before the competent court regarding commission of offence punishable under the Aadhaar Act. However, the petitioner has not availed such remedy till date.

16. In view of the above discussions, the present writ petition is liable to be rejected at this stage, with the liberty to the petitioner, if so advised to seek remedy as provided under Section 47 of the Aadhaar Act, to file a complaint before the competent court in accordance with law.

With this observation, this petition stands finally ***disposed of.***

(2019)11ILR A1252

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ C No. 24902 of 2019 connected with other cases

Uday Pratap Singh @ Harikesh ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law-U.P. Panchayat Raj Act, 1947 - Section 27 -District magistrate-not notified as prescribed authority in notification u/s 27(2)-procedure under chapter XIII not adhered-surcharge cannot be levied during pending enquiry-impugned order unsustainable.

Writ Petition allowed (E-9)

List of cases cited: -

1. Indu Devi Vs District Magistrate, Chitrakoot & ors., (2006) (3) AWC 2787 (Relied upon)

2.Smt. Bhanati Devi Vs St. Of U.P. & ors., (20170 (2) ALJ 374 (distinguished)

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

1. This batch of writ petitions raises the question of the jurisdiction of the District Magistrate to pass orders of surcharge as envisaged under Section 27 of the **Uttar Pradesh Panchayat Raj Act 1947 ["the Act"].** The principal contention which has been addressed is to the lack of jurisdiction inhering in the District Magistrate to exercise powers comprised in the aforementioned provision. Additionally it has been urged that the impugned orders imposing surcharge upon the petitioners have been passed in clear violation of Chapter XIII of the **Uttar Pradesh Panchayat Raj Rules 1947** [hereinafter for the sake of brevity to be referred to as **"the Rules"**] and more particularly Rules 256-259 as comprised in that Chapter.

2. Bearing in mind the fact that the issue was being raised in repeated petitions, the Court had called upon the State respondents to file affidavits. The matter then again arose in the leading writ petition in which the learned Chief Standing Counsel was directed to obtain instructions and address submissions. On 20 August 2019, this Court passed a detailed order indicating and identifying the issues which arose. Pursuant to the liberty so granted, the State has filed an affidavit dealing with the legal issues raised and the learned Chief Standing Counsel submitted that the said affidavit be adopted in all writ petitions insofar as the legal questions are concerned. The State has also chosen to file independent affidavits in some of the writ petitions. The affidavit dealing with the legal issues was circulated amongst the learned counsels for parties with liberty to respond. Pursuant to that order, responses have been filed by and on behalf of the petitioners. Thereafter the matter was heard and judgment reserved. Before proceeding to deal with the legal issues that have been addressed, the Court deems it apposite to briefly notice the salient facts of each writ petition.

Writ-C No. 24902 of 2019

3. The petition impugns an order dated 06 March 2019 passed by the Chief Development Officer and consequential orders imposing surcharge upon the petitioner. The order records that it is being issued with the approval of the District Magistrate. These orders came to be passed even prior to the issuance of a show cause notice dated 30 May 2019 purporting to initiate proceedings under Section 95(1)(g) of the Act.

Writ-C No. 25964 of 2019

4. The petition impugns orders passed pursuant to directions issued by the District Magistrate holding the petitioner liable to pay surcharge.

Writ-C No. 26493 of 2019

5. The writ petition assails an order imposing surcharge during the pendency of an enquiry initiated under Section 95(1)(g) of the Act read with the **Uttar Pradesh Panchayat Raj (Removal of**

Pradhans, Up Pradhans and Members) Enquiry Rules 1997 ["the 1997 Rules"]. The order impugned has been passed pending a final enquiry and upon the financial and administrative powers of the Pradhan being ceased.

Writ-C No. 29989 of 2019

6. This petition impugns the order of the District Magistrate dated 12 September 2018 seeking to recover surcharge under Section 27 of the Act pending conclusion of enquiry proceedings under the 1997 Rules.

Writ-C No. 30016 of 2019

7. This petition similarly challenges an order passed by the District Magistrate in purported exercise of powers conferred by Section 27 of the Act pending conclusion of enquiry proceedings initiated under the 1997 Rules.

Writ-C No. 17665 of 2019

8. The petition challenges the order of the District Magistrate passed under Section 27 of the Act. Additionally challenge is laid to the order passed by the Appellate Authority affirming the same.

Writ-C No. 12607 of 2019

9. This petition has been preferred by an erstwhile Pradhan assailing the order of the District Magistrate imposing surcharge in purported exercise of powers comprised in Section 27 of the Act.

Writ-C No. 22075 of 2003

10. This petition too is by an erstwhile Pradhan challenging an order of surcharge passed by the District Magistrate.

Writ-C No. 21265 of 2019

11. The petition here also is a former Pradhan who assails an order passed by the District Magistrate imposing surcharge.

Writ-C No. 21097 of 2019

12. This petition is similar to the above and represents a challenge by a Pradhan whose term had come to an end to an order imposing surcharge.

Writ-C No. 21086 of 2019

13. This petition also is by a former Pradhan challenging an order imposing surcharge.

Writ-C No. 28430 of 2019

14. This petition challenges an order issued by the District Magistrate seeking recovery of surcharge during pendency of the enquiry contemplated under the 1997 Rules.

Writ-C No. 27258 of 2019

15 This petition challenges an order of the District Magistrate directing recovery of surcharge. The order itself has been passed in the backdrop of a show cause notice issued calling upon the petitioner to explain why further action under Section 95(1)(g) of the Act be not commenced and a three member interim committee constituted.

Writ-C No. 26873 of 2019

16. The petition assails the order passed by the District Panchayat Raj

Officer requiring the petitioner to deposit the amount of surcharge as computed and as directed by the District Magistrate.

Writ-C No. 26082 and 25734 of 2019

17. These two petitions assail orders passed by the District Magistrate upon conclusion of enquiry proceedings initially commenced under Section 95(1)(g) of the Act. However it becomes pertinent to note that the procedure as prescribed under Rule 6 of the 1997 Rules was neither followed nor a final enquiry as contemplated thereunder undertaken. The orders of surcharge have come to be passed merely on conclusion of an enquiry by the District Magistrate with respect to loss caused.

18. From the brief recordal of the individual facts of each petition, the challenge laid to orders of surcharge passed by the District Magistrate can be conveniently classified as falling broadly in three categories: -

(A) Orders of surcharge simpliciter made by invocation of Section 27 of the Act.

(B) Orders of surcharge passed pending conclusion of a final enquiry under the 1997 Rules and where financial and administrative powers of the concerned Pradhan may or may not have been ceased.

(C) Orders of surcharge passed upon conclusion of a final enquiry conducted in accordance with the 1997 Rules.

19. The power to impose surcharge stands comprised in Section 27 of the Act. That provisions reads thus: -

"27. Surcharge- (1) Every Pradhan or Up-Pradhan of a Gram Panchayat every member of a 3[Gram Panchayat] or of a Joint Committee or any other committee constituted under this Act and every Sarpanch, Sahayak Sarpanch or Panch of a Nyaya Panchayat shall be liable to surcharge for the loss, waste or misapplication of money or property 3[belonging to the Gram Panchayat or Nyaya Panchayat] as the case may be, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan, Up-Pradhan, member, Sarpanch, Sahyak Sarpanch or Panch;

Provided that such liability shall cease to exist after the expiration of the 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 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."

20. Subsection (2) thereof provides that the Prescribed Authority shall fix the amount of surcharge according to the procedure that may be prescribed. The expression *"Prescribed Authority"* is defined in Section 2(q) of the Act as under: -

"2[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 Parishad or the Kshettra Samiti, 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;"

21. By virtue of a notification dated 31 May 1969, Chapter XIII came to be inserted in the Rules. Rules 256-259 set out the procedure for imposition of surcharge. Those rules are extracted herein below: -

"Rule 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, Memher, 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.

Note- Any information required by the Chief Audit Officer, Cooperative Societies and Panchayats or any officer subordinate to him not below the rank of Auditor, Panchayats for preliminary enquiry, shall be furnished and all connected papers and records shall be shown to him by the Pradhan immediately on demand.

(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.

(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."

22. The power to impose surcharge under the Act and the Rules has been framed in order to recover the loss, waste or misapplication of money or property belonging to a Gram Panchayat, if that loss, waste or misapplication be as a direct consequence of the neglect or misconduct of a Pradhan, Member, Sarpanch, Sahayak Sarpanch or Panch. As is evident from a reading of the proviso appended to Section 27(1) the liability to make good such loss or waste ceases to exist upon expiration of a period of ten years from the occurrence of such loss or five years from the date when the person liable ceases to hold office whichever be later. Section 27(2) provides that the Prescribed Authority shall fix the amount of surcharge according to the procedure that may be prescribed and thereafter certify the amount to the Collector who on being satisfied that the said amount is due, realise the same as if it were arrears of land revenue. Section 27(3) creates an appellate forum providing an opportunity to an aggrieved person to assail the order of the Prescribed Authority fixing the amount of surcharge by preferring an appeal against that order either to the State Government or such other Appellate Authority as may be prescribed.

23. It becomes relevant to note here that Section 2(q)(ii) defines a Prescribed Authority to be such as may be notified by the State Government whether generally or for any particular purpose. This Court is really not concerned with the provisions made in Section 2(q)(i) since Schedule-III of the **Uttar Pradesh Kshetra Panchayat And Zila Panchayat Adhiniyam 1961** admittedly does not deal with the levy of surcharge. It is apposite to note at the outset itself that despite repeated opportunities, learned Chief Standing Counsel was unable to place for the consideration of the Court

any notification issued by the State Government designating or appointing a Prescribed Authority in accordance with Section 2(q)(ii) read with Section 27(2). The Court's attention was drawn only to a notification of 30 July 1966 in terms of which the Commissioner of the Division was designated as the *"appellate prescribed authority"* with reference to Section 27(2). The relevant extracts of that notification are reproduced herein below: -

"[210] English translation of Panchayat Raj Vibhag Notification No.4191-K/XXXIII-6-64, dated 27th July, 1996, publishing in U.P. Gazette, Pt. I, dated July 30, 1966, p. 3961.

In exercise of the powers under clause (q) of Section 2 of the U.P. Panchayat Raj Act, 1947 (U.P. Act No.XXVI of 1947), the Governor of Uttar Pradesh is pleased to notify the authorities indicated in column 2 of the Schedule below as prescribed authorities for purposes of the sections and rules mentioned in column 1 thereof in respect of the whole of Uttar Pradesh except the districts of Uttar Kashi, Pithoragarh and Chamoli :

SCHEDULE

Section or rule	Prescribed Authority
1	2
.....	
27(2) · ·	Commissioner of the Division as the appellate prescribed authority.
.....	

---

24. It is pertinent to note that Section 27(2) does not deal with the provision of appeal which is exclusively governed by subsection (3) thereof. Although the expression "Prescribed Authority" is employed in Section 27(2) the notification in question refers to the Commissioner of the Division as the "appellate prescribed authority". Surely and in light of the structure of Section 27 the Appellate and Prescribed Authority cannot possibly be the same person. That provision does not envisage a dual role of Prescribed and Appellate Authority being performed or discharged by one individual. However this anomaly could not be explained by the learned Chief Standing Counsel. In any case, it becomes relevant to underline that no notification was either relied upon or placed before the Court to establish that the District Magistrate had been designated as the Prescribed Authority for the purposes of Section 27(2).

25. The Court then proceeds to the provisions engrafted in Chapter XIII of the Rules. The rule making power is comprised in Section 110 of the Act. Section 110 (2)(xlvi) confers powers upon the State Government to frame rules in respect of matters that are to and may be prescribed. Apart from this provision no other part of Section 110(2) specifically deals with the subject of surcharge or the provisions made in Section 27 of the Act. This provision, therefore, appears to be the only source of power entitled to be read in support of the provisions made in Chapter XIII of the Rules. This

additionally since Section 27(2) provides that the Prescribed Authority shall fix the amount of surcharge "*according to the procedure that may be prescribed*".

26. Rule 256 envisages an enquiry being initiated and undertaken by the Chief Audit Officer, Cooperative Societies and Panchayat in case he consider that loss, waste or misuse of monies or property has occurred as a direct consequence of the negligence of a Pradhan or officer or servant of the Gram Panchayat. Upon the Chief Audit Officer being of that opinion, he is empowered to elicit an explanation from the Pradhan, officer or servant of the Gram Panchayat to explain why he not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gram Panchayat or its property. Rule 256 then constructs a dichotomy between Pradhan, Pradhans, Up-Pradhans and members of the Gram Panchayat on the one hand and officers and servants of that local body on the other. The explanation, which the Chief Audit Officer requires, is to be called through the District Magistrate in the case of Pradhans, Up-Pradhans and members and through the District Panchayat Raj Officer in the case of officers and servants. Rule 256(2) enumerates the contingencies in which the Chief Audit Officer may call for an explanation. Rule 256(3) then confers the right upon the Pradhan, Up-Pradhan, member officer or servant from whom an explanation has been called to move the concerned Gram Panchayat for inspection of records connected with the requisition for surcharge. In terms of the provisions made in sub-rules (1) and (3) of Rule 256, the Chief Audit Officer is obliged to grant time not exceeding two months for the furnishing of an explanation in respect of the requisition for surcharge. The Chief Audit Officer in terms of Rule 256(3) is also empowered to grant a reasonable extension of time for submission of an explanation if circumstances so warrant.

27. Upon expiry of the period prescribed in sub-rules (2) and (3) of Rule 256 and after examining the explanation received by him, the Chief Audit Officer is statutorily required to submit all papers along with his recommendations to the District Magistrate concerned in case of Pradhans, Up-Pradhans and members and to the District Panchayat Raj Officer in the case of officers and servants. This provision is made and put in place in terms of Rule 257. The District Magistrate or the District Panchayat Raj Officer after examining and considering the explanation, if any, that may be submitted call upon the Pradhan, Up-Pradhan, member, officer or servant to pay the whole or part of the sum of surcharge for which he has been found liable in accordance with Rule 257(2). The first proviso to Rule 257(2) then states that the District Magistrate or the District Panchayat Raj Officer may not order the recovery of surcharge if they be satisfied that the loss was caused by an act of the Pradhan, Up-Pradhan, member, officer or servant in the *bona fide* discharge of their duties. In terms of the second proviso to Rule 257, the loss, waste or misuse which occurs as a result of a resolution of the Gram Panchayat or any of its committees shall be recovered equally from amongst all members of that local body who are reported to have participated in the passing of such resolution.

28. Significantly, the fourth proviso then prescribes that the Pradhan, Up-

Pradhan, member, officer or servant shall not be liable to surcharge 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 when the Pradhan, Up-Pradhan, member, officer or servant ceases to be the holder of the said position in the Gram Panchayat whichever be later. The fourth proviso to Rule 257(2) thus constructs and prescribes a period of limitation in stark contrast and conflict with the first proviso to Section 27(1) which prescribes the limitation to be 10 or 5 years whichever be later in identical contingencies. However the Court only notices this aspect and does not deem it necessary to dwell on this issue further since the validity of this part of Rule 257 is not subject matter of the questions raised in this batch.

29. In terms of Rule 258, any person aggrieved by an order of surcharge passed by the District Magistrate under Rule 256 may appeal to the Commissioner of the Division if the order of surcharge be one made against the Pradhan, Up-Pradhan or the member of the Gram Panchayat. In case the order of surcharge is one that is made against an officer or servant of the Gram Panchayat, Rule 258(2) entitles them to assail the same by way of an appeal to the District Magistrate. Rule 259 mandates that the amount of surcharge to which the Pradhan, Up-Pradhan, member, officer or servant has been held liable, shall be paid within three months from the date of communication of the order requisitioning surcharge. The proviso to Rule 259(1) places this liability in abeyance during the pendency of any appeal that may be preferred under Rule 258. Rule 259(2) then prescribes that if the amount of surcharge is not paid within the time specified, it shall be recovered as arrears of the land revenue.

30. Addressing submissions on behalf of the petitioners, it has been contended that the District Magistrate has not been empowered under Section 27 to make an order of surcharge. The petitioners would contend that in the absence of any notification designating the District Magistrate as the Prescribed Authority for the purposes of Section 27(2), the orders impugned are rendered unsustainable. Referring to the provisions made in the Rules, it was contended that none of the impugned orders were preceded by any enquiry initiated or undertaken by the Chief Audit Officer in accordance with Rule 256. In the absence of the provisions of Rule 256 having been adhered to, it was contended that the District Magistrate could not independently and in the absence of a recommendation in that respect of the Chief Audit Officer existing proceed to pass orders for recovery of surcharge. The petitioners then contend that the order of surcharge cannot be passed during the pendency of an enquiry under Section 95(1)(g). It was submitted that the financial and administrative powers of a Pradhan come to be ceased by virtue of powers enshrined in the proviso to Section 95(1)(g) where the competent authority is *prima facie* of the opinion that the Pradhan has committed financial or other irregularity. It was submitted that since this power comes to be invoked at a stage where the competent authority has only reached a *prima facie* conclusion, the impugned orders seeking to recover surcharge are clearly unsustainable. Reliance was placed upon the provisions made in the **1997 Rules** to submit that even after the competent authority arrives

at a conclusion that a formal enquiry is warranted in light of the material gathered in the course of the preliminary enquiry, those rules lay down a detailed procedure for an in-depth enquiry being initiated and undertaken thereafter. It was pointed out that in that enquiry charges are framed and the response of the Pradhan elicited and only after regular proceedings which include the examination of witnesses are completed that an order of removal may ultimately come to be passed. It was submitted that the imposition of surcharge at the stage of conclusion of a preliminary enquiry is wholly illegal and in any case violative of the law as laid down by the Division Bench of the Court in **Indu Devi Vs. District Magistrate, Chitrakoot and Others1.**

31. In **Indu Devi** the Division Bench after examining the scheme of the Act held thus:

9. A perusal of the Scheme under Section 27 of the Act indicates that a Pradhan is liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such is direct consequence of his neglect or misconduct while he was such Pradhan. The said finding of misconduct as referred to in Section 27 can be based from the inquiry under Section 95(1)(g) when the misconduct is proved against the Pradhan. On the basis of finding of misconduct under Section 95(1)(g) of the Act, it is open for the competent authority to issue surcharge notice and pass appropriate orders. The competent authority may also independently direct for surcharge under Section 27 of the Act and pass appropriate orders after being satisfied with the misconduct.

...

11. The *prima facie* finding of the competent authority under Section 95(1)(g), proviso is not same as finding of misconduct as contemplated under Section 27 of the Act. We are satisfied that on the basis of mere *prima facie* finding of guilt, the order of surcharge could not have been passed under Section 27 of the Act.

...

13. In view of the aforesaid, we are satisfied that without conclusion of final inquiry under Section 95(1)(g) of the Act with regard to finding of misconduct on the part of the Pradhan, the order of surcharge could not have been passed." (emphasis supplied)

32. Refuting the afore noted submissions, the learned Chief Standing Counsel submitted that Section 27(2) empowers the imposition of a surcharge in accordance with a procedure that may be prescribed. That procedure, according to the learned Chief Standing Counsel, stands encapsulated in Chapter XIII of the Rules and in view of the provisions made therein the District Magistrate was clearly empowered to pass the impugned orders. According to the learned Chief Standing Counsel since a detailed procedure stands prescribed in Chapter XIII for the imposition of surcharge, the District Magistrate must be recognized as statutorily empowered to requisition the payment of surcharge even in the absence of a notification issued under Section 2(q)(ii) read with Section 27(2). The respondents principally place reliance upon the judgment rendered by a Division Bench of the Court in **Smt. Bhanati Devi Vs. State of U.P. and Others2** to submit that the same is an authority which clearly recognises the power of the District

Magistrate to impose surcharge independent of the provisions made in Section 27 of the Act and in exercise of powers comprised in Section 95(1)(g).

33. In **Bhanati Devi,** the Division Bench held as under:

"12. In the present case much issue is being raised on the fact that in proceedings under Section 95(1)(g) of 1947 Act read with 1997 Rules, the amount in question could not have been directed to be recovered as it has been done in the present case. Learned counsel for the petitioner appellant, in support of his argument, has relied on a judgment of this Court in the case of Indu Devi Vs. District Magistrate, Chitrakoot and others, 2006 (3) AWC 2787: (2006 (2) ALJ 747).

13. The said judgment in question clearly gives the answer to the question posed by the petitioner as in the facts of the said case as therein final enquiry under Section 95 (1) (g) of 1947 Act has not at all been concluded and even then recovery proceedings have been initiated at the stage when proceedings under Section 95(1)(g) of 1947 Act has not been concluded and recovery has been directed, in such a situation, the Division Bench has taken the view that on the basis of mere *prima facie* finding of guilt the order or surcharge could not have been passed under Section 27 of the 1947 Act. This judgment in effect subscribed the view that once finding of Competent Authority has been returned under Section 95(1)(g) of 1947 Act, then based on finding of misconduct as contemplated under Section 27 of the 1947 Act orders of surcharge can be passed. Paragraph 9 of the said judgment provides for as follows:

"A perusal of the Scheme under Section 27 of the Act indicates that a Pradhan is liable to surcharge for the loss, waste or mis-application of money or property belonging to the Gram Panchayat, if such is direct consequence of his neglect or misconduct while he was such Pradhan. The said finding of misconduct as referred to in Section 27 can be based from the inquiry under 95(1)(g) when the misconduct is proved against the Pradhan. On the basis of finding of misconduct under 95(1)(g) of the Act, it is open for the competent authority to issue surcharge notice and pass appropriate orders. The competent authority may also independently direct for surcharge under Section 27 of the Act and pass appropriate orders after being satisfied with the misconduct."

14.The extract of the judgment, quoted above, would go to show that under the scheme of the Act, a Pradhan is liable to surcharge for the loss, waste or mis-application of money or property belonging to Gram Panchayat, if such is direct consequence of his neglect or misconduct while he was Pradhan. The finding of misconduct or negligence that has also resulted in loss, waste or mis-application of money or property can be arrived at in proceedings under Section 95(1)(g) of the 1947 Act read with 1997 Rules and when misconduct/negligence is proved in the said enquiry, it is also open to the authority to issue surcharge notice and pass appropriate order. Thus where misconduct/negligence is substantiated in the enquiry, then simultaneously as District Magistrate is competent to pass order of removal and can also pass order of surcharge, the proceedings on this score cannot be faulted. Once there is duality of authority conferred in District Magistrate and the requirement under the

Rules is that direction for surcharge should be preceded by show- cause notice, then the composite notice issued under Section 95 (1)(g) of the 1947 Act read with 1997 Rules and Section 27 (2) for surcharge cannot be faulted. The competent authority is also free to independently direct for surcharge under Section 27 of the Act and pass appropriate order after being satisfied with the misconduct/negligence.

...

17. In the present case accepted position is that proceedings under Section 95(1)(g) of the 1947 Act read with 1997 Rules has been undertaken and at the point of time when notice has been given to the petitioner appellant, she has been categorically informed that she has caused loss and for causing loss she can be removed and amount in question can also be recovered from her. Once proceedings are undertaken under Section 95(1)(g) of the 1947 Act for removal of Pradhan and therein misconduct/negligence is substantiated, that has the impact of causing loss, waste or mis-application of money or property belonging to Gram Panchayat, then based on the same, apart from passing order of removal, the Competent Authority, as is provided for under Section 27 read with Rules 256, 257 and 258 of the U.P. Panchayat Raj Rules, 1947, recovery can also be directed and in the present case what we find from the record is that the Competent Authority under Section 95(1)(g) of the 1947 Act read with 1997 Rules alongwith Section 27 read with Rules 256, 257 and 258 of the U.P. Panchayat Raj Rules, 1947, the District Magistrate has given notice to the petitioner appellant for recovery of the amount in question on account of misconduct and, in view of this, the proceedings, that have been so undertaken, cannot be said to be vitiated on said count whatsoever. The view of learned Single Judge in the case of Sher Ali (supra) is in the teeth of the dictum in the case of Indu Devi (2006 (2) ALJ 747) (supra), as such, the ratio of the case laid down there is not being approved of by us and judicial discipline binds us to follow the ratio of the case as laid down in the case of Indu Devi (supra) by a Co-ordinate Bench of this Court.

18. In view of this, once the final decision was to be taken for removal of Pradhan and the said misconduct also clearly reflected financial loss, then recovery in question can be made, in this backdrop, there is no infirmity in the exercise, that has been so undertaken by the District Magistrate and learned Single Judge is right when he has proceeded to make observation that there is no averment in the entire writ petition that this excess payment has not been paid and that is how the public funds have been misappropriated and defalcated." (emphasis supplied)

34. Section 27 of the Act embodies the power conferred upon the Prescribed Authority to effect recoveries in respect of loss, waste or misapplication of money or property of the Gram or Nyay Panchayat. The recovery is described as a surcharge. The order is liable to be made in case the loss, waste or misapplication of money or property is a direct consequence of the neglect or misconduct of the Pradhan, member, Sarpanch, Sahayak or Panch. In this batch of writ petitions, the Court is principally concerned with the levy of surcharge on Pradhans, present and former and Secretaries or officers of the Gram Panchayat. The proviso to Section 27 (1)

then prescribes a period of limitation for initiation of action for levy of surcharge by providing that the liability would cease to exist upon the expiry of 10 years from the occurrence of the loss or 5 years from the date when the person held liable ceases to hold office whichever be later.

35. Sub section (2) of Section 27 clearly appears to be the key to the question which stands posed. The power to fix surcharge is vested by virtue of this provision in the Prescribed Authority. The expression Prescribed Authority is defined by Section 2 (q) (ii) of the Act to be the authority notified as such by the State Government whether generally or for any particular purpose. We are really not concerned with Section 2 (q) (i) since that relates to subjects enumerated in Schedule III of the **U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam 1961**. The subject of recovery of surcharge by an executive order, admittedly, is not dealt with in Schedule III of that enactment.

36. The primary question issue which immediately arises is whether the District Magistrate has been duly notified to be the *"Prescribed Authority"*. The unequivocal answer to that question must be in the negative. The State has been unable to place for the consideration of the Court any notification in terms of which the District Magistrate may have been specified or designated as the *"Prescribed Authority"*. Although reference was made to a notification dated 30 July 1966, as noticed above, that does not resolve the issue since it merely speaks of the Commissioner of the Division and that too in the context of being the "appellate prescribed authority". The evident and apparent anomaly in the expression used was not explained by the respondents. This issue arises since undisputedly the Commissioner cannot possibly perform or discharge a dual role of both the Prescribed and Appellate Authority. In any case even if it were assumed that the intent was to designate the Commissioner as the Prescribed Authority, then too the impugned orders must fall since they have come to be made by the respective District Magistrates. Viewed in the alternative of it being a notification prescribing an appellate authority, the Court notes that the notification refers to Section 27 (2). The subject of appeal against an order imposing surcharge is not dealt with in Section 27(2) at all. Appeals are dealt with exclusively by sub section (3) of Section 27. The singular and significant conclusion that the Court arrives at is that the notification of 30 July 1966 cannot be recognised as repository of either a conferment of power upon the District Magistrate to impose surcharge nor can it be viewed or accepted as a designation of the District Magistrate as the *"Prescribed Authority"* for the purposes of Section 27(2). If this notification were accepted as one designating the Commissioner as the Prescribed Authority, then too the impugned orders cannot be sustained. It may additionally and in all fairness be noted that even the learned Chief Standing Counsel did not urge that the State recognises the Commissioner as the Prescribed Authority by virtue of this notification.

37. The Court then proceeds to consider the submission addressed on behalf of the respondents that the provisions made in the Rules must be recognised as sufficient compliance with the provisions of Section 27 (2) and a

prescription of the District Magistrate as the Prescribed Authority. However this Court finds itself unable to sustain the contention for the following reasons. Firstly the usage of the expression *"Prescribed Authority"* in Section 27(2) can neither be understood nor interpreted without referring to or in ignorance of Section 2 (q)(ii). Secondly the framing of the Rules must be read in light of the requirement placed by Section 27(2) of surcharge being recovered *"according to the procedure that may be prescribed...."*. Sub section (2) of Section 27 neither empowers nor authorises the respondents to designate a Prescribed Authority by way of a rule or piece of subordinate legislation. It only permits and sanctions the prescription of a *"procedure"* for recovery of surcharge. It is to that extent alone that the rule making power comprised in Section 110 can be brought to bear. In any case the mere power to prescribe a procedure does not and cannot dilute the rigour of complying with Section 2(q)(ii). The submission of the respondents urged in this context is consequently rejected.

38. The Court then proceeds to consider whether the impugned orders have been made in accordance with the procedure prescribed in Chapter XIII of the Rules. As noticed hereinabove, the proceedings in terms of Rule 256 are envisaged to commence upon an enquiry being initiated by the Chief Audit Officer. It is only upon conclusion of that enquiry and the drawl of recommendations by the Chief Audit Officer that the District Magistrate or the District Panchayat Raj Officer come into the fray as per Rule 257. However in none of these petitions was the procedure prescribed in these Rules followed. None of the orders impugned in this batch of petitions were established to have been made in compliance with the procedure prescribed in Rules 256-258. The role assigned to the Chief Audit Officer, it becomes pertinent to note, is not without purpose. This becomes evident when one bears consideration upon the situations in which the enquiry is liable to be undertaken. The situations and instances in which such an enquiry is liable to be initiated are duly enumerated in Rule 256(2). It is perhaps bearing in mind the nature and subject matter of the enquiry to be undertaken that a particular role has been assigned to the Chief Audit Officer. The Court only seeks to emphasise that the involvement of the Chief Audit Officer and the assignment of a preliminary fact finding role to that authority appears to be indicative of the imperatives of his involvement in light of the nature of the enquiry which is liable to be undertaken and the issues that would need to be examined therein.

39. In any case the undisputed position which emerges in this batch is that the procedure prescribed under Chapter XIII was not adhered to. The Court consequently arrives at the irresistible conclusion that the impugned orders are rendered wholly unsustainable on this ground also.

40. That then takes the Court to consider whether an order of surcharge could have been passed during the pendency of an enquiry contemplated under the 1997 Rules. As noted in the opening parts of this decision most of the writ petitions which fall in this category relate to orders of surcharge passed during the pendency of an enquiry contemplated under the 1997 Rules. In

some cases, the orders of surcharge have come to be passed simultaneously with orders ceasing the financial and administrative powers of the concerned Gram Pradhan. The jurisdiction to cease the financial and administrative powers of the Pradhan is exercised in light of the proviso appended to Section 95(1)(g). A careful reading of that proviso establishes that this jurisdiction is exercised at a stage where the competent authority is *prima facie* of the opinion that the concerned Pradhan or Up-Pradhan has committed financial or other irregularities. The *prima facie* opinion so formed cannot possibly be recognized as conferring power on the authority to command a recovery of surcharge. Since the jurisdiction to cease financial and administrative powers is itself exercised at a stage where only a preliminary and tentative satisfaction of wrongdoing has been arrived at, that cannot form the basis for imposition of surcharge. The Court finds itself unconvinced to sanction to the respondents a power to recover surcharge at this stage since it would not only be legally impermissible, it would also amount to holding the Pradhan, officer or employee guilty of misconduct even before a final and conclusive finding in that respect comes to be entered. The Pradhan, officer or servant of the Gram Panchayat cannot possibly be held liable to make good the alleged loss caused even before they are actually held guilty in the final enquiry that is contemplated under the 1997 Rules. This issue is no longer *res integra* and stands concluded in light of the decision rendered by the Division Bench in **Indu Devi.** The Division Bench in **Indu Devi** in unequivocal terms held that the *prima facie* finding under Section 95(1)(g) cannot be equated with a finding of misconduct contemplated under Section 27. **Indu Devi,** therefore is a binding authority in respect of the proposition that an order of surcharge cannot be passed on the mere *prima facie* recordal of a finding of guilt.

41. That only leaves the Court to consider the decision in **Bhanati Devi** which was relied upon by the learned Chief Standing Counsel in support of his contention that the District Magistrate while undertaking an enquiry under Section 95(1)(g) is also empowered to requisition recovery of surcharge. As this Court reads the decision in **Bhanati Devi,** it finds itself unable to sustain this submission for the following reasons.

42. **Bhanati Devi** was a decision in which findings of misconduct had come to be entered in a final enquiry and an order of removal proposed to be passed. While proposing to remove the elected representative there the District Magistrate also called upon her to show cause why surcharge be not levied and recovered. It was in that context that the Court came to hold that once the District Magistrate is satisfied that an order of removal must be passed, he can also simultaneously direct recovery of surcharge. It becomes pertinent to note that the Court while rendering judgment in **Bhanati Devi** noticed and approved the decision in **Indu Devi. Bhanati Devi**, therefore, cannot be viewed as an authority laying down a principle contrary to what was found in **Indu Devi.** All that can be gathered from **Bhanati Devi** is recognition of the authority of the District Magistrate to simultaneously direct removal and recovery of surcharge where in the final enquiry allegations of misappropriation or loss have come to be

conclusively recorded. However in none of these writ petitions was a final enquiry as contemplated under Rule 6 of the 1997 Rules concluded nor were any conclusive findings of misconduct, misappropriation or loss in accordance with the procedure prescribed thereunder recorded. The impugned actions consequently cannot be sustained even on the principles as formulated in **Bhanati Devi**.

43. On a consideration of the aforesaid conclusions the Court holds: -

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;

F. The *prima facie* findings of wrongdoing arrived at during the course of or in contemplation of an enquiry initiated under Section 95(1)(g) cannot form the foundation for levy or recovery of surcharge.

44. Accordingly and for the reasons noted above, all these writ petitions shall stand **allowed**. The impugned orders levying surcharge as also all consequential directions for recovery shall consequently quashed. It is however left open to the State respondents, if so chosen and advised, to proceed further in accordance with law bearing in mind the conclusions recorded in this judgment.

(2019)11ILR A1268

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 25502 of 2019

Ahmad Ullah ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Azizur Rahman Khan

Counsel for the Respondents:
A.S.G.I., Sri Vikas Budhwar, Sri Yogendra Kumar

A. Administrative Law – Allotment of retail dealership - Natural Justice - Category of Petitioner changed from Group 1 to Group-3 for retail outlet dealership-no reason provided - impugned order quashed.

Held: - It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it. (Para 8)

Writ Petition allowed (E-9)

List of cases cited: -

1. Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs Shukla & Brothers, (2010) 4 SCC 785

2. M/s Travancore Rayon Ltd. Vs UOI, (1969) (3) SCC 868

3.S.N. Mukherjee Vs UOI, (1990) 4 SCC 594

4. Dharampal Satyapal Ltd. Vs Depyty Commissioner of Central Excise, Gauhati & ors., (2015) 8 SCC 519

5. J. Ashoka Vs University of Agricultural Sciences & ors., (2017) 2 SCC 609

6. Kranti Associates Pvt. Ltd. & anr. Vs Masood Ahmed Khan & ors., (2010) 9 SCC 496

7. Nanak Chand Sharma Vs St. of U.P. & 3 ors.-Writ C No. 18164 of 2018

(Delivered by Hon'ble Piyush Agarwal, J.)

1. We have heard Shri Azizur Rahman Khan, learned counsel for the petitioner and Shri Vikas Budhwar, learned counsel for the respondent nos. 2 & 3.

2. By means of the present writ petition, the petitioner is challenging the order dated 13.07.2019 passed by the respondent no. 3; whereby, the petitioner's candidature for Retail Outlet Dealership in Group - 1 category has been rejected and the same has been changed to Group - 3 category.

3. The facts of the case, in brief, are that on 25.11.2018, an advertisement was issued for selection of retail outlet dealership by the respondent - Hindustan Petroleum Corporation Limited (HPCL) for different locations. The petitioner, vide online application dated 21.12.2018, applied for the location on Dumariyaganj - Bansi road, Village - Sekhui, Tappa - Hallour, Block - Dumariyaganj, District - Siddharth Nagar. Thereafter, vide letter/e-mail dated 20.06.2019, the petitioner was declared successful in draw of lots for the retail outlet dealership in Group - 1 category and the petitioner was asked to submit certain documents and security amount. Pursuant to the aforesaid letter, the petitioner deposited the security amount of Rs. 40,000/- on 26.06.2019, along with the documents.

4. Thereafter, by the impugned letter/order dated 13.07.2019, the petitioner's candidature for Retail Outlet Dealership was changed from Group - 1 to Group - 3. The petitioner has been further informed that his candidature for retail outlet dealership may be considered for selection along with Group - 3 category as per the guidelines.

5. Learned counsel for the petitioner submits that the order dated 13.07.2019

has been passed in gross violation of the principles of natural justice and without affording an opportunity of hearing to the petitioner. He further submits that no reason has been assigned in the impugned order for rejecting the claim of the petitioner.

6. Learned counsel for the respondents, on the other hand, submits that the impugned order does not suffer from any illegality and tries to justify the passing of the impugned order.

7. On perusal of the impugned order, we find that the respondent - Corporation has not recorded any conclusion in the impugned order and without assigning any reason, the category of the petitioner for retail outlet dealership has been changed from Group - 1 to Group - 3.

8. It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it.

9. Highlighting this rule, the Hon'ble Supreme Court, in the case of ***Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. Shukla & Brothers,*** (2010) 4 SCC 785, has observed that the administrative authority and the tribunal are obliged to give reasons, absence whereof would render the order liable to judicial chastisement. The relevant paragraphs of the aforesaid judgement are quoted as under:-

"10. The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad.

11. The Supreme Court in the case of S.N. Mukherjee v. Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the Courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-

"11. ...the orderly functioning of the process of review requires that the grounds upon which the administrative

agency acted be clearly disclosed and adequately sustained."

12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from absolute principle of law that the Courts should record reasons for its conclusions to enable the appellate or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

14. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

15. In the case of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], the Supreme Court held as under:-

"6. .....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

16. In the case of Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) SLT 345, the Supreme Court clarified the rationality behind providing of reasons and stated the principle as follows:-

"56. . . Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration in Re, `proper adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. Contradictory reasons are equal to lack of reasons. . . ."

17. In Gurdial Singh Fijji v. State of Punjab [(1979) 2 SCC 368], while dealing with the matter of selection of candidates who could be under review, if not found suitable otherwise, the Court explained the reasons being a link between the materials on which certain conclusions are based and the actual conclusions and held, that where providing reasons for proposed supersession were essential, then it could not be held to be a valid reason that the concerned officer's record was not such as to justify his selection was not contemplated and thus was not legal. In this context, the Court held:-

"... "Reasons" are the links between the materials on which certain conclusions are based and the actual conclusions. The Court accordingly held that the mandatory provisions of Regulation 5(5) were not complied with by the Selection Committee. That an officer was "not found suitable" is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give anything approaching the judgment of a Court, but it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List."

This principle has been extended to administrative actions on the premise that it applies with greater rigor to the judgments of the Courts.

18. In State of Maharashtra v. Vithal Rao Pritirao Chawan [(1981) 4

SCC 129], while remanding the matter to the High Court for examination of certain issues raised, this Court observed:

". . . It would be for the benefit of this Court that a speaking judgment is given."

19. In the cases where the Courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the Court of competent jurisdiction are challenged in absence of proper discussion. The requirement of recording reasons is applicable with greater rigor to the judicial proceedings. The orders of the Court must reflect what weighed with the Court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court.

20. A Bench of Bombay High Court in the case of M/s. Pipe Arts India Pvt. Ltd. V. Gangadhar Nathuji Golamare [2008 (6) Maharashtra Law Journal 280], wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held:-

"8. The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh v. Union of India and Ors. 1995 (Suppl) 2 SCC 83, the Court held as under:

"8. ...His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made."

10. In the case of Jawahar Lal Singh v. Naresh Singh and Ors. (1987) 2 SCC 222, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

12. In the case of State of Punjab and Ors. v. Surinder Kumar and Ors. [(1992) 1 SCC 489], while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the

Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In the case of Hindustan Times Ltd. v. Union of India and Ors. [(1998) 2 SCC 242], the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

14. Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of State of U.P. v. Battan and Ors. [(2001) 10 SCC 607], the Supreme Court held as under:

"4. ...The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable."

15. Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha v. State of Bihar and Ors. JT 2003 (Supp.2) SC 354.

16. In a very recent judgment, the Supreme Court in the case of State of Orissa v. Dhaniram Luhar (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R. In Breen v. Amalgamated Engg. Union observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary

requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

17. Following this very view, the Supreme Court in another very recent judgment delivered on 22nd February, 2008, in the case of State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007) stated that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless."

18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law,mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Blackrobed Bureaucracy Or Collegiality Under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:-

"My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not."

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant.Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:-

"When reasons are announced and can be weighed, the public can have

assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

"The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and

(4) to provide reasons for an appeal Court to consider."

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge

found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award. The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

21. The principles stated by this Court, as noticed supra, have been reiterated with approval by a Bench of this Court in a very recent judgment, in State of Uttaranchal v. Sunil Kumar Singh Negi [(2008) 11 SCC 205], where the Court noticed the order of the High Court which is reproduced hereunder:-

"I have perused the order dated 27.5.2005 passed by Respondent 2 and I do not find any illegality in the order so as to interfere under Article 226/227 of the Constitution of India. The writ petition lacks merit and is liable to be dismissed."

and the Court concluded as under:-

"In view of the specific stand taken by the Department in the affidavit which we have referred to above, the cryptic order passed by the High Court cannot be sustained. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in State of U.P. v. Battan1. About two decades back in State of Maharashtra v. Vithal Rao Pritirao Chawan the desirability of a speaking order was highlighted. The requirement of indicating reasons has been judicially recognised as imperative. The view was reiterated in Jawahar Lal Singh v. Naresh Singh.

10. In Raj Kishore Jha v. State of Bihar this Court has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

"11. 8. ... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;..

12. In the light of the factual details particularly with reference to the stand taken by the Horticulture Department at length in the writ petition and in the light of the principles enunciated by this Court, namely, right to reason is an indispensable part of sound judicial system and reflect the application of mind on the part of the court, we are

satisfied that the impugned order of the High Court cannot be sustained."

22. Besides referring to the above well-established principles, it will also be useful to refer to some text on the subject. H.W.R. Wade in the book "Administrative Law, 7th Edition, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

".....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice...

.....Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself....."

23. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be.

24. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be.

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem

to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. By practice adopted in all Courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of Alexander Machinery (Dudley) Ltd. (supra), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate.

28. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate."

10. We find that the authority concerned has only recoded its conclusion without assigning any reason. It is a well settled law that the administrative order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion. The absence of reason makes an order unsustainable. One of the most important aspects for insisting to record reason is that it substitutes the subjectivity with objectivity. It is also treated as a part of natural justice and fair play.

11. In the case of ***M/s Travancore Rayon Ltd. v. Union of India,*** 1969 (3) SCC 868 the Supreme Court has held as under:

"11. ...The communication does not disclose the "points" which were

considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

12. The aforesaid said judgment has been quoted with approval by the Constitution Bench of the Supreme Court in the case of ***S.N. Mukherjee Vs. Union of India, (1990) 4 SCC 594.***

13. The Constitution Bench of the Hon'ble Supreme Court in the case of ***S.N. Mukherjee*** (supra) has emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise".

14. The Hon'ble Supreme Court, in the said judgement, has emphasised the importance of recording a reason for decision by the administrative authority and the Tribunal to enable the Courts to exercise the power of review in consonance with the settled principle and the authorities are advised of the consideration underlining the action under review.

15. The Hon'ble Supreme Court has consistently taken the view that recording of reason is an essential feature of dispensation of justice. A litigant, who approaches the Court with a grievance in accordance with law, is entitled to know the reason for grant or rejection of his prayer. An administrative order without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Authority in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that administrative order.

16. The Hon'ble Supreme Court in the case of ***Dharampal Satyapal Limited Vs. Depyty Commissioner of Central Excise, Gauhati & Others,*** (2015) 8 SCC 519 has held as under:-

"19. What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable

and inextricable part of the doctrine of principles of natural justice?

20. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'. Moral naturalism captures the essence of commonsense morality - that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi- judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. <u>It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'."</u>

17. The Hon'ble Supreme Court in the case of ***J. Ashoka Vs. University of Agricultural Sciences & Others,*** (2017) 2 SCC 609 has held as under:-

"22. In G. Durga Nageshwari, it was held as under:-

"9. The above case no doubt interpreted the Indian Administrative Service Regulations. Regulation 5(5) of the said Regulations required recording of reasons for supersession. But as can be seen from the above paragraph of the Judgment, the Supreme Court based its conclusion on the right to equality guaranteed under Articles 14 and 16(1) of the Constitution and observed that recording or reasons for overlooking the claim of a person who is above and select a person below was necessary. The said principle was applied by this Court in the case of T.K. Devaraju v. State of Karnataka, ILR 1988 KAR 2084. This Court pointed out that the Regulation 5(5) of the Indian Administrative Service Regulation was only for the purpose of giving effect to Article 14 and 16(1) of the Constitution and the position would be the same even in the absence of such a regulation because of recording of reasons is the only way to ensure obedience to the fundamental right guaranteed under Articles 14 and 16(1). Therefore, in our opinion, Clause (4) of Statute 30 must be read along with Articles 14 and 16(1) of the Constitution, for the reasons, the University of Agricultural Sciences is state as defined

in Article 12 of the Constitution and hence bound by the Articles included in the Fundamental Rights Chapter. Therefore, when under Clause (2) of Statute 30, a Selection Committee constituted for making selection on the basis of the performance of the candidate at the interview recommends the names in the order of merit, the power of the Board of Regents to choose best among them means normally it should proceed in the order of merit as arranged by the Selection Committee, and if it is of the view that any person placed lower is the best, it can do so, but it has to record reasons. If reasons are recorded then it can be said that the provisions of Articles 14 and 16(1) are complied with. But if a person placed below is appointed without assigning any reason, there is no other alternative than to hold that such a selection and appointment is arbitrary and violative of Articles 14 and 16(1) of the Constitution.

10. In the present case, it is not disputed that no reasons had been recorded by the Board of Regents as to why the 2nd respondent was selected for appointment in preference to the petitioner though the petitioner was placed at Sl. No. 1 and the 2nd respondent was placed at Sl. No. 3. The learned Counsel for the University submitted that reasons were not recorded in view of the earlier decision of this Court in Keshayya's case in which it was held that the Board of Regents had the power to select any one of the persons whom it considers best and make the appointment. But the precise question raised in this case and which was not raised in Keshayya's case is as to whether the Board of Regents could do so without assigning any reason. As shown earlier, the recording of reasons is a must having regard to the right guaranteed to the citizens under Articles 14 and 16(1) of the Constitution. Therefore, we are of the view that whenever the Board of Regents considers that a person placed lower in merit in the list of selected candidates recommended by the Selection Committee, it can do so only by recording reasons as to why the case of the person placed above is being overlooked and the person below is considered the best for being appointed. In the present case, no reasons have been recorded, may be for the reason the Board considered that it was unnecessary as stated by the learned Counsel. He however submitted that the Board of Regents has stated that respondent-2 is more suitable than the petitioner. That is the conclusion and not the reason. That conclusion must be preceded by the reason which is wanting in this case"

24. Reasons are the links between materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject - matter for a decision whether it is purely administrative or quasi - judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We, therefore, are of the considered opinion that the relevant provisions of the Statute were fully complied with."

18. Further, the Hon'ble Supreme Court in the case of ***Kranti Associates Private Limited & Another Vs. Masood Ahmed Khan & Others,*** (2010) 9 SCC 496 has held as under:-

"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases.

Initially this Court recognized a sort of demarcation between administrative orders and quasi- judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in A.K. Kraipak and others vs. Union of India and others reported in AIR 1970 SC 150.

13. In Kesava Mills Co. Ltd. and another vs. Union of India and others reported in AIR 1973 SC 389, this Court approvingly referred to the opinion of Lord Denning in Rigina vs. Gaming Board Ex parte Benaim [(1970) 2 WLR 1009] and quoted him as saying "that heresy was scotched in Ridge and Boldwin, 1964 AC 40".

14. The expression `speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See 1878-97 Vol. 4 Appeal Cases 30 at 40 of the report)

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the `inscrutable face of a Sphinx'.

16. In the case of Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala and others, AIR 1961 SC 1669, the question of recording reasons came up for consideration in the context of a refusal by Harinagar to transfer, without giving reasons, shares held by Shyam Sunder. Challenging such refusal, the transferee moved the High Court contending, inter alia, that the refusal is mala fide, arbitrary and capricious. The High Court rejected such pleas and the transferee was asked to file a suit. The transferee filed an appeal to the Central Government under Section 111 Clause (3) of Indian Companies Act, 1956 which was dismissed. Thereafter, the son of the original transferee filed another application for transfer of his shares which was similarly refused by the Company. On appeal, the Central Government quashed the resolution passed by the Company and directed the Company to register the transfer. However, in passing the said order, Government did not give any reason. The company challenged the said decision before this Court.

17. The other question which arose in Harinagar (supra) was whether the Central Government, in passing the appellate order acted as a tribunal and is amenable to Article 136 jurisdiction of this Court.

18. Even though in Harinagar (supra) the decision was administrative, this Court insisted on the requirement of recording reason and further held that in exercising appellate powers, the Central Government acted as a tribunal in exercising judicial powers of the State and such exercise is subject to Article 136 jurisdiction of this Court. Such powers, this Court held, cannot be effectively exercised if reasons are not given by the Central Government in support of the order (Para 23, page 1678-79).

19. Again in the case of Bhagat Raja vs. Union of India and others, AIR 1967 SC 1606, the Constitution Bench of this Court examined the question whether the Central Government was bound to pass a speaking order while dismissing a revision and confirming the order of the State Government in the context of Mines and Minerals (Regulation and

Development) Act, 1957, and having regard to the provision of Rule 55 of Mineral and Concessions Rules. The Constitution Bench held that in exercising its power of revision under the aforesaid Rule the Central Government acts in a quasi-judicial capacity (See para 8 page 1610). Where the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying any reason, this Court, exercising its jurisdiction under Article 136, may find it difficult to ascertain which are the grounds on which Central Government upheld the order of the State Government (See para 9 page 1610). Therefore, this Court insisted on reasons being given for the order.

20. In M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302, while dealing with U.P. Sugar Dealers License Order under which the license was cancelled, this Court held that such an order of cancellation is quasi-judicial and must be a speaking one. This Court further held that merely giving an opportunity of hearing is not enough and further pointed out where the order is subject to appeal, the necessity to record reason is even greater. The learned Judges held that the recording of reasons in support of a decision on a disputed claim ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant law and that the decision was just. (See para 7 page 1304).

21. In the case of M/s. Travancore Rayons Ltd. vs. The Union of India and others, AIR 1971 SC 862, the Court, dealing with the revisional jurisdiction of the Central Government under the then Section 36 of the Central Excise and Salt Act, 1944, held that the Central Government was actually exercising judicial power of the State and in exercising judicial power reasons in support of the order must be disclosed on two grounds. The first is that the person aggrieved gets an opportunity to demonstrate that the reasons are erroneous and secondly, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power (See para 11 page 865-866).

22. In M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758, this Court while considering an award under Section 11 of Industrial Disputes Act insisted on the need of giving reasons in support of conclusions in the Award. The Court held that the very requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. The second principle is based on the jurisprudential doctrine that justice should not only be done, it should also appear to be done as well. The learned Judges said that a just but unreasoned conclusion does not appear to be just to those who read the same. Reasoned and just conclusion on the other hand will also have the appearance of justice. The third ground is that such awards are subject to Article 136 jurisdiction of this Court and in the absence of reasons, it is difficult for this Court to ascertain whether the decision is right or wrong (See para 5 page 2761).

23. In Union of India vs. Mohan Lal Capoor and others, AIR 1974 SC 87, this Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service

(Appointment by Promotion Regulation) held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two (See para 28 page 98).

24. In Siemens Engineering and Manufacturing Co. of India Ltd. vs. The Union of India and another, AIR 1976 SC 1785, this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. The learned Judges emphatically said that every quasi-judicial order must be supported by reasons. The rule requiring reasons in support of a quasi- judicial order is, this Court held, as basic as following the principles of natural justice. And the rule must be observed in its proper spirit. A mere pretence of compliance would not satisfy the requirement of law (See para 6 page 1789).

25. In Smt. Maneka Gandhi vs. Union of India and Anr., AIR 1978 SC 597, which is a decision of great jurisprudence significance in our Constitutional law, Chief Justice Beg, in a concurring but different opinion held that an order impounding a passport is a quasi-judicial decision (Para 34, page 612). The learned Chief Justice also held when an administrative action involving any deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision.

26. Justice Y.V. Chandrachud (as His Lordship then was) in a concurring but a separate opinion also held that refusal to disclose reasons for impounding a passport is an exercise of an exceptional nature and is to be done very sparingly and only when it is fully justified by the exigencies of an uncommon situation. The learned Judge further held that law cannot permit any exercise of power by an executive to keep the reasons undisclosed if the only motive for doing so is to keep the reasons away from judicial scrutiny. (See para 39 page 613).

27. In Rama Varma Bharathan Thampuran vs. State of Kerala and Ors., AIR 1979 SC 1918, Justice V.R. Krishna Iyer speaking for a three-Judge Bench held that the functioning of the Board was quasi-judicial in character. One of the attributes of quasi- judicial functioning is the recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. Learned Judge held that natural justice requires reasons to be written for the conclusions made (See para 14 page 1922).

28. In Gurdial Singh Fijji vs. State of Punjab and Ors., (1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in Capoor (supra), held that "rubber-stamp reason" is not enough and virtually quoted the observation in Capoor (supra) to the extent that reasons "are the links between the materials on which certain conclusions are based and the actual conclusions." (See para 18 page 377).

29. In a Constitution Bench decision of this Court in Shri Swamiji of Shri Admar Mutt etc. etc. vs. The

Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors., AIR 1980 SC 1, while giving the majority judgment Chief Justice Y.V. Chandrachud referred to Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows:

"Ces-sante Ratione Legis Cessat Ipsa Lex"

30. The English version of the said principle given by the Chief Justice is that:

"29. ....Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." (See para 29 page 11).

31. In M/s. Bombay Oil Industries Pvt. Ltd. vs. Union of India and Others, AIR 1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its previous decisions in Capoor (supra) and Siemens Engineering (supra), discussed above.

32. In Ram Chander vs. Union of India and others, AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (Para 4, page 1176).

33. In M/s. Star Enterprises and others vs. City and Industrial Development Corporation of Maharashtra Ltd. and others, (1990) 3 SCC 280, a three-Judge Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see Para 10, page 284-285).

34. In Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi and others, (1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on consideration of the materials on record, should record reasons in support of the conclusion reached (see para 22, pages 738-739).

35. In the case of M.L. Jaggi vs. Mahanagar Telephones Nigam Limited and others, (1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the

said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see para 8, page 123).

36. In Charan Singh vs. Healing Touch Hospital and others, AIR 2000 SC 3138, a three-Judge Bench of this Court, dealing with a grievance under CP Act, held that the authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is, therefore, imperative that such a body should arrive at conclusions based on reasons. This Court held that the said Act, being one of the benevolent pieces of legislation, is intended to protect a large body of consumers from exploitation as the said Act provides for an alternative mode for consumer justice by the process of a summary trial.

The powers which are exercised are definitely quasi-judicial in nature and in such a situation the conclusions must be based on reasons and held that requirement of recording reasons is "too obvious to be reiterated and needs no emphasizing". (See Para 11, page 3141 of the report)

37. Only in cases of Court Martial, this Court struck a different note in two of its Constitution Bench decisions, the first of which was rendered in the case of Som Datt Datta vs. Union of India and others, AIR 1969 SC 414, Mr. Justice Ramaswami delivering the judgment for the unanimous Constitution Bench held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. The Court held that an order confirming such proceedings does not become illegal if it does not record reasons. (Para 10, page 421- 422 of the report).

38. About two decades thereafter, a similar question cropped up before this Court in the case of S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984. A unanimous Constitution Bench speaking through Justice S.C. Agrawal confirmed its earlier decision in Som Datt (supra) in para 47 at page 2000 of the report and held reasons are not required to be recorded for an order confirming the finding and sentence recorded by the Court Martial.

39. It must be remembered in this connection that the Court Martial as a proceeding is sui generis in nature and the Court of Court Martial is different, being called a Court of Honour and the proceeding therein are slightly different from other proceedings. About the nature of Court Martial and its proceedings the observations of Winthrop in Military Law and Precedents are very pertinent and are extracted herein below:

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

40. Our Constitution also deals with Court Martial proceedings differently as is clear from Articles 33, 136(2) and 227(4) of the Constitution.

41. In England there was no common law duty of recording of reasons. In Marta Stefan vs. General Medical Council, (1999) 1 WLR 1293, it has been

held, "the established position of the common law is that there is no general duty imposed on our decision makers to record reasons". It has been acknowledged in the Justice Report, Administration Under Law (1971) at page 23 that "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".

42. Even then in the case of R vs. Civil Service Appeal Board, ex parte Cunningham reported in (1991) 4 All ER 310, Lord Donaldson, Master of Rolls, opined very strongly in favour of disclosing of reasons in a case where the Court is acting in its discretion. The learned Master of Rolls said:

"..It is a corollary of the discretion conferred upon the board that it is their duty to set out their reasoning in sufficient form to show the principles on which they have proceeded. Adopting Lord Lane CJ's observations (in R vs. Immigration Appeal Tribunal, ex p Khan (Mahmud) [1983] 2 All ER 420 at 423, (1983) QB 790 at 794-795), the reasons for the lower amount is not obvious. Mr. Cunningham is entitled to know, either expressly or inferentially stated, what it was to which the board were addressing their mind in arriving at their conclusion. It must be obvious to the board that Mr. Cunningham is left with a burning sense of grievance. They should be sensitive to the fact that he is left with a real feeling of injustice, that having been found to have been unfairly dismissed, he has been deprived of his just desserts (as he sees them)".

43. The learned Master of Rolls further clarified by saying:

"..thus, in the particular circumstances of this case, and without wishing to establish any precedent whatsoever, I am prepared to spell out an obligation on this board to give succinct reasons, if only to put the mind of Mr. Cunningham at rest. I would therefore allow this application."

44. But, however, the present trend of the law has been towards an increasing recognition of the duty of Court to give reasons (See North Range Shipping Limited vs. Seatrans Shipping Corporation, (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration.

45. In English vs. Emery Reimbold and Strick Limited, (2002) 1 WLR 2409, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in Cullen vs. Chief Constable of the Royal Ulster Constabulary, (2003) 1 WLR 1763, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held,

"7. ...First, they impose a discipline ... which may contribute to such decisions being considered with care. Secondly, reasons encourage transparency ... Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched." (Para 7, page 1769 of the report).

46. The position in the United States has been indicated by this Court in S.N. Mukherjee (supra) in paragraph 11 at page 1988 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise

their duty of review unless they are advised of the considerations underlying the action under review". In S.N. Mukherjee (supra) this court relied on the decisions of the U.S. Court in Securities and Exchange Commission vs. Chenery Corporation, (1942) 87 Law Ed 626 and John T. Dunlop vs. Walter Bachowski, (1975) 44 Law Ed 377 in support of its opinion discussed above.

47. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg

Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

48. For the reasons aforesaid, we set aside the order of the National Consumer Disputes Redressal Commission and remand the matter to the said forum for deciding the matter by passing a reasoned order in the light of the observations made above. Since some time has elapsed, this Court requests the forum to decide the matter as early as possible, preferably within a period of six weeks from the date of service of this order upon it.

49. In so far as the appeal filed by the Bank is concerned, this Court finds that the National Consumer Disputes Redressal Commission in its order dated 4th April 2008 has given some reasons in its finding. The reasons, inter alia, are as under:

"We have gone through the orders of the District Forum and the State Commission, perused the record placed before us and heard the parties at length. The State Commission has rightly confirmed the order of the District Forum after coming to the conclusion that the Petitioner and the Builder - Respondents No.3 and 4 have colluded with each other and hence, directed them to compensate the complainant for the harassment caused to them."

19. A Division Bench of this Court in Writ C No. 18164 of 2018 ***(Nanak Chand Sharma Vs. State of U.P. & 3 Others,*** decided on 03.12.2018) has held as under:-

"We find that the authority concerned has only recoded his conclusion without assigning any reason. It is a well settled law that not only administrative but judicial order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion. The absence of reason makes an order unsustainable. One of the most important aspects for insisting to record reason is that it substitutes the subjectivity with objectivity. It is also treated as a part of natural justice and fair play.

In the case of M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868 the Supreme Court has held as under:

"11. ...The communication does not disclose the "points" which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration

of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

The aforesaid said judgment has been quoted with approval by the Constitution Bench of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984. Similar view has been taken by the Supreme Court in the cases of Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87; Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519; Kranti Associates Private Limited Vs. Masood Ahmed Khan, (2010) 9 SCC 496; Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336 and J. Ashoka v. University of Agricultural Science and others, (2017) 2 SCC 609."

20. In view of the aforesaid cases of the Hon'ble Supreme Court as well as this Court, it is clear that the reason is the heartbeat of the order and without reason, the order becomes dead.

21. The administrative order, without any reason, causes prejudice to the person against whom it is passed. The Hon'ble Supreme Court, time and again, has emphasized the importance of recording reason for the decision by the administrative authorities.

22. In the case in hand, after perusal of the material available on record, we find that while passing the impugned order dated 13.07.2019, the respondent no. 3 has not assigned any reason for changing the category of the petitioner from Group - 1 to Group - 3 for the retail outlet dealership.

23. For the reasons mentioned above, we find that the impugned order dated 13.07.2019 cannot be sustained in the eyes of law and it is, accordingly, quashed.

24. The matter is remanded back to the respondent for passing afresh reasoned and speaking order after furnishing opportunity of hearing to all the stake holders.

25. The writ petition is, accordingly, allowed.

26. No order as to costs.

(2019)11ILR A1291

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 26540 of 2019

M/S Vasu Infrastructure Private Ltd. ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akshat Siha

Counsel for the Respondents:
C.S.C.

A. Service Law -Employees Compensation Act, 1923 - Section 10. Petitioner deliberately lingered the proceedings - registered notice sent prior and also upon registration of claim petition-Petitioner submitted reply to the prior notice – Petitioner was aware of the proceedings-Still did not appear. Ex parte order rightly passed.

Held: - The aforementioned order passed by the Employees Compensation Commissioner can also not be faulted with for the reason that E.C. Act, 1923 is a piece of social security legislation providing for a speedy and efficient machinery for determination and payment of compensation to the employees. It may also be taken note of that as per the provisions under Section 4A compensation is to be paid as soon as it falls due. (Para 27)

Writ Petition dismissed. (E-9)

List of Cases cited: -

1. Oriental Insurance Co. Ltd. Vs Mohd. Nasir & ors., (2009) 6SCC 280

2. The Workmen of M/s Firestone Tyre & Rubber Co. of India Pvt. Ltd. Vs The Management & ors., (1973)1 SCC 813 B.D. Shetty & ors. Vs CEAT Ltd. & anr., (2002) 1 SCC 193

3. Allahabad Bank & anr. Vs All India Alahabad Bank Retired Employees Association, (2010) 2 SCC 44

4. Jeewanlal Ltd. & ors. Vs Appellate Authority & ors., (1984) 4 SCC 356

5. Bharat Singh Vs Management of New Delhi Tuberculosis centre, (1986) 2 SCC 614

6. UPSRTC Vs St. Of U.P. & ors., Writ C no.6971/2017

7. Nagar Nigam Gorakhpur Vs Suresh Pandey & ors., Writ C No.-45310/2017

8. Pratap Narain Singh Deo Vs Srinivas Sabata & ors., 9(1976) 1 SCC 289

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

1. Heard Sri Akshat Sinha, learned counsel for the petitioner and Sri Mata Prasad, learned Standing Counsel appearing for the respondent nos. 1 and 2.

2. The present petition seeks to challenge the order dated 29.3.2019 passed by the Employees Compensation Commissioner/Assistant Labour Commissioner U.P. Gorakhpur whereby the application filed by the petitioner for recall of the orders dated 5.8.2016 and 28.7.2017 has been rejected.

3. Learned counsel for the petitioner has submitted that the orders dated 5.8.2016 and 28.7.2017 having been passed in proceedings which were exparte the same ought to have been recalled by the Employees Compensation Commissioner and the rejection of the recall application in the said circumstances is erroneous. The counsel for the petitioner has further sought to contend that even on merits the claim made by the claimant respondent was not sustainable.

4. Per contra, learned Standing Counsel appearing for the State respondents has submitted that upon registration of the claim petition as Case No. W.C.C. 2/2015 a registered notice dated 08.01.2016 was duly sent to the petitioner and it was only thereafter on 05.08.2016 that an order was passed for proceeding exparte. It has also been

pointed out that prior to filing of the claim petition the claimant had duly served a registered notice upon the petitioner under Section 10 of the Employee's Compensation Act, 19231 and the petitioner had submitted a reply to the same. It is accordingly submitted that the petitioner was fully aware of the proceedings and despite due notice it deliberately allowed the case to proceed exparte and as such there was no sufficient reason made out for the orders to be recalled. As regards the contention sought to be raised by the petitioner on the merits of the claim, it was submitted that in the event the petitioner seeks to challenge the order dated 28.7.2017 awarding compensation on its merits the statutory remedy of filing an appeal under Section 30 of the E.C.Act, 1923 may be availed of.

5. In order to appreciate the rival contentions it may be necessary to advert to the relevant statutory provisions as contained under the E.C.Act,1923 which are being extracted below :-

"3. **Employer's liability for compensation.**- (1) If personal injury is caused to an employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable --

(a) in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding three days;

(b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to--

(i) the employee having been at the time thereof under the influence of drink or drugs, or

(ii) the wilful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees, or

(iii) the wilful removal or disregard by the employee of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employee.

[(2) If an employee employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment, or if an employee, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III, contracts any disease specified therein as an occupational disease peculiar to that employment, or if an employee whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment, contracts any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the contrary is proved, the accident shall be deemed to have arisen out of, and in the course of, the employment:

[Provided that if it is proved,--

(a) that an employee whilst in the service of one or more employers in any employment specified in

Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and

(b) that the disease has arisen out of and in the course of the employment, the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section:

[Provided further that if it is proved that an employee who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule, for a continuous period specified under this sub section for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C, as the case may be, as an occupational disease peculiar to the employment and that such disease arose out of the employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section.]]

[(2A) If an employee employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment, the contracting whereof is deemed to be an injury by accident within the meaning of this section, and such employment was under more than one employer, all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may, in the circumstances, deem just.]

[(3) The Central Government or the State Government, after giving, by notification in the Official Gazette, not less than three months' notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and thereupon the provisions of sub-section (2) shall apply, in the case of a notification by the Central Government, within the territories to which this Act extends or, in case of a notification by the State Government, within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.]

(4) Save as provided by sub-sections (2), (2A) and (3) no compensation shall be payable to an employee in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment.

(5) Nothing herein contained shall be deemed to confer any right to compensation on an employee in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by an employee in any Court of law in respect of any injury--

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the employee and his employer providing for the

payment of compensation in respect of the injury in accordance with the provisions of this Act.

[(4). **Amount of compensation**.- (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:--

(a) where death results from the injury : an amount equal to fifty per cent. of the monthly wages of the deceased employee multiplied by the relevant factor;

or an amount of one lakh and twenty thousand rupees, whichever is more;

(b) where permanent total disablement results from the injury : an amount equal to sixty per cent. of the monthly wages of the injured employee multiplied by the relevant factor; or an amount one lakh and twenty thousand rupees], whichever is more;

[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b).]

Explanation I.--For the purposes of clause (a) and clause (b), "relevant factor", in relation to a [an employee] means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the [employee] on his last birthday immediately preceding the date on which the compensation fell due.

(c) where permanent partial disablement result from the injury: (i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Explanation I.--Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II.--In assessing the loss of earning capacity for the purpose of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

(d) where temporary disablement, whether total or partial, results from the injury : a half monthly payment of the sum equivalent to twenty-five per cent. of monthly wages of the employee, to be paid in accordance with the provisions of sub-section (2).

[(1A) Notwithstanding anything contained in sub-section (1), while fixing the amount of compensation payable to a an employee is respect of an accident occurred outside India, the Commissioner shall take into account the amount of compensation, if any, awarded to such employee in accordance with the law of the country in which the accident occurred and shall reduce the amount fixed by him by the amount of

compensation awarded to the employee in accordance with the law of that country.]

[(1B) The Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (I), such monthly wages in relation to an employee as it may consider necessary.]

(2) The half-monthly payment referred to in clause (d) of sub-section (1) shall be payable on the sixteenth day --

(i) from the date of disablement where such disablement lasts for a period of twenty-eight days or more, or

(ii) after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter:

Provided that--

(a) there shall be deducted from any lump sum or half-monthly payments to which the employee is entitled the amount of any payment or allowance which the [employee] has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be; and

(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the [employee] before the accident exceeds half the amount of such wages which he is earning after the accident.

Explanation.--Any payment or allowance which the employee has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.

[(2A) The employee shall be reimbursed the actual medical expenditure incurred by him for treatment of injuries caused during course of employment.]

[(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half-month.]

[(4) If the injury of the employee results in his death, the employer shall, in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of not less than five thousand rupees for payment of the same to the eldest surviving dependant of the employee towards the expenditure of the funeral of such employee or where the employee did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.]

[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount specified in this sub-section.]

[(4A). **Compensation to be paid when due and penalty for default.**- (1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may

be, without prejudice to the right of the employee to make any further claim.

[(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall--

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent, of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.--For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

[(3A) The interest and the penalty payable under sub-section (3) shall be paid to the employee or his dependant, as the case may be.]

(10). **Notice and claim.**- (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or in case of death within two years from the date of death:

Provided that where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the employee was continuously absent from work in consequence of the disablement caused by the disease:

[Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the employee to absent himself from work, the period of two years shall be counted from the day the employee gives notice of the disablement to his employer:

Provided further that if a employee who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:]

[Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim]--

(a) if the claim is preferred in respect of the death of an employee resulting from an accident which occurred on the premises of the employer, or at any place where the employee at the time of the accident was working under the control of the employer or of any person employed by him, and the employee died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of

the premises or place where the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed had knowledge of the accident from any other source at or about the time when it occurred:]

Provided further that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this subsection, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

[(3) The State Government may require that any prescribed class of employers shall maintain at their premises at which employees are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured employee employed on the premises and to any person acting bona fide on his behalf.

(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice-book is maintained, by entry in the notice-book.]"

6. From a reading of the aforementioned statutory provisions it may be noticed that the provisions under Section 3 provide for employer's liability for compensation in a case if personal injury is caused to an employee by accident arising out of and in the course of his employment. The amount of compensation is to be assessed as per terms of Section 4. Furthermore in terms of Section 4A it has been provided that compensation under Section 4 is to be paid as soon as it falls due and even in cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts and such payment is to be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim. Sub-section (3) of Section 4A mandates that where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due and if in his opinion there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty.

7. The Workmen's Compensation Act, 19232 was enacted as a piece of welfare legislation for the purposes of

providing social security to employees in a situation of growing complexity of industry with the increasing use of machinery and consequent danger to workmen along with their comparative poverty rendering them vulnerable.

8. In order to appreciate the scheme of the Act, the statement of objects and reasons of the statutory enactment may be referred to. For ease of reference the relevant extract from the statement of objects and reasons is being reproduced herein under :-

"The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves renders it advisable that they should be protected as far as possible, from hardship arising from accidents. A legislation of this kind helps to reduce the number of accidents in a manner that cannot be achieved by official inspection, and to mitigate the effect of accidents by provision for suitable medical treatment, thereby making industry more attractive to labour and increasing its efficiency. The Act provides for cheaper and quicker disposal of disputes relating to compensation through special tribunals than possible under the civil law."3

9. The W.C.Act, 1923 has undergone several amendments in order to widen its scope and in terms of the amending Act 45 of 2009 the long title and the provisions of the Act have been amended so as to substitute "workman" by the "employee".

10. The object of the Act as reflected from the statement of objects and reasons is to protect the workmen from the hardship arising from accidents occurring during the course of employment. The benefits so conferred are aimed to give an increased sense of security to the workmen as an ameliorative measure so as to render industrial life more attractive and increase the availability, productivity and efficiency of labour.

11. The objects of the E.C.Act, 1923 came up for consideration in the case of **Oriental Insurance Co. Ltd. Vs. Mohd. Nasir and Ors.4,** and after taking notice of the statutory provisions contained therein it was held that the Act is a beneficial legislation in so far as it provides for payment of compensation to workmen employed by the employers and accordingly the provisions therein are to be liberally construed keeping in mind the legislative intent with a view to give effect it its objects.

12. The E.C.Act, 1923 being thus a piece of social security and welfare legislation with its dominant purpose to protect the employees, the provisions of the Act have to be interpreted so as to subserve the object of the legislation which is to make the employer responsible for the loss caused to the employee by injuries or death arising out of and in the course of employment.

13. The provisions under the Act provide for necessary measures to protect the employees and their dependents from the hardships arising from the accidents occurring during the course of employment and with this object in mind the rights of the employees are to be generously treated while applying the statutory provisions so as to ensure a speedy and efficient machanism for

determination and payment of compensation as per the provisions of the Act.

14. Applying the rule of beneficent construction, the provisions of the E.C. Act, 1972 are to be interpreted so as to give them a wide meaning rather a restrictive meaning which may negate the very object of the enactment. A beneficial legislation, it is well settled, as to be construed in its correct perspective so as to fructify the legislative intent underlying its enactment.

15. In construing a remedial statute courts are to give it the widest amplitude which its language would permit. The principle of applying a liberal construction to a remedial legislation has been emphasised in the **Construction of Statues by Crawford5** pp. 492-493 in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

16. To a similar effect is the observation made by **Blackstone in Construction and Interpretation of Laws6,** by stating as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

17. In the context of beneficial construction as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes7** as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

18. Further, in the same treatise, in the context of industrial legislation, it has been stated as follows:-

"Industrial legislation provides a fruitful field for the application of the tendency towards beneficial construction..."

19. The principle of applying a liberal construction to a labour welfare legislation was emphasised in the case of **The Workmen of M/s Firestone Tyre & Rubber Company of India Pvt. Ltd. Vs. The Management & Ors.8** where in the context of the provisions of the Industrial Disputes Act, 1947, it was observed as follows:-

"35. ...We are aware that the Act is a beneficial piece of legislation enacted in the interest of employees. It is well settled that in construing the provisions of a welfare legislation, courts should adopt, what is described as a beneficent rule of construction. If two constructions are reasonably possible to be placed on the

section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred..."

20. The mode of interpretation of a social welfare legislation, in the context of the provisions of the Industrial Employment (Standing Orders) Act, 1946, came up for consideration in the case of **B.D. Shetty & Ors. Vs. CEAT Ltd. & Anr.9,** and it was held as follows:-

"12. ...a beneficial piece of legislation has to be understood and construed in its proper and correct perspective so as to advance the legislative intention underlying its enactment rather than abolish it. Assuming two views are possible, the one, which is in tune with the legislative intention and furthers the same, should be preferred to the one which would frustrate it."

21. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the context of the Payment of Gratuity Act, 1972 in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association10,** and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the directive principles of State policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

22. A similar view was taken with regard to adopting the beneficial rule of construction in respect of social welfare legislation, in the case of **Jeewanlal Ltd. & Ors. Vs. Appellate Authority under the Payment of Gratuity Act & Ors.11**, wherein it was stated as follows:-

"11. In construing a social welfare legislation, the court should adopt a beneficent rule of construction ; and if a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed..."

23. Reference may also be had to the case of **Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors.12**, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11....the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the

legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

24. The aforementioned position of law has been discussed in recent judgments of this Court in **U.P.S.R.T.C. Thru Its R.M. Vikasnagar Kanpur Vs. State Of U.P. And 3 Others13** and **Nagar Nigam Gorakhpur Thru Nagar Ayukt Vs. Suresh Pandey And 2 Others14.**

25. In the case at hand the facts as reflected from the order dated 28.7.2017 indicate that the Employees Compensation Commissioner has duly taken note that before filing of the claim petition the requisite notice of claim under Section 10 had been duly served upon the petitioner-employer and upon registration of the claim also a registered notice dated 8.1.2016 had been sent to the petitioner and only thereafter the order dated 5.8.2016 was passed directing the case to proceed exparte. It was subsequent thereto that the Employees Compensation Commissioner upon taking into consideration the facts of the case and the evidence on record had proceeded to allow the claim petition of the claimant respondent.

26. The order dated 29.3.2019 passed upon the recall application filed by the petitioner also takes note of the fact that prior to filing of the claim petition the claimant had served a registered notice under Section 10 upon the petitioner-employer and in response to the same a reply had also been submitted by the employer admitting the factum of employment of the claimant with the petitioner. The order also records that after filing of the claim petition and despite issuance of notice the petitioner did not appear and allowed the case to proceed exparte and only after passing of the order dated 28.7.2017 awarding compensation and upon issuance of a show cause notice dated 9.12.2017 pursuant thereto the petitioner-employer filed the recall application. The Employees Compensation Commissioner has accordingly drawn an inference that the petitioner deliberately wanted to linger the proceedings and in the facts of the case where the claimant had suffered 100% disability and was not in a position to contest the proceedings further, taking into considering the larger interest of justice the recall application has been rejected.

27. The aforementioned order passed by the Employees Compensation Commissioner can also not be faulted with for the reason that E.C.Act, 1923 is a piece of social security legislation providing for a speedy and efficient machinery for determination and payment of compensation to the employees. It may

also be taken note of that as per the provisions under Section 4A compensation is to be paid as soon as it falls due. In this regard reference may be had to the judgment in the case of **Pratap Narain Singh Deo Vs. Srinivas Sabata and Ors.15,** wherein it was held that compensation becomes payable on the date of the accident and not on the date of determination of the amount thereof. The relevant observations made in the judgment are as follows:-

"7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section, provides that the employer shall be liable to pay compensation if "personal injury is caused to a workmen by accident arising out of and in the course of his employment". It was not the case of the employer that the right to compensation was taken away under Sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore become liable to pay the compensation as soon as the aforesaid personal injury was caused to the workmen by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the commissioner's order dated May 6, 1968 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, he settled by the commissioner..

8. It was the duty of the appellant, under Section 4A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent.."

28. Counsel appearing for the petitioner has not been able to dispute the facts of the case and also the legal position, as referred to above, and has not been able to point out any material error or irregularity in the order passed by the Employees Compensation Commissioner/Assistant Labour Commissioner U.P. Gorakhpur rejecting the recall application so as to warrant interference in exercise of powers in writ jurisdiction under Article 226 of the Constitution of India.

29. The writ petition lacks merit and is accordingly dismissed.

30. It is however made clear that this Court has not adjudicated on the merits of the claim which has been allowed by the Employees Compensation Commissioner in proceedings under the E.C.Act, 1923 and the dismissal of the writ petition would not preclude the petitioner from taking recourse to other remedies which may be available to it under law.

(2019)11ILR A1303

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Writ C No. 27391 of 2019

M/S Ajay Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devbrat Mukherjee

Counsel for the Respondents:
C.S.C.

A. Admistrative Law – Review - Indian Forest Act, 1927- Section 4, 5 & 20 - Additional District Judge has power of review-State Government to implement-decisions given by Additional District Judge-in Appeals and review.

B. Once order passed-treating disputed land as 'Reserved Forest'-only activity for forest purpose permitted. Once notification u/s 4 issued-various rights on such land barred u/s 5.

Held: - The injunction under Section 5 cannot be diluted or done away by any administrative decision by State Government. By virtue of Section 5, no right can be acquired by any person in respect to a land notified under Section 4. (Para 26)

C. Absence of notice u/s 20 - State Government not empowered to treat disputed land to belong to the Revenue Department.

Held: -the restriction under section 5 of Act, 1927 is applicable in respect of the land notified under section 4 and it has nothing to do with notification under Section 20 (Para 28)

Writ Petition dismissed (E-9)

List of cases cited: -

1. Banwasi Seva Ashram Vs St. of U.P. & ors. (1986) 4 SCC 753

2.Ved Prakash Garg & ors. i.e. Writ Petition No. 29546 of (2003)

3.Ravindra Kumar Singh & ors. Vs Additional District & Sessions Judge, Anpara & ors., (2007) (9) ADJ 251 (distinguished)

4. Smt. Pyari Devi Vs St. of U.P. & ors. AIR (2004) All. 70

5. T.N. Godavarman Thirumulkpad Vs UOI, (1997) 2 SCC 267

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Dinesh Kumar Singh -I, J.)

1. Heard Sri Devbrat Mukherjee, learned counsel for petitioner and learned Standing Counsel for State of U.P. and its Authorities.

2. This Writ Petition under Article 226 of Constitution of India has been filed by sole petitioner, M/s Ajay Kumar, a Proprietary Firm of which Ajay Kumar Sharma is the proprietor. Relief sought in the present petition is to issue a writ of certiorari quashing order dated 27.07.2019, (Annexure No. 1 to Writ Petition) which is an order passed by Regional Forest Officer, Dala Range, Obra Forest Range Division, Sonbhadra (hereinafter referred as "RFO") on a representation of petitioner dated 30.04.2019 which was submitted pursuant to order of this Court dated 24.04.2019 passed in Writ Petition No. 24530 of 2018. The Representation has been rejected by RFO.

3. Facts, in brief, as borne out from averments made by petitioner in petition as also the documents appended thereto are that there is a 'Crusher' plant established in Arazi No. 4478, Village, Billi, Markundi, Tehsil Robertsganj, District Sonbhadra.

4. In respect of Arazi No. 4478 (M), Area 2-0-0, one Ravindra Kumar Singh filed an application before Forest Settlement Officer (hereinafter referred as "F.S.O.) registered as Case No. 243 of 1993. F.S.O. vide order dated 19.08.1993 recommended for exclusion of 2-0-0 area of plot no. 4478 (M) from the proposal of 'Reserve Forest'.

5. Appeals against said order were taken Suo Moto by Additional District Judge, Obra, Sonbhadra, pursuant to Supreme Court's judgement in **Banwasi Seva Ashram Vs. State of U.P. and others (1986) 4 SCC 753.** In para 10 (2) and (3), Supreme Court had given directions as under:-

"(2) In regard to the lands notified under Section 4 of the Act, even where no claim has been filed within the time specified in' the notification as required under Section 6(c) of the Act, such claims shall be allowed to be filed and dealt with in the manner detailed below:

I. Within six weeks from December 1, 1986, demarcating pillars shall be raised by the Forest Officers of the State Government identifying the lands covered by the notification under Section 4 of the Act. The fact that a notification has been made under Section 4 of the Act and demarcating pillars have been raised in the locality to clearly identify the property subjected to the notification shall be widely publicized by beat of drums in all the villages and surrounding areas concerned. Copies of notices printed in Hindi in abundant number will be circulated through the Gram Sabhas giving reasonable specifications of the lands which are covered by the notification. Sufficient number of inquiry booths would be set up within the notified area so as to enable the people of the area likely to be affected by the notification to get the information as to whether their lands are affected by the notification, so as to enable them to decide whether any claim need be filed. The Gram Sabhas shall give wide publicity to the matter at their level, Demarcation, as indicated above, shall be completed by January 15, 1987. Within three months therefrom, claims as contemplated under Section 6(c) shall be received as provided by the statute.

II. Adequate number of record officers shall be appointed by December 31, 1986. There shall also be five experienced Additional District Judges, one each to be located at Dudhi, Muirpur, Kirbil of Dudhi Tehsil and Robertsganj and Tilbudwa of Robertsganj Tehsil. Each of these Additional District Judges who will be spared by the High Court of Allahabad, would have his establishment at one of the places indicated and the State shall provide the requisite number of assistants and other employees for their efficient functioning. The learned Chief Justice of the Allahabad High Court is requested to make the services of five experienced Additional District Judges available for the purpose by December 15, 1986 so that these officers may be posted at their respective stations by the first of January, 1987. Each of those Additional District Judges would be entitled to thirty per cent of the salary as allowance during the period of their work. Each Additional District Judge would work at such of the five notified places that would be fixed up by the District Judge' of Mirzapur before December 20, 1986. These Additional District Judges would exercise the powers of the Appellate Authority as provided under Section 17 of the Act.

III. ***After the Forest Settlement Officer has done the needful under the provisions of the Act, the findings with the requisite papers shall be placed before the Additional District Judge of the area even though no appeal is filed and the same shall be scrutinized as if an appeal has been taken against the order of the authority and the order of the***

Additional District Judge passed therein shall be taken to be the order contemplated under the Act.

3. When the Appellate Authority finds that the claim is admissible, the State Government shall (and it is agreed before us) honour the said decision and proceed to implement the same. ***Status quo in regard to possession in respect of lands covered by the notification under Section 4 shall continue as at present until the determination by the appellate authority and no notification under Section 20 of the Act shall be made in regard to these lands until such appellate decision has been made."***

(Emphasis added)

6. Appeal was registered as Appeal No. 1324 of 1993 and decided vide order dated 30.09.1994. Case No. 243 of 1993 of Ravindra Kumar Singh was considered in para 36 of Appeal No. 1324/1993 and it reads as under:-

"36. अपीलान्तर्गत ***वाद संख्या 243 / 93*** *में अन्तरनिहित भूखण्ड* ***संख्या 4478 क मि / 20–0–0*** *पर* ***रवीन्द्र कुमार सिंह*** *द्वारा आपत्ति की गयी और कहा गया कि इस पर उसका लेबर हटमेट आफिस, मकान आदि स्थित है। राज्य सरकार की अनुमति से कार्य कर रहा है जिसे धारा 4 की विज्ञप्ति से पृथक किया जाय। वन विभाग की तरफ से आपत्ति की गयी कि राज्य सरकार की सम्पत्ति है दूसरा कोई इसका मालिक नहीं हो सकता। राज्य सरकार की अनुमति से किये गये कार्य पर अधिकार नहीं दिया जा सकता। वन संरक्षण अधिनियम लागू है। आपत्ति खारिज होने योग्य है पक्षों को साक्ष्य का अवसर दिया गया। आवेदक ने 1987 से खनन कार्य करने का प्रमाण पत्र दिया और खनिज अनुज्ञा पत्र दिनांक 12.03.1992 का प्रस्तुत किया है। वन* ***बन्दोबस्त अधिकारी ने भूमि का निरीक्षण किया और मौखिक साक्ष्य का परिशीलन किया इसके परिणाम स्वरूप 2–0–0–0 भूमि को पूर्ववत राज्य सरकार में बने रहने के आदेश के साथ इस वाद का निस्तारण किया।"***

"36. Objection has been raised by ***Shri Ravindra Kumar*** *on l****and no. 4478 Ka Mi./20-0-0*** *mentioned in the* ***suit no. 243 of 1993*** *under appeal, stating that his labour hutment office, house etc. are situated thereon and that he is working with the permission of the State Government and that the same may please be excluded from the notification issued u/s 4. Objection has been raised on behalf of the forest department saying that nobody else cannot be the owner of the same as it belongs to the State Government. A right cannot be vested just on the basis of the work undertaken by permission of the State Government. Forest (Conservation) Act is applicable. The objection is liable to be rejected. The parties were afforded the opportunity to adduce evidences. The applicant has produced a certificate for doing mining work since 1987 as also a licence for mining dated 12.03.1992.* ***The Forest Settlement Officer inspected the land and perused the oral evidence; and thereafter, disposed of this case with the order that 2-0-0-0 land be retained with the State Government as was earlier."***

(Emphasis added)

(English translation by Court)

7. Findings are recorded by appellate authority in paragraph 56 to 61. It confirmed order of F.S.O. Thereafter Review Applications were filed by Forest Department. Review Application relating to Ravindra Kumar Singh in Appeal No. 1324 of 1993 was numbered as 234 of 1997, Forest Department Vs. Ravindra Kumar Singh and Others. This Review Application along with others was

accepted and allowed vide judgement dated 31.05.2003. Operative part of order reads as under:-

*"**वन विभाग द्वारा प्रस्तुत** की गयी **सभी उपरोक्त पुर्नोविचार याचिकायें स्वीकार की जाती हैं। पक्षकार के द्वारा प्रस्तुत पुर्नाविचार याचिका संख्या–37/2002 एवं 198/ 2002 खरिज की जाती है।** सभी पुर्नाविचार याचिकाओं के समक्ष **सभी अपीलों में पारित निर्णय आस्त किये जाते हैं।** उपरोक्त **सभी वन विभाग द्वारा** प्रस्तुत **पुर्नोविचार याचिकायें एवं पक्षकार द्वारा प्रस्तुत पुर्नोविचार याचिका संख्या–37/2002 एवं 198/2002 में अंकित भूखण्ड को धारा 4 भारतीय वन अधिनियम के अन्तर्गत सुरक्षित वन बनाये जाने के प्रस्ताव में सम्मिलित किये जाने का आदेश दिया जाता है।** इस निर्णय की मूल प्रति रिव्यू याचिका संख्या 158/97 वन विभाग बनाम सुखन्दर उपाध्याय में रखी जाय शेष याचिकाओं में इसकी प्रति रखी जाय।"*

***"All the aforesaid review petitions** presented by the **forest department are allowed. Review Petition Nos. 37/2002 and 198/2002 presented by the party are dismissed. Judgements passed in all appeals under challenge** in all the review petitions are set aside. The piece of land mentioned in **all the review petitions presented by the forest department and also in the review petition nos. 37/2002 and 198/2002 presented by the party, is ordered to be included in the proposal for constituting** it a reserved forest under section 4 of the Indian Forest Act. The original copy of this judgement be kept with the Review Petition No. 158/97 Forest Department Vs Sukhander Upadhyay and its copies be kept with the remaining petitions." (Emphasis Added)*

(English translation by Court)

8. Ravindra Kumar Singh, being aggrieved by judgment and order dated 31.05.2003, whereby review application was allowed by Additional District Judge, Obra, filed Writ Petition No. 41578 of 2007. One Ved Prakash Garg and Others (Appeal No. 45 of 94 and Review Application No. 227 of 1997) also challenged order dated 31.05.2003 in **Writ Petition No. 29546 of 2003 (Ved Prakash Garg and others Vs. Additional District and Sessions Judge and Others).** Writ Petition filed by Ved Prakash Garg and others i.e. Writ Petition No. 29546 of 2003 was allowed vide judgement dated 14.2.2006 and operative part of judgement reads as under:-

***"In view of the facts that the State government has itself taken a decision that the land in question should be treated as land belonging to the Revenue Department of the State Government on which mining operations should be permitted as was being done earlier.** It is **directed that the applications for renewal of the mining leases of the petitioners shall be considered** and decided by the respondent no. 3 in accordance with law production of a certified copy of this order before the said respondent.*

*With the aforesaid directions, this writ petition stands allowed **and the order dated 31.05.2003 is quashed.** There shall be no order as to costs."*

(Emphasis added)

9. It may be noticed at this stage that before learned single judge, Sri S.M.A. Quazmi, Additional Advocate General appearing on behalf of State made a statement that Additional District Judge had no power of review of its own order. Similarly, Sri Shashi Nandan, learned Senior Advocate appearing on behalf of

petitioners stated that during pendency of Writ Petition, mining lease of the petitioners have expired and their applications for renewal were pending before Additional District Magistrate and he may be directed to decide the same at the earliest. The judgement dated 14.02.2006, therefore, was passed by learned Single Judge in the backdrop of the above statements of Additional Advocate General appearing for the State and learned Senior Counsel appearing for petitioners, Ved Prakash Garg and Others.

10. Ravindra Kumar Singh in his Writ Petition No. 41578 of 2007 claimed extension of benefit of the judgement dated 14.02.2006 passed in Writ Petition No. 29546 of 2003. However his Writ Petition came to be decided by a learned Single Judge (Hon'ble Ashok Bhushan, J. as His Lordship then was) and vide judgement and order dated 4.10.2007, Writ Petition was dismissed. The judgment is reported as **Ravindra Kumar Singh and Others Vs. Additional District and Sessions Judge, Anpara and Others, 2007 (9) ADJ 251.** We propose to discuss this judgment in detail at a later stage.

11. State Government following judgment dated 14.02.2006 passed in Writ Petition No. 29546 of 2003, issued a Government Order dated 18.09.2008 informing Principal Conservator of Forest that land under the aforesaid judgement belongs to Revenue Department of Government and would not come within the category of "Forest Land".

12. Petitioner claimed that Crusher plant was established at Gata No. 4478, area 2 bighas. It was purchased by petitioner from Ravindra Kumar Singh, about 10 years back and since then, he is operating the said Crusher Plant.

13. RFO issued notice dated 16.05.2018 informing that Arazi no. 4478 is a "Forest Land" and no commercial or non forest activities can be carried out thereon, therefore, petitioner must remove his Crusher plant and vacate the said land. The plant of petitioner was also seized on the same day in purported exercise of power under Sections 5/26/52 of Indian Forest Act, 1927 (hereinafter referred to be as "Act, 1927").

14. Notice dated 16.5.2018 as also seizure, was challenged by petitioner in Writ Petition No. 24530 of 2018 which was allowed vide judgement and order dated 24.04.2019 on the ground that no show cause notice or opportunity was given, therefore, RFO was directed to pass fresh order after giving opportunity of hearing to petitioner. The judgement dated 24.04.2019 reads as under:-

"Heard Shri Devbrat Mukherjee, learned counsel for the petitioner and the learned standing counsel for the respondents.

The petitioner in the writ petition is seeking quashing of the notice dated 16.5.2018 whereby the petitioner's Crusher plant has been sealed under section 52 of the Indian Forest Act, 1927.

It is pointed out that in the identical matter a writ petition no. 23756 of 2018 (M/s Ballia Sita Stone Products and another Vs. State of U.P. and others) was filed challenging the same Notification dated 16.5.2018 and the said writ petition was allowed by this court vide judgment and order dated 19.7.2018 and the impugned notices dated 16.5.2018 and 25.5.2018 were quashed

*and the **respondent was directed to pass a fresh order in the matter after affording opportunity of hearing to the petitioners.***

Learned counsel for the parties do not dispute that the controversy in the present writ petition is identical to that of writ petition no. 23756 of 2018 and in this writ petition also no opportunity of hearing was given to the petitioner before sealing his Crusher plant.

In this view of the matter, we quash the impugned notice dated 16.5.2018 and direct the respondent no. 3-Forest Range Officer, Dala Range, Dala District Sonbhadra to re-examine the matter and pass appropriate orders in accordance with law within three months from the date of receipt of the certified copy of this order.

The writ petition stands allowed."

(Emphasis added)

15. Petitioner communicated aforesaid judgement to RFO vide letter dated 29.04.2019. Thereafter impugned order has been passed by RFO holding that in respect of Arazi No. 4478 matter has already been decided by this Court in **Ravindra Kumar Singh and Others Vs. Additional District Judge and others (Supra)** and that judgement has become final, hence, land in question on which 'Crusher plant' is being run, has to be dealt with according to the aforesaid judgement.

16. Sri Devbrat Mukherjee, learned counsel for petitioner, contended that Arazi No. 4478 was notified only under Section 4 of Act, 1927 and no notification under Section 20 of Act, 1927 has been issued till date, therefore, land in question cannot be treated to be a 'Forest land'. Respondent no. 3 while passing impunged order and treating the land in dispute as 'Forest' land has committed manifest error. He placed reliance on the judgement of this Court in **Ved Prakash Garg and Others Vs. Additional District Judge and Others (Supra)** and said that judgement in **Ravindra Kumar Singh and Others Vs. Additional District Judge and others (Supra)** is per incuriam and cannot hold the field on the question, whether land in dispute is a 'Forest Land' or not. He also pointed out that against the judgement in **Ved Prakash Garg (Supra),** State Government preferred Special Appeal Defective No. 63 of 2018, and same was dismissed on the ground of laches, vide order dated 2.02.2018 since appeal was filed after 11 years and 320 days. State Government then filed Special Leave Petition (Civil) Diary No. 33675 of 2018 and Supreme Court, after condoning delay, dismissed Special Leave Petition vide order dated 22.11.2018. Since judgment of learned Single Judge in **Ved Prakash Garg and Others (Supra)** has become final upto Supreme Court, therefore, it is binding upon respondents and it was not open to RFO to take a different view in the matter. He submitted that unless final notification under Section 20 is issued declaring disputed land as "Reserve Forest", merely on the basis of Section 4 notification, land in dispute cannot be treated to be "Reserve Forest Land", hence, functioning of Crusher Plant of petitioner can not be stopped. He also submitted that Forest (Conservation) Act, 1980 (hereinafter referred to as "Act, 1980") is not applicable to land in dispute; respondents cannot take advantage of their own wrong; RFO has not applied its mind; impugned order has been passed with

malafide and illegally; no opportunity has been given to petitioner of being heard before passing impugned order and, therefore, he prayed that impugned order is liable to be set-aside.

17. The above facts we have discussed in detail for the reason that in the Writ Petition, facts have not been pleaded in a whole-some, chronological manner. There is a complete jumbling and confusion which has been sought to be created so as to seek shelter under the judgment of this Court in **Ved Prakash Garg (Supra)** and to avoid the judgment in **Ravindra Kumar Singh and Others Vs. Additional District Judge and others (Supra)** which was in respect of this very land which is subject matter of this Writ Petition on which petitioner is running 'Crusher Plant' having been purchased from Ravindra Kumar Singh. Since judgment in **Ravindra Kumar Singh and Others Vs. Additional District Judge and others (Supra)** is in respect of land in dispute, therefore, it is inter-se parties as petitioner stands in the shoes of Ravindra Kumar Singh and this judgment is binding upon him.

18. The first submission that the judgment in **Ravindra Kumar Singh and Others Vs. Additional District and Sessions Judge (supra)** is per incuriam has no substance inasmuch as the judgment has attained finality between the parties i.e. Ravindra Kumar Singh and State of U.P. and petitioner having purchased 'Crusher Plant' standing on the disputed land from Ravindra Kumar Singh, he has entered into the shoes of Ravindra Kumar Singh and, therefore the above judgment is binding upon petitioner also. Moreover the judgment in **Ravindra Kumar Singh and Others Vs. Additional District and Sessions Judge (Supra)** has already considered earlier Single Judge judgment in **Ved Prakash Garg (Supra)** and therefore, it cannot be said that it is per incuriam. We find that learned Single Judge in **Ravindra Kumar Singh and Others Vs. Additional District and Sessions Judge (Supra)** has relied on an earlier Division Bench Judgment in **Smt. Pyari Devi Vs. State of U.P. and others AIR 2004 All. 70.**

19. In **Smt. Pyari Devi Vs. State of U.P. and others (Supra)**, the facts were that she was granted a mining lease of sand for excavating minor minerals. Lease was executed by District Magistrate, Sonbhadra in respect of Plot no. 246/1 to the extent of an area of 10 acres situated in Village, Gurdha, Tehsil Robertsganj, District Sonbhadra. Lease was executed for a period of three years in accordance with the provisions of U.P. Minor Mineral (Concession) Rules, 1963 (hereinafter referred to as "Rules 1963"). Smt. Pyari Devi commenced mining operation but vide order dated 29.06.2002, mining operation of 11 persons including Smt. Pyari Devi was prohibited. The order passed by District Magistrate referred to order of Additional District Judge dated 03.06.2002 in Review Application No. 2810 of 1992 directing for constituting 'Reserved Forest' in Plot No. 246/1, area 453 bighas and 17 biswas under Section 4 of Act, 1927. The Division Bench was also having a Special Appeal filed by one Bhairao Ram challenging judgement dated 4.10.2002 passed by learned Single Judge in Writ Petition No. 29926 of 2002 dismissing the same which has also arisen from similar orders as were passed by Additional District Judge and District

Magistrate in the case of Smt. Pyari Devi and in that Special Appeal, an incidental question arose as to whether appeal was maintainable or not since it had arisen from the order of learned Single Judge wherein order of Additional District Judge was challenged. Counsel of Bhairao Ram contended that Additional District Judge had no jurisdiction to review appellate order and therefore, review order was without jurisdiction. This question was also considered by Division Bench in **Smt. Pyari Devi Vs. State of U.P. and others (Supra)**. Considering merits of the matter, Division Bench, noticed factual background that State Government issued a notification dated 09.04.1969 published in U. P. Gazette dated 21.06.1969 under Section 4(1) of Act, 1927 declaring that it has been decided to constitute the land, as detailed in notification, as 'Reserved Forest'; the Notification included Plot No. 716 area 485 bighas and 15 biswas (out of which Plot No. 246/1 area 453 bighas and 17 biswas was carved out). A Writ Petition was filed before Supreme Court as Public Interest Litigation claiming that Adiwasis and other backward people using forest land as their habitat and means of livelihood will be deprived if State Government is permitted to declare entire land as 'Reserved Forest'. Therein various directions were issued by Supreme Court.

20. The scheme of Act, 1927 is that whenever State Government decides to constitute any land, a 'Reserved Forest', it shall issue a notification in official gazette specifying the situation and limits of such land and also appointing an officer named 'F.S.O.' to enquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits. This notification is contemplated under Section 4(1) of Act 1927. Section 6 of Act, 1927 contemplates that F.S.O. shall publish in local vernacular, in every town and village of neighborhood, specifying the situation and limits of proposed forest, expanding consequences and fixing a period and requiring every person claiming any right mentioned in section 4 or Section 5 of Act, 1927 within such period either to present to F.S.O. a written notice or to appear before him and state nature of such right. Section 7 contemplates an enquiry by F.S.O. The F.S.O. is supposed to pass an order under Section 11(2) regarding claim made by a person. Section 12 deals with the rights of pasture or to forest produce and under Section 15, an order is to be passed which may ensure continued exercise of rights so admitted. Section 17 contemplates an appeal against the order of F.S.O.

21. On Plot No. 246/1 Mahendra Singh and Rajendra Singh, sons of Bhupendra Singh had filed an objection staking their claim to be part of the aforesaid plot i.e. Area 26 bighas 8 biswas. This was allowed by F.S.O. and he recommended their land to be excluded from 'Reserved Forest' in view of directions of Supreme Court in **Banwasi Sewa Ashram Vs. State of U.P. (Supra).** Additional District Judge considered those orders of F.S.O in appeal and initially appeal was decided in favour of Mahendra Singh and Rajendra Singh but on a Review Application of State Government, the order was recalled and decided in favour of State directing that Plot No. 246/1 be reserved for constituting 'Reserved Forest'. This Court while considering validity of review order of Addl. District Judge, said once

Additional District Judge passed an order for treating disputed land as 'Reserved Forest', no activity other than forest purpose could have been carried out on such land and for this purpose, provisions of Act, 1980 come into play. Court relied on a Supreme Court judgement in **T.N. Godavarman Thirumulkpad Vs. Union of India, (1997) 2 SCC 267** wherein it was held that all on going non forest activities within any forest in any State throughout the country without prior approval of Central Government must cease. The said direction was given on 12.12.1996. Thus, Court said that State Government was obliged to stop all non forest activities in any forest area. Since petitioners, Smt. Pyari Devi and Bhairao Ram were claiming right to carry on operations on the land which was directed to be constituted 'Reserved Forest' by the order of Additional District Judge, such claim could not have been admitted as it was and it would have been contrary to the provisions of Act, 1980 and also directions given by Supreme Court in **T.N. Godavarman Thirumulkpad (Supra).**

22. Court also considered a submission that petitioners, Smt. Pyari Devi and Bhairao Ram, were not party before F.S.O. and Additional District Judge and held that those were the proceedings under Special Act giving right to the party to the proceeding on different stages and a person who was not party at any stage cannot be allowed to challenge order passed in those special proceedings. The two petitioners were lessee from State Government and cannot claim higher rights from the lessor i.e. State Government which has not challenged order of Additional District Judge in respect of Plot No. 246/1.

23. The Division Bench also considered the argument that Additional District Judge had no power of review. It found that Supreme Court in **Banwasi Sewa Ashram (Supra)** has clearly directed State Government to implement decisions given by Additional District Judge in appeals as well as in review. The argument that the Additional District Judge could not have entertained review was contrary to directions given by the Supreme Court, hence rejected. The relevant observations made by Division Bench in **Smt. Pyari Devi Vs. State of U.P. and others (Supra)** reads as under:-

"The argument of counsel for the appellant is in the teeth of the aforesaid direction and cannot be accepted. The judgments of the Apex Court are binding for all courts under Article 141 of the Constitution of India."

24. The Division Bench therefore upheld order of Additional District Judge passed in Review Application on 03.06.2002. The relevant extract of the judgement upholding the said order, reads as follows:

*"From the foregoing discussions, **the judgment of Additional District Judge dated 3rd June, 2002 cannot be said to be without Jurisdiction.** The Additional District Judge while passing the order dated 3rd June, 2002 was within his jurisdiction and the said jurisdiction was exercised by the appellate Court in exercise of Jurisdiction conferred under Forest Act which is Central Act referable to Entry 17 A of the Concurrent List. The judgment dated 3rd June, 2002 which was challenged in the writ petition being a judgment passed by a Court in exercise of*

jurisdiction under Central Act, the special appeal is clearly barred under Chapter-VIII, Rule 5 of the Rules of the Court and the submission of counsel for the appellant that present special appeal is maintainable cannot be accepted."

25. Learned Single Judge in **Ravindra Kumar Singh and Others Vs. Additional District and Sessions Judge (supra)**, when was confronted with another Single Judge Judgment in **Ved Prakash Garg (Supra)**, said in para 14 of the judgment, as follows:

*"14. Much **emphasis has been laid** by learned Counsel for the petitioners **on the subsequent judgment of the learned Single Judge in Ved Prakash Garg's case (supra)** in which the learned Single Judge in view of the stand taken by the State quashed the order or review as being without jurisdiction. The judgment in the said case cannot help the petitioners in the present case due to following two reasons:*

*(a) The **attention of the learned Single Judge in Ved Prakash Garg's case (supra) was not invited to the earlier Division Bench in Smt. Pyari Devi's case (supra), which categorically laid down that Additional District Judge has power of review.** It is relevant to note that **judgment in Pyari Devi's case was with regard to same notification under Section 4 of the Forest Act in which notification the land on which petitioners claimed right of mining lease was also included.** The Division Bench judgment having held that Additional District Judge had power of review was a binding precedent and the **judgment given by learned Single Judge without noticing the said judgment cannot be followed as good precedent.***

(b) Learned Single Judge in Ved Prakash Garg's case (supra) has decided the the case on the basis of concession made by the learned Advocate General at the bar that the Additional District Judge has no power to review its own order. The judgment was thus, in fact, based on concession given by the learned Advocate General to the effect that Additional District Judge has no power of review. The decision is based only on the said statement and does not lay down any ratio to be laying down any ratio or precedent to be followed."

(Emphasis added)

26. Court also held that though in **Ved Prakash Garg and Others (Supra),** review order dated 31.05.2003 was set-aside but that would not apply in all the cases and would be confined to cases which were before learned Single Judge in Ved Prakash Garg and others and would not be applicable to Ravindra Kumar Singh. Court also said that once notification under Section 4 is issued, various rights on such land are barred by section 5, to be exercised, and it is a kind of injunction regarding accrual of rights after issue of notification under Section 4. Court said that Section 5 contemplates that no rights shall be acquired in or over the land comprised in a notification under Section 4 except by succession or under a grant or a contract made or entered into or on behalf of Government or some persons in whom such rights were vested when a notification was issued. The injunction under Section 5 cannot be diluted or done away by any administrative decision by State Government. By virtue of Section 5, no right can be acquired by any person in respect to a land notified under Section 4. Court also dealt with the argument that notification under section 20 has not been

issued, therefore, no restriction can be placed and said, in para 22 of the judgement, that even if notification under Section 20 of Act, 1927 has not been issued, Section 5 of Act, 1927 would operate by virtue of notification under Section 4 and land included in Section 4 Notification cannot be said to be a land in which non forest activities i.e. mining operation be permitted as per observations of Supreme Court in **T.N. Godavarman Thirumulkpad (Supra).** It also held that once an order has been passed by Additional District Judge under Section 17 as an appellate authority, State Government has no power to alter the said decision by taking an administrative decision. In para 28 of the judgement, Court also considered the submission that so long as notification under Section 20 is not issued, State Government was entitled to take the land as not belonging to Forest department but to Revenue department and said that after issue of notification under Section 4, Section 5 comes into play and prohibition of accrual of any right operate after issue of notification under Section 4, hence no decision can be taken by State Government contrary to section 5 of Act, 1927. Mere fact that notification under Section 20 has not been issued, would not empower State Government to take an administrative decision to treat disputed land included under Section 4 as land, belong to Revenue Department or to permit mining in the said land. No such power is conferred upon State Government even if no notification under Section 20 has been issued. Para-28 of the judgment is quoted for ready reference as under:

"28. The last submission of the petitioners that Section 20 notification having not been issued, the State Government was fully entitled to treat the land as land not belonging to the Forest Department and the same as belonging to the Revenue Department. As noted above, ***after issuance of notification under Section 4, Section 5 comes into play and prohibition of accrual of any right operate after issuance of notification under Section 4.*** *The issue as to whether the State Government by any administrative decision can take a decision contrary to Section 5 of the Forest Act has already been discussed above.* ***The fact that Section 20 notification has not yet been issued does not empower the State Government to take an administrative decision to treat the land included in notification under Section 4 as a land belonging to the Revenue Department or to permit mining in the said land. Thus non issuance of notification under Section 20 of the Forest Act does not empower the State Government to take any administrative decision to permit any mining operation*** *in the land included in the notification under Section 4 of the Forest Act." (Emphasis added)*

27. Thus, in respect of land in dispute, it is admitted that Notification under Section 4 was already issued and thus Section 5 became operative. Counsel for petitioner admits that the land in question belong to Ravindra Kumar Singh who has already lost the matter before this Court and his writ petition has been dismissed while judgment of appellate authority i.e. Additional District Judge allowing review of the State Government has been affirmed and become final.

28. Petitioner's counsel submits that he has not purchased land from Ravindra

Kumar Singh and it is only 'Crusher Plant, which was already operating for the last more than 10 years and he has not purchased land at all. In our view, prohibition of Section 5 applies to land which has been notified under Section 4. The aforesaid land which according to petitioner belong to Ravindra Kumar Singh, issue has already been finalized by this Court by dismissing writ petition of Ravindra Kumar Singh. Therefore, no activities other than activities of forest purpose can be carried out on the land in question in view of injunction under section 5 of Act, 1927. The restriction under section 5 of Act, 1927 is applicable in respect of the land notified under section 4 and it has nothing to do with notification under Section 20. This aspect has been dealt with in detail by this Court in writ petition in which the land in dispute, itself, was up for consideration and said judgment has become final. Therefore, in no manner, petitioner can be allowed to carry on mining operation which is an activity not connected with forest purpose on the land in question, and thus, claim of petitioner in our view, has rightly been rejected by Collector/District Magistrate by the impugned order.

29. Knowing the fact that in respect to land in dispute, matter has already attained finality before this Court when writ petition of Ravindra Kumar Singh was dismissed, still petitioner, in a circuitous way has not only attempted to continue mining operations on the said land but gone to the extent of contending that the judgement passed by this Court in a matter related to land in dispute itself should be ignored as per incuriam though the judgement is binding on the parties and their successors, legal representatives etc., hence, in our view, petitioner in filing this writ petition has not come with clean hands and continuous litigation including the present writ petition is nothing but a gross abuse of process of law. The writ petition, therefore, deserves to be dismissed with cost.

30. In view thereof, the writ Petition is dismissed with cost which we quantify as Rs. 50,000/-.

(2019)11ILR A1315

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 28084 of 2019

Residents Welfare Association ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Swapnil Kumar, Sri Sudhanshu Kumar

Counsel for the Respondents:
C.S.C., Anjali Upadhya, Ms. Archana Singh, Sri Bhanu Bhushan Jauhari, Sri V.K. Singh

A. Administrative Law -Societies Registration Act, 1860 - - Natural Justice - Petitioner-registered society - bye laws cancelled by impugned order -without reason-impugned order quashed-matter remanded back.

Writ Petition disposed (E-9)

List of cases cited: -

1. Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs Shukla & Brothers, (2010) 4 SCC 785

2. Sant lal Gupta Vs Modern Co-operative Group Housing Society Ltd. & ors., (2010) (13) SCC 336

3. S.N. Mukherjee Vs UOI, (1990) 4 SCC 594

4. Kranti Associates Pvt. Ltd. & anr. Vs Masood Ahmed Khan & ors., (2010) 9 SCC 496

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Sri V.K.Singh, learned senior counsel assisted by Ms. Archana Singh has sought time to move an impleadment application on behalf of one of the flat owners of the Society which was opposed by Sri Swapnil Kumar, learned counsel for the petitioner on the ground that this writ petition has been filed by the Residents Welfare Association, hence he has no locus.

2. In view of Chapter XXII Rule 5(A) of the Allahabad High Court Rules the Court permits Sri V.K.Singh, learned senior counsel to appear and be heard in this case.

3. With the consent of the learned counsel for the parties the case is taken up for final disposal.

4. Present writ petition has been filed amongst other the following relief:

"issue a writ, order or direction in the nature of certiorari quashing the orders dated 9.4.2019 (Annexure 12) and 21.6.2019 (Annexure 13) issued by the respondent no.3."

5. The petitioner is a society registered under the Societies Registration Act, 1860 having Registration No. 2663 which was renewed from time to time. The Deputy Registrar, Firms Societies and Chits Mohanpuri Meerut, respondent no.2 by order dated 12.12.2017 cancelled the bye-laws of the petitioner and directed it to submit a new bye-laws as per model bye-laws under the U.P. Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010. In response to the said order the petitioner submitted a copy of new bye-laws to the respondent no.2 through registered post on 23.1.2018.

6. The respondent no.2 by his order dated 19.2.2018 has approved and registered the new bye-laws of the petitioner-Society. The said bye-laws of the petitioner was duly approved by the Great Noida Industrial Development Authority on 22.2.2018. Thereafter a notice was issued for cancellation of the bye-laws of the petitioner-society to which the petitioner submitted its reply. The respondent no.2 by order dated 30.6.2018 has cancelled the bye-laws of the petitioner against which the petitioner preferred Writ -C No. 26696 of 2018 which was partly allowed on 17.9.2018.

7. On 6.11.2018 the Secretary of the petitioner- society issued a notice for convening a special general body meeting to get the bye-laws approved. On 25.11.2018 the special general body meeting was held and bye-laws were framed and passed by the members present therein. The bye-laws were approved by the general house and presented before the competent authority-respondent no.3 on 30.11.2018 for its approval. The respondent no.3 by the impugned order dated 9.4.2019 has rejected the same on the ground that there

are variation in Clause 39 from the model bye-laws. The petitioner on 23.4.2019 filed a review petitioner which was dismissed by the respondent no.3 by the impugned order dated 21.6.2019. Hence the present writ petition.

8. Heard Sri Swapnil Kumar along with Sudhanshu Kumar, learned counsel for the petitioner, Sri V.K.Singh, learned senior counsel Sri B.B.Jauhari, learned counsel for respondent no.3 and learned standing counsel for the State respondents.

9. Learned counsel for the petitioner submitted that the impugned orders dated 9.4.2019 and 21.6.2019 have been passed in gross violation of the principles of nature justice without recording any reason. He further submitted that an order without a valid reason cannot be sustained. He further submits that the impugned orders be set aside and direction be issued to the respondents to pass a fresh reasoned order.

10. Learned counsel for the respondents have no objection to it.

11. It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it.

12. Highlighting this rule, the Hon'ble Supreme Court, in the case of ***Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. Shukla & Brothers,*** (2010) 4 SCC 785, has observed that the administrative authority and the tribunal are obliged to give reasons, absence whereof would render the order liable to judicial chastisement. The relevant paragraphs of the aforesaid judgement are quoted as under:-

"10. The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad.

11. The Supreme Court in the case of S.N. Mukherjee v. Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best

be vindicated by clarity in its exercise". To enable the Courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-

"11. ...the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from absolute principle of law that the Courts should record reasons for its conclusions to enable the appellate or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

14. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of

rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

15. In the case of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], the Supreme Court held as under:-

"6. .....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

16. In the case of Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) SLT 345, the Supreme Court clarified the rationality behind providing of reasons and stated the principle as follows:-

"56. . . Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration in Re, `proper adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. Contradictory reasons are equal to lack of reasons. . . ."

17. In Gurdial Singh Fijji v. State of Punjab [(1979) 2 SCC 368], while dealing with the matter of selection of candidates who could be under review, if not found suitable otherwise, the Court explained the reasons being a link between the materials on which certain conclusions are based and the actual conclusions and held, that where providing reasons for proposed supersession were essential, then it could not be held to be a valid reason that the concerned officer's record was not such as to justify his selection was not contemplated and thus was not legal. In this context, the Court held:-

"... "Reasons" are the links between the materials on which certain conclusions are based and the actual conclusions. The Court accordingly held that the mandatory provisions of Regulation 5(5) were not complied with by the Selection Committee. That an officer was "not found suitable" is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give anything approaching the judgment of a Court, but

it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List."

This principle has been extended to administrative actions on the premise that it applies with greater rigor to the judgments of the Courts.

18. In State of Maharashtra v. Vithal Rao Pritirao Chawan [(1981) 4 SCC 129], while remanding the matter to the High Court for examination of certain issues raised, this Court observed:

". . . It would be for the benefit of this Court that a speaking judgment is given."

19. In the cases where the Courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the Court of competent jurisdiction are challenged in absence of proper discussion. The requirement of recording reasons is applicable with greater rigor to the judicial proceedings. The orders of the Court must reflect what weighed with the Court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court.

20. A Bench of Bombay High Court in the case of M/s. Pipe Arts India Pvt. Ltd. V. Gangadhar Nathuji Golamare [2008 (6) Maharashtra Law Journal 280], wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held:-

"8. The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh v. Union of India and Ors. 1995 (Suppl) 2 SCC 83, the Court held as under:

"8. ...His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made."

10. In the case of Jawahar Lal Singh v. Naresh Singh and Ors. (1987) 2 SCC 222, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on

the reasons which had weighed with the trial Court.

12. In the case of State of Punjab and Ors. v. Surinder Kumar and Ors. [(1992) 1 SCC 489], while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In the case of Hindustan Times Ltd. v. Union of India and Ors. [(1998) 2 SCC 242], the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

14. Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of State of U.P. v. Battan and Ors. [(2001) 10 SCC 607], the Supreme Court held as under:

"4. ...The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable."

15. Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha v. State of Bihar and Ors. JT 2003 (Supp.2) SC 354.

16. In a very recent judgment, the Supreme Court in the case of State of Orissa v. Dhaniram Luhar (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R. In Breen v. Amalgamated Engg. Union observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to

perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

17. Following this very view, the Supreme Court in another very recent judgment delivered on 22nd February, 2008, in the case of State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007) stated that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless."

18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law,mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Blackrobed Bureaucracy Or Collegiality Under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:-

"My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not."

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a

legitimate expectation on the part of the litigant.Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:-

"When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

"The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and

(4) to provide reasons for an appeal Court to consider."

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing

reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award. The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

21. The principles stated by this Court, as noticed supra, have been reiterated with approval by a Bench of this Court in a very recent judgment, in State of Uttaranchal v. Sunil Kumar Singh Negi [(2008) 11 SCC 205], where the Court noticed the order of the High Court which is reproduced hereunder:-

"I have perused the order dated 27.5.2005 passed by Respondent 2 and I do not find any illegality in the order so as to interfere under Article 226/227 of the Constitution of India. The writ petition lacks merit and is liable to be dismissed."

and the Court concluded as under:-

"In view of the specific stand taken by the Department in the affidavit which we have referred to above, the cryptic order passed by the High Court cannot be sustained. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in State of U.P. v. Battan1. About two decades back in State of Maharashtra v. Vithal Rao Pritirao Chawan the desirability of a speaking order was highlighted. The requirement of indicating reasons has been judicially recognised as imperative. The view was reiterated in Jawahar Lal Singh v. Naresh Singh.

10. In Raj Kishore Jha v. State of Bihar this Court has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

"11. 8. ... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the

salutary requirements of natural justice is spelling out reasons for the order made;..

12. In the light of the factual details particularly with reference to the stand taken by the Horticulture Department at length in the writ petition and in the light of the principles enunciated by this Court, namely, right to reason is an indispensable part of sound judicial system and reflect the application of mind on the part of the court, we are satisfied that the impugned order of the High Court cannot be sustained."

22. Besides referring to the above well-established principles, it will also be useful to refer to some text on the subject. H.W.R. Wade in the book "Administrative Law, 7th Edition, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

".....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice...

.....Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself....."

23. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be.

24. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a

party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be.

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. By practice adopted in all Courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of Alexander Machinery (Dudley) Ltd. (supra), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate.

28. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate."

13. The Supreme Court in a long line of decisions has settled that the hallmark of order and exercise of judicial power of the judicial officers/ quasi-judicial officers and administrative officers must be supported by reasons. Even in the case of interim orders the Supreme Court in **Sant Lal Gupta v. Modern Co-operative Group Housing**

Society Ltd. and others, 2010 LawSuit (SC) 719 : 2010 (13) SCC 336, has held that if the High Court passes an interim order, it must be supported by reason.

14. A Constitution Bench of the Supreme Court in the case of **S.N. Mukherjee v. Union of India,** AIR 1990 SC 1984, which has been consistently followed by the Supreme Court, has held that if an order is without reason, the order becomes arbitrary. The said judgment has been followed in **Kranti Associates Private Limited Vs. Masood Ahmed Khan,** (2010) 9 SCC 496, and Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519. In the aforesaid cases, the Supreme Court has held that the reasons are heartbeats of the order and if there is no reason, the order becomes dead.

15. We find that the authority concerned has only recorded its conclusion without assigning any reason. It is a well settled law that the administrative order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion. The absence of reason makes an order unsustainable. One of the most important aspects for insisting to record reason is that it substitutes the subjectivity with objectivity. It is also treated as a part of natural justice and fair play.

16. The Hon'ble Supreme Court has consistently taken the view that recording of reason is an essential feature of dispensation of justice. A litigant, who approaches the Court with a grievance in accordance with law, is entitled to know the reason for grant or rejection of his prayer. An administrative order without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Authority in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that administrative order.

17. In view of the aforesaid cases of the Hon'ble Supreme Court it is clear that the reason is the heartbeat of the order and without reason, the order becomes dead.

18. The administrative order, without any reason, causes prejudice to the person against whom it is passed. The Hon'ble Supreme Court, time and again, has emphasized the importance of recording reason for the decision by the administrative authorities.

19. From a perusal of the materials available on record we find that while passing the impugned orders dated 9.4.2019 and 21.6.2019 the respondent no.3 has not assigned any reason in not accepting the bye-laws submitted by the petitioner.

20. For the reasons mentioned above, we find that the impugned orders dated 9.4.2019 and 21.6.2019 cannot be sustained in the eyes of law and the same are accordingly, quashed.

21. The matter is remanded back to the respondent no.3 for passing a fresh reasoned and speaking order after affording an opportunity of hearing to all the stake holders expeditiously preferably within a period of three months from the date of production of a certified copy of this order before him.

22. It is made clear that we have not adjudicated the claim of the petitioner on

merits and the respondent no.3 is free to pass an appropriate reasoned order in accordance with law.

23. With the aforesaid observations/directions, the writ petition is disposed of.

(2019)11ILR A1328

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2019

BEFORE
THE HON'BLE MR. YASHWANT VARMA, J.

Writ C No. 28520 of 2019

M/S Ansal Landmark Township(Pvt.) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant Shukla

Counsel for the Respondents:
C.S.C., Sri Rohan Gupta

A. Civil Law-Legal Services Authorities Act, 1987 - Section 22E (3) - there cannot be two decrees on one claim – In case of separate opinions, all opinions to be pronounced together on same date. Permanent Lok Adalat to draw operative directions consistent with majority view.

HELD: - The pronouncement of the award must necessarily be simultaneous on part of both the majority and the member constituting the minority. Both the majority and the minority would be entitled to render separate opinions where after operative directions would have to be necessarily framed in tune and consistent with the view and the decision ultimately arrived at by the majority. The operative directions would have to be drawn by the Tribunal reflecting and comprising the majority view that prevailed and the claim would consequently have to be recognized as having been disposed of in terms of those operative directions. (Para 17)

B. Civil Law- Indian Contract Act, 1872 - If conditions within integrated township are uninhabitable-allottee cannot be compelled to take on possession-demand of penal interest and holding charges-unsustainable. Petitioner cannot be permitted to enforce contract-that is one sided and unfair.

More fundamentally the Court is of the firm view that the petitioner cannot be legally permitted to enforce the terms of the contract in a manner that is patently one sided and unfair. A developer cannot be permitted to assert that while a failure on its part to abide by contractual obligations are liable to be condoned, those operating upon the allottee must be strictly enforced. (Para 29)

Writ petition disposed of (E-9)

List of cases cited: -

1. Bar Council of India Vs UOI, (2012) 8 SCC 243

2. Pioneer Urban Land & Infrastructure Ltd. Vs Govindan raghvan, (2019) 5 SCC 725

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

1. This petition, which constitutes the second foray of the petitioner before this Court, challenges the awards pronounced by the Permanent Lok Adalat, Ghaziabad. On an earlier occasion the award dated 13 February 2019 [hereinafter to be referred as the **"original award"]** rendered by the Permanent Lok Adalat was set aside by a learned Judge of the Court in terms of his judgment dated 23 April 2019 rendered on Writ C No. 13895 of 2019. The

original award was set aside since the same had come to be pronounced and made only by two members of the Permanent Lok Adalat and in the absence of the Chairman.

2. The present petition impugns the awards dated 28 and 29 June 2019 passed by the Permanent Lok Adalat, Ghaziabad in Case No. **PLA/2016.** The awards rendered by the Permanent Lok Adalat bear two separate dates since the Chairman delivered his decision on 28 June 2019 whereas the Members thereof pronounced their opinion on 29 June 2019. The significant question that arises for consideration is whether the two separate awards pronounced by the constituents of the Permanent Lok Adalat are legally sustainable. The claim that was instituted before the Permanent Lok Adalat essentially challenged the validity of the levy of penal interest and holding charges by the petitioner [a developer of an integrated township] upon the third respondent [the allottee] on an alleged failure to take possession of a residential plot and complete construction thereon.

3. However before proceeding further, the following salient facts would merit notice. The respondent No. 3 is an allottee of a residential plot situate in an integrated township being developed by the petitioner. That township, known as **"Sushant Aquapolis",** comprises of residential plots, high-rise towers, commercial facilities and other supportive and attendant amenities. The plot was initially allotted to one Ms. Anita Uppal who transferred the same to Sumit Pal Singh. Sumit Pal Singh is stated to have transferred the residential plot to the third respondent on 14 November 2008. Although there is no dispute with respect to the fact that the principal consideration for the residential plot has been duly paid and liabilities in respect thereof discharged, it may only to be noted that 70% of the total consideration had been paid by 6 April 2009 and thereafter further payments made on 16 April 2009.

4. Admittedly although the integrated township which was described to be a *"high rise lake front township"* had been launched in 2007, as per the petitioner itself at least till 2009 the same had not been fully developed. On 23 April 2009, the third respondent is stated to have addressed a communication to the petitioner bringing to its attention news reports that a waste dump was proposed to be established by the Municipal Corporation adjacent to the project site. It was asserted that the establishment of that waste dump would render the project uninhabitable and consequently called upon the petitioner to respond to the veracity of the news reports that had appeared. This issue is stated to have been raised yet again in terms of the communications of the third respondent dated 12 March and 28 July 2010. On 13 August 2010, the petitioner issued a letter offering possession to the third respondent and called upon him to pay the balance consideration in respect of the plot in question. Although the third respondent reiterated his request for the petitioner clarifying the position with respect to establishment of the proposed waste dump in his communications of 1 February 2011, those communications were not responded to. On 3 September 2011, the petitioner apprised the third respondent of a dispute with respect to the establishment of the waste dump pending in Court but assured the allottee that the project would not be adversely affected.

While this exchange of correspondence ensued, it has come on record that the project was not completed even though five years had expired from the date of allotment. The third respondent is stated to have ultimately cleared all outstanding dues in respect of the plot in question in 2012 and receipt of such payments were issued by the petitioner on 14 April 2012. It becomes significant to note that the third respondent asserts to have cleared and liquidated the remaining dues as demanded by the petitioner subject to the condition that no penal interest or holding charges would be levied. However, on that very date a demand for penal interest and holding charges was raised by the petitioner against the third respondent. It is this demand that led to the dispute traveling to the Permanent Lok Adalat. Before this Court also parties were ad idem that the only issue that survives is with respect to the levy of penal interest and holding charges.

5. When the petition was initially heard, the Court noticed that two awards appeared to have been pronounced by the Permanent Lok Adalat. This in light of the fact that while the Chairman delivered his decision on 28 June 2019, the two Members pronounced their order on 29 June 2019. Drawing the attention of learned counsels to the provisions made in Section 22E of the **Legal Services Authorities Act 19871** which clearly provided that in case of a difference of opinion between the Members constituting the Permanent Lok Adalat award was liable to be declared by majority, it was pointed out that the impugned orders were rendered unsustainable on this short ground alone. The counsels were accordingly apprised of the prima facie opinion of the Court that the award could not be sustained in light of the unambiguous provisions made in Section 22E (3) of the 1987 Act. However, in order to lay the controversy at rest and since the dispute itself stood narrowed down only to the demand of penal interest and holding charges, learned counsels were granted an opportunity to explore the possibility of arriving at a settlement. The parties, however, could not come to any settlement.

6. On a failure on the part of respective parties to arrive at a settlement and bearing in mind the fact that the dispute inter partes had been lingering since 2010, proceedings initiated before the Lok Adalat in 2016 and already remanded back once on an earlier occasion, the Court expressed its view to learned counsels that it would be inexpedient to remit the matter to the Permanent Lok Adalat once again and that it would be in the interest of justice that the matter be heard on merits and the dispute lent a quietus at this stage itself. On that note, learned counsels consented for the petition being heard and disposed of on merits. It is in the above background that the petition was ultimately set down for hearing.

7. Sri Prashant Shukla, leaned counsel appearing in support of this petition, took the Court in detail through the award pronounced by the Chairman to contend that the demand of penal interest and holding charges was in accord with the agreement which governed the transaction and that consequently the dispute as raised by the petitioner was clearly untenable. He submitted that although the petitioner had offered possession as far back in 2010 it is the

third respondent who refused to take possession of the residential plot and thus became liable to pay penal interest and holding charges. It was submitted that the waste dump did not come to be established and therefore the objection as taken by the third respondent was untenable. Sri Shukla contended that no conciliation preceded the award being pronounced and submitted that consequently the orders passed by the Permanent Lok Adalat were liable to be set aside on this ground alone. In support of this submission, Sri Shukla placed reliance upon the decision rendered by the Supreme Court in **Bar Council of India Vs. Union of India2** and more particularly to the observations entered therein emphasizing the obligation of the Permanent Lok Adalat to initiate and undertake a process of settlement and conciliation. Insofar as the issue of the establishment of the waste dump is concerned, Sri Shukla submitted that the aforesaid project came to be stalled pursuant to the injunction issued by the National Green Tribunal [hereinafter to be referred to as the **"NGT"]** in 2016 and the project itself ultimately dropped. It is pertinent to note that the petitioner refers to the injunction of the NGT issued in December 2016 and the project itself being shelved by the Municipal Corporation, Ghaziabad in 2018. It was further asserted that as many as 150 allottees had accepted possession by payment of charges and completion of all formalities. It was also asserted that these allottees have been living in the project since 2010. Though it is admitted by the petitioner that there was delay in construction and completion of the project, the same is explained to be on account of circumstances beyond the control of the petitioner. It is consequently contended that no deficiency of service or negligence can be attributed to it.

8. The Court called upon Sri Shukla to clarify whether the agreement specified any rate at which holding charges were liable to be levied. To this it was fairly conceded that no specific charge or rate at which holding charges were liable to be demanded stood stipulated in the agreement.

9. Refuting the submissions urged on behalf of the petitioner, Sri Rohan Gupta, learned counsel appearing for the third respondent, submitted that the record clearly reflected that despite repeated communications being addressed, the issue of establishment of the waste dump was never clarified by the petitioner at least till 2011. According to Sri Gupta, even in the communication of the petitioner of 2011 only an assurance was proffered and no details with respect to any decision taken by the Municipal Corporation to shift the proposed waste dumb referred to. According to Sri Gupta, the admitted facts established that the waste dump was proposed to be set up adjacent to the township itself and it was in that backdrop that the NGT issued the injunction in December 2016. Sri Gupta contends that as per the petitioner's own assertion in the writ petition the project was ultimately shelved by the Municipal Corporation, Ghaziabad only in 2018. This, according to Sri Gupta, is clearly indicative of the fact that at least till 2018 there was no clarity whether the waste dump would or would not be established next to the residential township. Sri Gupta contended that the proposed establishment of the waste dump directly impacted the viability of the respondent

No. 3 and other allottees constructing residential premises in its immediate vicinity. Sri Gupta highlighted the fact that the project itself was touted to be a **"Lake Facing Integrated Township"** and that the entire underlying concept of such a township would have been placed in jeopardy in case a waste dump came to be established adjacent thereto. He submitted that it was in that background that the third respondent persisted in seeking clarifications from the petitioner before taking possession. According to him, in case the third respondent was compelled to take possession, it would have resulted in him facing a fait accompli in case the waste dump had ultimately come to be established.

10. Sri Gupta then referred to the Commissioner's report filed before the Permanent Lok Adalat which according to him clearly established that the project was incomplete, construction work was ongoing and that basic amenities and supportive infrastructure had not been established. Sri Gupta referred to the report of the Commissioner in extenso to contend that the conditions as obtaining at the site rendered construction impossible and conditions uninhabitable. From this report of inspection undertaken in 2017, it was also highlighted that neither the proposed hospital nor nursing home had been constructed. Referring to that report it was pointed out that under construction towers were not barricaded and even safety netting as mandated in terms of environmental norms not placed around them. It was submitted that on account of ongoing construction work, the environment in the township rendered conditions unlivable and that the main road for ingress and egress was being used day and night by trucks and dumpers carrying construction material and waste. He also referred to the fact that a mixing plant continued to function in the township which was proof of the fact that construction activities were continuing therein.

11. Sri Gupta then assailed the validity of the provisions in the agreement pertaining to penal interest and holding charges and submitted that they were clearly unconscionable since the third respondent was compelled to sign on the dotted line and accept the terms and conditions as imposed by the petitioner. Sri Gupta taking the Court through the terms of the agreement submitted that it was clearly one sided and an outcome of the unfair bargaining position in which the allottee stood placed. It was contended that since there was an admitted failure on the part of the petitioner to fulfill its own obligations under the agreement, the provisions in respect of penal interest and holding charges could not be enforced. According to Sri Gupta, the third respondent had bargained for a residential plot in an integrated township. He referred to the fact that the petitioner itself had advertised the project to be a self-sufficient residential oasis. However and since the reality at the ground level was in stark contrast to what had been proposed and promised, Sri Gupta contended that the levy of penal interest and holding charges was clearly illegal, unfair and unjust.

12. Sri Shukla, learned counsel for the petitioner, was granted an opportunity to respond to the submissions addressed on behalf of the third respondent who assailed the validity of the agreement on the ground of being unconscionable and

thus unenforceable. Learned counsel, however, chose not to proffer any legal justification in that respect. It is the rival submissions recorded above that now fall for determination.

13. For the sake of clarity and ease of reference this would perhaps be an appropriate stage to identify the core questions that arise in the background of the facts noticed above and the rival submissions advanced. The Court finds that the following three principal issues arise for consideration: -

A. The validity of two separate awards pronounced by the Permanent Lok Adalat in respect of a singular cause

B. The legality of the levy of penal interest and holding charges, and

C. The validity of the stipulations contained in the agreement executed between the parties, which are assailed on the ground of being unconscionable and thus unenforceable.

14. The Court firstly proposes to dispose of the peripheral issue and contention addressed on behalf of the petitioner that no conciliation proceedings were undertaken by the Permanent Lok Adalat before rendering award. It becomes pertinent to note that the original award in unambiguous terms records that a conciliation process was undertaken and the matter placed for disposal on merits only once such efforts did not bear fruit. In Paragraph -20 of the writ petition it is however asserted that this recital as appearing in the original award is incorrect. The aforesaid assertion is affirmed on the personal knowledge of the deponent to the writ petition, who is stated to be the Manager (Land) of the petitioner. This deponent, however, does not disclose as to how he derives personal knowledge of this fact. He also does not assert to have been present before the Permanent Lok Adalat when hearings were held nor does he state that he was continually associated with the proceedings that were undertaken by the Permanent Lok Adalat. On a more fundamental plane the Court notes that the petitioner is not stated to have made any application to the Permanent Lok Adalat assailing or disputing the recordal of conciliation proceedings having been undertaken and seeking rectification of the record in that respect. It is well settled that recitals appearing in an order or decision of a Tribunal cannot be assailed or questioned unless a procedure for rectification duly initiated before that Tribunal or Authority itself. While this would have been sufficient to negative the contention in this regard as canvassed, the Court further notes that in the earlier round of litigation that ensued between parties and travelled to this Court also no such allegation or contention appears to have been urged. Sri Shukla despite liberty being granted in this regard was unable to either place for the perusal of the Court either a copy of the earlier writ petition nor was he able to otherwise establish that this objection was taken to the award that was originally rendered. In any case, as this Court reads the judgment rendered by the learned Judge on the earlier writ petition, it is manifest that the only ground which appears to have been orally urged in challenge to the award was that it had come to be passed by two Members and in the absence of the Chairman. In view thereof, the Court finds itself unable to accept the submission that the Permanent Lok Adalat proceeded to render award without undertaking requisite conciliatory measures.

15. Having disposed of this issue, the Court then proceeds to deal with the principal questions that arise.

A. The validity of two separate awards rendered by the Permanent Lok Adalat in respect of a singular cause

16. The Court deems it apposite to firstly deal with the legality of the procedure as adopted by the Permanent Lok Adalat which has resulted in two separate and distinct awards coming into existence. The Court is constrained to observe that the Chairman of the Permanent Lok Adalat clearly records in his order that the two members had duly apprised him of not being in agreement with the view proposed to be taken by him, that they were inclined to follow a separate line of reasoning and arrive at a decision contrary to what he proposed to make. Despite that being the admitted position, the Chairman proceeded to pronounce his decision on 28 June 2019. It is also relevant to note that the dissenting members did not simultaneously and in any case on that date pronounce their decision. They proceeded to declare their decision on the next day, namely, 29 June 2019. The Court bears in mind the provisions made in Section 22E of the 1987 Act which prescribes in unambiguous terms that the award made by the Permanent Lok Adalat shall be by a majority of persons constituting the Tribunal. It is also pertinent to note that Section 22E confers on the award rendered by the Permanent Lok Adalat the same status as that of a decree of the Civil Court. Section 22E, which is the key to the answer to this issue, reads as follows:

"22E. Award of Permanent Lok Adalat to be final.- (1) Every award of the Permanent Lok Adalat under this Act made either on merit or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them.

(2) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.

(3) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.

(4) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

(5) The Permanent Lok Adalat may transmit any award made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court".

17. It is manifest from a plain reading of Section 22E that the 1987 Act does not envisage two separate awards being rendered. This, undisputedly, since there cannot be two decrees in respect of one claim. While dissent and difference of opinion can be envisaged and is always a possibility in the case of a multi-member Tribunal, such situations are and would be clearly governed by Section 22E (3). In case of a difference of opinion, it is open to the members of a multi-member Tribunal to record independent and separate opinions. It is also possible for some of the members to join together and render a decision thus constituting the majority view. If the majority proceeds to draw up a separate opinion, the remaining member of the Tribunal can always record dissent. However, the pronouncement of the award must necessarily be simultaneous on the part of both the majority and the member constituting the

minority. Both the majority and the minority would be entitled to render separate opinions where after operative directions would have to be necessarily framed in tune and consistent with the view and the decision ultimately arrived at by the majority. The operative directions would have to be drawn by the Tribunal reflecting and comprising the majority view which prevailed and the claim would consequently have to be recognized as having been disposed of in terms of those operative directions. This procedure and practice, which is well settled and must be recognised as the solitary course liable to be adopted was evidently not followed.

18. As a consequence of the procedure adopted by the Permanent Lok Adalat in the present case, two awards have come into being in respect of a singular claim. The correct approach on the part of the Chairman of the Permanent Lok Adalat upon being informed by the other members that they were desirous of taking and adopting a stand contrary to that proposed by him would have been to desist from pronouncing award on 28 June 2019. The correct, nay, the only course which should have been adopted was for the Permanent Lok Adalat to pronounce opinions together and on the same date. After declaration of separate opinions it would have been incumbent upon the Permanent Lok Adalat to draw up operative directions consistent with the view taken by the majority. However and since this course was not adopted by the Permanent Lok Adalat, it has resulted in the coming into existence of two separate and inconsistent decrees. Undisputedly there cannot possibly be two separate decrees in respect of one claim. As observed earlier, while there may be separate views and opinions pronounced in a matter, the decree must necessarily be only one and that which reflects and embodies the majority view that prevailed. Both the orders of 28 and 29 June 2019 consequently are liable to be quashed and set aside on this ground alone.

B. The legality of the levy of penal interest and holding charges by the petitioner upon the third respondent

19. The Court then proceeds to deal with the substance of the dispute which led to the institution of proceedings before the Permanent Lok Adalat. In order to appreciate the nature of the contract between the parties it would be apposite to notice some of the salient clauses of that agreement. The relevant provisions of the agreement are extracted herein below:

"1. That the BUYER has applied for a plot and the DEVELOPER has with the consent of the BUYER allotted the Plot No. 0032 in Block A admeasuring 251 Sq. meters (approx 300 Sq. Yards) @ Approx Rs.10,458/- per sq. meter (Rs. 8750/- per sq. yard) in Acquapolis Ghaziabad subject to the following terms and conditions:

2. That the above agreed price of the residential plot covers development of internal service such as laying of roads, development of parks and landscapes, laying of water lines laying of sewer lines, laying of electrical HT/LT lines, street lights, laying of storm water drain lines and erection of electrical sub-stations and to develop necessary civil services essential for a convenient living. The payments is to be made in

installments as prescribed in Schedule-1/ Schedule-1A annexed to this Agreement. The applicable schedule shall form and be read as part of this Agreement.

...

11. That the timely payment of installments as stated in Schedule-1/Schedule-1A of the Agreement and applicable stamp duty, registration fee and other charges payable under this Agreement is the essence of this contract. In the absence of any notice of demand issued by the DEVELOPER, it shall be incumbent on the BUYER to strictly comply with the terms of timely payment and the other terms and conditions on this Agreement, failing which allotment shall stand cancelled and the entire amount of Earnest Money deposited by him shall be forfeited and the BUYER shall be left with no right or lien on the plot. The amount(s), if any, paid over and above the Earnest Money shall be refunded to the BUYER without any interest. In exceptional circumstances, the DEVELOPER may at its sole absolute discretion condone the delay in payment by charging an interest @ 18% p.a. on the amount outstanding. In the event of the DEVELOPER waiving the right of forfeiture and accepting payment on that account, no right, whatsoever, would accrue to any other defaulting BUYER (Buyer/Purchaser).

...

14. That the BUYER agrees that the sale of the units is subject to force majeure clause which inter alia include delay on account of non-availability of steel, cement or any other building materials, or water supply or electric power or, slow down, strike or due to a dispute with the construction agency employed by the DEVELOPER, civil commotion or by reason of war, or enemy action or earthquake or any act of God, delay in certain decisions/ clearances from statutory body(ies) or if non-delivery of possession is as a result of any notice, order rules or notification of the Government and / or any other public or Competent Authority or for any other reason beyond the control of the DEVELOPER and any of the aforesaid event, the DEVELOPER shall be entitled to a reasonable corresponding extension of the time of delivery of possession of the said plot on account of force majeure circumstances and in such eventuality the BUYER will not claim any amount of money by way of damages/ compensation from the DEVELOPER.

15. That the booking/ allotment, once made, cannot be cancelled by the BUYER. However, the discretion absolutely rests with the DEVELOPER to allow cancellation subject to forfeiture of Earnest Money. The amount, if any, paid over and above the Earnest Money shall be refunded to the BUYER without any interest.

...

17. That the BUYER shall be bound to start construction of the house with due sanction of Competent Authority with in a period of 3 years from the date of intimation to take possession is sent by the DEVELOPER, failing which DEVELOPER will be entitled to resume the plot without any compensation and to allot the same to intending another BUYER and sale price of the plot received by DEVELOPER shall be refunded to the BUYER without any interest. Alternatively, it shall be at the sole discretion of the DEVELOPER to extend the period of construction, but in that event, the BUYER shall be liable to pay holding charges for the plot area to the DEVELOPER for the extended period as decided by the DEVELOPER."

20. The essence of the complaint which was laid before the Permanent Lok Adalat manifests from the following averments as contained in the petition filed by the third petitioner:-

"1.That Defendant launched a plan for integrated township popularly known as Aquapolis a at Dundahara. Ghaziabad in 2007. This township includes the multistory flats, Commercial Complex and other institutions. In his agreement letter Ansal called it highrise Lake Front Township. The copy of sale plan and advertisement brochure is enclosed herewith as Annexure-

..

6. That On dt 16 April, 2009 Complainant had further paid Rs. 2,69,063/- being 10% of the plot and requested to Defendant to inform the possession for the property. At this time 80% of the payment of plot has been made to the Defendant.

Complainant has also enquired in this letter from Defendant that there is great rumor and news about dump yard of Govt. Local Body is coming in Aquapolis project or nearby and expressed his fear if such yard comes in this project and vicinity/neighbourhood of the project then nobody will be able to have their residential house in such non-living condition. Complainant requested Defendant to inform the date of possession and clarify the status of dumping yard. This letter was received in Defendant office on 23th April, 2009 and places here as Annexure 4.

No reply was given by Defendant to Complainant of this letter.

13. On 29 Nov 2011 Complainant issued a letter to Defendant to reminding them dumping yard issue and asked for the layout map of the project indicating the position of plot and dumping yard and distance between the them, but Defendant neither gave any reply nor any details in this regards till date.

Complainant also stated that since the project is not clear even after approx. 5 years from the allotment than how the possession can be made to consumer.

However, to buy peace of mind which is also disturbed due to their demand letters and without prejudice to his rights, Complainant has made the balance payment of Rs.5,30,051 towards 100% cost of plot and Rs.60,000/- for the water connection, electric connection and infrastructure development charges.

As per the discussion with Defendant, it was agreed that accepting these payment interest mentioned in demand letter is totally waived and Defendant will not be entitled for any interest, damage etc. In future also. This fact was mentioned in our letter also through which the abvoe such payment has been made. The Defendant has accepted the payment and issued the official receipts on 14.04.2012 the for above said cost and charges. This letter and receipts are at Annexure-11.

14. On dt. 14.04.2012 again Defendant issued for the penal interest and holding charges. This letter is at Annuxure-12.

15. Complainant again replied to the Defendant that we have made all payments to them and nothing is due and asked them to clarify again dumping yard

issue, layout map of the project and dumping yard. Complainant has also informed to the Defendant that no sewer line is present at site and reiterated that they have taken a plot for residential in a mini town ship where all the committed commercial center and other facilities were shown on paper. But does not exist all at site Just merely cutting the lands into plot you cannot enforce the customer to take the possession whereas the whole other site is under construction.

As on that date also the construction material is scattered at the site and dumper with dust and other building materials are moving all round for the constructions of the project. The condition of the site is such that possibility of living with the family is not possible at all at the site. This letter is at Annexure- 13.

16. That the defendant has issued the statement of account for the demand of interest for Rs.2,20,266/- and holding charges for Rs.3,00,639/- up to April 20, 2015, which are totally unwarranted. This letter is at Annexure-14.

17. The Defendant has never replied / given any details on the issue of dumping yard. Even in one of the letter of Defendant has admitted that land title was not clear. His project for mini township is far behind the its committed and even at present their does not seem any such situation on the site which was committed by Defendant and shown on its catalogue and broacher at the time of selling of plot. It is a case of fraud against the small and innocent buyer. On one side the Defendant is not able to deliver, which was committed by them and on the other side there are enjoying the 100% payment collected from the buyers.

Now they want to collect the undue charges like panel interest, holding charges etc. by threating and not giving the possession without these payments. Till date the dumping yard issue is there, and the project is also incomplete then how the Defendant can ask the holding charges and interest. In such situation, Complainant are entitled for interest for other payments as the project is not delivered by Defendant, and they should also be penalized for their deficiency in services."

21. The Court also deems it relevant to refer to the following facts as recorded in the report submitted by the Commissioner before the Permanent Lok Adalat.

''मैने निरीक्षण किया तो पाया कि उस समय मिक्सिंग प्लान्ट बन्द है लेकिन आस पास कई बहु मंजिले अर्ध निर्मित टावरों में कुछ निर्माण कार्य चल रहा है। सम्पूर्ण टाउनशिप मुख्यतः दो हिस्सों में बटी हुई है। पश्चिम दक्षिण की ओर भूखण्ड है व उत्तर–पूर्व की ओर अधिकांशतः बहुमंजिले टावर हैं। अंसल लैण्डमार्क के प्रतिनिधि द्वारा बताया गया कि भूखण्डों की संख्या 250 है। यह भी बताया गया कि कुल भूखण्डों के लगभग 90 प्रतिशत स्वामियों को अधिपत्य दिया जा चुका है तथा अब तक लगभग दस भवनों का निमार्ण पूर्ण हो चुका है व चार पांच निमार्णाधीन है। मै अधिकांशतः विवादित भूखण्ड से दिखाई दे रहे थे। कुल बहुमंजिले टावरों की संख्या तेईस बतायी गयी जिनमें से 13 के ैजतनबजनतम का निर्माण किया गया है और 04 टावरों के विषय में वबबनचंदबल बमतजपपिबंजम प्राप्त कर चुका है। सम्पूर्ण टाउनशिप में चार स्कूल प्रस्तावित है जिनमें से दो का निर्माण किया जा चुका है। टाउनशिप में अभी तक चिकित्सा सुविधा सुविधा है कोई अस्पताल व नर्सिंग होम नही बनाया गया है, थाने का निर्माण भी नही किया गया है।

मैने निरीक्षण में पाया कि मिक्सिंग प्लान्ट और निमार्णाधीन टावरों व टाउनशिप के

भूखण्ड वाले भाग जिसमें सड़क पार्क आदि की सुविधा उपलब्ध है उसे सुरक्षा व प्रदूषण से बचाने की दृष्टि से बेरीकेटिंग लगाकर पृथक नही किया गया है। निमार्णाधीन टावरों को एन0 जी0 टी0 के आदेश के बावजूद जाली से नही

उक्त श्री विवेक गुप्ता द्वारा मुझे यह बताया गया कि निर्माणाधीन टावरों के जो मजदूर है, बेरीकेटिंग न होने के कारण उनसे व ट्रकों और डम्परों के कारण पूरा क्षेत्र रात्रि के समय विशेष रुप से असुरक्षित है।''

22. At the very outset it would be pertinent to briefly elucidate and explain the concept and key elements of what is commonly understood as an *"integrated township"*. An allottee in an "integrated township" envisages and visualizes a consolidated and unified project complete and self sufficient in all respects. An integrated township, which may comprise of condominiums and residential plots, is understood and expected to comprise of an amalgam of various elements which together would make it self-sufficient and enhance the quality of life within it. Apart from making provision for roads, street lighting, sewer lines and waste treatment measures therein, it would also be expected to include supportive and shared facilities attendant to the basic infrastructural amenities referred to above. These may extend to establishment of supportive facilities that may be promised by the developer such as a commercial center, medical center, recreational facilities and security to name a few. These *"gated communities"*, as we have come to commonly describe such projects, are secured communes which not merely provide a residence to its occupants but also provide to them shared and concomitant facilities within the premises itself so as to make it self-sustaining, convenient and thus enhancing the over all experience of residing therein.

23. Undisputedly, the residential plot in question was situate in the integrated township that the petitioner proposed to develop. The integrated township was described by the petitioner itself as comprising of residential plots, high rise towers, commercial facilities and other supportive infrastructural amenities. The petitioner chose to describe the township as a high-rise lake front township. It was with the aforesaid project concept in mind that the third respondent entered into a contract with the petitioner. From the contents of the Commissioner report which was submitted before the Permanent Lok Adalat, however, it comes to light that out of a total of twenty three towers which were proposed to be constructed, occupancy certificates had been granted only in respect of four. The Commissioner further noted the assertion of the petitioner that 90% of the allottees had been supposedly granted possession. The inherent and manifest inconsistency between this assertion and the recordal of fact that occupancy certificates had been granted only in respect of four towers out of a total of twenty three which were proposed could not be explained by the petitioner. The Commissioner further notes that the proposed medical facility and Nursing Home had neither been constructed nor established. He further records in his report that the construction work within the township was ongoing and that none of the constructions had been either barricaded or secured by netting so as to control dust and pollutants generated in the course of construction activity. He also notices in his report the existence of a Cement Mixing Plant being operated as well as the continuous movement of dumpers and trucks within the township, as a result of which a large

quantity of dust and other particulates shrouded the entire project site. The Commissioner also records that as per the statement of the third respondent the movement of trucks and heavy dumpers in the night on common access roads rendered the project site wholly unsafe. From the facts as recorded by the Commissioner in his report and those extracted hereinbefore, it is evident that the project site was incomplete and construction activity ongoing even in December 2017 when it was inspected on the directions of the Permanent Lok Adalat.

24. The petitioner, however, challenges the recordal of facts by the Commissioner on the strength of the provisions made in Schedule -I to the Agreement and contends that since the payment of instalments was linked to different stages of development, it must be presumed that all infrastructural work had been completed. Sri Shukla in his submissions also laid emphasis on this aspect and urged the Court to accept as a fact that all civil and infrastructural work had been completed since payments were demanded in accordance with the provisions of Schedule 1. It was on this basis that it was principally urged that the facts to the contrary as recorded by the Commissioner must be ignored. This Court however finds itself unable to accept this submission in light of the unambiguous position of facts obtaining at the ground level as encapsulated in the report of the Commissioner. The report of the Commissioner as accepted by the Permanent Lok Adalat and the recordal of facts therein cannot be ignored merely on the basis of the provisions made in Schedule 1 of the agreement. In any case the stage of development of a project is a question which for obvious reasons cannot be left to be adjudged or ascertained on the tenuous thread of a presumption. It is essentially a question of fact to be established on the basis of evidence of respective parties. It is only the evidence which is placed on the record that is liable to be evaluated in order to ascertain the veracity of the rival claims. The petitioner in the present case has been unable to assail the findings recorded by the Commissioner on the strength of any cogent or reliable evidence that may have convinced this Court to reject that report. The submission as addressed at the behest of the petitioner in this respect is liable to be and is consequently rejected.

25. It is also pertinent to note that while the petitioner in Paragraph -31 of the writ petition avers that 150 allottees accepted possession and have been living in the project since 2010, this fact is sought to be established on the strength of particulars set out in a chart appended at Annexure -12 of the writ petition. Annexure -12 to the writ petition makes interesting reading. It establishes that none of the 158 allottees whose particulars find mention therein were granted possession in Sushant Aquapolis, the project in question. In fact Annexure 12 to the writ petition clearly evidences all the 158 allottees mentioned therein having been adjusted in different projects of the petitioner. It is evident therefore that the petitioner has made a statement on affidavit which if not incorrect is at least misleading.

26. That takes the Court then to the issue of the waste facility that was proposed to be established by the Municipal Corporation, Ghaziabad

adjacent to the project site and appears to have been the main bone of contention between the parties. As per the disclosures made by the petitioner itself, the construction of the proposed waste treatment facility was stayed by the N.G.T. as late as in December 2016. As per the admitted case of the petitioner, the proposal of the waste site was dropped by the Municipal Corporation, Ghaziabad only in 2018. From these disclosures as made by the petitioner it is evident that the specter of the proposed waste facility continued to hover upon the project right up to 2016 when the NGT intervened and issued an order of restraint. It is pertinent to note that the petitioner does not refer to any other decision of the local body that may have indicated that the proposal had been shelved at any time prior to 2016. In fact the petitioner has itself disclosed that the project was dropped only in 2018. The petitioner was compelling the petitioner to take possession and commence construction in 2010 when at that time a waste-dumping site was proposed to be established adjacent to the project. In case the waste facility was to be established, it would have, undeniably, adversely impacted the viability of a residential house being established in its immediate vicinity. It would have undisputedly created a wholly pernicious environment. Significantly, though the allotment was transferred to the petitioner in 2008, the project had not been completed even in 2017. The petitioner also candidly admits to the delay in completion of the project in paragraphs 34, 35, 36 and 37 of the writ petition. In the considered view of the Court, it is in the aforesaid factual backdrop that the claim for penal interest and holding charges is liable to be evaluated.

27. In the present case it has come on record that while the petitioner had held out and promised the establishment of a commercial center, a medical center and hospital within the integrated township, none of these promised amenities had been established even in 2017 when the Commissioner visited the project site. In fact his report as submitted before the Permanent Lok Adalat clearly proves that the residential towers were being built and construction activity ongoing. If the environment at the project site were such as described and captured in the report of the Commissioner, it would be wholly unfair and inequitable to hold the allottee to be bound to take possession and commence construction. Where conditions within the integrated township are established to be uninhabitable or unlivable, the developer cannot compel the allottee to commence occupation of a residence. It would amount to compelling the allottee to live and breathe in an incomplete concrete labyrinth. In the present case, the third respondent was constrained to enter into a standard form contract desirous of constructing a residential house in what was touted to be a lake-facing oasis. It has, however, been established from the record that this ultimately turned out to be a misleading mirage. Additionally the Court notes that the petitioner itself admits to the delay in the completion of the project. It has also failed to establish that the report of the Commissioner was patently incorrect or was liable to be debunked. As per the material placed by the petitioner itself all 158 allottees of the project were adjusted in different projects. Viewed in that backdrop the Court finds that the demand of penal interest and holding charges is rendered unsustainable.

C. The validity of the stipulations contained in the agreement executed between the parties which are assailed on the ground of being unconscionable and thus unenforceable.

28. Coming then to the validity of the individual clauses of the agreement, the Court notices that they were unilaterally loaded and framed in favour of the petitioner. The payment schedule forming part of the agreement required the allottee to pay all moneys by the time possession was offered. In terms of clause 11 the timely payment of instalments was described to be the essence of the contract. It also entitled the petitioner to levy interest @ 18% on the defaulted amount in case it chose not to cancel the allotment and forfeit the moneys paid. Clause 14 of the agreement denuded the buyer from the right to claim damages or compensation in case of delay in completion of the project on account of a force majeure. This clause itself is framed in expansive terms relieving the developer completely from being held accountable for delays and disruptions in implementation of the project. The force majeure events extended from a non-availability of building material to disputes that the developer may have with the construction agency engaged by it. The buyer was deprived of the right to seek cancellation of allotment with absolute discretion in this respect vesting in the developer. Clause 17, which deals with the levy of holding charges, mandates the levy of that charge in case the allottee fails to commence construction within 3 years of allotment and where the lapse in that respect is condoned by the developer. Significantly this clause neither stipulates the rate nor does it prescribe the manner in which holding charges would be computed. Sri Shukla, learned counsel for the petitioner, even in the course of his oral submissions could not explain the basis on which the holding charges had been computed.

29. More fundamentally the Court is of the firm view that the petitioner cannot be legally permitted to enforce the terms of the contract in a manner that is patently one sided and unfair. A developer cannot be permitted to assert that while a failure on its part to abide by contractual obligations are liable to be condoned, those operating upon the allottee must be strictly enforced. In such situations where the stage of development of the project is such that it is rendered unsuitable for living, an allottee cannot be required to fulfill his/her part of the bargain. The developer cannot be legally permitted to enforce the terms of the contract in such a partisan fashion.

30. In law, for a contract to be held as valid, it must be informed by the essential attributes of reciprocity. An agreement which is constructed on the basis of mutual and reciprocal obligations cannot be interpreted so as to permit one party to completely renege from its obligations while holding the other party bound inviolably to discharge its burden. The Court is of the considered view that this aspect assumes added significance when it finds that the position of parties places one in an unfair bargaining position. As noted above, the third respondent had no option but to accept the terms and conditions embodied in the standard form contract. The stipulations contained therein left that respondent with no leverage or negotiating space. While the project remained incomplete and

conditions on site inhabitable, the petitioners expected the third respondent to complete construction and occupy the plot. The issue of the proposed waste treatment facility hovered ominously over the entire project. That issue attained quietus only in 2018 when the project was ultimately shelved by the Municipal Corporation, Ghaziabad. Viewed in that background the Court is of the firm view that the imposition of penalty and holding charges cannot be legally enforced against the third respondent. It would be wholly inequitable to recognise the petitioner as being entitled to enforce these clauses of the agreement in light of a manifest failure on its part to fulfill its obligations under the agreement. More importantly those clauses are clearly unconscionable having been imposed upon the third respondent under a standard form contract leaving him no option but to accept the conditions as imposed by the petitioner.

31. Dealing with an identical issue, the Supreme Court in a recent decision rendered in the matter of **Pioneer Urban Land And Infrastructure Limited Vs. Govindan Raghvan3** held thus: -

"6.1. In the present case, admittedly the appellant builder obtained the occupancy certificate almost 2 years after the date stipulated in the apartment buyer's agreement. As a consequence, there was a failure to hand over 14 possession of the flat to the respondent flat purchaser within a reasonable period. The occupancy certificate was obtained after a delay of more than 2 years on 28-08-2018 during the pendency of the proceedings before the National Commission. In LDA v. M.K.Gupta [(1994) 1 SCC 243], this Court held that when a person hires the services of a builder, or a contractor, for the construction of a house or a flat, and the same is for a consideration, it is a "service" as defined by Section 2 (1)(o) of the Consumer Protection Act, 1986. The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service. In Fortune Infrastructure v. Trevor D'Lima [(2018) 5 SCC 442] this Court held that a person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation.

6.2. The respondent flat purchaser has made out a clear case of deficiency of service on the part of the appellant builder. The respondent flat purchaser was justified in terminating the apartment buyer's agreement by filing the consumer complaint, and cannot be compelled to accept the possession whenever it is offered by the builder. The respondent purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation.

...

6.7 In Central Inland Water Transport Corporation Limited and Ors. v. Brojo Nath Ganguly [(1986) 3 SCC 156], this Court held that :

"89. ... Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. .... *This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power.* It

is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. ... ... These cases can neither be enumerated nor fully illustrated. *The court must judge each case on its own facts and circumstances."*

(emphasis supplied)

6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 08-05-2012 are ex facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder.

7. In view of the above discussion, we have no hesitation in holding that the terms of the apartment buyer's agreement dated 08-05-2012 were wholly one-sided and unfair to the respondent flat purchaser. The appellant builder could not seek to bind the respondent with such one-sided contractual terms."

32. Viewed in light of the principles enunciated in **Pioneer Urban** the Court finds itself unable to sustain the impugned levy of penal interest and holding charges. The third respondent is consequentially found and held entitled to the possession of the allotted plot without penal interest and holding charges being charged or levied.

33. Accordingly and for the reasons afore noted, the writ petition shall stand **disposed of** in the following terms. While the impugned awards rendered by the Permanent Lok Adalat on 28 and 29 June 2019 for reasons assigned in this judgment shall stand quashed, the third respondent is held entitled to the possession of the plot in dispute. The demand towards penal interest and holding charges as raised by the petitioner is held to be unenforceable.

34. In order to avoid the specter of separate and inconsistent awards being rendered in the future, the Court requests the Registrar General of the Court to forward a copy of this judgment to the Secretary, State Legal Services Authority

to be circulated amongst all the Permanent Lok Adalats established in the State for future guidance.

(2019)11ILR A1345

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 30495 of 2019

Naubat Gupta & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kamal Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Suresh C. Dwivedi, Sri Rajesh Kumar Yadav

A. Civil Law-Land Acquisition Act, 1894 - Explanation IV of S. 11 & Or. II R. 2, C.P.C. - Principle of *constructive res judicata* - Petitioner have already taken their compensation - Proprietary of further relief considered.(Para. 14, 15 & 25)

Held: - Writ is barred by principle of constructive res judicata - Petition devoid of merit.
Writ Petition dismissed (E-1)

Case law relied: -

1. Greenhalgh Vs Mallard (1947 (2) All ER 257).

2. Direct Recruit Class II Engineering Officers Association Vs St. of Mah. (1990 (2) SCC 715).

3. Kunjan Nair Sivaraman Nair Vs Narayanan Nair & ors. (2004) 3 SCC 277.

4. Alka Gupta Vs Narender Kumar Gupta (2010) 10 SCC 141

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioners, learned Standing Counsel for the respondent nos. 1 and 2 and Sri Suresh C. Dwivedi, learned counsel for the respondent no. 3.

2. The petitioners have preferred the present writ petition with the following prayers:-

"(i) Issue a writ, order or direction in the nature of Mandamus directing the respondent no.2, Collector/District Magistrate, Kushinagar to consider the grievance of the petitioners, fixing the residential urban market circle rate on the acquire land Arazi No. 232 area 0.5080 hectare, Arazi no. 231 area 0.3080 hectare and Arazi no. 177 area 0.3160 hectare situated at Mauza Sohrauna, Tehsil Padrauna, District Kushinagar.

(ii) issue a writ, order or direction in the nature of Mandamus directing the respondent no.2 Collector/District Magistrate, Kushinagar to pay the compensation accordingly under the Land Acquisition Act, 1894 treating the acquired land Arazi no. 232 area 0.5080 hectare, Arazi no. 231 area 0.3080 hectare and Arazi no. 177 area 0.3160 hectare situated at Mauza Sohrauna, Tehsil Padrauna, District Kushinagar as residential urban area.

(iii) issue a writ, order or direction in the nature of Mandamus directing the respondent no.2, Collector/District Magistrate, Kushinagar to consider and decide the

representation of petitioners dated 07.12.2018 accordance with law.

(iv) issue any other order or direction, which this Hon'ble Court may deems fit and proper under the facts and circumstances of the case.

(v) award the cost of the petition."

3. Facts in brief as contained in the writ petition are that the petitioners are bhumidhars of Arazi Nos. 232, 231 and 177 area 0.5080 and 0.3160 hectare respectively. The aforesaid land of the petitioners was situated in Mauza - Sohrauna, Tehsil - Padrauna, District Kushinagar. The State Government issued notifications under section 4(1) of Land Acquisition Act, 1894 (hereinafter called as 'Act 1894') on 12.01.2010, which was followed by a notification under Section 6 of the Act of 1894 on 15.9.2010. The aforesaid notifications were issued for the purpose of construction of 'Navin Mandi'. By way of aforesaid notification land of the petitioners was also sought to be acquired.

4. The Collector/District Magistrate, Kushinagar/ respondent no. 2, issued a notice under section 9 of the Act of 1894 to the petitioners on 27.11.2010 asking them to submit their objections, if any. The objections were duly filed by the petitioners. The petitioners also filed a writ petition before this Court being Writ Petition No. 7132 of 2013 (Shareef Ali and others vs. State of U.P. and others). The said writ petition was disposed of finally by the Coordinate Bench of this Court vide its judgment and order dated 03.03.2016. The order passed in the aforesaid writ petition is reproduced below:-

"There are serious issues of fact with regard to actual possession of the land, subject matter of the land acquisition proceedings. In paragraph 22 of petition, it has been stated that only symbolic possession has been taken. However in reply thereto, in paragraph 25 of the counter affidavit, it has been stated that actual physical possession has been taken.

The correctness of the averments made in paragraph 25 of counter affidavit is disputed with reference to a letter subsequently written by Secretary, Krishi Utpadan Mandi Samiti, who at best is the subsequent transferee of the acquired land. Therefore, nothing turns upon the letter of secretary concerned.

We in the facts of the case only permit the petitioner to approach the State Government i.e. respondent no.1, at the first instance.

In view of the aforesaid, writ petition is disposed of with liberty to the petitioner to make a representation ventilating all his grievances supported by all such documents as he may be advised before respondent no.1 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 in accordance with law by means of a reasoned speaking order, preferably within eight weeks thereafter."

5. Pursuant to the aforesaid order, the Principal Secretary, Rajya Krishi Utpadan Mandi Parishad, Uttar Pradesh, Lucknow/respondent no. 3 rejected the representation submitted by the petitioner vide its order dated 26.04.2017. The decision taken by the respondent no. 3 has become final since the same was never

challenged by the petitioners at any point of time including in the present writ petition.

6. After the aforesaid decision taken by the respondent no. 3 now the petitioners had preferred the present writ petition stating therein that the compensation should be awarded to the petitioners treating their land under residential urban market area instead of agriculture area.

7. Learned counsel for the petitioners relied upon a notification issued by the Nagarpalika Parisha, Padrauna, Kushinagar dated 19.02.2018, copy of which is appended as Annexure 8 to the writ petition. By the aforesaid notification the Prescribed Authority/Sub-Divisional Magistrate, Sadar, issued a list of villages under prescribed area situated in Padrauna, Kushinagar. The petitioners' village is at serial no. 10 in the aforesaid list. In view of the aforesaid, it is argued that the petitioners' land was covered under the Nagarpalika Parishad and is semi urban area. After the aforesaid notification was issued, a representation was submitted by the petitioners before respondent no. 2/Collector/D.M, Kushinagar on 07.12.2018. Since no decision was taken on the same a reminder was sent by the petitioners on 05.03.2019. Since no decision was taken on the aforesaid representations, the petitioners have preferred the present writ petition, with the prayer to issue a mandamus directing the respondent no. 2 to consider the grievance of the petitioners and fix the residential urban market circle rate on the acquired land and to give the compensation to the petitioners accordingly.

8. In response to the arguments made by the learned counsel for the petitioners, it is argued by the learned counsel for the respondents that land of the petitioners was acquired as per the procedure prescribed under the Act of 1894 in the year 2010. The compensation was also paid to the petitioners. The notification was issued by the Nagar Palika Parishad, Padrauna, Kushinagar in the year 2018. By the aforesaid notification the land of the petitioners now falls within semi urban area. The aforesaid notification, which was issued by the Nagar Palika Parishad, Padrauna, Kushinagar was not retrospective as such the petitioners were not entitled for any relief pursuant to the aforesaid notification.

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

10. With the consent of learned counsel for the parties, the writ petition is being disposed of finally at the admission stage.

11. From perusal of the facts as narrated above, it is clear that vide notifications issued under sections 4 and 6, land of the petitioners was acquired by the State Government as per the procedure prescribed under the Act 1894. The compensation was also awarded to the petitioners at the relevant time. Being not satisfied with the same, the petitioners had filed a writ petition, Writ Petition No. 7132 of 2013 (Shareef Ali and others Supra), which was finally decided by a Coordinate Bench of this Court vide its judgment and order dated 03.03.2016. Pursuant to the same, the respondent no.3 rejected the claim set up by the petitioners vide its order dated 26.4.2017. The

aforesaid order has become final between the parties.

12. From perusal of the records, it further transpires that in terms of the notification issued by the Nagar Palika Parishad, Padrauna, Kushinagar dated 19.2.2018 representations were made by the petitioners with the request that the land of the petitioners should be treated as residential urban market area. At the time when the land of the petitioners was acquired no such notification was in existence. Further if the petitioners want that their land should be treated as residential urban market area and enhanced compensation should be paid to them such prayer should be made by them in their earlier writ petition.

13. The copy of the notification issued by the U.P. Government, Nagar Vikas, Anubhag-6 dated 19.2.2018 is appended as annexure 8 to the writ petition. By the aforesaid notification only objections were invited by the General Public. The writ petition is absolutely silent that what happened thereafter. For the purpose of enhancement of compensation representations were made by the petitioners, copies of which have been appended as annexure 10 and 11 to the writ petition. Nothing has been stated in the aforesaid representations of the petitioners that under what circumstance petitioners became entitled for the benefit of the notification issued by the State Government dated 19.2.2018 by which the land of the petitioners now falls within prescribed area.

14. It is further argued by the learned counsel for the respondents that the petitioners have already taken their compensation, pursuant to the acquisition of their land. Learned counsel for the respondents placed before this Court a letter dated 26.03.2019 written by the Deputy Land Acquisition Officer, Devariya/Kushinagar. From perusal of which it is clear that a sum of Rs. 80,26,000/- was transmitted in the account of petitioner no. 1. In this view of the matter, it is argued that once the amount of award has been accepted by the petitioners, no further relief could be granted to the petitioners in so far as the present writ petition is concerned.

15. From perusal of the facts as narrated in the writ petition it further appears that the present writ petition filed by the petitioners is barred by principles of constructive res judicata. The provisions in this regard have been contained under explanation IV of Section 11 as well as under Order II Rule 2 of the Code of Civil Procedure. The extract of aforesaid provisions are quoted below :-

11. Res judicata- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation-I.- The expression "former suit" denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation-II. For the purposes of this section, the competence

of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation-III. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation-IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

*"2. **Suit to include the whole claim.**-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any port of his claim in order to bring the suit within the jurisdiction of any Court."*

17. Under Explanation IV of Section 11 of the Code of Civil Procedure it is prescribed that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and subsequently in issue in such suit.

18. Order II Rule 2 of the Code of Civil Procedure deals with the provisions in which it is prescribed that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action

19. The principle underlying Explanation IV to Section 11 becomes clear from **Greenhalgh v. Mallard [1947 (2) All ER 257]** thus:

"....it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them." (emphasis supplied)

20. In **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra [1990 (2) SCC 715]**, a Constitution Bench of the Apex Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100) thus;

"35. ... an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

21. The Supreme Court in the Case of **Kunjan Nair Sivaraman Nair vs. Narayanan Nair And Others reported in (2004) 3 SCCC page 277** held that order II concerns framing of a suit and lays down the general principle that the plaintiff shall include whole of his claim in the framing of the suit which the plaintiff is entitled to make in respect of a cause of action; and if he does not do so then he is visited with the consequences indicated therein.

22. The observations were made in paragraph 13 of the aforesaid judgement

in respect of section 11 of the Code of Civil Procedure 1908, which is reproduced below:-

"Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised. "

"The doctrine of res judicata differs from the principle underlying Order II Rule 2 in that the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. Order II concerns framing of a suit and requires that the plaintiffs shall include whole of his claim in the framing of the suit. Sub-rule (1), inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the very same cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any Court, he will not be entitled to that relief in any subsequent suit. Further sub-rule (3) provides that the person entitled to more than one reliefs in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for such relief he shall not be afterwards be permitted to sue for relief so omitted."

23. In paragraph 6 of the aforesaid judgment observations were made by the Supreme Court in respect of Order II Rule 2 of the Code of Civil Procedure. The paragraph 6 of the aforesaid judgement is reproduced below:-

"6. We shall first deal with the question regarding applicability of Order II Rule 2 of the Code. Said provision lays down the general principle that suit must include whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not do so then he is visited with the consequences indicated therein. It provides that all reliefs arising out of the same cause of action shall be set out in one and the same suit, and further prescribes the consequences if the plaintiff omits to do so. In other words Order II Rule 2 centers round one and the same cause of action. "

24. The same view was taken by the Supreme Court in the Case of **Alka Gupta vs. Narender Kumar Gupta reported in (2010) 10 SCC 141.** Paragraph 20 to 24 of the aforesaid judgment is reproduced below:-

"20. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was

no plea of constructive res judicata, nor had the appellant plaintiff an opportunity to meet the case based on such plea.

21. Res judicata means `a thing adjudicated' that is an issue that is finally settled by judicial decision. The Code deals with res judicata in section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

"11. Res judicata.--No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"

22. Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

(i) The matter must be directly and substantially in issue in the former suit and in the later suit.

(ii) The prior suit should be between the same parties or persons claiming under them. (iii) Parties should have litigated under the same title in the earlier suit.

(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

(v) The court trying the former suit must have been competent to try particular issue in question.

23. To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression `former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that:

"Explanation IV.- Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

24. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack

and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed.

25. In view of the facts as stated above, we are of the view that the writ petition is devoid of merits and the same is liable to be dismissed.

26. Accordingly the same is dismissed. No order as to cost.

(2019)11ILR A1352

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE
THE HON'BLE ASHOK KUMAR, J.

Writ C No. 30964 of 2019

Rakesh Saxena ...Petitioner
Versus
Commissioner Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Deepak Kumar Jaiswal

Counsel for the Respondents:
C.S.C.

A. Civil Law-Indian Stamp Act, 1899 - Section 47A & 56(1) - Stamp Deficiency - Justification of recovery proceeding - Order of court below in respect of stamp deficiency set aside by appellate Court –Recovery proceeding, consequential to the original order is improper and unjustified. (Para 18)

Writ Petition allowed (E-1)

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

1. श्री दीपक कुमार जायसवाल याची के विद्वान अधिवक्ता एवं विपक्षी संख्या- 1,2,3 व 4 की ओर से विद्वान स्थायी अधिवक्ता को सुना गया।

2. वाद के तथ्य इस प्रकार हैं कि याची राकेश सक्सेना द्वारा कृषि भूमि को दिनांक 25.08.2018 को क्रय किया गया।

3. याची के विद्वान अधिवक्ता का कथन है कि उपरोक्त कृषि भूमि को क्रय करने के सम्बन्ध में याची द्वारा मूल्य का प्रतिदान आर0टी0जी0एस0 व एन0ई0एफ0टी0 के माध्यम से विक्रेता को किया गया।

4. स्टाम्प कलेक्टर / अपर जिलाधिकारी (वित्त / राजस्व), फर्रुखाबाद, वाद संख्या 09/2018-19 सरकार बनाम राकेश सक्सेना अन्तर्गत धारा- 47-ए भारतीय स्टाम्प अधिनियम के अन्तर्गत पारित आदेश दिनांक 20.05.2019 के द्वारा याची के विरुद्ध कम स्टाम्प शुल्क रु0 14,08,050/-, अर्थदण्ड रु0 1,50,000/- तथा बैनामा निष्पादन की तारीख दिनांक 25.08.2018 से वसूली के दिनांक तक देय कम स्टाम्प शुल्क पर 1.5 प्रतिशत प्रतिमाह की दर से साधारण ब्याज आरोपित किया गया।

5. याची द्वारा स्टाम्प कलेक्टर के उक्त आदेश दिनांक 20.05.2019 के विरुद्ध वाद संख्या 01440/2019 राकेश सक्सेना बनाम उ0 प्र0 सरकार अन्तर्गत धारा- 56(1) भारतीय स्टाम्प अधिनियम, 1899 के अन्तर्गत अपील दाखिल की गई।

6. याची द्वारा न्यायालय आयुक्त, कानपुर मण्डल के सम्मुख उक्त अपील में यह कथन किया गया कि क्रय की गई भूमि का प्रयोग पूर्णतः कृषि भूमि के रूप में होता है तथा

यह कि क्रय की गई भूमि का अकृषक होने का प्रश्न ही उत्पन्न नहीं होता है।

7. स्टाम्प कलेक्टर द्वारा स्थल का निरीक्षण करने हेतु आदेशित किया गया तथा स्थल निरीक्षण आख्या से यह दृष्टीगोचर हुआ कि प्रश्नगत भूमि पर पिछले 20 वर्षों से कृषि कार्य नहीं हुआ है, जबकि खसरा 1412 फसली पत्रावली पर उपलब्ध थी, में गेंहू की फसल के बारे में उल्लेख किया गया है।

8. याची द्वारा न्यायालय आयुक्त, कानपुर मण्डल के सम्मुख यह भी कहा गया कि क्रय की गई भूमि हाइवे या सी0सी0 रोड के किनारे स्थित नहीं है तथा यह कि भूमि के किनारे किसी प्रकार का कोई विकसित क्षेत्र नहीं है।

9. याची के विद्वान अधिवक्ता द्वारा कहा गया कि याची द्वारा जिला मूल्यांकन सूची के अनुसार देय स्टाम्प शुल्क अदा किया गया है तथा गाटा संख्या- 725 के सम्पूर्ण रकबा का बैनामा कराया गया है।

10. न्यायालय आयुक्त, कानपुर मण्डल द्वारा याची की उक्त अपील को निर्णित करते समय याची के विद्वान अधिवक्ता एवं जिला शासकीय अधिवक्ता (राजस्व) के तर्कों को भली भाँति सुना गया तथा स्टाम्प कलेक्टर के आदेश दिनांक 20.05.2019 व पत्रावली का सम्यक परिशीलन किया गया।

11. न्यायालय आयुक्त द्वारा प्रपत्रों के सम्यक परिशीलनोपरान्त यह पाया गया कि अधीनस्थ न्यायालय द्वारा याची की अनुपस्थिति में एकतरफा आदेश पारित किया है तथा यह कि स्थल का निरीक्षण भी याची की अनुपस्थिति में किया गया है। न्यायालय आयुक्त द्वारा यह भी पाया गया कि स्थल निरीक्षण करने हेतु अधीनस्थ न्यायालय द्वारा याची को कोई नोटिस नहीं भेजी गई न ही जाँच अधिकारी द्वारा स्थल निरीक्षण करते समय कोई फोटोग्राफी कराई गयी।

12. न्यायालय आयुक्त द्वारा उपरोक्त सम्बन्ध में निम्न बातों की विवेचना की गयी जो कि नीचे वर्णित है:-

"संयुक्त स्थल निरीक्षण दिनांक 18.09.2018 में उल्लेख है कि " लोगों ने बताया कि प्लाटिंग की योजना बना ली है" पर विश्वास कैसे किया जा सकता है? अधीनस्थ न्यायालय का प्रश्नगत आदेश एकपक्षीय है तथा अपीलार्थी की उपस्थिति में स्थल निरीक्षण भी नहीं किया गया है। ऐसी स्थिति में अपीलार्थी को सुनकर पुनः आदेश पारित करने की आवश्यकता प्रतीत होती है। तद्नुसार अपील बलयुक्त होने के कारण प्रत्यावर्तित किये जाने योग्य है।"

13. उपरोक्त तथ्यों को दृष्टिगत रखते हुए न्यायालय आयुक्त द्वारा याची द्वारा दाखिल की गई अपील को आंशिक रूप से स्वीकार किया गया तथा अधीनस्थ न्यायालय द्वारा पारित आदेश दिनांक 20.05.2019 को अपास्त / निरस्त किया गया एवं अधीनस्थ न्यायालय को यह निर्देशित किया गया कि सम्पूर्ण कार्यवाही अर्थात, स्थल निरीक्षण व साक्ष्यों का आकलन तथा सुनवाई का युक्तियुक्त अवसर अपीलार्थी की उपस्थिति में एवं अपीलार्थी को सम्यक अवसर प्रदान करते हुए किया जावे तथा वाद को पुनः गुण-दोषों के आधार पर निर्णित किया जावे।

14. न्यायालय आयुक्त, कानपुर मण्डल द्वारा अपने आदेश के अनुपालन हेतु अपीलार्थी को दिनांक 08.10.2019 को अधीनस्थ न्यायालय के समक्ष उपस्थिति हेतु निर्देशित किया गया तथा सम्पूर्ण पत्रावली भी अधीनस्थ न्यायालय को वापस भेजी गई।

15. उपरोक्त आदेश न्यायालय आयुक्त, कानपुर मण्डल द्वारा दिनांक 04.09.2019 को पारित किया गया।

16. याची के विद्वान अधिवक्ता का कथन है कि यद्यपि न्यायालय आयुक्त, कानपुर मण्डल द्वारा याची की अपील स्वीकार करते हुए अधीनस्थ न्यायालय को वाद को पुनः सुनवाई हेतु प्रतिप्रेषित किया गया है तथा दिनांक 08.10.2019 की तिथि भी निश्चित की गई है परन्तु विपक्षी संख्या- 3 व अमीन, जिला कासगंज द्वारा पूर्व में जारी मांगपत्र दिनांक 08.07.2019 के अनुपालन में याची के विरुद्ध कुल रु0 18,01,618/- की माँग को याची से वसूली / जमा कराने हेतु उत्पीड़नात्मक कार्यवाही की जा रही है जो कि सर्वथा गलत है।

17. यद्यपि न्यायालय आयुक्त, कानपुर मण्डल द्वारा वाद को प्रतिप्रेषित करते हुए अधीनस्थ न्यायालय के सम्मुख सुनवाई हेतु दिनांक 8 अक्टूबर, 2019 की तिथि निश्चित की गई व याची को आदेशित किया गया कि वह अधीनस्थ न्यायालय के सम्मुख दिनांक 8 अक्टूबर, 2019 को उपस्थित हों जबकि दिनांक 8 अक्टूबर, 2019 को विजयादशमी / दशहरे का सार्वजनिक अवकाश प्रदेश सरकार द्वारा घोषित किया गया है अतएव उक्त परिस्थित में मैं उक्त तिथि (8 अक्टूबर, 2019) को स्थगित करते हुए दिनांक 31 अक्टूबर, 2019 की तिथि निश्चित करता हूँ।

18. मेरे द्वारा याची के विद्वान अधिवक्ता तथा विद्वान स्थायी अधिवक्ता को सुना गया तथा अधीनस्थ न्यायालय तथा न्यायालय आयुक्त, कानपुर मण्डल के निर्णयों का परिशीलन किया गया तथा यह पाया गया कि जबकि न्यायालय आयुक्त, कानपुर मण्डल द्वारा याची की अपील स्वीकार करते हुए वाद को पुनः निर्धारण हेतु अधीनस्थ न्यायालय के सम्मुख प्रतिप्रेषित किया गया है व अधीनस्थ न्यायालय के निर्णय दिनांक 20.05.2019 को निरस्त किया जा चुका है तब उस दशा में विपक्षी संख्या- 3 व अन्य सम्बद्ध अधिकारियों / कर्मचारियों द्वारा याची के विरुद्ध वसूली योग्य बकाया धनराशि को जमा करने की कार्यवाही किसी भी दशा में सही नहीं है।

19. उपरोक्त तथ्यों को दृष्टीगत रखते हुए प्रस्तुत याचिका स्वीकार की जाती है तथा अधीनस्थ न्यायालय / अपर जिलाधिकारी (वित्त / राजस्व), फर्रुखाबाद को निर्देशित किया जाता है कि वे न्यायालय आयुक्त, कानपुर मण्डल के आदेश दिनांक 04.09.2019 का अनुपालन सुनिश्चित करें तथा जब तक कि प्रतिप्रेषित वाद का निर्धारण गुण-दोष के आधार पर न किया जावे याची के विरुद्ध की जा रही उत्पीड़न की कार्यवाही को समाप्त किया जाता है तथा विपक्षी संख्या 3 व अमीन, जिला कासंगज एवं उनके अधीनस्थ / सम्बद्ध कर्मचारियों को निर्देशित किया जाता है कि वे याची के विरुद्ध वसूली की कार्यवाही तुरन्त समाप्त करें।

20. प्रस्तुत याचिका उपरोक्त निर्देशों के साथ **स्वीकृत** की जाती है।

(2019)11ILR A1354

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C. No. 31163 of 2019

Neeraj Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Tyagi

Counsel for the Respondents:

C.S.C.

A. Civil Law-U.P. Cooperative Society Act, 1965 - Section 128 - Power of Sub-Registrar - Issuance of Office Memorandum - Although from plain reading of the provision of S. 128, it appears that it is only the Registrar, who can exercise the power under it, but, in view of notifications dated 24.06.1969 and 26.07.2006 and in absence of any suspicion to the said notification, the Sub-Registrar has power to issue Office Memorandum. (Para 14)

B. Civil Law-Dispute of Committee of Management of Cooperative Society - Power to decide - U.P. Cooperative Society Rules, 1968 - Rule 229 (2) - Applicability thereof - Although under the Rule, the concerned District Magistrate may decide a dispute pertaining to the constitution of the committee of management or election or appointment of any office-bearer, but when the procedure, whereby the membership of a member was cancelled, has been found defective by the Sub-Registrar after enquiry being conducted on the complaint filed before it, the provision of the Rule 229 (2) would not have been applicable - No illegality in issuing the impugned Office Memorandum by Sub-Registrar. (Para 16 & 19)

Writ petition dismissed (E-1)

(Delivered by Hon'ble Shashi Kant Gupta, J. &
Hon'ble Saurabh Shyam Shamshery, J.)

1— प्रार्थी जो साधन सहकारी समिति लि0 बीरन, विकास क्षेत्र–देवबन्द, जनपद–सहारनपुर (आगे सहकारी समिति से रूप में उल्लेखित किया जायेगा) के सभापति है, इस याचिका के माध्यम से, उप आयुक्त एवं उप निबन्धक सहकारिता, सहारनपुर मण्डल, सहारनपुर द्वारा पारित कार्यालय ज्ञाप, दिनांक 13 सितम्बर 2019 के विरूद्ध उत्प्रेरण रिट प्रारित करने की प्रार्थना की है।

2— सहकारी समिति ने अपनी बैठक दिनॉक 5–7–2019 को उपस्थित सदस्यों के द्वारा सर्व सम्मति से कुछ निर्णय लिए, जिनके द्वारा श्री रामेश्वर, श्री सुनील कुमार को अन्हर्ता के कारण, श्रीमती सीता देवी को प्रबन्ध कमेटी की तीन बैठकों से अधिक चार बैठकों में अनुपस्थित रहने के कारण सदस्यता से हटाने का प्रस्ताव पारित किया व श्रीमती नफीसा सदस्य प्रबन्ध कमेटी की मृत्यु के कारण हुए रिक्त स्थान पर श्रीमती माया देवी का नाम सर्व सम्मति से आमेलित किया।

3— नीरज कुमार, माया देवी व पन्नो सदस्यगणों ने सचिव, सहकारी समिति को पत्र दिनॉक 10–7–2019 लिखकर उ0प्र0 सहकारी समिति नियमावली के नियम 454 के अन्तर्गत विचार करने हेतु प्रबन्ध कमेटी की बैठक बुलाने की प्रार्थना की।

4— उपरोक्त पत्र पर, सहकारी समिति ने एजेण्डा पास किया व बैठक के लिए 18–7–2019 को 11 बजे प्रातः का समय निर्धारित किया। 18–7–2019 को कोरम पूर्ण न होने के कारण बैठक स्थगित कर दी गई एवं नई तिथि 19–7–2019 निर्धारित की गयी।

5— अगामी बैठक होने से पहले, बाबुराम त्यागी ने एक शिकायती पत्र दिनॉक 18–7–2019, मुख्य कार्यपाल अधिकारी व सहायक आयुक्त/सहायक निबन्धक को प्रेषित किया, जिसमें सहकारी समिति द्वारा अवैधानिक कार्यो एवं निर्णयों का उल्लेख किया एवं जॉच कराने की प्रार्थना की।

6— 19–7–2019 को सहकारी समिति की बैठक कोरम के अभाव में भी पूर्ण करा ली गई। उ0प्र0 सहकारी समिति नियमावली 1968 के नियम 102 के अनुसार ऐसी व्यवस्था है। बैठक में बाबूराम त्यागी, प्रबन्ध कमेटी के सदस्य व अध्यक्ष की अनर्हरता पर भी विचार किया गया। अन्तः बाबूराम त्यागी को प्रबन्ध कमेटी की सदस्यता एवं अध्यक्षता के पद से हटाने का संकल्प पारित किया गया। सदस्य व अध्यक्ष पद को रिक्त भी घोषित किया गया। बैठक में जयपाल, लक्ष्मी व सुरेन्द्र कुमार सदस्यों के पद पर आमेलित भी किया गया।

7— उपरोक्त शिकायती पत्र का संज्ञान लेते हुए उप आयुक्त एवं उप निबन्धक, सहकारिता, सहारनपुर मण्डल, सहारनपुर ने अपर जिला सहकारी अधिकारी, तहसील देवबन्द, से जॉच आख्या मांगी। जॉच आख्या के आने पर उप आयुक्त एवं उप निबन्धक ने कार्यालय ज्ञाप, दिनॉक 13—9—2019 पारित किया।

8— जॉच आख्या, दिनॉक 7—8—9 से यह विधित है, जैसा कि कार्यालय ज्ञाप में उल्लेखित है, कि दिनॉक 10—6—2019 से 22—7—2019 तक संचालक मण्डल की कोई भी बैठक विधिवत आहुत नहीं की गई। कोरम पूर्ण न होने पर भी बैठक की अगली तिथि उसी एजेण्डा में निर्धारित की गई। मात्र तीन संचालकों ने सचिव की अनुपस्थिति में अलग कागज पर बैठक किया जाना दर्शित किया। कोई नोटिस भी नियमानुसार प्रेषित नहीं किया गया तथा 19—7—2019 व 22—7—2019 को हुए समिति की बैठक में लिए गये निर्णयों को विधि सम्मत नहीं माना गया।

9— उप आयुक्त एवं उप निबन्धक ने जॉच आख्या को ध्यान में रखते हुए व अन्य अभिलेखों, कार्यवाही पुस्तिका के आधार पर अपना निर्णय लिया तथा कार्यालय ज्ञान दिनॉक 13.9. 2019 पारित किया, जिसका मुख्य भाग निम्न है :—

''यतः उक्तानुसार प्रकरण में प्राप्त जॉच आख्या, समिति की बैठक दिनांक 0.5.07.19, 19.07.19 एवं 22.07.19 की कार्यवाही पुस्तिका की छायाप्रतियों, अन्य अभिलेखों के अवलोकन एवं सहायक आयुक्त एवं सहायक निबन्धक सहकारिता सहारनपुर द्वारा की गयी संस्तुति के आधार पर यह स्पष्ट हो रहा है कि साधर सहकारी समिति लि0 झबीरन के संचालक मण्डल की बैठक दिनांक 05.07.19, 19.07.19 तथा बैठक दिनांक 22.07.19 एवं उनमें पारित समस्त प्रस्ताव कूटरचित ढंग से एक षड्यन्त्र के तहत सम्पादित किये गये है जो उ0प्र0 सहकारी समिति अधिनियम 1965 सहकारी समितिनियमावली 1968 एवं समिति की उपविधियों में उल्लेखितप्राविधानों के प्रतिकूल होने के कारण उक्त सन्दर्भित बैठकों मेंपारित प्रस्तावों पर उ0प्र0 सहकारी समिति अधिनियम 1965की धारा—128 के अन्तर्गत कार्यवाही किया जाना आवश्यक होगया है।अतः मैं राजेश कुमार सिंह, उप आयुक्त एवं उप निबन्धक,सहकारिता, उ0प्र0 सहारनपुर मण्डल सहारनपुर,शासन की अधिसूचनासंख्या—3328—सी/12—सी—ए—25 (1)/67/दिनांक24.06.69 एवं सहपठित अधिसूचना संख्या—65/49—2—2006—148— (5)/2006/दि नांक 26.07.2006 के तहत प्रदत्तनिबन्धक की शक्तियों का प्रयोग करते हुये, उ0प्र0 सहकारीसमिति अधिनियम—1965 की धारा—128 के प्राविधानों के अन्तर्गत, साधन सहकारी समिति लि0 झबीरन जनपद सहारनपुर5के संचालक मण्डल की बैठकों दिनांक 05. 07.2019 दिनांक19.07.2019 तथा बैठक दिनांक 22. 07.2019 में पारित समस्तप्रस्तावों के क्रियान्वयन को स्थगित करते हुए उक्त समिति केसचिव/प्रबन्ध कमेटी को आदेश देता हूँ कि वह उक्त बैठको मेंपारित समस्त प्रस्तावों के लिये निर्णयों पर अधिकतम 15 दिनके अन्दर समिति के संचालक मण्डल की बैठक आहूत कराकर पुनर्विचार करे एवं लिये गये निर्णय से दिनांक 30.09.2019 कोपूर्वान्ह—11 बजे समिति के सचिव एवं संचालकगण स्वयं उपस्थित होकर उक्त के परिप्रेक्ष्य में समस्त सुसंगत साक्ष्यों सहित अधोहस्ताक्षरी कार्यालय (गन्ना भवन हकीकत नगर) मेंअवगत कराय

10— उपरोक्त कार्यालय ज्ञाप, दिनांक 13—9—2019 से पीड़ित होने के कारण याचीकर्ता ने यह यचिका, भारतीय संविधान के अनुच्छेद 226 के अन्तर्गत उत्प्रेषण रिट हेतु, इस उच्च न्यायालय में दाखिल की गई है।

11— याची के विद्वान अधिवक्ता, श्री पंकज कुमार त्यागी ने बहस करते हुए कहा कि कार्यालय ज्ञाप, निम्न कारणों से अवैधानिक है।

(क) उत्तर प्रदेश सहकारी समिति अधिनियम 1965 की धारा 128 के अनुसार कतिपय मामले में सहकारी समिति के संकल्पों को निष्प्रभावित करने या सहकारी समिति के किसी अधिकारी के आदेश को रद्द करने का अधिकार सिर्फ निबन्धक को है, न कि उप निबन्धक को, क्योंकि कार्यालय ज्ञाप दिनांक 13—9—2019 उप निबन्धक द्वारा धारा 128 के अन्तर्गत पारित किया गया है, अतः यह कार्यालय ज्ञाप अवैधानिक है।

(ख) उत्तर प्रदेश राज्य सहकारी समिति निर्वाचन नियमावली 2014 के नियम 48 के अनुसार, अगर अनर्हता के कारण किसी सदस्य की सदस्यता के हटाने का संकल्प समिति द्वारा लिया जाता है, तो वो सदस्य निर्णय के प्राप्ति के 30 दिन के भीतर अधिनियम तथा नियमों के उपबन्धनों के अधीन पंचनिर्णय करा सकता है। वर्तमान वाद में बाबू राम ने नियम 48 का उपयोग नहीं किया है। उप प्रबन्धक को शिकायती पत्र का संज्ञान नहीं लेना चाहिए था व बाबू राम त्यागी को नियम 48 के अंतर्गत पंचनिर्णय के लिए प्रार्थना करनी चाहिये थी। इस कारण से भी कार्यालय ज्ञाप अवैधानिक है।

(ग) याची के विद्वान अधिवक्ता ने यह भी कहा की उ0प्र0 सहकारी समिति नियमावली 1968 के नियम 450 के अनुसार ''यदि किसी सहकारी समिति की प्रबन्ध कमेटी के निर्वाचित या आमेलित सदस्यों के पद में कोई आकस्मिक रिक्ति हो, तो प्रबन्ध कमेटी के शेष सदस्यों द्वारा उन व्यक्तियों में से, जो कमेटी की सदस्यता के लिए पात्र हों, आमेलन द्वारा पूरी की जायेगी''। अतः समिति द्वारा की गई कार्यवाही जिससे जयपाल, लक्ष्मी व सरेन्द्र कुमार को सदस्यों के पद पर आमेलित किया गया है, सर्वथा ठीक है।

(घ) वर्तमान विवाद को सुनने का अधिकार उ.प्र. सहकारी समिति नियमावली 1968 के नियम 229(2)(ख) के अनुसार जिला मजिस्ट्रेट को है न कि उप प्रबन्धक को।

(च) जिन सदस्यों (सुनील व रामेश्वर) की सदस्यता रद्द करी गई है वो विधि सम्मत है क्योकि उन्होंने समिति के नियमों का उल्लघंन किया था। उन्होंने समिति से कोई भी ऋण व्यवसाय नहीं किया था। अन्य सदस्य सीता देवी लगातार चार बार कमेटी की बैठक में अनुपस्थित रही थी एवं बाबूराम त्यागी ने अधिनियम, नियमों व समिति के उपबन्धों के प्रतिकूल कार्य किया था। इन कारणों से समिति द्वारा लिए गये संकल्प संवैधानिक व न्यायपूर्ण है। कार्यालय ज्ञाप दि0 13–9–2019 के द्वारा उप प्रबन्धक का हस्तक्षेप आमान्य है।

12– इससे विपरित मुख्य स्थायी अधिवक्ता ने कार्यालय ज्ञाप के पक्ष में बहस की।

13– हमने याची के विद्वान अधिवक्ता व मुख्य स्थायी अधिवक्ता की बहस सुनी व याचिका में संलग्न प्रपत्रों का परिशीलन किया। इस याचिका पर निर्णय लेने के लिए निम्न धारा व नियमों का उल्लेख करना आवश्यक है।

धारा 128 उ.प्र. सहकारी समिति अधिनियम 1965 –

कतिपय मामलों में सहकारी समिति के संकल्पो को निष्प्रभाव करने या सहकारी समिति के किसी अधिकारी के आदेश को रद्द करने का निबन्धक का अधिकार–

(1) निबन्धक किसी सहकारी समिति की प्रबन्धक कमेटी या उसके सामान्य निकाय द्वारा पारित किसी संकल्प को निष्प्रभाव कर सकता है; या

(2) सहकारी समिति के किसी अधिकारी द्वारा दिये गये आदेश को रद्द कर सकता है; यदि उसकी यह राय हो कि यथास्थिति, संकल्प या आदेश समिति के उद्देश्यों के अन्तर्गत नहीं है या अधिनियम, नियमों अथवा समिति के उपविधियों के उपबन्धों के प्रतिकूल है तदुपरान्त प्रत्येक संकल्प या आदेश शून्य तथा अपवर्ती हो जाएगा और समिति के अभिलेखों से निकाल दिया जाएगाः

प्रतिबन्ध यह है कि निबन्धक, कोई आदेश करने के पूर्व सहकारी समिति की प्रबन्ध कमेटी, सामान्य निकाय या अधिकारी से, ऐसी अवधि जो वह निश्चित करे, किन्तु जो पन्द्रह दिन से कम न होगी, के भीतर, यथास्थिति, प्रस्ताव पर, या आदेश पर पुनर्विचार किये जाने की अपेक्षा करेगा, और यदि वह ठीक समझे तो वह ऐसी अवधि के दौरान उस प्रस्ताव या उस आदेश के प्रवर्तन को स्थगित कर सकता है।

नियम 48, उ0प्र0 शासन सहकारी समिति निर्वाचन नियमावली, 2014 – किसी सहकारी समिति की प्रबन्ध कमेटी का यह कर्तव्य होगा कि ऐसा कोई व्यक्ति जो किसी भी प्रकार अनर्ह हो जाय, प्रबन्ध कमेटी के सदस्य का पद धारण न किये रहे। ज्योंही यह तथ्य प्रबन्ध कमेटी की जानकारी में आये, कि कोई सदस्य किसी प्रकार अनर्ह हो गया है, चाहे वह ऐसे सदस्य होने के पूर्व या उसके पश्चात् अनर्ह हुआ हो, कमेटी इस विषय पर एक बैठक में विचार करेगी, जो इस प्रयोजन के लिए बुलाई जायेगी। ऐसी बैठक की कार्यसूची की एक प्रति उस सदस्य को, जिसके विरूद्ध कार्रवाई करने का प्रस्ताव हो,

व्यक्तिगत रूप से या रजिस्ट्री डाक द्वारा (प्राप्त अभिस्वीकृति) दी जायेगी। यदि सम्बन्धित व्यक्ति को ऐसी अनर्हता के कारण कमेटी की सदस्यता से हटाने का संकल्प पारित हो जाय, तो ऐसे संकल्प की एक प्रति भी सम्बन्धित व्यक्ति को रजिस्ट्री डाक द्वारा (प्राप्त अभिस्वीकृति) भेजी जायेगी और तदुपरान्त ऐसे सदस्य को किसी अन्य प्रकार से प्रबन्ध कमेटी के सदस्य के रूप में प्रबन्ध कमेटी की किसी बैठक में कार्य करने या उपस्थित होने की अनुज्ञा नहीं दी जायेगी। ऐसे सदस्य का पद रिक्त घोषित किया जायेगा। यदि वह व्यक्ति ऐसी कार्यवाही में क्षुब्ध हो तो वह नोटिस प्राप्त होने के दिनांक से 30 दिन के भीतर अधिनियम तथा नियमों के उपबन्धों के अधीन पंचनिर्णय करा सकता है।

नियम 229 . उ.प्र. सहकारी समिति नियमावलीए 1968.

(1) **x x x x x x x x x x x x x x x x x x x x x x x x x x x x**

(2) यदि विवाद कमेटी के संगठन या किसी सहकारी समिति के किसी पदाधिकारी या प्रतिनिधि के निर्वाचन या नियुक्ति से सम्बन्धित हो तो अभिदेश–

(क) **x x x x x x x x x x x x x x x x x x x x x x x x**

(ख) किसी शीर्ष समिति से भिन्न किसी सहकारी समिति की दशा में, उस जिले के, जिसकी समिति हो, जिला मजिस्ट्रेट को किया जायेगा।

14– सर्व प्रथम इस बिन्दु का निस्तारण करना आवश्यक है कि क्या उप प्रबन्धक/उप निबन्धक सहकारिता को उ.प्र. सहकारी समिति अधिनियम 1965 की धारा 128 के अन्तर्गत कार्यालय ज्ञाप करने का अधिकार था या नहीं? धारा 128 को सामान्य रूप से पढ़ने से यह विदित है कि, धारा 128 में दी गई शक्ति का प्रयोग निबन्धक द्वारा ही किया जा सकता है। परन्तु उप प्रबन्धक ने अपने कार्यालय ज्ञाप में विशिष्ट शब्दों में लिखा है कि उन्हें शासन की अधिसूचना संख्या–3328–सी/12– सी– ए–25 (1)67/दिनांक 24.06.69 एवं सहपठित अधिसूचना संख्या–65/49–2–2006–148–(5)/2006/दिनांक 26.07.2006 के तहत निबन्धक की शक्तियॉ प्रदान की गई है। उन्हीं शक्तियों का प्रयोग करते हुए कार्यालय ज्ञाप पारित किया गया है। इस अधिसूचना की सत्यता पर कोई संदेह नहीं किया जा सकता है। अतः इस बिन्दु पर वादी के विद्वान अधिवक्ता का तर्क बलहीन होने के कारण अस्वीकार किया जाता है।

15. उ0प्र0 सहकारी समिति नियमावली 1968 के नियम 450 के अनुसार किसी सदस्य के पद में कोई आकस्मिक रिक्ति हो तो कमेटी के शेष सदस्यों द्वारा आमेलन द्वारा पूरी की सकती है। परन्तु इस याचिका में जिन सदस्यों को सदस्यता से हटाया गया था उन्होंने उस प्रक्रिया को ही चुनौति दी थी, जिस पर उप प्रबन्धक द्वारा कार्यालय ज्ञाप परित कर, संपूर्ण प्रक्रिया अवैधानिक होने के कारण निरस्त कर दी गई है। अतः नियम 450 की इस वाद में कोई उपयोगिता ही नहीं है।

16. उ0प्र0 सहकारी समिति नियमावली के नियम 229 (2) ख के अनुसार अगर विवाद प्रबन्ध कमेटी के संगठन या किसी सहकारी समिति के किसी पदाधिकारी या प्रतिनिधि के निर्वाचन या नियुक्ति से सम्बन्धित हो तो आभिदेश उस जिले के जिसकी समिति हो, जिला मजिस्ट्रेट द्वारा किया जायेगा। परन्तु वर्तमान विषयगत में वो प्रक्रिया जिसके द्वारा कुछ सदस्यगण की सदस्यता निरस्त की गयी है उसको ही दोषपूर्ण बताया गया, एवं उसकी शिकायत उप निबन्धक से की गयी, जिन्होंने जांच आख्या मांगवा कर अपने कार्यालय ज्ञाप द्वारा समिति द्वारा अपनाई गई प्रक्रिया को दोषपूर्ण मानते हुए निरस्त किया है व समस्त प्रक्रिया को दुबारा वैधानिक रूप से कराने का आदेश दिया है। अतः वर्तमान परिस्थितियों में नियम 229 (2) ख का उपयोग नहीं हो सकता है।

17. उप प्रबन्धक ने अपने कार्यालय ज्ञाप में विशिष्ट शब्दों में उल्लेखित किया है कि ''साधन सहकारी समिति लि0 झबीरन के संचालक मण्डल की बैठक दिनांक 05.07.19, 19.07.19 तथा बैठक दिनांक 22.07.19 एवं उनमें पारित समस्त प्रस्ताव कूटरचित ढंग से एक षडयंत्र के तहत सम्पादित किये गये है जो उ0प्र0 सहकारी समिति अधिनियम 1965 सहकारी समितिनियमावली 1968 एवं समिति की उपविधियों में उल्लेखितप्राविधानों के प्रतिकूल होने के कारण उक्त सन्दर्भित बैठकों

मेंपारित प्रस्तावों पर उ0प्र0 सहकारी समिति अधिनियम 1965की धारा–128 के अन्तर्गत कार्यवाही किया जाना आवश्यक होगया है।'' उप प्रबन्धक ने उक्त निषकर्ष पर पहुॅचने के लिएजॉच आख्या व अन्य परिपत्रों को आधार बनाया है। याची केविद्वान अधिवक्ता यह बताने में असफल रहे कि जॉच आख्या वनिष्कर्ष अवैधानिक है।

18. समस्त तर्को का व याचिका के साथ संलग्न प्रपत्रोंका ध्यान पूर्वक परिशीलन करनेकेउपरान्त हमारा मत है किउप आयुक्त/उप प्रबन्धक को धारा 128 के अंतर्गत कार्यालयज्ञाप दिनॉक 13.9.2019 को पारित करने का पूर्ण रूप सेअधिकार प्राप्त था तथा उन्होंने जांच आख्या व अन्य प्रपत्रोंको ध्यान में रखकर वैधानिक निर्णय लिया कि बैठक दिनांक05.07.2019, 19.07.2019 तथा 22.07.2019 में पारित समस्तप्रस्तावों के क्रियान्वयन को स्थगित कर देना चाहिये व यह भीनिर्देशित किया कि समस्त प्रस्तावों पर अधिकतम 15 दिन केअन्दर समिति के संचालक मण्डल की बैठक आहूत कराकरनियमानुसार पुनर्विचार करे।

19. पूर्वगत परिच्छेदों में की गयी विभिन्न बिन्दुओं पर चर्चा पर विचार करने के उपरान्त हम इस निष्कर्ष पर पहुॅचते है, कि उप आयुक्त/उप प्रबन्धक के कार्यालय ज्ञाप दिनांक 13.9.2019 में कोई भी वैधानिक त्रुटि नहीं है। अतः यह याचिका खारिज करने योग्य है।

तद्नानुसार यह याचिका खारिज की जाती है।

(2019)11ILR A1359

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 31946 of 2019

M/S. Marson/S Electrical Industries ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna, Sri Hitesh Pachori, Ms. Gunjan Jadwani

Counsel for the Respondents:
C.S.C., Sri Suman Kumar Yadav, Sri R.K. Mishra

A. Constitution of India - Art. 14 – Natural Justice- Forfeiture of Security and blacklisting - Notice and consideration of reply - In an administrative decision making process, the justice and fair play demands giving of notice as well as due consideration of reply - Unless reply is duly considered, it cannot be said that there was due application of mind by authority - Impugned order quashed.(Para 10 & 12)

Writ Petition allowed (E-1)

Case law relied: -

1. M/s. Vindhyawasini T. Transport Vs St. of U.P. & ors, (Writ - C No. 14505 of 2015 decided on 20/02.2018).

3. Gorkha Security Services Vs Govt. (NCT of Delhi) & Others, (2014) 9 SCC 105.

4. M/s. Continental India Pvt. Ltd. Vs St. of U.P. & ors, (Writ - C No. 26917 of 2019 decided on 17/09/2019).

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

1. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Ms. Gunjan Jadwani, learned counsel for the petitioner, Sri R.K. Mishra, learned Advocate holding brief of Sri Suman Kumar Yadav, learned counsel for respondent nos. 2 and 3, Dr. Devendra Kumar Tiwari, learned Additional Chief

Standing Counsel appearing for State respondent no. 1 and perused the record.

2. By means of this petition under Article 226 of the Constitution, the petitioner has challenged the orders dated 02.09.2019, 04.09.2019 and 06.09.2019.

3. The main grievance of the petitioner is that he has not been given any notice much less a show cause notice prior to passing of orders which have resulted in adverse civil consequences.

4. The argument advanced by learned counsel for the petitioner is that the order debarring the petitioner from entering into any agreement or contract for a period of three years, amounts to blacklisting and in view of this, he submits that no order of blacklisting could have been passed without giving prior notice or show cause to the petitioner in respect of such a proposed action. He further argued that forfeiture of the security amount has also been without due consideration of his reply and is therefore, not to be sustained in law. Learned counsel for the petitioner in support of the argument has relied upon a Division Bench judgment of this **Court in Writ - C No. 41505 of 2015** decided on 20.02.2018. Learned counsel for the petitioner has relied upon paras 18, 19 & 20 of the said judgment.

5. We made a pointed query from learned counsel for the respondents regarding the above factual and legal position.

6. In reply, the argument of learned counsel for the respondent Corporation is that the petitioner was given a notice on 20.08.2019 which was to the effect that the explanation was required from the petitioner regarding anomalies committed and on being not satisfied or in case if the notice not duly replied to, the petitioner would be held guilty and the appropriate orders will be passed for blacklisting of the petitioner. Needless to say, as it is also argued, that forfeiture of the security amount was liable to take effect automatically in view of the terms and conditions of agreement reached between the parties.

7. However, from the orders impugned in this petition, we do not find that the reply to the show cause notice submitted by the petitioner dated 26.08.2019 finds any reference. The settled legal position is that even in an an administrative decision making process, the justice and fair play demands that not only notice be given to the parties aggrieved, but reply submitted by the parties should be duly considered. There has to be a due application of mind to the reply and explanation submitted by the party to the show cause notice.

8. In the light of terms and agreement as have reached between the parties which provide for forfeiture of security and blacklisting we take notice dated 20.02.2018 to be a valid notice in the form of show cause of the proposed action.

9. In the case of **M/s. Vindhyawasini T. Transport v. State of U.P. & Others, Writ - C No. 14505 of 2015,** a Division Bench, of which one of us (Ajit Kumar, J.) was member, has quoted para 21 of the judgment of Apex Court in **Gorkha Security Services v. Government (NCT of Delhi) & Others, (2014) 9 SCC 105,** which reads as under:

"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action."

10. However, we find from the recitals made in the order that the competent authority has proceeded to pass an order holding the petitioner simply guilty, but does not discuss the reply which the petitioner had submitted regarding the charges that have come to be levelled in the show cause notice. What we further find that even the notice dated 02.08.2019 does not find reference in the order.

11. Recently in the case of **M/s. Continental Indial Private Limited v. State of U.P. & 3 Others, Writ - C No. 26917 of 2019,** we, while considering the aspect of non consideration of reply, have held thus:

"9. It is a settled legal position of law that when show cause notice is issued and the authority is dealing with the matter to decide an issue then in such an administrative decision making process an authority is required not only to consider the reply point-wise raised before it but to deal with the same and record reasons for rejecting the same, if it intends to reject after due evaluation of the same.

10. In the impugned order all that has been stated is that the assessment of cess has taken place and, therefore, the liability was of the petitioner to pay and in the absence of such payment being made, the amount is required to be recovered as arrears of land revenue.

11. This is no evaluation of reply nor, the order can be called as reasoned one. Fairness in action means fairness in approach to the ultimate result. A conclusion drawn if is questioned on the ground that an authority that was seized with the defense version failed to refer the same or failed to apply its mind, the natural corollary is, such an action is vitiated for arbitrariness in approach to the issue. Whatever is arbitrary is opposed to natural law, a concept of justice that entails impartial dealing. In other words fairness demands impartial approach to an issue that needed adjudication, may be in a summary manner. Every administrative order ultimately has to pass the testing anvil of Article 14 of the Constitution of India. Article 14 of the Constitution of India not only requires compliance of principles of natural justice but due application of mind also and complete fairness in procedure and fairness in procedure means not only issuance of notice for the cause for which the proceedings is drawn to the affected but also due consideration of the reply submitted to the show cause notice and

evaluation of the same in correct perspective. In other words there has to be objective consideration of the reply in so far as issues are concerned in order to record the complete satisfaction not only to make the order reasoned one but legally enforceable on the norms of principles of just and fair play. We find all these aspects quite lacking in the order impugned and again being confronted with the said legal position, learned counsel for the Pollution Control Board says that the matter can be revisited by the competent authority."

12. In view of the above exposition of law and the attending facts and circumstances of the case in hand, we are of the opinion that unless the reply is duly considered it cannot be said that there was due application of mind by the authority concerned and therefore, in our considered opinion, the matter requires to be revisited by the authority.

13. In view of the above, the orders impugned dated 02.09.2019, 04.09.2019 and 06.09.2019 are hereby quashed.

14. The respondents are directed to consider the explanation submitted by the petitioner to the show cause notice and pass order afresh within a period of four weeks from the date of production of certified copy of this order.

15. The writ petition is **allowed.**

(2019)11ILR A1362

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 32145 of 2008

Sri Kant Chaubey & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Babu Nandan Singh

Counsel for the Respondents:
C.S.C., Dr. D.K. Tiwari

A. Constitution of India - Art. 14 - Administrative action tested on the anvil of Art. 14 - Exercising administrative power calls for due application of mind. (Para 14)

B. Finding of fact - Perversity – Complete lack of material to demonstrate that the work of installment of hand pump was illegal. finding of facts is absolutely perverse - Could not have reached conclusion as to misappropriation of funds. (Para 25)

C. Principles of natural justice - Consideration of objection and it's evaluation are part of procedural safeguards even in matters of administrative inquiry –

Held:- Failing consideration, order can be rendered to have been passed in violation of natural justice. (Para 26)

Writ Petition allowed (E-1)

Case law relied: -

1. Vijay Shankar Pandey Vs Union of India & anr. (Civil Appeal No. 9043 of 2014 decided by Supreme Court on 22.09.2014)

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

1. Heard Sri Babu Nandan Singh, learned counsel for the petitioners and

learned Standing Counsel Dr. D.K. Tiwari representing the State-respondents.

2. By means of this writ petition, the petitioners have assailed the order dated 02.06.2008 whereby a recovery of Rs. 2,80,007.00/- has been ordered. The petitioners have challenged the said order on the ground that the said order is passed on a report dated 18.01.2008 submitted by a four member inquiry committee holding the petitioners liable for misappropriation and embezzlement of an amount to the tune of Rs. 2,80,007.00/-. The petitioners submit that the second inquiry into the charges was totally unwarranted and was maliciously instituted for the reason that an earlier three member committee had conducted an inquiry and had submitted a report on 20.01.2007 in which, in respect to the same charges, the petitioners were not found to be guilty and it was only in respect of a sum of Rs. 44,194/- that the audit was directed to be conducted as the work regarding this much of amount was not found to have taken place on the spot. The committee of which the petitioners were members was granted time till 15th of August, 2007 to get the work audited and submit the relevant vouchers so as to enable the committee to form a final opinion in respect of the said amount. The petitioners thereafter got the work audited by C.A. Narayan Kumar Agrawal & Co. which submitted its report on 14.8.2007.

3. The argument is that instead of considering the said report in respect of the amount in question for which the petitioners were required to submit the audit report, a four member inquiry committee got constituted which conducted the inquiry *de novo* which was quite unwarranted in the given facts and circumstances of the case nor, the petitioners were communicated about any such new constitution of the inquiry committee. So it is also a case of gross violation of minimum compliance of rules of natural justice.

4. *Per contra*, the argument advanced by learned Standing Counsel is that it was a fact finding inquiry conducted by earlier three member committee and even though the petitioners were absolved of the charges enumerated therein, yet in matters of administrative enquiry there was no bar for the committee to re-consider the entire aspect of the matter while considering the audit report. He submits that the inquiry committee has not only conducted spot inspection and took stock of the situation regarding the work carried out on the spot but even verified things from the records and have returned findings of misappropriation of public fund. He submits that it was the onerous duty of the committee to have ensured that the work assigned was translated into action on ground and the committee having not found so, the petitioners were liable to be saddled with liability of misappropriation/embezzlement of public fund which was chiefly meant to be spent in public interest under the development plan.

5. Having heard learned counsel for the parties and their respective arguments raised across the bar and having perused the entire records placed before this Court through writ petition, counter affidavit and the pleadings raised by respective parties, we find that the core issue that has been raised before this Court is whether it was open for the respondent to have constituted a new committee to hold an inquiry *de novo* whereas the inquiry

committee earlier constituted had already conducted an inquiry and had absolved the petitioners of the charges.

6. One more issue which has been raised is of non-compliance of principles of natural justice both in the matter of constitution of new inquiry committee without informing the petitioners and without giving them any participation in the inquiry. For examining the above two issues it is necessary to draw the facts of the case in a narrow compass.

7. As the pleadings have come to be raised and undisputed facts are that Central Government sponsored a scheme for supplying potable water in rural areas styled as 'Jal Nidhi Pariyojna' popularly known as ' Rajiv Gandhi Pay Jal Mission'. In order to implement the said scheme in the State of U.P., some districts were selected by the State Government and the State Government made 'Zila Prabandhan Pariyojna Ekai' and constituted at village level 'Gramin Pay Jal Evam Swachhata Samiti'. The task of the Samiti was to utilize provided fund in laying down pipeline and setting up hand-pumps, mini-pumps and their repair work. The petitioners who constituted the Samiti were provided with a chart work to be carried out by them in village Kodaria of development block Sakaldiha, District Chandauli.

8. From perusal of the work chart, which has been appended as Annexure No.2 to the writ petition, we have found that there were locations provided for setting up of the hand-pumps. The petitioners carried out work and submitted their reports. Spot inquiry was conducted initially in a summary manner and the petitioners were issued with a show cause notice on 21.05.2007 that on the basis of a survey carried out *prima facie* case of misappropriation of public fund to the tune of Rs. 3,99,666/- appeared to be correct. The petitioners in response to the show cause notice, submitted their reply on 08.06.2007.

9. A three member committee was constituted consisting of District Development Officer, Chandauli, District Earth Evam Sankhya Adhikari, Chandauli and Junior Engineer, District Village Development Corporation, Chandauli Abhikaran. The said committee visited the spot where the development was carried out on 20.07.2007 and submitted report according to which Jal Nidhi Yojna was provided with budget of Rs. 5,47,969.00/- and consuming the said fund, in all, ten hand-pumps were installed and repair work was conducted in respect of six hand-pumps and one hand-pump was re-bored; a pond was dug up and two mini water supply lines were laid; regarding hand-pumps and hand-pump work, the hand-pumps were found to be installed in places in respect of the persons. However, two hand-pumps were found to be inside the boundary walls of S.K. Chaube and Umrao Singh respectively. However, the neighbours informed that they were never stopped from taking water from the said hand-pumps. Regarding repair of the hand-pump work, only one hand-pump was not found in working order. Regarding mini water supply lines, it was detected by the committee that pipeline was laid and overhead tank was constructed but since the scheme had come to an end and no further budget was provided by Government of India and so connection could not be given. Regarding the re-bore work, the report made no adverse remark

and regarding the digging work of the pond, the report was that the measurement and assessment could not be made because the pond was full of water. However, it was reported that the villagers admitted that pond was dug up. Thus, the three-member committee in its ultimate conclusion arrived that in respect of Rs. 44,194/-, the work was not found on the spot and therefore, the petitioners were directed to get the work audited and submit the audit report for consideration of the committee.

10. In the considered opinion of the Court, the above report as discussed hereinabove submitted on 20.07.2007 by the three-member committee sufficiently demonstrate that the only issue was in respect of fund of Rs. 44,194/- regarding which the work was not traceable on the spot and the petitioners were virtually to explain their position by getting the work audited and submit the report and it is in this regard that the work got audited by them and the CA firm N.K. Agarwal & Co. submitted its report on 14.08.2007 and was forwarded by the petitioners. It appears that after the said report was submitted, the Chief Development Officer vide some letter dated 22.11.2007 constituted a new four-member committee, this time having Assistant Engineer of District Rural Development Authority, Chandauli as also one of the members for holding a *de novo* inquiry into the matter. The report was submitted on 18.01.2018 by the said committee and this time, the committee found the petitioners to be guilty of misappropriation of public fund meant to be spent under the scheme at the hand of the committee, to the tune of Rs. 2,80,07.00/-.

11. We find that this time regarding the mini water tank pipeline supply, the committee submitted a report that though overhead tanks were prepared, constructed and established but the pipeline was not laid and nobody was offered connection and that the land was not handed over to the Ground Water Management Committee whereas during the earlier inquiry, it was ordered that it will be handed over to the Ground Water Management Committee and thus in respect of both the projects, the work was found to be only half way done resulting in complete loss of Rs. 2,75,507/- alleged to have been spent by the committee on the said project. Regarding the hand-pump it was reported that the hand pumps were installed on the land of the respective villagers and that no soak-pit was found in respect of the hand-pump. Regarding other works, no further adverse report was there but in respect of digging up of pond, it was assessed that there was irregularity during the digging work.

12. Coming to the first argument raised by learned counsel for the petitioners that once an inquiry was completed and report was submitted and the petitioners were required to submit audit report with respect to an amount of Rs. 44,000/- only, there was no occasion to constitute another committee to conduct inquiry de novo into the alleged charges, we find the argument raised by the petitioners having merit for the reasons hereunder.

13. From a bare reading of the first inquiry report dated 20.07.2007, it is clearly revealed that in respect of all the five charges, all the works that were to be taken by the committee that consisted of the petitioners except for reporting doubts in respect of expenditure incurred in digging of the pond, there was no adverse

report regarding other works. In so far as the digging work of the pond is considered, report was not that it was not done, instead, the report was that proper evaluation could not be done of the expenditure incurred in the pond. However, in the totality of the scenario that the committee arrived after conducting spot inspection, it found the only work not done in the form of *prima facie* opinion against Rs. 44, 194/- shown to have been spent and to that extent only, the petitioners are right in asserting, the committee permitted the petitioners to submit documents.

14. Under the circumstances, we are of the considered opinion that it can be safely concluded that the respondent did not find petitioners guilty in respect of Rs. 5,89,774/- shown to have been spent on the project undertaken by the committee consisting of the petitioners. In such circumstances, when the committee did not make the inquiry to continue while submitting its report dated 20.07.2007, there was no occasion to conduct another inquiry into the same charges by constituting a new committee. We further notice that in reply of the audit report submitted by the petitioners regrading Jal Nidhi Project, as sought for under the earlier report, the subsequent committee did not discuss the same at all and it appears that the committee was virtually reconstituted now with four members to hold an inquiry *de novo*. An administrative action is required to be tested at least on the testing *anvil* of Article 14 of the Constitution of India. Exercising administrative power, therefore, calls for a due application of mind where at least the authority is to test as to whether any past action at its end requires reconsideration.

15. The perusal of second inquiry report submitted on 18.1.2008 does not discuss the earlier inquiry at all nor, does it discuss the reasons why the new inquiry was ordered. All that is discussed is that under the orders passed by Chief Development Officer dated 22.11.2007, the inquiry was to be conducted and was being conducted. Further, on facts, we also find that the inquiry regarding mini water tank pipeline supply and hand pump and also about the digging of pond turns out to be absolutely contrary to what was found in the earlier report. Interestingly, both the reports are based on spot inspection. The earlier committee that consisted of three members namely District Development Officer, Chandauli, Junior Engineer, District Village Development Board, Chandauli and District Finance and Accounts Officer, Chandauli, if found on the spot that hand-pumps were correctly installed and that the pipelines were laid and water tanks were constructed but connection could not be given on account of paucity of fund and annulment of scheme, we fail to understand as to how these two same officers namely District Finance and Accounts Officer, Chandauli and Junior Engineer, District Village Development Board, Chandauli found altogether different picture in the second spot inspection. This shows that either the earlier report is to be doubted or the subsequent one is to be doubted for malafide actions or the report was submitted for extraneous considerations.

16. However, there appears to be no justification for such administrative action by the District Development Officer to constitute another inquiry committee and hold inquiry. Second inquiry committee can only be constituted either at the

instance of the persons concerned who have grievance with the inquiry committee or if the earlier inquiry committee has abandoned its task half way or if there is a report of complaint regarding the conduct of affairs by the members of inquiry committee already constituted. None of the above points are found in the present case and, therefore, the petitioners are right in submitting that there was no occasion to constitute another inquiry committee. We further find that there being no complaint regarding the findings returned by the earlier inquiry committee, there was no occasion to hold another inquiry *de novo* into the charges nor, do we find anything coming in the counter affidavit justifying the second inquiry committee. In such circumstances, therefore, we are of the opinion that constitution of the second inquiry committee was absolutely illegal and also on facts quite unwarranted.

17. Besides above, the findings as have come to be returned by the second inquiry committee has been absolutely contrary to the one submitted by the earlier inquiry committee. We fail to understand as to how the same officers submit two inquiry reports while conducting two spot inspections of the same place. If the hand-pumps were installed in the house or in the boundary or over the land of residents of the village, it should have been come in the very first inquiry report itself but what we find is that except for the two houses, second inquiry report also does not state as to which plot number, the hand pump was installed and it could have been said that the hand pump was installed at a particular place. In the absence of such cogent material being discussed by the inquiry committee, the findings returned by the inquiry committee to that score is liable to be set aside.

18. We further find that in respect of laying down of pipeline, the inquiry report is absolutely incorrect, the reason being that in the first inquiry report, it has come to be recorded that because of paucity of fund due to annulment of the scheme, water connection could not be given. The second inquiry committee does not discuss the first inquiry report and does not hold that the first inquiry was in any manner incorrect and, therefore, the finding to that effect in the second inquiry report cannot be sustained. Similarly, we find that with respect to the digging of the pond, the second report had simply expressed doubts. There is no material discussed nor any cogent or conclusive finding of fact has been returned as to how the digging of the pond could have been doubted.

19. Coming to the second question that the entire proceedings of inquiry conducted by the committee was against the principles of natural justice, we find that the recitals made in the inquiry report are only reflective of the presence of the petitioners but are not reflective of any discussion being held on the spot with the petitioners or that any statement of the petitioners was recorded.

20. In the absence of any such above event having taken place during inquiry it can be safely concluded that there was hardly any participation of the petitioners in the inquiry and to that extent the inquiry was violative of principles of natural justice. We further find that the petitioners after they were supplied with copy of the inquiry report along with covering letter on 23.2.2008 to show

cause on the findings of the joint inquiry committee, the petitioners did submit reply on 10.3.2008 reiterating the reason for which the connection could not be given.

21. It is further argued that in the earlier inquiry conducted, the petitioners were exonerated of the charges and they were only required to submit the bill and vouchers which were submitted on 8.6.2007 itself and, therefore in respect of other charges, no further action was required to be taken except considering the petitioners' reply of submission of vouchers etc. in respect of Rs.44,000/-.

22. From perusal of the second enquiry report, we find that the above reply of the petitioners has been brushed aside simply on the ground that petitioners had not been able to explain as to why and under what circumstances water pumps were installed in the personal land of Madan Prajapati and Arun Kumar and merely the proceeding on the basis of these two facts coupled with the charge that petitioners had not been able to render explanation regarding non-construction of the soak-pit, the order of the petitioners have been saddled with the liability of misappropriation of fund to the tune of Rs.2,80,00,07/-.

23. Having carefully examined the order impugned, we further notice that the District Development Officer Chandauli has simply proceeded to rely upon the second inquiry report while passing the order.

24. A pertinent question was raised in their reply to the show cause by the petitioners that once they had been exonerated in the first inquiry, that inquiry report should have been considered and the earlier liability was limited to Rs.44,000/- but nothing of the sort has been discussed in the order impugned. We further find that a lot of work was shown in the earlier inquiry report to have been performed and so budget was sanctioned for the purpose but merely because two hand pumps were found on the land of two neighbours, petitioners have been held guilty of misappropriation of the entire fund.

25. In our considered opinion, such a finding of fact is absolutely perverse because there is no such material available to demonstrate that all the work of installment of hand pump was illegal or that the particular plot number on which the hand pumps were installed particularly relating to Arun Kumar Singh and one Madan Prajapati were against norms and resulted in misappropriation of funds. We further find from the work list that mini pipeline was laid near the houses of Madan Prajapati and Arun Kumar Singh and this is not disputed. In the second inquiry report, it is stated that there was no pipeline laid whereas in the earlier inquiry report it was found that the pipeline was laid but connection could not be given due to paucity of fund and annulment of scheme. The two contrary reports if are read together, the finding of not granting water connection to any one is absolutely baseless and further the second inquiry report shows that the connection in front of the houses of Madan Prajapati and Arun Kumar Singh which is supported by the work list. Had the authority passing the order dated 2.6.2008 evaluated the two reports in correct perspective of the entire scenario regarding the development work carried at the end of the petitioners, it would not

have come to the conclusion as arrived at under the order impugned holding the petitioners guilty of misappropriation of funds.

26. The consideration of the objections are part of procedural safeguards even in matters of administrative inquiry. While opportunity of oral hearing may not be prescribed for in every case but non consideration of objection/reply by the authority passing the final order on the basis of the inquiry report which should have been disputed and doubted, cannot be approved of. The legal principle involved in the recent past two decades are clearly in favour of the law that consideration of reply and the objection and its evaluation and appreciation in respect of the charges or the issues sought to be decided is a must, failing which, the order can be rendered to have been passed in violation of principles of natural justice.

27. Even otherwise, the settled legal position is that in the administrative decision making process, the authorities require to adjudicate the points involved rendering due application of mind to the charges, the inquiry report received and reply submitted by the charged officer. However, all these aspects we find lacking in the order impugned and therefore, in our considered opinion the order dated 2.6.2008 deserves to be quashed.

28. In a matter of second enquiry, though in a disciplinary proceeding, the Apex Court in **'Vijay Shankar Pandey vs. Union of India & Anr.' (Civil Appeal No. 9043 of 2014** decided on 22.09.2014) vide para 21, 22 and 23 had held that:

"21. Be that as it may, the question is whether the disciplinary authority could have resorted to such a practice of abandoning the Enquiry already undertaken and resort to appointment of a fresh Enquiring Authority (multi-member). The issue is not really whether the Enquiring Authority should be a single member or a multi member body, but whether a second inquiry such as the one under challenge is permissible. A Constitution Bench of this Court in K.R. Deb v. The Collector of Central Excise, Shillong, (1971) 2 SCC 102, examined the question in the context of Rule 15(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. It was a case where an enquiry was ordered against a sub-Inspector, Central Excise (the appellant before this Court). The inquiry officer held that the charge was not proved. Thereafter the disciplinary authority appointed another inquiry officer "to conduct a supplementary open inquiry". Such supplementary inquiry was conducted and a report that there was "no conclusive proof" to "establish the charge" was made. Not satisfied, the disciplinary authority thought it fit that "another inquiry officer should be appointed to inquire afresh into the charge".

22. The Court held that:

"12. It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of

the Inquiring Officer or Officers does not appeal to the Disciplinary Authority. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.

13. In our view the rules do not contemplate an action such as was taken by the Collector on February 13, 1962. It seems to us that the Collector, instead of taking responsibility himself, was determined to get some officer to report against the appellant. The procedure adopted was not only not warranted by the rules but was harassing to the appellant." (Emphasis supplied) and allowed the appeal of K.R. Deb.

23. ***It can be seen from the above that the normal rule is that there can be only one Enquiry. This Court has also recognized the possibility of a further Enquiry in certain circumstances enumerated therein. The decision however makes it clear that the fact that the Report submitted by the Enquiring Authority is not acceptable to the disciplinary authority, is not a ground for completely setting aside the enquiry report and ordering a second Enquiry."***

29. Though in the above judgment this Court was interpreting a particular rule but where there is no rule, it is all the more necessary to first set aside earlier enquiry before proceeding for fresh enquiry. Thus, in view of the above legal position and even otherwise on findings as we have discussed in detail, the order dated 2.6.2008 unsustainable and the same is, accordingly quashed.

30. It is, however, left open for the respondents to consider the reply, audit report and vouchers submitted by the petitioners in respect of the work against which in the first inquiry report it was found that Rs.44,194/- was spent. For rest of the charges, the matter stands concluded and is not permitted to be reopened.

31. In view of the above, the writ petition is allowed to the above extent.

(2019)11ILR A1370

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGARWAL, J.

Writ C No. 42225 of 2014

Ravindra Kumar Singh & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri S. Shekhar, Sri Prakher Tandon, Sri V.K. Singh

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Devendra Kumar, Sri M.C. Tripathi

A. Civil Law-National Highways Act, 1956 - Section 3-H (4) – Land Acquisition - Dispute of share in Property - In the event any dispute arose between parties in respect of their share in the property and consequently in the amount of compensation, it is obligatory on the competent authority to refer the matter to the Civil Court for the apportionment of the shares of the co-sharers. (Para 20)

B. National Highways Act, 1956 - Section 3G– Object- Security against unnecessary and protracted litigation - Legislature

has taken care that entire acquisition proceeding may be completed as expeditiously as possible and unnecessary litigation be avoided and at the same time the interest of the land owner has also been taken care of - Scheme of the Act has been designed to ensure that amount of compensation be paid to owner of the land without protracted litigation - Section 3G (5) provides for arbitration. It clearly shows the intention of legislature for expeditious payment of the compensation to the owners. (Para 21)

C. National Highways Act, 1956 - Section 76-A - Power of Review - Determination of Compensation by competent authority – Power of review is not an inherent power. It has to be conferred by the statute by an express or specific provision – National Highways Act, 1956 does not empower the Collector to review an order passed by him under Section 76-A - In the absence of any power of review, the Collector could not subsequently reconsider his previous decisions – Hence, the order of review is without jurisdiction. (Para 31, 32 & 34)

Writ petition allowed (E-1)

Case law relied: -

1. Chandra Bhan Singh Vs Latafat Ullah Khan AIR 1978 SC 1814.

2. Kuntesh Vs Management, H.K. Mahavidyalaya, Sitapur AIR 1987 SC 2186.

3. Patel Chunibhai Dajibha Vs Narayanrao Khanderao Jambekar (1965) 2 SCR 328 : AIR 1965 SC 1457.

4. Kalabharati Advertising Vs Hemant Vimalnath Narichania (2010) 9 SCC 437.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J. &
Hon'ble Piyush Agarwal, J.)

1. This Writ Petition takes exception of an Order dated 05.06.2014 passed by the Competent Authority, the respondent No. 2 under the provisions of The National Highways Act, 1956 (for short 'the Act').

2. The brief facts which are necessary to dispose of this Writ Petition are recapitulated as under.

3. Petitioners are two in number they are real brothers. Their grievance is that Khasra No. 21, Gata No. 435/1.951 hectare in village Hatisa Tehsil Hathras, was their ancestral property. Their grandfather Laxman Singh was recorded tenure holder. He had four sons, Heera Singh, Megha Singh, Kalyan Singh and Babu Singh. Both the Petitioner are sons of Babu Singh. Heera Singh and kalyan singh died issueless.

4. The said plot was acquired under the provisions of the Act for widening of National Highway No.93 between 0.000 to KM 79.00 (Agra-Aligarh Division).

5. On 6.08.2011, the Central Government made a notification under Section 3-A(1) in two local newspapers inviting objections , if any, from any person interested in the land mentioned in the Notification.

6. The Competent authority received a large number of objections. After disposing them a report was sent to the Central Government. On 4.07.2012, the Central Government published a Notification in the official Gazette under section 3 D of the Act declaring that land has been acquired for the road widening and it came to vest in the Central

government free from all encumbrances a charges.

7. The competent Authority thereafter proceeded to determine the compensation in terms of sub section (4) of section 3 G of the Act. A notification was issued in two local newspapers by the competent authority. The competent Authority vide order dated 01.03.2013 has determined the compensation. The order is on the record.

8. Dissatisfied with the Award the Claimants moved the applications under Sub Section (5) of section 3G the Act. The arbitrator by his order dated 17.8.2013 affirmed the award of the competent authority. He held that the compensation for agricultural land shall be awarded at the rate of Rs 625 sq. m . and commercial land at the circle rate prevailing in August 2011.

9. It is stated that the dispute arose amongst the petitioners and their Cousin Brothers who are co sharer in respect of shares of Heera Singh and Kalyan Singh who died issueless. They filed objections for the apportionment of their share. In their objection they pointed out that several litigation is pending in revenue courts for their claim. Thus they made the prayer that compensation be not be paid to any party till the decisions of Revenue courts where the matters are pending.

10. Mr. Ravindra Kumar Singh and another, the petitioners herein , filed a Writ Petition No. 68135 of 2013, which was disposed of by a Division Bench of this Court on 21.2.2014, with the consent of parties.

11. Pursuant to the orderof this Court dated 21.2.2014, the matter was sent to the competent authority for release of the undisputed amount amongst the petitioners and other co-owners, however, by the impugned order, the competent authority has reopened the matter on the merit and has re determined the compensation changing the nature of land from commercial to agricultural by a non-speaking and skeletal order.

12. We have heard learned counsel for the petitioner, Mr. V. K. Singh, learned Senior Advocate assisted by Mr. Prakher Tandon, and learned Standing Counsel for the State.

13. It is contended on behalf of the petitioners that the competent authority-respondent No. 2 does not have any authority to review his own order as the Act does not confer any power of review upon the competent authority.

14. Elaborating his submission it was urged that once an award has become final, the competent authority has no power to reopen the entire issue on merits. It was strenuously submitted by learned Senior Advocate that the Division Bench passed the order dated 21.2.2014 with the consent of parties whereby a direction was issued to the competent authority to release the undisputed amount. The competent authority was bound to release undisputed amount as per direction issued by the Division Bench. But the competent authority has misdirected itself by reopening the entire issue on merits contrary to the direction of the Division Bench of this Court.

15. Learned Standing Counsel submits that the competent authority found that earlier demand of the compensation on the basis of nature of

land was incorrect, hence, he was justified to reopen the entire issue. However, learned Standing Counsel has very fairly submitted that statute of the Highways Act does not confer any power upon the competent authority to review his own order.

16. Mr. Singh has placed reliance upon the judgments of the Supreme Court rendered in ***Chandra Bhan Singh vs. Latafat Ullah Khan1, and Kuntesh v. Management, H.K. Mahavidyalaya, Sitapur2.***

17. We have heard the learned counsel for the parties and have perused the material on record.

18. Indisputably, the petitioner's father was one of the co- sharer of the land and his title has not been challenged in the proceedings. The only dispute was in respect of the apportionment of the four co-owners. The said issue was referred under sub section (4) of Section 3-H of the Act.

19. At this stage it would be advantageous to set out Section 3-H (4) of the Act .It reads thus:

"3-H(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated."

20. As can be seen in the event of any dispute arose between parties in respect of their share in the property and consequently in the amount of compensation the said provision makes it obligatory on the competent authority to refer the matter to the Civil Court for the apportionment of the shares of the co-sharers. We do not find it appropriate to advert the said issue in present proceedings. Concededly, the said dispute is still pending before the District Judge.

21. The scheme of the Act provides different stages for acquisition, determination and payment of the compensation to the land owner . A combined reading of the Section 3A ,3B ,3C, 3D, 3E ,3 G and 3 H shows that though the provisions of the land Acquisition Act is not applicable but the Legislature has taken care that entire acquisition proceeding may be completed as expeditiously as possible and unnecessary litigation be avoided. At the same time the interest of the land owner has also been taken care of. The scheme of the act has been designed to ensure that amount of compensation be paid to owner of the land without protracted litigation. The sub section (5) of section 3G which provides the Arbitration, clearly shows the intention of legislature for expeditious payment of the compensation to the owners. Section 3G itself cast an duty on the competent authority to safeguard the interest of all the stake holders.

22. It is apposite to note that the aforesaid sections have been inserted by an amendment Act 16 of 1997(w.e.f. 24.01.197).

23. It is material to note that the petitioners have approached this Court under Article 226 of the Constitution of India for a direction to the competent authority to release the undisputed

amount. The parties concerned stated before the Division Bench that appending determination of the share under Section 3 H (4) by competent Civil Court, the competent authority be directed to release the payment of 1/4 share each to the petitioners as well as to respondent nos. 4 to 9. Thus, the Division Bench having recorded the consent of the parties, directed the competent court to release the undisputed amount.

24. Relevant part of the judgment of the Division Bench reads thus:

"Learned counsel for the parties are at agreement that pending determination of the share under Section 3 H (4) by competent Civil Court the competent authority be directed to release the payment of 1/4 share each to the petitioners as well as to respondent nos. 4 to 9.

In view of above the competent court is directed to make the payment of 1/4 compensation to both the petitioners jointly and 1/4 to respondent nos. 4 to 9 jointly.

The payment of rest of the compensation i.e. balance 1/2 shall be made as per order of the Civil Court under Section 3H(4). We further observed that the payment in so far as the descendants of Megha Singh respondent nos. 4 to 9 are concerned be made as per their entitlement. The rest 1/2 of the compensation shall be deposited in an interest bearing account in a nationalized Bank.

With these observations, the present petition is disposed of."

25. The order unmistakably shows that there was a clear direction to the competent authority to release the undisputed amount. The Court has not given any room for redetermination of the compensation amount which was determined earlier by the competent authority which was affirmed by the Arbitrator. Suffice to say that the order was passed after hearing all the parties with their consent.

26. After the Division Bench passed the aforesaid order dated 21.2.2014, the competent authority has reopened the entire matter and changed the basis of determination of the compensation regarding commercial use of the land by recording a finding contrary to the Award which had attained finality.

27. Regard being had to the fact that the competent authority in its order dated 3.12.1013 has decided petitioners claim as Claim Number 4. In his order he has determined the compensation on the basis of circle rate prevalent on 01.08.2010. Accordingly he found that market value of commercial land was Rs 4000 sq.m (Rs 4,00,00,000.0 in the words, Four Crore per Hectare) and Agricultural land at the rate of Rs 300 sq.m(Rs. 30,00,000, in the words, Thirty lacs per Hectare)

28. The Arbitrator has not reversed the order rather it has affirmed the award and enhanced the compensation in respect of Agricultural land.

29. Worthy of mention here is that chart appended with the order of Arbitrator's order clearly mentions the amount of compensation awarded to the petitioners

30. The question, therefore, that falls for consideration is whether if the competent authority has the authority to

review the order which has attained the finality.

31. We find unbroken line of authority to the effect that power of review is not an inherent power .It needs to be conferred by the statute by express or specific provision. In absence of any such power the order simply becomes without jurisdiction. The legal position in this regard is much too well settled to require any reiteration. We may in this regard gainfully refer to the decision of the Supreme Court in ***Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar3.***

32. The Act does not empower the Collector to review an order passed by him under Section 76-A. In the absence of any power of review, the Collector could not subsequently reconsider his previous decisions and hold that there were grounds for annulling or reversing the Mahalkari's order. The subsequent order dated February 17, 1959 reopening the matter was illegal, ultra vires and without jurisdiction. The High Court ought to have quashed the order of the Collector dated February 17, 1959 on this ground.

33. The said judgement has been consistently followed by the Supreme Court, in ***Kalabharati Advertising v. Hemant Vimalnath Narichania4*** the Supreme Court has made the following observation:

"Review in absence of statutory provisions

12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Harbhajan Singh v. Karam Singh.)

13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji, Major Chandra Bhan Singh v. Latafat Ullah Khan4, Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya, State of Orissa v. Commr. of Land Records and Settlement6 and Sunita Jain v. Pawan Kumar Jain this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction."

34. Applying the said principle, we find that the competent authority has traveled beyond its jurisdiction to review its own order. He has ventured to sit over the order by his predecessor in reopening the Award. Hence, in the absence of any power of review, impugned order passed by the competent authority in the present case is without jurisdiction.

35. In view of the above, the order passed by the competent authority dated 05.06.2014 needs to be set aside and it is accordingly set aside.

36. We direct the competent authority to comply with the directions of the Division Bench passed in Writ

Petition No. 68135 of 2013 wherein a direction has been issued to release the undisputed amount amongst the co-owners in terms of the chart appended to the order of Arbitrator.

37. With the aforesaid observations present writ petition is allowed.

(2019)11ILR A1376

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 42911 of 2008

Ranjeet ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A. Kumar Singh, Smt. D. Gupta

Counsel for the Respondents:
C.S.C.

A. Constitution of India - Art. 14 - Natural Justice - Cancellation - Fair price shop - No discussion of reply of the petitioner - Every administrative action and administrative enquiry should result in an order passed on reasons indicative of the application of mind, by the authority - No full-fledged inquiry - cancellation order deserves to be quashed. (Para 11 & 17)

B. Scope of Writ – Non-disclosure of facts - Disclosure of criminal case is not required when fair price shop license is granted earlier to such criminal case. (Para 18 & 19)

Writ Petition allowed (E-1)

Case law relied: -

1. Rashmi Metaliks Ltd. & anr. Vs Kolkata Metropolitan Development Authority & ors. (2013) 10 SCC 95.

2. T.P. Senkumar. IPS Vs Union of India & ors. (2017) 6 SCC 801.

3. Mangalam Organics Ltd. Vs Union of India (2017) 7 SCC 221.

4. Puran Singh Vs St. of U.P. (Writ Petition no. 55845 of 2009, decided on 19/12/2011).

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

1. Heard Sri A. Kumar Singh, learned counsel for the petitioner and Sri S.N. Shukla, learned Standing Counsel for the State respondents.

2. By means of this writ petition under Article 226 of the Constitution of India, the petitioner has approached this Court for quashing the order dated 31.07.2008 by which the fair price shop license of the petitioner has been cancelled on the ground that there were two criminal cases pending against the petitioner bearing Case Crime No. 183 of 2008, under Sections 452/ 323, 504, 506 IPC and one Non-Cognizable Report (for short 'NCR') No. 98 of 2007, under Sections 323, 504, 506 IPC.

3. Initially writ petition was entertained by a Division Bench of this Court vide order dated 21.08.2008 and this Court while noticing the argument of learned counsel for the petitioner that the offences that were though criminal in nature but were petty offences and should not have formed the basis of cancellation of fair price shop license, stayed the effect and operation of the impugned order 31.07.2008.

4. Pursuant to the above interim order dated 21.08.2008 petitioner has been running the fair price shop till today.

5. Briefly stated facts of the case are that the petitioner, who is having a fair price shop license validly granted by the authorities, was issued with a show cause notice dated 02.07.2008 served upon the petitioner on 17.07.2008 calling upon him to explain as to why the fair price shop license may not be cancelled on the ground that there were criminal cases registered against the petitioner. The emphasis was laid on clause 10 of the Government Order dated 17.08.2002 in which vide Clause (d) it is provided that the fair price shop license shall be given to a person against whom there should not be any criminal case registered.

6. It is in this above factual background that the petitioner's fair price shop license was suspended also vide order dated 02.07.2008 and reply/ explanation was sought from the petitioner. In compliance of the notice issued, as above, to the petitioner, the petitioner submitted his detailed reply in which vide paragraph no. 5 he brought to the notice of the authorities that in connection with Case Crime No. 183 of 2008, under Sections 452/ 323, 504, 506 IPC, he had already filed a Criminal Misc. Writ Petition No. 1179 of 2008 in which interim order had been passed and which was already supplied to the police station concerned. He, therefore, submitted that unless and until he was declared guilty of the offences, he cannot be taken as convict and no penal action, therefore, should be taken against the petitioner.

7. In so far as the NCR is concerned, it was brought to the notice of the higher authorities by the same reply that no further investigation had been conducted in connection with NCR no. 98 of 2007 under Sections 323, 504, 506 IPC and therefore, it could not be taken as a ground to cancel the license of the petitioner. The petitioner also submitted that in respect of the distribution of scheduled commodities and running of fair price shop, there was no complaint against the petitioner and therefore, the petitioner could not be held guilty of any violation of terms of agreement or contract pursuant to which he was running the fair price shop. Thus, it was pleaded that there was no occasion to cancel the fair price shop license of the petitioner.

8. Having considered the reply of the petitioner, the authority has simply referred three facts that vide order dated 02.08.2008 the fair price shop license of the petitioner was suspended and he was required to submit explanation within a week; and that the notice was also published in news daily 'Amar Ujala' on 04.07.2008; the reply was submitted by the petitioner on 18.07.2008 which was duly examined but the answer was not found satisfactory; and therefore, in public interest, the fair price shop license of the petitioner was being cancelled.

9. That argument advanced by learned counsel for the petitioner is two fold: firstly, the fair price shop license of the petitioner has been cancelled in respect of the charges in which the petitioner has not been found guilty till date and further that there was no charge of misappropriation of the scheduled commodities or malpractice nor, there was any complaint of overpricing that may be said to have resulted in violation of terms of agreement pursuant to which he was running the fair price shop; and

secondly argument is that no prescribed procedure followed in cancelling the fair price shop license of the petitioner as no final inquiry was conducted in the matter. Besides above, yet another argument is that the order is basically non speaking and cryptic one as in one line the reply of the petitioner has been rejected holding it to be non satisfactory. He submits that the respondent was hide bound in law to consider the reply of the petitioner in correct prospective and should have recorded reasons as to why the reply of the petitioner was not satisfactory.

10. *Per contra*, the learned counsel for the State respondents has submitted that once the criminal case has come to be registered against the petitioner and which is not disputed, the petitioner cannot claim any equity before this Court. It is submitted that the NCR was registered in the year 2007 at the time when the allotment of shop was done and therefore, the petitioner was definitely guilty of concealment of material facts and this Court should not interfere in exercise of powers under Article 226 of the Constitution of India in such matters.

11. Having heard learned counsels for the parties and their arguments advanced across the Bar and having perused the records, we find that as far as the order passed by respondent cancelling the fair price shop license of the petitioner is concerned, it really lacks the qualities and essentials of an order which can be said to be a reasoned order. While it is true that a criminal case was referred to in the show cause notice and in connection therewith a reply was submitted finds reference in the order impugned but there is no discussion about the reply submitted by the petitioner so that it can be deciphered what were the reasons that have weighed the consideration of the respondent authorities in ultimately arriving at a conclusion to cancel the fair price shop license of the petitioner. Every administrative action and administrative inquiry should result in an order passed on reasons which should be indicative of due application of mind by the authority dealing with the matter and passing the order. No amount of pleadings raised in the counter affidavit can substitute the reasons which have not come to be recorded in the order impugned, to justify the order.

12. In case of **Rashmi Metaliks Limited and Another v. Kolkata Metropolitan Development Authority and Others, (2013) 10 SCC 95**, considering the aspect of judicial review in case of administrative action, the Apex Court held that if the reasons are not contained in the order, it is bad.

13. Again in the case of **T.P. Senkumar. IPS v. Union of India and Others, (2017) 6 SCC 801**, the Apex Court has held that an administrative order must be judged by reason mentioned therein and cannot supplemented by the reason through affidavit or otherwise in subsequent court proceedings.

14. Further in the case of **Mangalam Organics Ltd. v. Union of India (2017) 7 SCC 221** vide taking note of the limited scope of judicial review of administrative action, the Court did carve out an exception if an order is passed with /an extraneous purpose, upon extraneous consideration or arbitrary without applying its mind to the relevant consideration or were it is not guided by

norms which are relevant to the object already achieved under Artice 14 of the Constitution.

15. So in view of the above legal position, the order impugned cannot be sustained on this count alone and deserves to be quashed.

16. however, we further proceed to examine the order from the point of view of the **Essential Commodities (Distribution and Control) Order, 2004** (in short 'Control Order') and the Government Order framed in that regard. While it is true that a preliminary inquiry is held under the Control Order read with relevant Government Orders to form a *prima facie* opinion to suspend the shop but ultimately a full fledged inquiry is contemplated and unless and until a full fledged inquiry is held and report is submitted, the authorities are not justified in taking the ultimate decision on the basis of preliminary inquiry and reply submitted by the petitioner. In the Full Bench judgment of this Court in **Puran Singh v. State of U.P. 2011 AIR 73** it has been held vide para 35 thus:

"35.Powers of suspension is centrally there but while exercising care is to be taken to the mandate of the proviso which states that the order is to be speaking one. Thus so far the power of suspension while proceeding to call upon the licencee about cancellation of the shop is concerned it is always there. It will be incorrect to hold that without preliminary enquiry in respect to a fact finding and without any opportunity the shop is not to be suspended. Para 4 and 5 of the Government Order clearly permits fulfledged enquiry purusant to the show cause notice for cancellation and then final decision in the matter. So far the order of suspension is concerned Government Order do not provide any appeal and at the same time there was no contention of signing an agreement as was made obligatory pursuant to Distribution Order of 2004."

17. So, in the present case it is factually correct that no no full fledged inquiry has been held and merely on the basis of reply of show cause notice, the authorities proceeded to cancel the fair price shop license of the petitioner and so, on this count also the impugned order deserves to be quashed.

18. However, we further proceed to examine the legal position regarding non disclosure of certain facts as has been claimed in the show cause notice referring to clause 10 of the Government order dated 17.08.2002 in which vide sub-clause (d) it was necessary for an applicant to have disclosed the criminal case, if any registered.

19. In the present case, we find the situation a bit different on facts. The fair price shop license was admittedly given to the petitioner in the year 2007, whereas, the criminal case is of the year 2008 bearing Case Crime No. 183 of 2008, under Sections 452/ 323, 504, 506 IPC and therefore, where cannot take it to be violation of any clause pursuant to which the petitioner was required to disclose factum of pending criminal case.

20. In so far as registration of NCR against the petitioner is concerned, the petitioner submits that he was not aware of any such case as no investigation ever took place and so there was no occasion to make any disclosure in that regard. The

question whether non disclosure of NCR would amount to violation of the conditions for grant of fair price shop license requires consideration in the present case. We consider that as far as the NCR is concerned it is not necessary that the petitioner might be aware of any such NCR registered against him and it has no where come either in the show cause notice, or in the final order passed by the authority that the petitioner had the knowledge of NCR registered on 17.07.2008 against him and yet he concealed this fact. It has also not come anywhere as to what is the exact date of grant of fair price shop license to the petitioner so that it cannot be examined and be verified as to whether the NCR dated 17.07.2008 was registered against the petitioner after the agreement or before, besides the fact that mere registration of an NCR also would not hold the petitioner guilty of offence complained of.

21. In view of the above, writ petition succeeds and is **allowed.** The order dated 31.07.2008 passed by the Sub-Divisional Magistrate, Etah is quashed. The petitioner is running the fair price shop under the interim order of this Court dated 21.08.2008, shall continue to run the same as a consequence to this order and is entitled to lift the essential commodities as per the agreement reached with the respondents for running the fair price shop in question.

(2019)11ILR A1380

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Civil Misc. Writ Petition No.- 44132 of 2017

Imran Khan ...Petitioner
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioner:
Sri Syed Mohammad Abbas Abdy

Counsel for the Respondents:
C.S.C., Sri Lalit Kumar Tripathi

A. Constitution of India - Art. 14 – Natural Justice - Suspension - Fair price shop licence of Society - Government order dated 09.01.1981 - Justification of condition to remove petitioner from sales person - Provision under which, the authority had asked the agent to be removed from being sales person is not clear - No fault found with the working of society and, no charges levelled against society - Condition to remove petitioner as a sales man quashed.
(Para 3, 4 & 6)

Writ Petition allowed (E-1)

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

1. The petitioner was appointed as a salesman by the District Cooperative Development Federation Limited, Jhansi, on 15.09.2009 to run a fair price shop named as Itwariganj fair price shop. When on 14.03.2016 certain complaints were made, action was taken on 28.03.2016 and the society?s license to run the fair price shop was suspended and the shop was attached to the fair price shop of one Babu Khan. On 28.03.2016 itself a First Information Report was also lodged.

2. Thereafter investigation commenced and on 06.02.2017 in the criminal proceedings a final report was

filed. In the mean time, the petitioner as a salesman filed an appeal against the order dated 28.03.2016 and the appeal was allowed on 23.11.2016 and the matter was remitted to the District Supply Officer. Thereafter, a notice was issued to the petitioner on 01.05.2017 with a direction that the petitioner had to submit his reply to the notice dated 21.09.2016. The petitioner, thereafter, submitted his reply on 03.05.2017. The order, thereafter, which was passed on 13.09.2017, however, found that the allegations against the shop were misfounded but it was stated in the order that the license would be restored only if the Cooperative Society changed its salesman. Further condition which was imposed was that the security which was deposited by the society would be forfeited.

3. Learned counsel for the petitioner submits that when by the order dated 13.09.2017 the District Supply Officer had restored the shop then he could not have imposed the two conditions namely, that the society had to change its salesman and also that the shop would be restored only if the security was forfeited. Learned counsel for the petitioner submits that the District Supply Officer exceeded his jurisdiction when he passed the order, as even though the petitioner was replying on behalf of the society it was not the petitioner who was given the show cause notice with regard to the malfunctioning of the shop.

4. Learned counsel relying on Clause 12 (8) of the Government Order dated 09.01.1981 states that such agents which were Cooperative Societies, if were found to be on the wrong then their licenses could be cancelled by the Assistant Registrar of societies after giving them a notice. In the instant case the petitioner who was a salesman had been asked to be removed by the District Supply Officer and thereafter the license of the agent (the cooperative society) has been restored. Under which provision the District Supply Officer had asked the agent to be removed from being a sales person is not clear.

5. Learned Standing Counsel, in reply, further submitted that the petitioner, in fact, was running the shop and, therefore, he himself had to suffer as a salesman.

6. Having heard the learned counsel for the petitioner, learned counsel for the society, Sri Lalit Kumar Tripathi and the Learned Standing Counsel, I am of the view that when the order was passed by the District Supply Officer that the shop was being restored then the condition that the petitioner had to be removed from being a salesman and that the security had to be forfeited was not warranted. This order also could not have been passed as no fault was found with the working of the society and no charges as were levelled against the society were proved. However, since the society is not before me, I only quash the portion of the order dated 13.09.2017 by which it has been stated that the license would be restored if the petitioner is removed as a salesman. The petitioner would therefore continue to be the salesman.

7. The writ petition, therefore, succeeds to the extent indicated above.

8. The writ petition is allowed.

(2019)11ILR A1382

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 45310 of 2017 connected with other cases

Nagar Nigam Gorakhpur ...Petitioner
Versus
Suresh Pandey & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Tripathi

Counsel for the Respondents:
C.S.C.

A. Civil Law-Payment of Gratuity Act, 1972 - Section 5 – Payment of Gratuity - Applicability to Municipal Corporation - All local bodies including Municipal Corporations would continue to be covered by the provisions of the Act unless they are exempted by the appropriate government by issuance of a notification as provided for u/s 5 of the Act. (Para 14 & 56)

B. Civil Law-Payment of Gratuity Act, 1972 - Uniformity of legislation throughout country - Earlier to it, some States, not all, had enacted legislations for payment of gratuity - There was no Central legislation - With object to ensure a uniformity in payment of gratuity to the employees throughout the country. The Payment of Gratuity Act, 1972 came to be enacted. (Para 25)

C. Payment of Gratuity Act, 1972 – is a beneficial piece of legislation enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure social security - Significance of the legislation lies in the acceptance of the principle of payment of gratuity as a compulsory statutory retiral benefit - Purpose is to provide for benefits to a workman upon his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. (Para 58)

D. Civil Law-Payment of Gratuity Act, 1972 - Section 5 and section 14 - Only in case a person holds a post that is governed by another Act providing for payment of gratuity, a claim would lie for exclusion of applicability of the Payment of Gratuity Act, 1972 i.e. the Central Act. In the absence of such exemption having been granted to the Nagar Nigam by State Government u/s 5, the provisions of the Payment of Gratuity Act, 1972 would have overriding effect by virtue of Section 14. (Para 13)

E. Payment of Gratuity Act, 1972 - Section 2(e) - Definition of 'Employee' - It means any person who is employed for wages in connection with the work of a factory, mine, oilfield, plantation, port, railway, company, shop or other establishment to which Payment of Gratuity Act, 1972 applies - It does not make any distinction between an employee on the basis of the fact that employees is paid daily wages or weekly wages or monthly wages. (Para 13, 20 & 24)

F. Payment of Gratuity Act, 1972 - Section 1(3) (b) and (c) - Meaning of word 'Establishment' - It has wide meaning to include commercial, public sector establishment and also non-commercial establishment - Municipal Council falls within the ambit of S. 1(3) (b) of the P. G. Act, 1972. (Para no. 33)

G. General Clause Act, 1897 - Section 3 (31) - Meaning of 'Local authority' - It means Municipal Committee, District Board etc., which are entrusted with the control or management of a Municipal or local fund. (Para 37)

H. Interpretation - Rule of Beneficent Construction - Application to welfare legislation - The provisions of Payment of Gratuity Act, 1972 are to be interpreted liberally so as to give it a

wide meaning rather a restrictive meaning which may negate the very object of the enactment - A beneficial legislation is to be construed in its correct perspective so as to fructify legislative intent underlying its enactment. (Para 60, 61 & 65)

Writ petition dismissed (E-1)

Case law relied: -

1. St. of Punjab Vs Labour Court, Jullundur & ors. (1980) 1 SCC 4.

2. Chaman Lal Vs Municipal Committee Panipat (1985) 87 (1) PLR 513.

3. Municipal Corp. of Delhi Vs V.T.Naresh & anr. (1986) I LLJ 323 Del

4. Municipal Board, Gangapur, Vs Controlling Auth. 1987 LAB. I.C. 575 (Raj. H.C.).

5. Nagar Palika, Moradabad Vs Appellate Auth. & Addl. Lab. Com, U.P. Kanpur & ors. 1989 LAB I.C. 173 (Alld. H.C.).

6. Poona Cantonment Board Vs S.K.Das & ors. (1993) II LLJ 487 Bom.

7. Municipal Committee Vs A. Nathi Ram & ors. (1998) III LLJ 1230 P&H.

8. Municipal Corp. of Delhi Vs Dharam Prakash Sharma & anr. (1998) 7 SCC 221.

9. Nagar Ayukt, Nagar Nigam, Kanpur Vs Mujib Ullah Khan & ors. 2008 (117) FLR 277 (All.H.C.).

10. Nagar Nigam, Gorakhpur Vs Ram Shanker Yadav & anr. (2019) 6 SCC 103.

11. Nagar Ayukt Nagar Nigam Vs Meraj Ahmad & anr. 2019 (162) FLR 278 (Alld. H.C.).

12. Nagar Palika Parishad, Kairana, Muzaffarnagar 7 anr. Vs Controlling Auth. & ors. 2008 (119) FLR 412 (Alld. H.C.).

13. Nagar Ayukt, Nagar Nigam, Kanpur Nagar Vs Brij Kishore Bajpai & anr. 2016 (4) ADJ 513.

14. The W'men of M/s Firestone Tyre & Rubber Co. of India Pvt. Ltd. Vs The Management & ors. (1973) 1 SCC 813.

15. B.D. Shetty & ors. Vs CEAT Ltd. & anr. (2002) 1 SCC 193.

16. Allahabad Bank & anr. Vs All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44.

17. Jeewanlal Ltd. & ors. Vs Appellate Authority under the Payment of Gratuity Act & ors. (1984) 4 SCC 356.

18. Bharat Singh Vs Management of New Delhi Tuberculosis Centre, New Delhi & ors. (1986) 2 SCC 614.

19. U.P.S.R.T.C., Kanpur Vs St. of U.P. & 3 ors. (Writ C No. 6971 of 2017, decided by Allahabad HC on 28.08.2019)

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

1. Heard Sri Sanjay Kumar Tripathi, learned counsel for the petitioner and Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Mata Prasad, learned Standing Counsel appearing for the respondent nos. 2, 3 and 4.

2. The present writ petition and the connected writ petitions have been filed by the petitioner-Nagar Nigam, Gorakhpur through its Nagar Ayukt against the orders passed by the Controlling Authority under the Payment of Gratuity Act, 1972/Assistant Labour Commissioner, U.P. Gorakhpur and also the orders passed by the Appellate Authority/Deputy Labour Commissioner, U.P. Gorakhpur.

3. Upon the writ petition being filed, notice was issued to the respondent no. 1 by registered post and in terms of office report dated 24.07.2019 the service of notice was deemed to be sufficient.

4. The particulars with regard to the orders under challenge in the bunch of writ petitions are as follows :-

Sl.No.	Writ Petition No.	Party Name	Date of order of the Controlling Authority	Date of order of the Appellate Authority
1	45310/2017	Nagar Nigam Gorakhpur Vs. Suresh Pandey and others	25.02.2016	20.06.2017
2	45311/2017	Nagar Nigam Gorakhpur Vs. Shahid and others	25.02.2016	20.06.2017
3	45314/2017	Nagar Nigam Gorakhpur Vs. Smt. Kanti Devi	25.02.2016	20.06.2017
4	45316/2017	Nagar Nigam Gorakhpur Vs. Kailash Chand Seth and others	25.02.2016	20.06.2017
5	45318/2017	Nagar Nigam Gorakhpur Vs. Laddan and others	25.02.2016	20.06.2017
6	45533/2017	Nagar Nigam Gorakhpur Vs. Raju and others	25.02.2016	20.06.2017
7	45536/2017	Nagar Nigam Gorakhpur Vs. Smt. Khatun	25.02.2016	20.06.2017
8	45542/2017	Nagar Nigarm Gorakhpur Vs. Mant Bali	23.04.2012 30.09.2016 (order passed in review)	20.06.2017

9	45545/2017	Nagar Nigam Gorakhpur Vs. Smt. Samirun and others	25.02.2016	20.06.2017
10	45550/2017	Nagar Nigam Gorakhpur Vs. Mod. Ali and others	25.02.2016	20.06.2017
11	45558/2017	Nagar Nigam Gorakhpur Vs. Smt. Sewati and others	25.02.2016	20.06.2017
12	45570/2017	Nagar Nigam Gorakhpur Vs. Vindhyachal and others	25.02.2016	20.06.2017
13	45581/2017	Nagar Nigam Gorakhpur Vs. Parag and others	23.04.2012	20.06.2017 (order passed in review)
14	45589/2017	Nagar Nigam Gorakhpur Vs. Mahesh	25.02.2016	20.06.2017
15	45602/2017	Nagar Nigam Gorakhpur Vs. Rajendra Prasad and others	25.02.2016	20.06.2017
16	45605/2017	Nagar Nigam Gorakhpur Vs. Smt. Jamuni and others	25.02.2016	20.06.2017
17	45608/2017	Nagar Nigam Gorakhp	25.02.2016	20.06.2017

		ur Vs. Aliraja and others		
18	45611/2017	Nagar Nigam Gorakhpur Vs. Premchand and others	23.04.2012 30.09.2016 (order passed in review)	20.06.2017
19	45613/2017	Nagar Nigam Gorakhpur Vs. Banarasi and others	25.02.2016	20.06.2017
20	45641/2017	Nagar Nigam Gorakhpur Vs. Jhinak	25.02.2016	20.06.2017
21	45751/2017	Nagar Nigam Gorakhpur Vs. Ayub Khan	23.04.2012 30.09.2016 (order passed in review)	20.06.2017

5. The writ petitions are based on similar set of facts and with the consent of the parties they are being taken up and decided together.

6. Writ-C No. 45310 of 2017 which has been treated to be leading petition seeks to challenge the order dated 25.2.2016 passed by the Controlling Authority in P.G. Case No. 38/2009 and also the order dated 20.6.2017 passed by the Appellate Authority in Appeal No. 11/2016.

7. Briefly stated the facts of this case are that upon an application filed by the respondent no. 1 before the Controlling Authority for a direction under Section 7 (4) of the Payment of Gratuity Act, 19721 read with Rule 10 of the Uttar Pradesh Payment of Gratuity Rules, 1975, P.G. Case No. 38/2009 was registered. In terms of the aforementioned application it was stated that as against the total amount of Rs.1,10,229/- which was due to the respondent towards gratuity a payment of Rs. 69,630/- had been made by the employers, and accordingly a claim was raised for the balance amount which was said to be due.

8. The aforesaid claim was contested by the petitioner-Nagar Nigam by filing objections whereunder it was stated that the entire amount of gratuity due to the respondent-employee had been paid to him and the claimwhich had been sought to be raised was legally untenable. It was submitted that the computation of the gratuity amount had been made as per the Regulation 3 (5) of the Gorakhpur Nagar Mahapalika Non-Centralized Employees (Retirement Benefit) Regulations, 19902.

9. The Controlling Authority upon a consideration of the facts of the case came to the conclusion that there was no dispute with regard to the last drawn wages, and also the fact that the employee was in continuous service in terms of Section 2-A of the P.G. Act, 1972, and accordingly held the employee entitled for payment of gratuity in terms of the said Act and allowed the application issuing a direction for payment of the difference of amount as claimed by the respondent-employee.

10. Challenging the order passed by the Controlling Authority, an appeal was filed under Section 7 (7) of the P.G. Act, 1972 which was registered as P.G.Appeal No. 11/2016. The grounds taken in the appeal were that the provisions of the P.G. Act, 1972 are not applicable to the petitioner-Nagar Nigam and the services of its employees are governed under its own service regulations and that the respondent-employee had been paid the gratuity amount as per the terms of the aforesaid Regulations. The Appellate Authority upon considering the facts of the case held that since there was no order of exemption granted to the petitioner under Section 5 (2) of the P.G. Act, 1972 in view of the overriding provision under Section 14, the P.G. Act 1972 would override the Regulations which were sought to be relied upon by the Nagar Nigam and accordingly the order passed by the Controlling Authority was held to be valid and was affirmed.

11. Counsel for the petitioner has sought to assail the orders passed by the Appellate Authority and the Controlling Authority by submitting that the provisions with regard to payment of gratuity under the Regulations of the Nagar Nigam are more beneficial in comparison to the provisions under the P.G. Act of 1972, and as such the employees of the Nagar Nigam were not entitled to claim gratuity under the said Act. It has been submitted that in addition to payment of gratuity the employees of the Nagar Nigam were also entitled for pension. It is furthercontended that the Regulations of 1990 have come into force subsequent to the enactment of the Act therefore the Regulations would override the provisions of the P.G. Act, 1972 and there was no requirement of seeking any exemption in terms of Section 5 of the said Act.

12. Per contra, learned Additional Advocate General appearing for the State of U.P. submits that the Regulations 1990 upon which reliance is sought to be placed by the petitioner -Nagar Nigam have not been framed by the State Government but have been framed by the Executive Committee of the Nagar Nigam under Section 548 (1) (f) of the Uttar Pradesh Municipal Corporation Act, 19593 and have been confirmed by the Corporation and thereafter published in the gazette.

13. It is further submitted that as per the definition of the term "employee" under Section 2 (e) of the P.G. Act, 1972 only persons holding a post under the Central Government or the State Government and who are governed by any other Act or by any Rules providing for payment of gratuity can claim exclusion from the provisions of the P.G. Act, 1972, and in the absence of any exemption having been granted to the petitioner-Nagar Nigam by the State Government under Section 5, the provisions of the P.G. Act, 1972 would

have overriding effect as per the provisions contained under Section 14.

14. The core issue which falls for consideration in the present petition is as to whether the employees of the petitioner-Nagar Nigam who governed by the Regulations 1990 are entitled for payment of gratuity under the provisions of the Payment of Gratuity Act, 1972.

15. In order to appreciate the controversy, the relevant statutory provisions under the Payment of Gratuity Act, 1972 may be adverted to :-

"Short title, extent, application and commencement. (1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Provided that in so far as it relates to plantations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It shall apply to

-

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, or, any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

(3A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.]

(4) It shall come into force on such date as the Central Government may, by notification, appoint.

"2. Definitions.--In this Act, unless the context otherwise requires,--

x x x x x

(b) *"completed year of service"* means continuous service for one year;

(c) *"continuous service"* means continuous service as defined in Section 2-A;

x x x x x

(e) *"employee"* means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;

x x x x x

(s) *"wages"* means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employments and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

2-A. **Continuous service.**--For the purpose of this Act,--

(1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer--

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than--

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case.

Explanation.--For the purpose of clause (2) the number of days on which an employee has actually worked under an employer shall include the days on which--

(I)he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

(3) where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during such period.

x x x x x

4. **Payment of Gratuity.**--(1) Gratuity shall be payable to an employee on the termination of his employment

after he has rendered continuous service for not less than five years,--

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease :

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

Provided further that in case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is minor, the share of such minor, shall be deposited with the Controlling Authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.--For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account :

Provided further that in the case of an employee who is employed in a seasonal establishment, and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.--In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed ten lakh rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),--

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so causes;

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i) if the services of such employee have been terminated for his

riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

5. **Power to exempt** :- (1) The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

(2) The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

(3) A notification issued under sub-section (1) or sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of this Act, but no such notification shall be issued so as to prejudicially affect the interests of any person.

14. Act to override other enactments, etc. The provisions of this Act or any rule made there under shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

16. The petitioner-Nagar Nigam is a Municipal Corporation governed in terms of the provisions contained under the Act, 1959 which was enacted to provide for the establishment of Municipal Corporations in certain cities with a view to ensure better municipal government of the said cities.

17. The word 'Corporation' or 'Municipal Corporation' has been defined in terms of Section 2 of the Act, 1959 in the following terms :-

"2.(11-A) "Corporation" or "Municipal Corporation" means the Municipal Corporation constituted for a city under sub-clause (c) of clause (1) of Article 243-Q of the constitution."

18. Chapter XXIII of the Act, 1959 deals with the subject Rules, **Bye-laws and Regulations** and Section 548 empowers the Executive Committee of the Municipal Corporation to frame regulations not inconsistent with the Act, the Rules and the Bye-laws, and in consonance with any resolution that may be passed by the Corporation.

19. For ease of reference Section 548 of the Act, 1959, referred to above, is being extracted below.

"548. Regulations-(1) The Executive Committee shall from time to

time frame regulations not inconsistent with this Act and the rules and bye-laws but in consonance with any resolution that may be passed by the Corporation -

(a) fixing the amount and the nature of the security to be furnished by any Corporation officer or servant from whom it may be deemed expedient to require security;

(b) regulating the grant of leave to Corporation officers and servants;

(c) determining the remuneration to be paid to the persons appointed to act for any of the said officers or servants during their absence on leave;

(d) authorizing the payment of traveling or conveyance allowance to the said officers and servants;

(e) regulating the period of service of all the said officers and servants;

(f) determining the conditions under which the said officers and servants, or any of them, shall on retirement or discharge receive pensions, gratuities or compassionate allowances, and under which the surviving spouse or children and in the absence of the surviving spouse or children, the parents, brothers and sisters, if any, dependent on any of the said officers and servants, shall after their death, receive compassionate allowances and the amounts of such pensions, gratuities or compassionate allowances;

(g) authorising the payment of contributions, at certain prescribed rates and subject to certain prescribed conditions, to any pension or provident fund which may, with the approval of the Executive Committee be established by the said officers and servants or to such provident fund, if any, as may be established by the Corporation for the benefit of the said officers and servants;

(h) prescribing the conditions under which and, the authority by whom, any officer or servant, may be permitted while on duty or during leave to perform a specified service or series of services for a private person or body or for a public body, including a local authority, or for the Government and to receive remuneration therefor;

(i) in general, prescribing any other conditions of service of the said officers and servants.

(2) The Executive Committee may also from time to time frame regulations not inconsistent with the provisions of this Act and the rules -

(a) determining the standards of fitness of buildings for human habitation;

(b) regulating the declaration of expenses incurred by the Municipal Commissioner under the provisions of this Act and the rules in respect of any materials or fittings supplied or work executed or thing done to,

upon or in connection with some building or land which are recoverable from the owner or occupier to be improvement expenses;

(c) regulating the grant of permission by the Municipal Commissioner for the construction of shops, ware-house, factories, huts or buildings designed for particular uses in any streets, portion of streets or localities specified in a declaration in force under Section 335.

(3) No regulation under sub-section (1) or under clause (a) of sub-section (2) shall have effect until it has been confirmed by the Corporation and, if made under clause (h) of sub-section (1), until it has in addition been confirmed by the State Government and in either case,

has been published in the Official Gazette.

(4) The Corporation or the State Government may decline to confirm a regulation when placed before it under sub-section (3) or confirm it without modification or after making such modifications as it may think fit."

20. In terms of Section 2(e) of the P.G. Act, 1972, an "employee" has been defined as meaning any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies. The only exclusion is in respect of persons holding a post under the Central Government or a State Government who are governed by any other Act or any Rules providing for payment of gratuity.

21. Section 4 of the P.G. Act, 1972 provides for payment of gratuity to an employee on the termination of his employment after he has rendered continuous service for not less than five years, upon occurrence of either of the following contingencies: (i) on his superannuation, (ii) on his retirement, (iii) on his death or disablement due to accident or disease. Sub-section (2) of Section 4 mandates that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. The expression "completed year of service" has been defined under Section 2(b) to mean continuous service for one year. As per Section 2(c), "continuous service" means continuous service as defined in Section 2-A. Further, in terms of Section 2-A an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

22. A conjoint reading of the aforementioned provisions lead to the inference that gratuity becomes payable to an "employee" on his superannuation after he has rendered "continuous service", for not less than five years. The computation of the amount payable as gratuity is to be made at the rate of fifteen days' wages, for every completed year of service or part thereof in excess of six months, based on the rate of wages last drawn by the employee concerned.

23. The expression "completed year of service" having been defined as "continuous service" for one year and the term "continuous service" being defined under Section 2(c) as per the terms of Section 2-A of the P.G. Act, 1972 which is to mean uninterrupted service including service which may be interrupted on account of certain exigencies specified therein.

24. It, therefore, follows that the P.G. Act, 1972 does not make any distinction between an employee on the

basis of the fact that the employee is paid daily wages or weekly wages or monthly wages. The only condition is that he should be employed by the employer on wages in an establishment covered by the P.G. Act, 1972 and that he should be in continuous service as required under Section 2-A and that he should have completed a minimum of five years of service in the said capacity. The computation of gratuity as per terms of Section 4 is to be made at the rate of fifteen days' wages for every completed year of service or part thereof in excess of six months based on the rate of wages last drawn.

25. The statement of objects and reasons of the P.G.Act, 1972 indicates that the need for the enactment was felt for the reason that there was no central legislation to regulate the payment of gratuity to industrial workers except the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. The Governments of the States of Kerala and West Bengal had enacted legislations for payment of gratuity to various categories of workers but other States had not done so. It was therefore felt necessary that instead of having different legislations for different States there should be a common legislation which would ensure a uniform pattern of payment of gratuity to the employees throughout the country and accordingly the P.G. Act, 1972 came to be enacted. The preamble of the Act shows that it has been enacted to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto.

26. In terms of Section 1 (3) (a), the P.G.Act, 1972 applies to every factory, mine, oilfield, plantation, port and railway company and under Section 1 (3) (b) to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. Clause (c) of Section 1 empowers the Central Government to apply the Act to such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, by notification in this behalf.

27. The applicability of clause (b) of sub-section (3) of Section 1 of the P.G.Act, 1972 came up for consideration in the case of **State of Punjab Vs. Labour Court, Jullundur and others4,** and it was held that the aforementioned provision applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. The relevant observations made in the judgment are as follows:-

"3....Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State".

.....

The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1(3)(b)

intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State...."

28. The question with regard to applicability of the provisions of P.G.Act, 1972 to Municipalities was taken up for determination in the case of **Chaman Lal Vs. Municipal Committee Panipat5,** and after noticing the provisions under Section 1 (3) (b), it was held that the Gratuity Act applies to all establishments which are covered by any law relating to establishments in a State. The relevant extracts from the judgment are as follows :-

"2. The only question that arises for determination is, whether the provisions of the Gratuity Act are applicable to the Municipalities in Haryana. In order to determine the question it is necessary to notice Section 1(3) (b) of the Gratuity Act, which reads as follows Section 1(3)" It shall apply to:

(a) x x x x

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed or were employed, on any day of the preceding twelve months."

3. It is evident from a bare reading of the section that the Gratuity Act applies to all establishments which are covered by any law relating to the establishments in a State. If there are more than one statutes in a State dealing with the said term, the provision of the Gratuity Act can be read in conjunction with any of such statutes. The Payment of Wages Act, 1936 (referred to as the 'Wages Act') deals with establishments and is applicable to all the States including the State of Haryana. Therefore, the provisions of Wages Act can be taken into consideration to find out whether a Municipality in Haryana is an establishment or not..."

29. The meaning of the word "establishment" under Section 1 (3) (b) of the P.G.Act, 1972 was explained in the case of **Municipal Corporation of Delhi Vs. V.T.Naresh and another6**, and the Municipal Corporation of Delhi was held to be an establishment within the meaning of the aforementioned Act. The observations made in the judgment are as follows :-

"6. It will be noticed that the word "establishment" used in the aforesaid clause of Payment of Gratuity Act, 1972 is not controlled by any type of establishment. It will include commercial, public sector establishment, private sector establishment as also the non-commercial establishment. Therefore, it is merely

because Municipal Corporation of Delhi which is created by Delhi Municipal Corporation Act, 1957 is also a local body or local authority, it does not mean that the Corporation will not be an "establishment" so long as it is so in relation to any law relating to "establishment". It need not multiply the instances. Only one is sufficient to make the Act applicable. I have, thus, no doubt that the Municipal Corporation of Delhi is an "establishment" within the meaning of S. 1, Sub-S. (3) Clause (b) of the Act."

30. The question of applicability of the P.G.Act, 1972 to Municipalities in the State of Rajasthan whose employees were entitled for benefits under Rajasthan Municipalities (Contributory Provident Fund and Gratuity) Rules, 1969 came up for consideration in the case of **Municipal Board, Gangapur, Vs. Controlling Authority under Payment of Gratuity Act, Bhilwara7,** and taking into consideration the provisions of Section 1 (3) (b) and Section 14, the P.G.Act, 1972 was held to be applicable. The observations made in the judgment are as follows :-

"6. ..in view of the wide definition of establishment, it is clear that the Municipal Board, Gangapur falls in this definition of establishment and is covered u/sub-(3) (b) of Section 1 of the Act. Similarly in somewhat identical circumstances Kerala and Punjab High Courts (supra) made the Gratuity Act applicable to local bodies also.

7. Next question that arises is that when rules have been framed for payment of gratuity to Municipal employees then how the Gratuity Act will be applicable. Mr. Lodha, learned Counsel for the petitioner submits that in view of the specific rules for payment of gratuity, these Rules of 1969 as referred to above shall cover the case of petitioner and not the Gratuity Act. This can be answered by referring to Section 14 of the Act. Section 14 of the Act very clearly lays down that this Act will have overriding effect on all other laws. Section 14 reads as under:-

14. Act to override other enactments etc.-The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

8. Section 14 overrides the other Rules or Act made on the subject by virtue by these provision. Rules of 1969 will have no role to play, so far as they are inconsistent with the Act. Thus the Payment of Gratuity Act will cover the Municipalities for the payment of gratuity and not the rules of 1969. Moreover, this is social legislation & it should be given more extensive application. Thus, this submission of Mr. Lodha has no force and rejected. I hold that the Payment of Gratuity Act is applicable to the Municipalities and in this view of matter, the appellate authorities have rightly upheld the order of the controlling authority..."

31. In **Nagar Palika, Moradabad Vs. Appellate Authority and Additional Labour Commissioner, U.P. Kanpur and others8,** the question with regard to applicability of the P.G.Act, 1972 to Nagar Palika employees was considered, and it was held that the provisions of the Gratuity Act were applicable to such employees. The observations made in the judgment are being extracted below :-

"9. The argument sought to be advanced by the learned counsel for the

petitioner is that the Municipal Board cannot be described as an 'establishment' because the word 'establishment' connotes some business transaction or at least it may include a public institution. Such a definition of the word 'establishment' is to be found in Black's Legal Dictionary.

10. I am afraid the argument is not sustainable. The activities which are carried on by the Municipal Board do go to make it a public institution undoubtedly. In fact Municipal Board, or for that matter, such local bodies do exist to cater to the needs of the general public and, therefore, many statutory duties have been conferred upon such bodies. To say that inspite of those functions which have to be carried out by those institutions in accordance with the mandate of law, those do not become public institutions is too bold an argument to be accepted.

11. Therefore, the Controlling Authority rightly entertained the application of the contesting respondent and was fully competent to decide the matter thus raised before it."

32. The issue with regard to applicability of the P.G.Act, 1972 to a Cantonment Board was taken up for consideration in the case of **Poona Cantonment Board Vs. S.K.Das and others9,** wherein it was held that the only test for applicability prescribed under Section 1 (3) (b) is that the establishment must be an establishment within the meaning of a specified type of law in a State, and in view of the qualifying test being satisfied the provisions of the Act were held to be applicable. The observations made in the judgment are as follows :-

"5... The contention, shortly put, is that the Act does not apply to the petitioner-Board, as the offices/establishments where the concerned workmen were employed do not fall within the ambit of Section 1(3)(b) so as to make the Act applicable. It is common ground that, at the relevant time, no notification within the contemplation of Section 1(3)(c) had been issued and that such a notification came to be issued only in January, 1982. It is also common ground that the petitioners' offices/establishments would not fall within Clause (a) of sub-section (3) of Section 1 of the Act. The Appellate Authority has negatived the contention by taking the view that the offices/establishments of the petitioner-Board were covered under the provisions of Section 1(3)(b) of the Act, as they satisfy the definition of the term "establishment" both under the provisions of the Contract Labour Regulation and Abolition Act 1970 and the Bombay Shops & Establishments Act, 1948.

6. The applicability of the Act is determined by Section 1 of the said Act. Clause (b) of sub-section (3) of Section 1, which is the only relevant provision which needs to be considered reads as under :

"1 Short title, extent, application and commencement -

(3) It shall apply to -

(a).....

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c)....."

7.The contention of the petitioner is that the offices/establishments where the

concerned workmen were employed are not covered by the provisions of the Contract Labour Regulations and Abolition Act, 1971, and the provisions of the Bombay Shops & Establishments Act, 1948. Consequently, those establishments would not amount to "establishments" within the meaning of the said laws, contemplated by Clause (b) of sub-section (3) of Section 1. Hence, the petitioner contends that the Payment of Gratuity Act would not apply.

8. It is difficult to accept the contention urged on behalf of the petitioner for more than one reason. In State of Punjab v. The Labour Court, Jullundur, and others (1981) I LLJ 354 SC, the Supreme Court had an occasion to consider a some what similar contention. The question arose therein as to whether the Hydel Department of the Government of Punjab, which had under taken a construction project, in which the concerned workmen were employed as work charged employees, answered the test in Section 1(3)(b) of the Payment of Gratuity Act, so as to enable the employees to claim gratuity. The State of Punjab contended that Section 1(3)(b) required that the establishment within its contemplation must be one "within the meaning of any law for the time being in force in relation to establishments in a state", which meant that it should be an establishment within the meaning of a law applicable to shops and establishments enacted by the State Legislature. This contention was emphatically rejected by the Supreme Court by pointing out (p. 355) :

"It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression 'law' in Section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statue relating to shops and establishments, both commercial and non-commercial. The Punjab Shops and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression 'establishments' unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act."

The Supreme Court, therefore, held that the Hydel Project run by the State of Punjab was an establishment falling within Section 1(3)(b) of the Payment of Gratuity Act, and, therefore, the workmen were entitled to claim gratuity.

9. In my view, the reasoning adopted by the Supreme Court in the judgment in State of Punjab (supra) would equally apply to the case of the petitioner. The Appellate Authority has

taken the view that the petitioner's offices/establishments would be 'establishments' within the meaning of the Contract Labour Regulation and Abolition Act, 1970, as defined in Section 2(1)(e). Interestingly, Section 2(1)(e) of the said Act defines the expression 'establishment' as under :

"2(i) In this Act, unless the context otherwise requires, -

.....

(e) "Establishment" means -

(i) any office or department of the Government or a local authority, or

(ii) any place where any industry, trade, business, manufacture or occupation is carried on;"

Even a cursory look at Section 2(1)(e)(ii) is sufficient to lead to the conclusion that the establishment contemplated thereunder could be an establishment of a local authority. It is not disputed that the Pune Cantonment Board is a local authority, and, therefore, I would have though that there would be no difficulty in holding that the establishment of the Pune Cantonment Board would be establishment within the meaning of Section 2(1)(e) of the Contract Labour (Regulation and Abolition) Act, 1970.

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11...in my view the establishments of the petitioner-Board are 'establishments' within the meaning of Section 2(1)(e)(i) of the Contract Labour (Regulation and Abolition) Act, 1970, which is a law in force in the State of Maharashtra in relation to shops and establishments in this State. Thus, the qualifying test in Section 1(3)(b) being satisfied, the Payment of Gratuity Act, 1972, was applicable, even at the relevant time, to the establishments of the petitioner Board, wherein the concerned workmen were working."

33. The word "establishment" used under Clause (b) and Clause (c) of sub-section (3) of Section 1 of the P.G.Act, 1972 has been held to have wide meaning and to include commercial, public sector establishments and also non-commercial establishments. The question as to whether a Municipal Committee/Council falls within the ambit of Section 1 (3) (b) of the P.G.Act, 1972 was considered in the case of **Municipal Committee Vs. A. Nathi Ram and others10,** and taking into consideration that Section 1 (3) (b) applies to every establishment covered by any law relating to establishments and applicable in a given State, and also referring to various judgments on the point by different High Courts, it was stated as follows:-

"9. There cannot be two views that the Act of 1972 is a piece of social welfare legislation enacted with a view to lay down a uniform pattern of payment of gratuity to different categories of employees who are employed in shops and establishments. While interpreting the provisions of the Act, the Court has to bear in mind that a welfare legislation must receive liberal construction keeping in view the purpose of the legislation. Therefore, if more than one interpretation can be given to the expression 'any law for the time being in force in relation to shops and establishments in a State', then the one which advances the object of the legislation will be preferred as against an interpretation which would wholly or partially defeat the legislative intendment. The Court will also refrain from interpreting a beneficent Statute like the Act of 1972 in such a manner which may

curtail its wide amplitude and result in denial of benefit of gratuity to a class of employees, unless it becomes a compelling necessity.

10. A careful analysis of Section 1(3)(b) of the Act shows that it applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State. It is note worthy that the Legislature has not used the word 'commercial' between the words 'and' and 'establishments' although it must be presumed to be aware of the laws enacted by the State Legislatures in relation to the shops and commercial establishments. In order to accept Shri Chaudhary's argument, we will have to add the word 'commercial' between the words 'and' and 'establishments' in Section 1(3)(b). Simultaneously, we will have to omit the word 'any' between the words 'of and 'law'. That, in our opinion is not permissible. Our Constitution clearly defines the jurisdiction of the Legislature, the Judiciary and the Executive. The power to enact or to amend an existing law is within the exclusive domain of the Legislature and while exercising the power of judicial review, the Courts will ordinarily refrain from treading into the field occupied by the Legislature. In other words, the Court will not take upon itself the task of enacting a law or making an amendment in an existing law by addition or omission by making an unwarranted assumption that the Legislature has not acted wisely while enacting a Statute. One of the well recognised principles of interpretation is that the Court will neither add words nor supply gaps or omission nor will it subtract words from a Statute. The Court will also avoid interpreting a Statute which will result in rendering surplus a provision of the Statute or some words thereof. In Smt. Hira Devi and Ors. v. District Board, Shahjahanpur, AIR 1952 SC 362, the provisions of U.P. District Boards Act, 1922 (as amended in 1933) came up for consideration before the Supreme Court. While reversing the order of the Allahabad High Court, the Supreme Court observed as under :

"....It would be an unwarranted extension of the powers of suspension vested in the Board to read, as the High Court purported to do, the power of suspension of the type in question whose sanction is necessary. It was unfortunate that when the Legislature came to amend the old Section 71 of the Act it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression 'orders of any authority whose sanction is necessary'. No doubt it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."

In British India General Insurance Co. v. Itbar Singh AIR 1959 SC 1331, their Lordships of the Supreme Court interpreted Section 96(2) and (6) of the Motor Vehicles Act, 1939. One of the arguments urged before the Supreme Court was that the word 'also' should be added after the word 'sum' in Section 96(2). Rejecting the argument, the Supreme Court observed that it is not permissible to add words in the Section unless the Section as it stands is meaningless or of doubtful meaning. The Supreme Court further held that Section 96(2) of the Motor Vehicles Act, 1939 was neither vague nor meaningless and

therefore, there was reason to add the word 'also' after the word 'sum'.

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12. Keeping these principles in view, we have no hesitation to hold that the word 'commercial' cannot he added between the words ' and and 'establishments' used in Section 1(3)(b) of the Act and, therefore, the expression 'shops and establishments' used in that Section cannot be restricted to the shops and commercial establishments as defined in the Act of 1958. Rather, for giving effect to the beneficent Statute enacted by the Parliament, it will be quite legitimate to consider all those establishments falling within the ambit of Section 1(3)(b) which are governed by any law applicable in the State of Haryana. "

34. The question as to whether employees of a municipality which had adopted the provisions of CCS (Pension) Rules, 1972 providing for both pension and gratuity, would remain entitled to payment under the P.G.Act, 1972, fell for consideration in the case of **Municipal Corporation of Delhi Vs. Dharam Prakash Sharma and another11,** and it was held that the gratuity as provided for under the Pension Rules would not disentitle an employee from getting the payment of gratuity under the P.G.Act, 1972 in view of the overriding provisions contained under Section 14 of the said Act. The observations made in the judgment in this regard are as follows :-

"2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment

from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules."

35. The question with regard to applicability of the provisions of the P.G.Act, 1972 in respect of employees of the Nagar Nigam Kanpur (a Municipal Corporation defined under Section 2 (11-A) of the Act, 1959) came up for consideration in the case of **Nagar Ayukt, Nagar Nigam, Kanpur Vs. Mujib Ullah Khan and others12,** wherein it was contended that the employees of the Municipal Corporation on their retirement were entitled to payment of gratuity in terms of the Retiral Dues and General Provident Fund Regulations 1962 made under Section 548 (1) of the Act, 1959 and in view thereof the payment of gratuity in respect of such employees would be under the said Regulations. The aforementioned contention was repelled and it was held as follows :-

"5. In the present case, the contesting respondents are not Central Government or State Government employees and thus the regulation made by the Nagar Nigam, Kanpur will not exempt them from Section 14 of the Payment of Gratuity Act, 1972. The State Government has not exempted these employees from the applicability of Payment of Gratuity Act, 1972. Section 14 of the Payment of Gratuity Act, 1972 provides that the provisions of the Act shall have effect notwithstanding any thing inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. The regularizations made under the U.P. Municipal Corporations Act, as such, would not apply for the purposes of calculation of payment of gratuity to the employees of Nagar Nigam, Kanpur."

36. It has been pointed out that in terms of Section 1 (3) (c) of the P.G.Act, 1972 the Central Government had published a Notification on 08.01.1982 and specified local bodies in which ten or more persons are employed, or were employed, on any day of the preceding twelve months as a class of establishments to which the Act shall apply. The Notification dated 08.01.1982 reads as under :-

"New Delhi, the 8th January, 1982

NOTIFICATION

S.O. No. 239....-In exercise of the powers conferred by Clause (c) of Sub-section (3) of Section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specified 'local bodies' in which ten or more persons are employed, or were employed, on any day preceding twelve months, as a class of establishments to

which the said Act shall apply with effect from the date of publication of this notification in the Official Gazette.

Sd/.

(R.K.A. Subrahmanya)

Additional Secretary

(F. No. S-70020/16/77-FPG)"

37. Following the definition under Section 3 (31) of the General Clauses Act, 1897, a "local authority" means a municipal committee, district board etc. which are entrusted with the control or management of a municipal or local fund. The aforementioned notification dated 8th January, 1982 which makes the P.G.Act, 1972 applicable to the local bodies would thus include Municipal Corporations also.

38. The question with regard to the applicability of the P.G. Act, 1972 to the Municipal Corporations of Kanpur and Gorakhpur came up for consideration in a recent judgment in the case of **Nagar Ayukt Nagar Nigam, Kanpur Vs. Mujib Ullah Khan and another with Nagar Nigam, Gorakhpur Vs. Ram Shanker Yadav and another13,** and taking into view the provisions of the P.G.Act, 1972 and the notification dated 08.01.1982 issued under Section 1 (3) (c), the P.G.Act, 1972 was held to be applicable. The relevant observations in the aforementioned judgment are being extracted below :-

"3. The appellant, the Municipal Corporation, Kanpur is governed by the Uttar Pradesh Municipal Corporation Act, 1959, whereas, the Respondent is an employee of the appellant. The employees in both cases claimed gratuity by invoking the jurisdiction of the Controlling Authorities under the Act. The argument of the Appellant before the learned Single Judge was that the gratuity is payable in accordance with the Retirement Benefits and General Provident Fund Regulations, 1962 framed Under Section 548 of the 1959 Act as amended on 11.01.1988. Such Regulations contemplate payment of gratuity at the rate of 15 days' salary per month for 16.5 months. It was found by the High Court that it is the Act which is applicable, whereby, gratuity calculated at the rate of 15 days' salary for every completed year without any ceiling of months or part thereof.

4. The argument raised by the appellant before the High Court is, that the gratuity is payable in terms of Rule 4(1) of the 1962 Regulations published Under Section 548 (1) of the 1959 Act as amended on 11.01.1988. Therefore, the employees of the Municipalities are entitled to gratuity only in terms of such Regulations and not under the Act.

5. The High Court relied upon a judgment reported as Municipal Corporation of Delhi v. Dharam Prakash Sharma AIR 1999 SC 293 to hold that only employees of Central Government or the State Government are exempt from the applicability of the Act, therefore, the employees of the Appellants would be governed by the Act and are entitled to gratuity in terms of the scale mentioned therein. It was held that the Act is not applicable only to the Central Government or State Governments in terms of definition of an "employee" under Section 2 (e) of the Act. Therefore, the employees of the Municipalities are entitled to the gratuity in terms of the provisions of the Act.

6. The appellant relies upon Section 3 of the U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 which is to the effect that such Act will have no application to the office of Government or Local Bodies. Therefore, on the strength of such statutory provision, it was argued that the Act would not be applicable in respect of the Municipalities. The appellant is not a factory, mine, oilfield, plantation, port and railway company and that there is no notification as stipulated under Clause (c) of Section 1(3) of the Act. Therefore, the employees of the Municipalities are entitled to the gratuity in terms of the Regulations framed in exercise of powers of Section 548 of the 1959 Act and not under the Act.

7. On the other hand, the learned Counsel for the Respondent pointed out that the Central Government has published a notification in terms of Section 1(3)(c) of the Act on 08.01.1982 to extend the applicability of the Act to the Municipalities. Thus, the Act is applicable to the Municipalities...."

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10. In terms of the above said Section 1(3)(c) of the Act, the Central Government has published a notification on 08.01.1982 and specified local bodies in which ten or more persons are employed, or were employed, on any day of the preceding twelve months as a class of establishment to which this Act shall apply....

11. We find that the notification dated 08.01.1982 was not referred to before the High Court. Such notification makes it abundantly clear that the Act is applicable to the local bodies i.e. the Municipalities. Section 14 of the Act has given an overriding effect over any other inconsistent provision in any other enactment. The said provision reads as under:

"14. Act to override other enactments, etc. The provisions of this Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

12. In view of Section 14 of the Act, the provision in the State Act contemplating payment of gratuity will be inapplicable in respect of the employees of the local bodies.

13. Section 2(e) of the Act alone was referred to in the judgment reported as Municipal Corporation of Delhi. The said judgment is in the context of CCS (Pension) Rules, 1972 which specifically provides for payment of Pension and Gratuity. The Act is applicable to the Municipalities, therefore, it is wholly inconsequential even if there is no reference to the notification dated 08.01.1982.

14. The entire argument of the appellant is that the State Act confers restrictive benefit of gratuity than what is conferred under the Central Act. Such argument is not tenable in view of Section 14 of the Act and that liberal payment of gratuity is in fact in the interest of the employees. Thus, the gratuity would be payable under the Act. Such is the view taken by the Controlling Authority."

39. It may be noticed that the aforementioned judgment is a decision on an appeal filed against the decision of this Court in **Nagar Ayukt, Nagar Nigam, Kanpur Vs. Mujib Ulla Khan and others,** referred to in the earlier part of this judgment.

40. The judgment in the case of **Nagar Ayukt, Nagar Nigam, Kanpur**

Vs. Mujib Ulla Khan and another has been followed in a recent judgment of this Court in the case of **Nagar Ayukt Nagar Nigam Vs. Meraj Ahmad and another14.**

41. The sheet anchor of the argument of the petitioner is based upon the judgment of this Court in the case of **Nagar Palika Parishad, Kairana, Muzaffarnagar and another Vs. Controlling Authority and others15** wherein it was held that since the employees of the municipalities concerned were covered by the provisions of the Uttar Pradesh Nagar Palika Non-Centralized Services Retirement Benefits Regulations, 198416 which had been made by the appropriate government in exercise of powers conferred under Section 297 (2) of the U.P. Municipalities Act, 191617, they would be covered in terms of the said Regulations and not under the P.G. Act, 1972.

42. The aforementioned judgment in the case of **Nagar Palika Parishad, Kairana Muzaffarnagar and another** came up for consideration before this Court in the case of **Nagar Ayukt, Nagar Nigam, Kanpur Nagar Vs. Brij Kishore Bajpai and another18,** wherein upon noticing the fact that the aforesaid decision was in connection with the employees of the Non-Centralized Services of Nagar Palika and not in respect to the employees of Nagar Nigam it was held that Section 14 gives an overriding effect to the P.G.Act and unless the establishment is exempt under Section 5 by issuance of a notification by the appropriate government, the same would be covered. The relevant observations made in the judgment are as follows :-

"5. In assailing the above order, the submission of Sri Sachan, learned counsel for the petitioner is that the payment of gratuity to the employees of the Nagar Nigam is governed by the provisions of Retiral Dues and General Provident fund and Regulations, 1962 as amended in 1988. The said Rules are more beneficial than the payment of gratuity under the Act. Therefore by necessary implication the Nagar Nigam gets exempted vide Section 5 of the Act from its applicability and its employees are entitled to gratuity only according to the Regulations.

6. In support he has placed reliance upon the decision of this Court dated 29.8.2008 in Nagar Palika Parishad Muzaffarnagar Vs. Controlling Authority under Payment of Gratuity Act 1972 Saharanpur, 2008 (5) ESC 3105.

7. In the aforesaid case before this Court, the question which had cropped up was whether the gratuity would be payable to the employees of the non centralized services of Nagar Palika as per the provisions of the Act or as per the Regulations framed by the State Government.

8. The learned Single Judge by a detailed judgment held that the employees of the non centralized services of Nagar Mahapalika are entitled to gratuity as per the Regulations framed by the State Government and not under the payment of Gratuity Act, 1972.

9. The aforesaid decision was in connection with the employees of the non-centralized service of the Nagar Palika and not in respect to the employees of the Nagar Nigam and as such would not apply in the present case.

10. The payment of gratuity in general is governed by the provisions of the Act and it has the overriding effect

over all previous enactments by virtue of Section 14 of the Act, unless the establishment is exempted by the State Government under Section 5 of the Act.

11. In other words, all establishments as provided vide Section 1 of the Act including Nagar Nigam are covered the provisions of the Act unless exempted.

12. Section 5 of the Act lays down the power of exemption. It provides if the appropriate government is satisfied that the employees of the establishment are receiving better benefits than those under the Act may by a notification exempt such an establishment from the operation of the Act. This means for exempting an establishment from the operation of the said Act there has to be a notification by the appropriate Government and that it should be satisfied that the employees were in receipt of benefits more beneficial than under the Act.

13. The petitioner has not pleaded or brought on record any notification issued by the appropriate government issued under Section 5 of the Act exempting Nagar Nigam from the operation of the Act and at the same time the exact benefit permissible under the Regulations vis-a-vis those under the Act to establish that benefits under the Regulations were much more than what the petitioner would receive under the Act.

14. In view of the aforesaid facts and circumstances, the employees of the Nagar Nigam are not outside the purview of the Act and are held entitle to gratuity under it."

43. There is another point of distinction between the facts of the case of **Nagar Palika Parishad, Kairana Muzaffarnagar and another** and the present case. The Regulations, 1984 which were relied upon in the case of **Nagar Palika Parishad Kairana Muzaffarnagar** have been made by the State Government in exercise of powers under Section 297 (2) read with Section 291 (1) (k) of the Act, 1916. Section 297 of the Act, 1916, referred to above, is being reproduced herein under :-

"297. Power to make regulations as to procedure, etc.--(1) A [Municipality] may, by special resolution make regulations consistent with this Act, or with any rule under Section 296 or regulation under sub-section (2) made by the [State Government], as to all or and of the following matters,--

(a) the time and place of the meetings of a [Municipality];

(b) the manner of convening meetings, and of giving notice thereof;

(c) the conduct of proceedings [including the asking of questions by members] at meetings, and the adjournment of meetings;

(d) the establishment of committees, other than merely advisory committees, for any purpose, and the determination of all matters relating to the constitution and procedure of such committees;

(e) the avoidance of any entry shown in the third column of Schedule II;

(f) with reference to sub-section (2) of Section 77, the augmentation of any maximum or minimum monthly salary specified in Sections 74, 75 or 76 with reference to powers over the staff;

(g) the delegation of powers, duties or functions to--

(i) the [President] of the [Municipality];

(ii) a committee constituted under clause (d);

(iii) a Chairman of such committee;

(iv) the executive officer; or

(v)[* * *] any other servant of a [Municipality];

(vi) any [person] in the service of the Government] who is employed as civil surgeon, medical officer-in-charge of a hospital or dispensary, medical officer of health, deputy inspector of schools or sub-deputy inspector of schools;

(h) the absentee or other allowances of the servants employed by [Municipality];

(i) the amount and nature of the security to be furnished by a servant of a [Municipality] from whom it is deemed expedient to require security;

(j) the grant of leave to servants of a [Municipality] and the remuneration to be paid to the persons, if any, appointed to act for them whilst on leave;

(k) the [conditions of service including] period of service of all servants of a [Municipality] and the conditions under which such servants, or any of them, shall, receive gratuities or compassionate allowances on retirement or on their becoming disabled through the execution of their duty, and the amount of such gratuities or compassionate allowance, and the conditions under which any gratuities or compassionate allowances may be paid to the surviving relatives of any such servants whose death has been caused through the execution of their duty;

(l) the payment of contributions, at such rates and subject to such conditions as may be prescribed in such regulations, to a pension or provident fund established by the [Municipality] or with approval of the [Municipality], by the said servants;

(m) the conditions subject to which sums due to a [Munici- pality], may be written off as irrecoverable, and the conditions subject to which the whole or any part of fee chargeable for distress may be remitted;

(n) all matters similar to those set forth in clauses (e) to (m) and not otherwise provided for in this sub-section; and

(o) all matters similar to those set forth in clauses (a) to (d) and not otherwise provided for in this sub-section.

(2) Provided that the [State Government] may, if it thinks fit, make regulations consistent with this Act in respect of any of the matters specified in clauses [(d) and] (h) to [(n)] of sub-section (1), and any regulations so made shall have the effect of rescinding any regulation made by the [Municipality] under the said sub-section in respect of the same matter or inconsistent therewith."

44. It may be noticed that sub-section (2) of Section 297 empowers the State Government to make regulations, if it thinks fit, consistent with the provisions of the Act, 1916, in respect of any of the matters specified under Clauses (d) and (h to n) of sub-section (1), and any regulation so made shall have the effect of rescinding any regulation made by the Municipality under the said sub-section in respect of the same matter or inconsistent therewith.

45. It was in exercise of the aforementioned powers under sub-section (2) of Section 297 that the Regulations, 1984 were made. An extract from the notification dated October 1, 1984

notifying the U.P. Nagar Palika Non-Centralized Services Retirement Benefits Regulations, 1984 is being reproduced below :-

"No. 3898/11-6-1984-217-V-79

October 1, 1984

In exercise of the powers under sub-section (2) of section 297 of the U.P. Municipalities Act, 1916 (U.P. Act II of 1916), the Governor is pleased to make the following regulations after their previous publication with Government notification no. 2837/XI-3-79-217-Miscellaneous-79, dated July 19, 1979, as required under sub-section (1) of section 300 of the U.P. Municipalities Act, 1916.

REGULATIONS

THE UTTAR PRADESH NAGARPALIKA NON-CENTRALIZED SERVICES RETIREMENT BENEFITS REGULATIONS, 1984.

PART I-PRELIMINARY

1. (1) Short title and Commencement- These regulations shall be called the Uttar Pradesh Nagarpalika Non-Centralized Services Retirement Benefits Regulations, 1984.

2. They shall come into force with effect from the date of their publication in the Gazette.

....."

46. The regulations in question in the present case namely Gorakhpur Nagar Mahapalika Non-Centralised Employees (Retirement Benefit) Regulations 1990 have been framed under Section 548 (1) (f) of the Act, 1959 whereunder the power to frame regulations is vested in the Executive Committee of the Municipal Corporation in contradistinction to the Regulations, 1984 framed under Section 297 of the Act 1916 whereunder it is the State Government which is vested with the power to make regulations.

47. It may be taken note of that in terms of sub-section (3) of Section 548, a regulation framed under sub-section (1) or under clause (a) of sub-section 2 is to have effect upon being confirmed by the Corporation, and in respect of a regulation made under clause (h) of sub-section (1) there is a further requirement of confirmation by the State Government.

48. The Gorakhpur Nagar Mahapalika Non-Centralised Employees (Retirement Benefit) Regulations, 1990 i.e. the Regulations under consideration in the present case, pertain to the subject of pensions and gratuities and are referable to the provisions contained under Clause (f) of sub-section (1) of Section 548 and in terms thereof the said regulations were framed by the Executive Committee and approved by the Corporation at its meeting held on February 2, 1991 and thereafter published in the gazette dated 27th June, 1992. The regulations framed under Section 548 (1) (f) are not required to be approved by the State Government and a specific stand to this effect has been taken by the learned Additional Advocate General appearing for the State respondents.

49. As noticed in the earlier part of this judgment, gratuity is payable to every "employee" covered by the definition of the term as under Section 2 (e) of the P.G.Act, 1972, on the termination of his employment after he has rendered continuous service for not less than five years, upon his superannuation, or on his retirement, or on his death or disablement due to accident or disease.

50. The applicability of the Act flows from the provisions under Section 1 of the P.G. Act, 1972. In terms of Clause (a) of sub-section (3) of Section 1, the Act applies to every factory, mine, oilfield, plantation, port, railway company and in terms of Clause (b) thereof it applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. Further, Clause (c) of sub-section (3) empowers the Central Government to apply the provisions of the Act to such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification specify.

51. The definition of the term 'employee' under clause (e) of Section 2 of the P.G.Act, 1972 excludes only persons holding a post under the Central Government or a State Government and who are governed by any other Act or by any Rules providing for payment of gratuity, from the purview of the Act.

52. It is thus only in respect of any establishment, factory, mine, oil field, plantation, port, railway company or shop to which the Act applies that the power to exempt under Section 5 may be exercised by the appropriate government.

53. The power to exempt from the operation of the provisions of the P.G.Act flows from Section 5 of the said Act and in terms thereof the appropriate government may, by notification and subject to such conditions as may be specified in the notification exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which the Act applies, from the operation of its provisions, if in the opinion of the appropriate government the employees of such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

54. In order to avail the benefit of exemption under Section 5 of the P.G.Act, 1972 the establishment concerned would therefore have to approach the appropriate government for invocation of the powers of exemption and the power to grant such exemption may be exercised upon the appropriate government being satisfied that the employees in such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the P.G.Act, 1972. The appropriate government may by a notification and subject to such conditions as may be specified in the notification grant the exemption.

55. It thus follows that in order to claim exemption the powers in respect thereof under Section 5 would have to be necessarily invoked by the establishment concerned by approaching the appropriate government and the said exemption cannot be held to follow automatically from a mere assertion of the establishment concerned that its employees are in receipt of gratuity or pensionary benefits which are not less favourable than the benefits conferred under the P.G.Act, 1972.

56. In the instant case, the Act having been made applicable to local

bodies which includes the Municipal Corporations in terms of the notification dated 8.1.1982 issued by the Central Government all such local bodies including Municipal Corporations would continue to be covered by the provisions of the Act unless they are exempted by the appropriate government by issuance of a notification as provided for under Section 5 of the Act.

57. It may be apposite to refer to Section 14 of the P.G.Act, 1972 in terms of which the provisions of the Act are to override other enactments and are to have effect nothwithstanding anything inconsistent therewith contained in any enactment. The overriding effect of Section 14 provides a kind of immunity to the right to claim gratuity under the P.G.Act, 1972 from any deduction attributable to the statutory payment of such benefit. Section 14 clearly provides that the right to claim gratuity by an employee under the provisions of the P.G.Act, 1972 is not based on any contract but a right which arises out of the provisions of the statute itself.

58. There cannot be any two views that the P.G.Act 1972 is a beneficial piece of legislation enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure social security. The significance of the legislation lies in the acceptance of the principle of payment of gratuity as a compulsory statutory retiral benefit. The Act accepts, as a principle, compulsory payment of gratuity as a social security measure to wage earning population in industries, factories and establishments. The main purpose and concept of gratuity is to provide for terminal benefits to a workman upon his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease.

59. The P.G. Act, 1972 being thus a welfare legislation meant for the benefit of the employees who serve their employer for a long time, it would be the duty of the employer to pay gratuity amount to the employee rather than denying the benefit on some technical ground.

60. Applying the rule of beneficent construction, the provisions of the P.G. Act, 1972 are to be interpreted liberally so as to give it a wide meaning rather a restrictive meaning which may negate the very object of the enactment. A beneficial legislation, it is well settled, as to be construed in its correct perspective so as to fructify the legislative intent underlying its enactment.

61. In construing a remedial statute courts are to give it the widest amplitude which its language would permit. The principle of applying a liberal construction to a remedial legislation has been emphasised in the **Construction of Statues by Crawford**19 pp. 492-493 in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

62. To a similar effect is the observation made by **Blackstone in**

Construction and Interpretation of Laws20, by stating as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

63. In the context of beneficial construction as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes21** as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

64. Further, in the same treatise, in the context of industrial legislation, it has been stated as follows:-

"Industrial legislation provides a fruitful field for the application of the tendency towards beneficial construction..."

65. The principle of applying a liberal construction to a labour welfare legislation was emphasised in the case of **The Workmen of M/s Firestone Tyre & Rubber Company of India Pvt. Ltd. Vs. The Management & Ors.22** where in the context of the provisions of the Industrial Disputes Act, 1947, it was observed as follows:-

"35. ...We are aware that the Act is a beneficial piece of legislation enacted in the interest of employees. It is well settled that in construing the provisions of a welfare legislation, courts should adopt, what is described as a beneficent rule of construction. If two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred..."

66. The mode of interpretation of a social welfare legislation, in the context of the provisions of the Industrial Employment (Standing Orders) Act, 1946, came up for consideration in the case of **B.D. Shetty & Ors. Vs. CEAT Ltd. & Anr.23,** and it was held as follows:-

"12. ...a beneficial piece of legislation has to be understood and construed in its proper and correct perspective so as to advance the legislative intention underlying its enactment rather than abolish it. Assuming two views are possible, the one, which is in tune with the legislative intention and furthers the same, should be preferred to the one which would frustrate it."

67. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the context of the P.G. Act, 1972 in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association24,** and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the directive principles of State policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

68. A similar view was taken with regard to adopting the beneficial rule of construction in respect of social welfare legislation, particularly in the context of the P.G. Act, 1972 in the case of **Jeewanlal Ltd. & Ors. Vs. Appellate Authority under the Payment of Gratuity Act & Ors.25,** wherein it was stated as follows:-

"11. In construing a social welfare legislation, the court should adopt a beneficent rule of construction ; and if a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed..."

69. Reference may also be had to the case of **Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors.26**, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11....the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

70. The aforementioned position of law has been discussed in a recent judgment of this Court in **U.P.S.R.T.C. Thru Its R.M. Vikasnagar Kanpur Vs. State Of U.P. And 3 Others27.**

71. In the case at hand, the provisions of the P.G.Act, 1972 having been made applicable to local bodies which includes Municipal Corporations in terms of the notification dated 08.01.1982

issued by the Central Government in exercise of powers conferred under Section 1 (3) (c) the same would be applicable to the employees governed by Regulations 1990 in the absence of any exemption notification having been issued with regard to the petitioner-establishment under Section 5 and it will have an overriding effect by virtue of Section 14 over any scheme which is less favourable to the said employees.

72. Counsel appearing for the petitioner has not been able to dispute the aforementioned legal proposition and has not been able to point out any material error or irregularity in the orders passed by the Controlling Authority and the Appellate Authority so as to warrant interference in exercise of powers in writ jurisdiction under Article 226 of the Constitution of India.

73. The writ petitions lack merit and are accordingly dismissed.

(2019)11ILR A1413

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 48556 of 2014

Executive Engineer E. Dist. Division & Ors. ...Petitioners
Versus
Presiding Officer Labour Court & Ors. ...Respondents

Counsel for the Petitioners:
Ms. Usha Kiran

Counsel for the Respondents:
C.S.C., Sri A.B. Vidyarthi, Sri Dilip Kumar Yadav, Sri R.B. Vidhtarthi

A. Labour law - Delay - Limitation to raise an Industrial Dispute - It is true that going by the law, no limitation is prescribed, but stale claims where the industrial dispute may no longer actually exist, would be something upon which the law would frown - Dispute should be referred as soon as possible after it has arisen and upon conciliation proceeding have failed - If sufficient material is not put forth for a long delay, it would certainly be fatal - Labour Court illegally failed to examine the claim, which was grossly belated by delay of 21 years. (Para 24, 25 & 26)

B Industrial dispute - Suppression of material fact - Earlier workmen moved proceeding before Conciliation officer u/s 2-A and also filed Writ petition and Special Appeal before High Court for his reinstatement, which were dismissed - Held suppression of these facts constitute material which if placed before the authority - strong probability exists, it would have swayed the subjective satisfaction of the authority the other way. (Para 27, 28 & 29)

C. Industrial dispute - Perversity in finding given by Labour Court - Plea of discrimination by workman claiming that similarly circumstanced workmen was reinstated, is incredible as other workmen, claimed to be similarly situate, was reinstated in compliance of a judicial order, not by an act of employer - Held, finding of Labour Court is perverse and hence award of Labour Court is illegal. (Para 32 & 33)

Writ petition allowed with costs (E-1)

Case law relied on: -

1. Chief Engineer, Ranjit Sagar Dam & anr Vs Sham Lal (2006) 9 SCC 124.

2. Kuldeep Singh Vs Instrument Design Development & Facilities Centre (2010) 14 SCC 176.

3. Sapan Kumar Pandit Vs U.P. St. Electricity Board & ors. (2001) 6 SCC 222.

4. Western India Match Co. Ltd. Vs Western India Match Co. Workers Union 7 ors, (1970) 1 SCC 225.

(Delivered by Hon'ble J.J. Munir, J.)

1. The Chairman of the U.P. Power Corporation Limited and two of its Executive Engineers have petitioned this Court under Article 226 of the Constitution seeking to quash an award, dated 25.09.2013 (published on 15.04.2014) made in Adjudication Case No.57 of 2011, between these petitioners and their workman, Mohd. Abrar, respondent no.2. The said award that is hereinafter referred to as the 'impugned award', has declared termination of services of Mohd. Abrar, respondent no.2, by the petitioners illegal with a further direction to reinstate the second respondent with continuity of service and back wages.

2. Heard Ms. Usha Kiran, learned counsel for the petitioners and Sri Dilip Kumar Yadav, learned counsel appearing for the workman-respondent no.2.

3. For the facility of reference, the three petitioners shall be hereinafter called the 'employers', whereas respondent no.2, Mohd. Abrar shall be referred to as the 'workman'.

4. It is the employers' case that they were earlier organized and called the U.P. State Electricity Board and are now known as the U.P. State Power Corporation. The employers owe their present altered legal existence to a notification dated 14.01.2000, issued under Section 13 of the U.P. Electricity Reforms Act. It is the further case of the employers that the workman raised an industrial dispute by moving the Deputy Labour Commissioner, Moradabad through an application under Section 2-A of the U.P. Industrial Disputes Act, 1947 (for short the 'Act'). On the basis of the said application, the Deputy Labour Commissioner, Moradabad Region, Moradabad made a reference under Section 2-K of the Act, in the following terms (translated into english from hindi vernacular):

"Whether the act of the employers in terminating the services of their workman Mohd. Abrar S/o Gulzar Ali, Class IV employee/lineman with effect from 31.03.1990 is proper and lawful? If not, to what benefit/ relief is the workman entitled, and with what particulars?"

5. On the basis of the aforesaid reference Adjudication Case No.57 of 2011 was registered on the file of the Presiding Officer, Labour Court, U.P. Rampur between employers and the workman. It is common ground between parties that before the Labour Court, both sides put in their written statements and rejoinder statements. Also, that the employer and the workman led their respective evidence, both documentary and oral.

6. The workman's case is to the effect that he was retained as a Lineman by the former U.P. State Electricity Board from 01.01.1978 to 31.05.1978. As a workman borne on the muster roll, his services during the said period were satisfactory. He was retained, as aforesaid, by the employers in the Electricity Distribution Division, Chandausi, District Moradabad. He was

detailed to duty at the Electricity Distribution Sub Division-II, Bilari, District Moradabad. It is then said by the Workman that from 01.04.1989 to 30.3.1990, he again served the employers as a Lineman in the Electricity Distribution Division-III. The workman has put in 240 days during every year and more of continuous and regular work. The employers without adhering to requirements of service of notice mandatory under the law, have removed him from service with effect from 31.3.1990. It is further claimed by the workman that he has put in a total of 609 days with the employers as a Lineman.

7. It is the workman's further case that other workmen, junior to him, are still in service with the employers. He has substantiated the last plea with particulars, nominating those junior workmen retained in service as: (1) Madhurendra Singh son of Sri Layak Singh, (2) Indrabhan Singh son of Sri Chandrabhan Singh, (3) Atul Babu son of Sri Ramesh Chandra, besides others. It is also asserted that the above named workmen have been retained in service, though juniors to the workman, by an Office Memo No. 4399/S-1 O.P., dated 17.08.2004 but the workman was not offered opportunity to join. To the contrary, the workman was informed through a letter dated 02.05.1999, issued by the employers that there was a ban on regular employment, and, that whenever the restriction, as aforesaid, is lifted, he would be taken back in. It is also said that despite a lapse of a period of 12 years, he has not received any information from the employers or has he been called back to work. It is also pleaded that the petitioner had filed a Special Appeal before this Court (presumably after losing his writ petition before the learned Single Judge), where this Court, vide judgment and order dated 30.11.2010, is said to have observed that it is open to the workman that like other workmen, similarly situate, he may also approach the Labour Court. It is thus, according to that course of action left open to him by this Court, by the judgment rendered in Special Appeal aforesaid, that the petitioner has raised the present industrial dispute, asking for reinstatement together with all consequential benefits.

8. The employers contested the aforesaid claim by filing their written statement before the Labour Court. A copy of their written statement is on record as Annexure no. 2 to this petition. The stand of the employers is that the former U.P. State Electricity Board through their B.O. No.147-G/ SC-10-1979, dated 17.01.1979 had prohibited engagement of employees in their establishment, borne on the muster roll. There were further clear instructions carried in the aforesaid Board Order, that services of all muster roll employees be dispensed with and a seniority list of all such retrenched workmen be drawn up. It was pleaded that this ban was still in force and has not been withdrawn by any subsequent order of the employers.

9. It is the further case of the employers that upon an inspection of all available records, including the seniority list and other records, relating to muster roll employees/workmen, did not show that any workman going by the name of Mohd. Abrar son of Gulzar Ali was borne on the muster roll. There is a plea specifically carried in paragraph 5 of the written statement of the employers, to the effect that owing to the ban on

employment of muster roll employees after January, 1979, the workman could not have been engaged as a muster roll employee after January, 1979. It is then pleaded that the workman is put to strict proof about his employment as a muster roll employee with the predecessor-Board, or the employers. It is then further pleaded that the documents, if any, put in by the workman regarding his employment had to be forged and fictitious, drawn up by his father Gulzar Ali, who was a Lineman with the employers . It is, particularly, urged that the workman has not come forward with clean hands. He has played fraud with the Court by concealing material facts from the Conciliation Officer, Moradabad, and also from this Court, in writ proceedings that he brought here.

10. It was pleaded that suppressing material facts, the workman caused the present reference to be made. About what are those facts that have been suppressed, it is pointed out by the employers that the workman initially filed a conciliation case before the Conciliation Officer/Assistant Labour Commissioner, Moradabad in the year 1999, with a plea that he was appointed on 01.01.1978 and his services were unlawfully terminated on 01.09.1978, while working as a muster roll employee. This case was filed after 21 years of his alleged termination, along with an application for condonation of delay. The Conciliation Officer, finding that no sufficient cause has been shown for this inordinate delay, rejected the application for condonation, as aforesaid, vide order dated 11.11.1999, and consigned the case to record. The workman did not assail the order of the Conciliation Officer, dated 11.11.1999 by which he declined to make a reference, relative to the petitioner's case regarding unlawful termination of service by the employers, with effect from 01.09.1978. Thus, the aforesaid order dated 11.11.1978, declining to make a reference, became final between the parties.

11. It is then pleaded that at this stage, he invoked the jurisdiction of this Court under Article 226 of the Constitution, and that too, about five years after the Conciliation Officer declined to make a reference, vide order dated 11.11.1999. He brought Civil Misc. Writ Petition no.22508 of 2004 with a prayer for the issue of a Mandamus or direction to appoint him as a class IV employee on a regular basis. This claim was based on the same cause of action as the one on the basis of which he unsuccessfully attempted to persuade the Conciliation Officer to raise an industrial dispute. In the writ petition, he did not disclose the proceedings that he had taken under the Act, unsuccessfully before the Conciliation Officer. Nevertheless, the learned Judge of this Court dismissed the writ petition aforesaid vide judgment and order dated 10.02.2005, holding that the delay of 14 years has nowhere been explained. It was also held that working for limited periods in two spells, does not entitle the workman to regular employment in the establishment of the employers. It was also held that the workman has an alternative remedy to raise an industrial dispute.

12. It is submitted by the learned counsel for the petitioner that this finding of the learned Judge clearly shows that the fact that the workman had earlier invoked his remedy unsuccessfully under the Act, was suppressed in the writ

petition. The workman assailed the order of the learned Single Judge through a special appeal being Special Appeal No.405 of 2005, which too came to be dismissed vide judgment and order dated 30.11.2010. However, in the judgment rendered in appeal, their Lordships of the Division Bench remarked that looking to the controversy involved, it is a case that requires adjudication on the basis of oral and documentary evidence for which the Labour Court was the appropriate forum, also noticing there that thirteen employees who were working along with the workman, had already approached the Labour Court. It is pleaded that taking cue from this observation of their Lordships of the Division Bench, the workman once again switched back to the Forum under the Act. On occasion, he moved an application under Section 2-A of the Act before the Conciliation Officer, Moradabad that was registered as Case No. 14 of 2011. Here, he came up with a case of termination based on a new date, that is to say, 31.03.1990. He is said to have suppressed the fact from the Conciliation Officer that he had earlier applied for a reference of his claim based on the first spell of engagement, ending on 01.09.1978 and had failed before the Conciliation Officer on 11.11.1999, an order that he never challenged. The workman was successful in persuading the Conciliation Officer to make a reference to the Labour Court this time, where in the present Adjudication Case, the impugned award, has been rendered. The Labour Court, in adjudicating the dispute, after elaborately setting out the case of parties and the evidence which they have relied, besides a paraphrased account of their respective submissions, went into the evidence of the Employer's witness, Prabhakar Singh. It is remarked about this witness that he acknowledged in his cross examination that from 01.03.1978 to 31.03.1990 he was not posted as the Executive Engineer. It is further noticed that he had said that he did not file a list of muster roll employees, removed in the year 1979. It is remarked by the Labour Court that this fact that he did not file a copy of the removed muster roll employees of the year 1979, makes it clear that the workman's name would be there in that list. It is also remarked by the Labour Court that the workman has filed a certificate of service from January 1978 to 31.08.1978 which he has proved but the Sub Divisional Officer, in his deposition in Court, has not dispelled the same. It is also recorded by the Labour Court that the workman has proved his certificate of service from 01.04.1989 to 31.03.1990, issued by the then Sub Divisional Officer, B.P. Singh, which too has not been refuted or dispelled by the Sub Divisional Officer in his deposition in the witness box.

13. It is also recorded by the Labour Court that the workman has also proved by his testimony in Court, a letter written by his learned Counsel to the Executive Engineer, Chandausi, Moradabad that was in the form of a questionnaire, and on record, marked Exhibit W-5. In relation to this document, the Labour Court has observed that in this questionnaire it has been acknowledged that other workman circumstanced as the workman, have been re-employed with effect from 17.08.2004. The Labour Court has drawn an inference here to conclude that this fact shows that the services of the workman have been terminated in an unlawful manner.

14. The Labour Court has recorded a further finding to the effect that the

workmen junior to the present workman are still in employment. The Labour Court has then taken note of a document marked as Exhibit E-2, proved by the Employers witness, about which the witness has said that the document carries the name of one Mohd. Akhtar, but does not mention the name of the workman (Mohd. Abrar). The Labour Court has moved on to remark that the workman's document, Exhibit W-2, the certificate of service issued by the Sub Divisional Officer, B.P. Singh indicates that the workman had remained in employment from 01.04.1989 to 31.03.1990. From this, again the Labour Court has concluded, that it goes to show that the workman had put in 240 days or more of service.

15. A further finding is recorded that before he was removed, the workman was not served with notice as required by the law or wages in lieu of notice or retrenchment compensation. The Labour Court concludes that in these circumstances, the workman was entitled to be reinstated with continuity in service and back wages. It is this award, which the Employers seek to assail through the present petition.

16. Ms. Usha Kiran, learned counsel for the petitioner submits that the impugned award passed by the Labour Court is based on perverse conclusions drawn from the evidence on record, or conclusions that are entirely misdirected. It is submitted that the finding regarding juniors to the workman being retained in service ignores from consideration material evidence, which is to the effect that the men who have been re-engaged, vide order dated 17.08.2004 have been so permitted in compliance of an interim order of this Court, passed in their favour, in Civil Misc. Writ Petition No.55554 of 2003, dated 17.12.2003. She submits that the impugned award, does not at all take this feature into account. It is her contention that in case the Labour Court had taken due note of the interim order of this Court, passed in favour of three other workmen, dated 17.08.2004, be they junior or not to the workman, the Labour Court would have concluded to the contrary. It is so as no rights can be based on a plea of discrimination, drawn on the basis of an act that is done in compliance of a judicial order. It is further argued on behalf of the petitioner that the finding of the Labour Court that Exhibit E-2 issued by the then S.D.O., which mentions name of a certain workman called Mohd. Akhtar, actually bears reference to the workman (Mohd. Abrar), is a perverse finding that has no basis to it. It is further submitted that there is absolutely no record or other evidence to show that the workman indeed worked as a muster roll employee from 01.04.1989 to 13.03.1990, completing 240 days and more of service in a year, so as to entitle him to the benefit of Section 6-N of the Act.

17. The Labour Court, in particular, ignored from consideration the fact that according to the workman's case, he worked in two spells, one from 01.01.1978 to 31.08.1978, and, in the second spell, from 01.04.1989 to 31.03.1990; and that basing his claim on the earlier period of engagement from 01.01.1979 to 31.08.1978, he had approached the Conciliation Officer in the year 1999, under Section 2-A of the Act, seeking to raise an industrial dispute, which has been declined by the Conciliation Officer vide order dated 11.11.1989, holding it to be highly belated, and one made after 21 years.

18. Learned counsel for the Employers has also pointed out that after attempting to seek a remedy before this Court on the writ side, and failing in that endeavour, the present application has been made to the Conciliation Officer, leading to the reference, now in hand. It includes the two different periods of engagement claimed by the workman, as the basis of raising a dispute, that is to say, the period from 01.01.1978 to 31.08.1978 and 01.04.1989 to 31.03.1990, where he had concealed his earlier failure, with regard to the period of his claim, based on engagement in the year 1978.

19. Learned counsel for the Employers also pointed out that when the workman first approached the Conciliation Officer seeking to raise an industrial dispute, both periods of engagement, that have been alleged, now on the second application under Section 2-A of the Act, were available, but in the first application, engagement in the year 1978 alone was made basis to raise the dispute. This according to Ms. Usha Kiran, learned counsel for the Employers shows that the subsequent claim put forward in the second application, and also in writ proceedings before this Court, is a claim that is based on fabrication with not a grain of truth to it. It is for this reason that the workman could not produce any evidence about either of the two stretches of time, during which he claims to have worked for the Employers. It is for the same reason that in all the relevant documents available with the Employers' establishment, that have been examined by them, and produced in Court, the name of the workman does not figure. It is submitted by her that these aspects have been completely overlooked by the Labour Court while rendering the impugned award. It is also argued by Ms. Usha Kiran that apart from all other facts, the workman's claim, on admitted facts, relates to a termination dating back to 31.03.1990, and the application under Section 2-A of the Act seeking to raise the industrial dispute was made in the year 2011, that is to say, after a period of 21 years. This makes the workman's claim ex facie stale where it is difficult to say whether any industrial dispute, indeed, survives, if at all ever there was one. The Labour Court has not at all bestowed consideration to the aforesaid feature about the workman's case, which according to the learned counsel for the Employers, if considered, might have led him to discard the workman's claim on ground of being highly belated and stale.

20. Sri Dilip Kumar Yadav, learned counsel appearing for the workman refuting the submissions made on behalf of the Employers has come up with a case that the workman was engaged from 01.01.1978 to 31.08.1978 as a lineman, borne on the muster roll. He was given a certificate of service for that period, which accounts more than 243 days where he performed well, and was appreciated. Thereafter, he was again re-engaged for the same work of a lineman from 01.04.1989 to 31.03.1990 in the *Vidyut Vitran Khand*, Moradabad. For this stint of his engagement, he was issued a certificate by the S.D.O.-III, of which the Labour Court has taken due note in the impugned award. The Labour Court has found it to be a validly proved document by the workman in his evidence, which the Employers Witnesses have not dispelled.

21. Learned counsel for the workman submits that these are findings of fact recorded by the Labour Court, in

which this Court in exercise of its powers under Article 226, or for that matter 227, cannot interfere. It is submitted that the Labour Court has found for a fact that the services of the workman were terminated in breach of the procedure prescribed under the Act, without service of notice for the requisite period, or paying him wages for the period of notice as required by law, rendering the termination of his services unlawful. The said finding also is based on the edifice of the earlier finding regarding the workman's engagement from 01.04.1978 to 31.08.1978, that far exceeds 240 days; it is also, therefore, a finding of fact, which cannot be disturbed by this Court. He has also urged that similarly circumstanced workmen, to wit, Rajesh Kumar, Mahendra Singh, Indrapal Singh and Atul Babu, who were also removed like the workman, have been reinstated in service by an order of the Executive Engineer, Electricity Distribution Division, Chandausi, District Moradabad, dated 17.01.2004, but the Employers have not reinstated the workman in like manner. According to the learned counsel for the workman, this amounts to hostile discrimination between similarly circumstanced workmen, by the Employers, who are after all, the State.

22. Learned counsel for the Employers has come up with a plea that the earlier application moved before the Conciliation Officer, that was rejected vide order dated 11.11.1999 by the Conciliation Officer/ Assistant Labour Commissioner, was not made by him. He had not filed any application prior to Case no.57 of 2011 before the Conciliation Officer, that was decided in his favour on 25.09.2011.

23. In the next breadth, learned counsel for the workman says that it is true that the workman had erroneously moved the Assistant Labour Commissioner, Moradabad instead of moving the Labour Court, U.P. at Rampur, but that application was illegally dismissed on ground of laches. The order there was never communicated to the workman. About the delay in the matter of approaching the Labour Court, Sri Dilip Kumar Yadav, learned counsel for the workman says that delay in itself is no disentitling parameter. He has placed reliance in support of the aforesaid contention of his on a decision of the Supreme Court in **Chief Engineer, Ranjit Sagar Dam and another vs. Sham Lal, (2006) 9 SCC 124,** where on the issue of delay in raising an industrial dispute, it has been held by their Lordships thus:

"9. So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on the facts of each individual case.

10. However, certain observations made by this Court need to be noted. In *Nedungadi Bank Ltd. v. K.P. Madhavankutty* [(2000) 2 SCC 455 : 2000 SCC (L&S) 283] it was noted at para 6 as follows: (SCC pp. 459-60)

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no

industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex facie bad and incompetent."

11. In *S.M. Nilajkar v. Telecom District Manager* [(2003) 4 SCC 27 : 2003 SCC (L&S) 380] the position was reiterated as follows (SCC at pp. 39-40, para 17):

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in *Shalimar Works Ltd. v. Workmen* [(1960) 1 SCR 150 : AIR 1959 SC 1217] that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. There is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even re-employment of most of the old workmen was held to be fatal in *Shalimar Works Ltd. v. Workmen* [(1960) 1 SCR 150 : AIR 1959 SC 1217] . In *Nedungadi Bank Ltd. v. K.P. Madhavankutty* [(2000) 2 SCC 455 : 2000 SCC (L&S) 283] a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In *Ratan Chandra Sammanta v. Union of India* [1993 Supp (4) SCC 67 : 1994 SCC (L&S) 182 : (1994) 26 ATC 228] it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants to any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated some time in 1985-86 or 1986-87. Pursuant to the judgment in *Daily Rated Casual Labour v. Union of India* [(1988) 1 SCC 122 : 1988 SCC (L&S) 138 : (1987) 5 ATC 228] the Department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the Scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings

and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay."

The above position was highlighted recently in *Sudamdih Colliery of Bharat Coking Coal Ltd. v. Workmen* [(2006) 2 SCC 329 : 2006 SCC (L&S) 306 : (2006) 1 Supreme 282."

24. A careful examination of the matter does indicate that the present reference, where the industrial dispute was raised in the year 2011 through an application made to the Conciliation Officer by the workman, relates to a termination of services made on 31.03.1990, going by the terms of the reference and nothing more. More or less, reckoned from the latter of the two stints that the workman had, in the Employers establishment as a muster roll borne lineman, the dispute has been raised after a delay of 21 years. It is true that going by the law, no limitation is prescribed, but stale claims where the industrial dispute may no longer actually exist,would be something upon which the law would frown. It is trite to say that what time period would constitute disentitling delay, would depend on the facts and circumstances of each case, as indicated in the decision of the Supreme Court in **Chief Engineer, Ranjit Sagar Dam and another** *(supra)*. But, delay is certainly a very relevant factor to be considered by the Labour Court, in cases that are brought after lapse of a relatively long period of time, going by the short period of human life, and the still shorter productive period of it. The two decisions of their Lordships of the Supreme Court, that have been referred to with approval in **Chief Engineer, Ranjit Sagar Dam and another** *(supra)*, are eloquent on various facets how delay would work to bar stale claims, notwithstanding the fact that a specified period of limitation is not prescribed by the statute to raise an industrial dispute. Various factors that have to be taken into consideration, are well illustrated there, and serve as a guiding hand in various matters where the issue arises.

25. Again, the Supreme Court in **Kuldeep Singh vs. Instrument Design Development & Facilities Centre, (2010) 14 SCC 176**, following two earlier decisions of their Lordships in **Sapan Kumar Pandit vs. U.P. State Electricity Board and others, (2001) 6 SCC 222** and a three Judge Bench of their Lordships in Western India Match Co. Ltd. vs. **Western India Match Co. Workers Union and others, (1970) 1 SCC 225,** that had been followed in **Sapan Kumar Pandit** *(supra)* held on the question of stale industrial disputes in **Kuldeep Singh** *(supra)*, thus:

"30. In view of the above, law can be summarised that there is no prescribed time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is more so in view of the language used, namely, if any industrial dispute exists or is apprehended, the appropriate Government "at any time" refer the dispute to a board or court for enquiry. The reference sought for by the workman cannot be said to be delayed or suffering from a lapse when law does not prescribe any period of limitation for raising a dispute under Section 10 of the Act. The real test for making a reference is whether at the time of the reference dispute exists or not and when it is made it is presumed that the

State Government is satisfied with the ingredients of the provision, hence the Labour Court cannot go behind the reference.

31. It is not open to the Government to go into the merit of the dispute concerned and once it is found that an industrial dispute exists then it is incumbent on the part of the Government to make reference. It cannot itself decide the merit of the dispute and it is for the appropriate court or forum to decide the same. The satisfaction of the appropriate authority in the matter of making reference under Section 10(1) of the Act is a subjective satisfaction. Normally, the Government cannot decline to make reference for laches committed by the workman. If adequate reasons are shown, the Government is bound to refer the dispute to the appropriate court or forum for adjudication.

32. Even though, there is no limitation prescribed for reference of dispute to the Labour Court/Industrial Tribunal, even so, it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly, when disputes relate to discharge of workman. If sufficient materials are not put forth for the enormous delay, it would certainly be fatal. However, in view of the explanation offered by the workman, in the case on hand, as stated and discussed by us in the earlier paragraphs, we do not think that the delay in the case on hand has been so culpable as to disentitle him any relief. We are also satisfied that in view of the details furnished and the explanation offered, the workman cannot be blamed for the delay and he was all along hoping that one day his grievance would be considered by the management or by the State Government. (Emphasis by Court)

26. A perusal of the impugned award in this case would show that the Labour Court, before whom this plea about the grossly belated claim had been raised vide paragraph 14 of the written statement, did not at all advert to the aforesaid aspect, that indeed was required to be addressed by the Labour Court looking to the 21 years that stood between the date of termination from service of the workman and the time when the industrial dispute was raised, leading to the adjudication case before the Labour Court. If it had been only this issue about non-examination of the plea regarding the prima facie stale industrial dispute, which the Labour Court has failed to examine, it would have merited a remand of the matter to the Labour Court, and nothing more. But, here there are other issues to which the attention of the Labour Court has been drawn, and conclusions reached one way about those.

27. Most important of these is the fact that the workman has suppressed from the Conciliation Officer, when he made the present reference, and also from the Labour Court, the fact that the workman had earlier moved the Conciliation Officer in the year 1999, under Section 2-A of the Act, where he had cited the period of his engagement with the Employers as 01.01.1978 to 31.08.1978. There, he had mentioned that his services were unlawfully terminated on 01.09.1978, and that he was borne on the muster roll during the period of his retention by the Employers. There is on record a Memo, dated 09.12.1999, which indicates that the aforesaid reference was declined as time barred by the

Conciliation Officer vide an order, dated 05.07.1999 (the Employer has indicated that date to be 11.11.1999 in the writ petition and elsewhere). The letter of the Conciliation Officer-cum-Assistant Labour Commissioner, Moradabad, is on record as Annexure no.4 to the writ petition. There is also on record a detailed note submitted by the Conciliation Officer, dated 11.11.1999 to the Deputy Labour Commissioner bearing a detailed reference to the case put up before him for conciliation and requesting a reference of an industrial dispute to be made, that he found to be stale with a delay of 21 years. A perusal of the said report dated 11.11.1999, that has been referred to by the Employers as an order, indicates that the matter was submitted for approval to the Deputy Labour Commissioner, who was, to all seeming, the Authority, delegated with powers to make a reference under Section 4-K of the Act by the State Government. The orders passed by the Conciliation Officer on 05.07.1999, and submitted to the Deputy Labour Commissioner for approval on 11.11.1999, which in due course, must be presumed to have been approved, were not challenged anywhere by the workman, and attained finality.

28. In between, the workman also tried to secure relief in substance, directed to ensure his reinstatement by the Employers through Civil Misc. Writ Petition no.22508 of 2004, that came to be dismissed vide order dated 10.02.2005. A Special Appeal from the said order of the learned Single Judge being Special Appeal no.405 of 2005, was also dismissed by the Division Bench, vide judgment and order dated 30.11.2010. At this juncture, the workman in the following year, that is to say 2011, suppressing all proceedings earlier taken before the Conciliation Officer in the year 1999, unsuccessfully to secure a reference of the industrial dispute to adjudication, and also all proceedings taken before this Court on the writ side, moved the Conciliation Officer again through an application under Section 2-A of the Act. The application made under Section 2-A of the Act in the year 2011, on the basis of which the present reference has been made, is on record as Annexure no.1 to the writ petition. It does not show anywhere even the slightest reference to the earlier efforts in the year 1999 before the Conciliation Officer, made by the workman unsuccessfully to secure a reference, and also before this Court on the writ side to seek relief of reinstatement in service, again unsuccessfully.

29. The suppression of these facts constitute material which if there before the State Government or its delegate, who exercised power to make the present reference under Section 4-K of the Act, in strong probability, would have swayed the subjective satisfaction of the Authority the other way. This plea about suppression of this fact of an earlier failed attempt to secure a reference was eloquently raised by the Employers in their written statement, vide paragraphs 8, 9, 10, 11, 12 & 13 thereof, which is on record of the writ petition, as Annexure no.2. A perusal of the impugned award, however, shows that the Labour Court has not at all looked into the aforesaid plea, about which there is evidence as well, documentary in nature, filed before it, to show that the present reference arose in consequence of the workman seeking it a second time on almost the same facts, and suppressing the result of earlier

proceedings before the Referring Authority. The Labour Court, has given a short shift to this plea and all the evidence in support of it, that has remained absolutely unconsidered by it while rendering the impugned award.

30. Much more on the substantial side of it is one striking feature, that cannot be lost sight of. A perusal of the report submitted by the Conciliation Officer-cum-Assistant Labour Commissioner, dated 11.11.1999 to the Deputy Labour Commissioner for the approval of its order proposing rejection of the workman's claim to a reference of the industrial dispute shows that in the earlier application seeking a reference, the period of engagement mentioned by the workman as a muster roll employee is 01.01.1978 to 31.08.1978, the date of unlawful termination mentioned being 01.09.1978. This application under Section 2-A of the Act was made in the year 1999. Now, in the present application, that has been made a second time, almost on the same facts, there is an added period of claimed service rendered by the workman with the Employers on the muster roll, that was allegedly the time between 01.04.1989 to 31.03.1990. Again, in the present application, it has been made different to be a case of working for the Employers in two stints, one from 01.01.1978 to 31.08.1978, and subsequently from 01.04.1989 to 31.03.1990. Peculiarly, there is no mention of this period of retention/ engagement by the Employers from 01.04.1989 to 31.03.1990 by the workman in his earlier application made to the Conciliation Officer in the year 1999 seeking to raise an industrial dispute. If the workman had, indeed, worked in two stints as he now claims, there is no reason why in the year 1999 the workman would not have put forth a claim based on the second stint from 01.04.1989 to 31.03.1990. This omission in the first application made to the Conciliation Officer is so telltale, that it leaves no manner of doubt in this Court's mind that the workman's case is founded on utter falsehood apparent on record. The Labour Court in ignoring this fact has committed a manifest error of law.

31. There is one strange finding, of course, manifestly illegal, that the Labour Court has recorded. It is about the Employers' documents exhibited as Ex. E-2, that appears to be the list of retrenched employees on the muster roll. In relation to the said document, the Labour Court has referred to the testimony of an Employers' witness, who appeared to prove the document, and stated that in the said document the name of one Mohd. Akhtar figures, but not of Mohd. Abrar. The Labour Court has remarked about it that the said document which mentions the name of Mohd. Akhtar, in fact relates to the workman, Mohd. Abrar, which corroborates the certificate of service issued to him by the S.D.O., B.P. Singh for the period 01.04.1989 to 31.03.1990. This certificate has been challenged as a forged document by the Employers. The question of forgery apart, there is absolutely no reasoning behind the inference of the Labour Court that the name of Mohd. Akhtar which figures in the document Ex. E-2, refers to the workman, Mohd. Abrar. The said finding is no more than the most wild conjecture. In the opinion of this Court, the said finding is manifestly illegal, also.

32. The Labour Court has also recorded a finding inferring illegal

termination of the workman's services from the fact that in answer to a letter from the workman's counsel to the Employers/ Executive Engineer, Chandausi, Moradabad, about reinstatement of similarly circumstanced named workmen, the Employers have acknowledged through a memo dated 17.08.2004, that they have been reinstated. Now, about this finding, it has been pointed out that the workmen under reference have been reinstated under a judicial order, being an interim order passed by this Court, dated 17.12.2003 in Civil Misc. Writ Petition no.55554 of 2003. This fact has been specifically mentioned in paragraph 25 of the writ petition, about which there is an evasive denial in paragraph 16 of the counter affidavit, which reads thus:

"16. That the contents of paragraphs 25 and 26 of the writ petition are not correct, hence denied."

The finding of the Labour, therefore, that similarly circumstanced workmen have been reinstated in service, is absolutely without basis, inasmuch as, reinstatement in that case is founded on a judicial order passed by this Court in a wriit petition. No plea of discrimination or differential treatment by the workman can be raised where the Employers have acted to reinstate some other workmen, claimed to be similarly situate, in compliance of a judicial order. That is no act of the Employers. The case of the workman is inherently unbelievable and incredible which the Labour Court ought to have noticed.

33. It is well settled that an award of the Labour Court, that is perverse or manifestly illegal, ought to be quashed by this Court in exercise of its jurisdiction under Article 226 of the Constitution.

34. The present case squarely falls in the category where the award has been rendered drawing perverse conclusions from evidence on record, ignoring material evidence and looking into irrelevant evidence. In the background also, there is this unignoreable plea of a stale claim, that has been raised after 21 years with no explanation forthcoming on the workman's part. The explanation, if at all there is one, is all about the workman invoking remedies earlier to the same end unsuccessfully; a fact that he has suppressed from the inception of these proceedings.

35. Under the circumstances, the award apart from being manifestly illegal, is also liable to be quashed in the interest of justice.

36. In the result, the writ petition succeeds and is **allowed with costs.** The impugned award dated 25.09.2013 (published on 15.04.2014) passed in Adjudication Case No.57 of 2011 by the Presiding Officer, Labour Court, Uttar Pradesh, Rampur, is hereby **quashed.**

(2019)11ILR A1426

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 51047 of 2017

Arun Vihar Residents Welfare Association G.B. Nagar ...Petitioner
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioner:

Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Sri Radhey Shyam Dwivedi, Sri Shekhar Srivastava

A. Civil Law-Industrial Dispute Act, 1947 – Preamble, Section 2(j), 6N – Ambit and meaning of industry - In order for an activity to be held to be covered within the ambit of the term 'industry', the activitiy should be an organized one and not that which pertains to private or personal employment - Held, when personal services are rendered to the members of a society and the society is constituted only for the purpose of those members and; the engagement of the employees is to provide such services, that activity cannot be treated to be covered within the purview of the term 'industry', nor such employees can be held to be 'workmen'. (Para 23 & 24)

B. Civil Law- Industrial Dispute Act, 1947 - Section 2(J) - Scope of Industry - Co-operative Housing Society is not an industry as defined under section 2(j) of the Act, 1947 and the employees, who were engaged to provide services to the members of a co-operative society cannot be treated as workman. (Para 18)

C. Triple Test - Determination of Industry - To determine whether and activity would fall within a purview of definition of industry are - (i) systematic activity (ii) organised by cooperation between employer and employee (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes. (Para 14)

D. Application of 'Dominant Nature Test' - Any ancillary activities, which may be carried on by a housing society, would be treated to be merely an adjunct and applying the 'dominant nature test' the same would not change the nature of activity so as to bring it within the purview of the term 'industry' (Para 25)

E. Writ of Certiorari - Jurisdictional fact – is a fact, on the existence of which jurisdiction of a Court or a Tribunal or an authority, may arise. If the jurisdictional fact does not exist, the Court or Tribunal or authority cannot act. If an inferior Court or Tribunal or authority wrongly assumes the existence of such fact, a writ of Certiorari would lie – Existence of jurisdictional fact is a *sine qua non* or condition precedent before any Court may assume jurisdiction to decide the *lis* on merits. (Para 31 & 34)

Writ Petition allowed (E-1)

Case law relied: -

1. Som Vihar Apartment Owners Housing Maintenance Ltd. Vs Workmen (2002) 9 SCC 652.

2. Bangalore Water Supply & Sewerage Board Vs A. Rajappa (1978) 2 SCC 213.

3. Karnani Properties Ltd. Vs St. of WB & ors. (1990) 4 SCC 472.

4. M.D. Manjur & ors. Vs Shyam Kunj Occupants Society & ors. AIR 2005 SC 1501.

5. Reg. Dir., E.S.I.C. Vs Tulsiani Chambers Premises Cooperative Society 2008 (116) FLR 656.

6. Smt. Jagvatibai S. Taak Vs. S.D. Paithane, P.O., VIII Labour Court Mumbai & anr. 2008 (119) FLR 234.

7. Smt. Rachana Gopinath & anr. Vs St. of Karnataka 2016 (150) FLR 1052.

8. M/s Arihant Siddhi Cooperative Housing Society Ltd. Vs Pushpa Vishnu More & ors. 2018 (159) FLR 271.

9. M/s Shantivan II Cooperative Housing Society Vs Smt. Manjula Govind Mahida & anr. 2019 LLR 601.

10. Arun Kumar & ors. Vs Union of India & ors. (2007) 1 SCC 732.

11. Ramesh Chandra Sankla & ors. Vs Vikram Cement & ors. (2008) 14 SCC 58.

12. Smt. Shrisht Dhawan Vs M/s Shaw Brothers (1992) 1 SCC 534.

13. Raza Textiles Ltd. v. I.T.O. (1973) 1 SCC 633 : 1973 SCC (Tax) 327 : AIR 1973 SC 1362.

14. Carona Ltd. Vs Parvathy Swaminathan & Sons (2007) 8 SCC 559

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

1. Heard Sri Diptiman Singh, learned counsel for the petitioner and Sri Shekhar Srivastava, learned counsel appearing on behalf of the third respondent.

2. The core issue which arises in the present petition is as to whether an association or society of apartment owners employing persons for rendering personal services to its members can be held to be an "industry" and its employees can be held to be "workmen" under the provisions of the Industrial Disputes Act, 19471 or under the U.P. Industrial Disputes Act, 19472.

3. The petition arises out of an award dated 22.07.2017 passed by the Labour Court in Adjudication Case No.1493 of 2008 whereby the reference with regard to the legality/validity of the termination of services of the third respondent w.e.f. 04.12.2002 has been answered by the Labour Court by holding that the termination having been made without following the provisions of Section 6N of the U.P.I.D. Act, 1947, the same would amount to an illegal retrenchment, and in view thereof a direction has been issued for reinstatement of the the third respondent in service with full back wages and all consequential benefits.

4. The records of the case indicate that upon an industrial dispute having been raised by the third respondent, a reference was made under Section 4K of the U.P.I.D. Act, 1947, and the question referred for adjudication was as follows:-

"क्या सेवायोजकों द्वारा अपने श्रमिक श्री राम नारायन मिश्रा पुत्र श्री मदन मोहन पद चपरासी की सेवायें दिनांक 04.12.2002 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि हाँ अथवा नहीं तो श्रमिक अपने सेवायोजकों से क्या अनुतोष प्राप्त करने का अधिकारी है और किस सीमा तक एवं अन्य किस विवरण सहित?ष

5. Apart from the written statements being filed by the parties, preliminary objections with regard to jurisdiction were also raised by the petitioner asserting that the petitioner being a society of apartment owners which had been formed for looking after maintenance of the apartments, and the same having not been formed for any profit motive, the provisions of the U.P.I.D. Act, 1947 would not be applicable and the proceedings which had been initiated were without jurisdiction.

6. Rejoinders were filed by the parties, and documentary and oral evidence were also adduced and thereafter the Labour Court passed the award which is sought to be challenged in the present petition.

7. It has been submitted by the counsel for the petitioner that the petitioner-society was registered under the U.P. Co-operative Societies Act, 1965, and subsequently in the year 2000 the society was registered under the Societies

Registration Act, 1860. The society was formed by resident members of Sectors 28, 29 and 37, Noida, and its main object is to provide the necessary maintenance facilities to the apartment owners who are its members. It was submitted that the residential area has been developed by Army Welfare Housing Organization, and the apartments were allotted to the serving and retired defence personnel. The object of the society is only to provide services to its members who are apartment owners and the society is not a profit earning body and as such the same cannot be held to be an industry and would not be covered by the provisions of the U.P.I.D. Act, 1947. It was further contended that the petitioner-society being not an industry and the provisions of the U.P.I.D. Act, 1947 being not applicable there would be no question of violation of provisions of Section 6N of the U.P.I.D. Act, 1947 or any other provisions of the said Act. Reliance in this regard has been placed on the judgment in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd. Vs. Workmen3.**

8. *Per contra*, the counsel appeared on behalf of the third respondent submits that the services of the workman having been terminated without any domestic enquiry and without complying with the provisions of Section 6N of the U.P.I.D. Act, 1947, the Labour Court has rightly answered the reference by holding the termination to be illegal and invalid and granting the relief of reinstatement with full back wages. Reliance has been sought to be placed upon the judgment in the case of **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa4 and Karnani Properties Ltd. Vs. State of West Bengal & Ors.5.**

9. Based on the rival contentions, the legal issue which arises in the present petition is as to whether an association or society of apartment owners, employing persons for rendering personal services to its members can be held to be an "industry" and its employees can be held to be "workmen" under the provisions of the I.D. Act, 1947 or under the U.P.I.D. Act, 1947.

10. For the purposes of adjudicating upon the aforementioned controversy it would be necessary to advert to the relevant statutory provisions under the I.D. Act, 1947:-

"2. Definitions.--

(j) "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;

(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the term of employment or with the conditions of labour, of any person;

(s) "workman" means any person (including apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of,

that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who being employed in a supervisory capacity, draws wages exceeding ten hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

11. It may be noted that the definitions of the aforementioned expressions "industry", "industrial dispute" and "workman" are in similar terms under the U.P.I.D. Act, 1947 also.

12. The I.D. Act, 1947 was enacted to make provisions for the investigation and settlement of industrial disputes and for certain other purposes. The preamble of the I.D. Act, 1947 also states the same object, and in its terms the Act seeks to achieve industrial peace and harmony and settlement of industrial disputes.

13. The meaning and scope of the term "industry" as defined under Section 2(j) of the I.D. Act, 1947 was exhaustively discussed and analysed in the judgment in the case of **Bangalore Water Supply and Sewerage Board** (supra). The conclusions recorded in the judgment are being extracted below:-

"140. 'Industry', as defined in Section 2(j) and explained in Banerji (supra), has a wide import.

(a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie, there is an "industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) "Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji (supra) and in this judgment ; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade or business, may still be "industry' provided the nature of the activity, viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of

"industry' undertakings, callings and services, adventures "analogous to the carrying on the trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

x x x x x

143. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not "workmen' as in the University of Delhi case (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (supra) will be the true test. The whole undertaking will be "industry' although those who are not "workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

14. The "triple test" laid down in the aforementioned judgment for determination as to whether an activity would fall within a purview of the definition of industry, is as follows:-

"...(i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes..."

15. The question as to whether an association or society of apartment owners employing persons for rendering personal services to its members would be covered within the meaning of the term "industry" for the purposes of Section 2(j) of the I.D. Act, 1947 was considered in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd.** (supra) and referring to the judgment in the case of **Bangalore Water Supply and Sewerage Board,** it was held that when personal services are rendered to members of a society which is constituted only for the purposes of those members, the activity would not be treated as an industry nor the employees would be treated as workmen. The relevant observations in the judgment are as follows:-

"7. Indeed this Court in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters from those covered by the definition in Section 2(j) of the Industrial Disputes Act. It is made clear that if literally interpreted these words are of very wide

amplitude and it cannot be suggested that in their sweep it is intended to include service however rendered in whatsoever capacity and for whatsoever reason. In that context it was said that it should not be understood that all services and callings would come within the purview of the definition; services rendered by a domestic servant purely in a personal or domestic matter or even in a casual way would fall outside the definition. That is how this Court dealt with this aspect of the matter. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and the regulation will not meddle with every little carpenter or a blacksmith, a cobbler or a cycle repairer who comes outside the idea of industry and industrial dispute. This rationale, which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat-owners for rendering personal services even if that group is not amorphous but crystallised into an association or a society. The decision in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] if correctly understood is not an authority for the proposition that domestic servants are also to be treated to be workmen even when they carry on work in respect of one or many masters. It is clear when personal services are rendered to the members of a society and that society is constituted only for the purposes of those members to engage the services of such employees, we do not think its activity should be treated as an industry nor are they workmen. In this view of the matter so far as the appellant is concerned it must be held not to be an "industry". Therefore, the award made by the Tribunal cannot be sustained. The same shall stand set aside."

16. The judgment in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd.** was subsequently followed in the case of **M.D. Manjur & Ors. Vs. Shyam Kunj Occupants' Society & Ors.6** and it was reiterated that the housing co-operative society is not an industry and its employees cannot be treated to be "workmen" as defined under Section 2(s) of the I.D. Act, 1947.

17. Reference may also be had to the case of **Regional Director, Employees' State Insurance Corporation Vs. Tulsiani Chambers Premises Co-operative Society7** wherein while considering the applicability of the Employees State Insurance Act, 19488 to a co-operative housing society it was held that the society could not be said to be covered within the meaning of the word "shop" so as to bring it within the ambit of the E.S.I. Act, 1948. The status of a housing co-operative society under various statutory enactments was considered and it was held that the society could not be said to be carrying out commercial or trading activities. The relevant observations made in the judgment are as follows:-

"49. In this background it is material to consider such activities and status of such society under other laws.

(A) Industrial Disputes Act, 1947 : The status of a Co-operative society under Industrial Disputes Act, 1947 was subject-matter of decision of the Apex Court in the case of Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor, 2001 LLR 599 = 2001 (3) LLN 815 (SC). The Honourable Apex Court has held the society cannot be

held to be Industry or shop and at the highest it can be stated that employees of the society are rendering personal services to the members of the society.

(B) Minimum Wages Act, 1948 : A Single Bench of this High Court was required to consider whether a Co-operative Society owning industrial units or galas wherein members or shareholders are carrying on commercial or trading activities in the said units would make the society amenable to Minimum Wages Act, 1948 insofar as employees of the Society are concerned. This was considered in the case of Kiran Industrial Premises Co-operative Society Ltd. v. Janata Kamgar Union [2001 (89) FLR 707 (Bom.)], it has been held that a society, in which its members carry on commercial and trading activities, cannot be treated or said to be engaged in any commercial venture or business, trade or profession and does not even amount to "commercial establishment" much less a "shop".

(C) Security Guards Act : In the case of - Maharashtra Rajya Suraksha Rakshak and Gen. Kamgar Union v. Security Guards Board for Greater Bombay and Thane District [2007 (2) AIR Bom. R. 146 (DB)], it has been held that a Co-operative Housing Society having residential and commercial tenements is not an establishment if it is not carrying on business, trade or profession even though some of its members are carrying on business, trade or profession in their premises. Relevant test is whether the society is carrying on business, trade or profession. Mere rendering of service by Society to its members, cannot be said to be either business or trade or commercial activity.

(D) Provident Fund and Misc. Provisions Act, 1952 : In the case of Backbay Premises Co-operative Society Ltd. v. Union of India [1997 (2) CLR 1075], it was held that the petitioner society consisting of various premises, which are used for business purpose by the members, are required to collect maintenance charges and statutory charges from its members under the provisions of Co-operative Societies Act and the Bye-laws. Such activity of the society would not amount to commercial or business activity. The petitioner society was hence not covered by the Act even under Section 1(3)(b) of the PF Act.

(E) Bombay Shops and Establishments Act, 1948 : A demi official letter of Under Secretary to Government of Maharashtra addressed to the Mumbai District Co-operative Housing Federation Ltd. (page 50 of respondent's compilation) clearly states that a Co-operative society is neither an establishment which carries on any business, trade or profession nor a society registered under Societies Registration Act. It is, therefore, not a commercial establishment as defined under the Bombay Shops and Establishments Act and hence it will not come within the purview of the Bombay Shops and Establishment Act.

50. The respondents-societies render services to the members are domestic in nature like operating lifts, water supply, electricity, cleaning, sweeping and security. These services are essential for the very existence and security of its members and society building. These services therefore are in the nature of personal services and cannot be said to be economic activity. Therefore such services as contended by itself would not make the respondents-societies a "shop"."

18. In **Smt. Jagvatibai S. Taak Vs. S.D. Paithane Presiding Officer, VIII Labour Court Mumbai & Anr.9** referring to the judgment of **Bangalore Water Supply and Sewerage Board**, it was reiterated that a co-operative housing society is not an "industry" as defined under Section 2(j) of the I.D. Act, 1947, and the employees who were engaged to provide services to the members of the society cannot be treated as "workmen". The observations made in the judgment are as follows:-

"3. It is now well settled by a catena of judgment that a co-operative housing society is not an industry. In the case of Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor [(2002) 9 SCC 652], the Supreme Court, after considering its judgment in the cas of **Bangalore Water Supply and Sewerage Board** Vs. S.A. Rajappa [1978 (36) FLR 266 (SC) = 1978 LIC 467], has observed that workmen engaged to provide service for members of a Society cannot be treated as "workmen" of the housing society, as a housing society is not an "industry" as defined under section 2(j) of the I.D. Act."

19. The question of applicability of the provisions of the Contract Labour (Regulation and Abolition) Act, 197010 to an apartment owners association came up for consideration in the case of **Smt. Rachana Gopinath & Anr. Vs. State of Karnataka11**, and upon examining its activities it was held that the same could not be said to be concerning any industry, trade, business, manufacture or occupation and accordingly the association could not be construed to be an "establishment" under Section 2(e) of the C.L.R.A. Act, 1970. The judgment in the case of **Bangalore Water Supply and Sewerage Board** and also **Som Vihar Apartment Owners Housing Maintenance Ltd.** were considered and it was stated as follows:-

"10. At this juncture, it would be apt to refer to the judgment of the Apex Court in the case of 'Management of Som Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor,' [2001 (1) LLJ 1413] wherein the Apex Court while considering the applicability of the Industrial Disputes Act, 1947 to the Apartment Owners Housing Society formed by the Apartment Owners, has held that when personal services are rendered to the Members of a Society and that Society is constituted only for the purposes of those Members to engage the services of such employees, its activity should not be treated as an industry nor are they workmen. In that context, it is held that the Apartment Owners Housing Maintenance Society is not an Industry. The Constitution Bench Judgment of the Apex Court in the case of **Bangalore Water Supply and Sewerage Board** v. R. Rajappa & Others, [1978 (36) FLR 266 (SC)] was considered while arriving at the said conclusion. It is held that the rationale which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat owners for rendering personal services even if that group is not amorphous but crystallized into an Association or a society. The proposition that domestic servants are also to be treated as workmen even when they carry on work in respect of one or

many masters is negated by the Apex Court in Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. case. This judgment is squarely applicable to the facts of the present case. The Apartment Owners Association is an Association created for the benefit of the Members of the Association and the so called workmen employed by the Association are rendering only personal services to the Members of the Association. As aforesaid, to attract the provisions of the Act, the essential ingredients of an 'establishment' as set out in Section 2(e) of the Act which contemplates that the activities must be commercial in nature, carried on by the office or Department of the Government or the Local Authority must be satisfied. In the absence of such satisfaction, respondent insisting for compliance of the procedures prescribed under the Act is wholly unsustainable."

20. In a similar set of facts, as in the present case, in **M/s Arihant Siddhi Co-operative Housing Society Ltd. Vs. Pushpa Vishnu More & Ors.12** where the termination of services of a watchman engaged by a co-operative housing society was subject matter of an industrial dispute and the Labour Court had answered the reference by making an award and directing reinstatement with full back wages and continuity of services, upon a challenge being raised to the award, it was held that where the predominant nature of the activity of the co-operative housing society was to render services to its own members, even if it carries on any commercial activity as an adjunct to its main activity it could not be termed as an industry within the meaning of Section 2(j) of the I.D. Act, 1947. The relevant extracts from the judgment are as follows:-

"2. The petition challenges an award passed by the Labour Court at Mumbai in a reference made to it under the Industrial Disputes Act. The controversy concerns the claim of reinstatement with full back wages and continuity of service of original respondent No.1. By the impugned award, the reference was allowed and reinstatement with full back wages and continuity in service was ordered. That order was challenged in the present petition chiefly on the ground that the Petitioner, against whom the award was passed, is not an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act.

3. The Petitioner is a Co-operative Housing Society. It had engaged respondent No.1 as a watchman. Upon his completion of 60 years of age, his services were terminated with effect from 1 November 2000. It is the petitioner's case that the termination was with mutual consent. That is a matter of dispute. Respondent No.1 was paid ex-gratia/retirement benefit, which was accepted by him. He, thereafter, raised a demand for reinstatement. It was his case that he was a permanent employee of the Petitioner and was terminated without any enquiry or offering proper retrenchment compensation. The reference was resisted by the petitioner herein on the ground that the Petitioner was a housing society; that the services rendered by respondent No.1 were personal services; and that the society not being an industry or respondent No.1 its workman within the meaning of the term under the Industrial Disputes Act, the reference was not maintainable. By its impugned award, the Labour Court held that though the society was a co-operative housing society, it earned profits by way of additional

income from its members and accordingly, fell within the definition of industry. The Court held that the profit motive was proved and that the society could not be termed merely as a housing society. It, accordingly, held the reference to be maintainable and then proceeded to decide the other issues concerning legality of the termination and the reliefs to be granted to respondent No.1.

4. This Court, in its judgment in the case of M/s. Shantivan-II Co. Op. Hsg. Society v. Smt. Manjula Govind Mahida, W.P. No.360 of 2007 dated 21 June, 2018 has considered whether a co-operative housing society can be termed as an industry within the meaning of Section 2(j) of the Industrial Disputes Act merely because it carries on some commercial activity, not as its predominant activity, but as an adjunct to its main activity. This Court has held that such society is not an industry. In a case like this, that is to say, where there is a complex of activities, some of which may qualify the undertaking as an industry and some would not, what one has to consider is the predominant nature of services or activities. If the predominant nature is to render services to its own members and the other activities are merely an adjunct, by the true test laid down in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa [(1978) 2 SCC 213] the undertaking is not an industry.

5. The Labour Court appears to have been swayed by the fact that a few members of the society were carrying on business such as coaching classes and dispensary and the society was charging advertisement charges for the neon signs put up by the members. The Court was of the view that the society was thereby earning income and, in the premises, could not be termed as a mere housing society. The Court also observed that in the premises the services rendered by respondent No.1 to the society and its members could not be termed as personal services. The Court observed that the judgment of Som Vihar Apartment Owners' Housing Maintenance Society's case accordingly had no application to the facts of the present case. There is a fundamental fallacy in this reasoning. As held by the Supreme Court in Bangalore Water Supply case when there are multiple activities carried on by an establishment, what is to be considered is the dominant function. In the present case, merely because the society charged some extra charges from a few of its members for display of neon signs, the society cannot be treated as an industry carrying on business of hiring out of neon signs or allowing display of advertisements. In the premises, the impugned award of the Labour Court suffers from a serious error of jurisdiction.

6. Rule is, accordingly, made absolute and the petition allowed. The reference before the Labour Court is held to be not maintainable and the order of reinstatement with continuity of service and full back wages passed by the Labour Court is quashed and set aside."

21. Again, in a similar case, in **M/s Shantivan-II Co-operative Housing Society Vs. Smt. Manjula Govind Mahida & Anr.13** the services of several persons engaged as sweepers were terminated by the housing co-operative society and upon an industrial dispute being raised references were made under Section 10 of the I.D. Act, 1947 and awards were passed by the Labour Court holding that since the housing society had indulged in a commercial activity of

letting out its premises to outsiders for services to be rendered for parking of vehicles etc., this activity made the housing society an industry within the meaning of Section 2(j). The awards of the Labour Court upon being challenged by filing writ petitions, the High Court placing reliance upon the judgment in the case of **Bangalore Water Supply and Sewerage Board and Som Vihar Apartment Owners Housing Maintenance Society Ltd.** reiterated that the housing society which had been formed by individual flat owners for providing services, maintenance and upkeep of the apartments could never be termed as an "industry" and the predominant nature of such society being to render services to its members the other commercial activities were merely an adjunct and on the basis of the same its activities could not be brought under the ambit of the term "industry". The observations made in the judgment are as follows:-

"6. These broad principles laid down by the Supreme Court in Banglore Water Supply case were applied by it to the particular case of a housing society in Som Vihar Apartment Owners' Housing Maintenance Society Ltd. Vs. Workmen C/o Indian Engg. & Genl. Mazdoor [(2002) 9 SCC 652]. That was a case where the appellant before the court was an entity which was said to be an association of apartment owners, rendering services to the latter. It was contended before the Court that the employees were not rendering personal services to the apartment owners directly but through the society; that they received salary and emoluments from the society; that they worked under the direct control and supervision of the society; and therefore, the society's activities must be characterized as activities of an industry. It would, accordingly, constitute an industry as understood by the Supreme Court in Banglore Water Supply case. The Supreme Court noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters and those covered under the definition under Section 2(j) of the Industrial Disputes Act, 1947 as considered in Banglore Water Supply case. The court noticed that services rendered by domestic servants purely in a personal or domestic matter or in a casual way would fall outside the definition. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and such resolution is not meant to meddle with every carpenter or blacksmith or cobbler or cycle repairer who comes outside the idea of industry and industrial dispute. The court noticed that this rationale, which applied all along the line to small professions like that of domestic servants, would also apply to those who were engaged by a group of flat owners for rendering services, even if that group was not amorphous but crystallized into an association or a society. The court held that when personal services are rendered to members of a society and the society is constituted only for the purposes of those members so as to engage employees for such services, its activities should not be treated as industry nor are the employees to be termed as workmen. The court, in the premises, held that the apartment owners' housing society, who was the appellant before it, was not an industry.

7. This law should have ordinarily put an end to any speculation whether or not a co-operative housing society like the one we are concerned

with in the present petition is an industry. A housing society, after all, is a society formed by and for individual flat owners, who in real terms own the property and who form themselves into a society so that services for maintenance and upkeep of the property, etc. could be availed of by them in a more systematic manner. Such society, in an ordinary case, can never be termed as an industry. Even in the present case, learned counsel for the Respondent does not dispute this position. It is, however, submitted, and that is what has found favour with the Labour Court, is that this society does not merely exist for rendering services to its members, but in fact carries on a commercial activity by hiring out a part of its terrace to an outside agency and earns income by way of licence fees or charges from this outside agency and to the extent that it does so, it must be treated as an industry. The submission has no force. What one has to consider in a case like this, that is to say, where there is a complex of activities, some of which may qualify the undertaking as an industry and some would not, what one has to consider is the predominant nature of services or activities. If the predominant nature is to render services to its own members and the other activities are merely an adjunct, by the true test laid down in Banglore Water Supply, the undertaking is not an industry. It cannot even possibly be suggested in the present case that the predominant nature of services rendered by the petitioner-society here is hiring out of its terrace for the purposes of erection of a telephone tower. It is but a minor part of its entire activity, a mere adjunct to its predominant activity, which is to enable the members to organize themselves better for availing personal services. The organized activity in its case does not possess the triple elements mentioned in the Bangalore Water Supply case. Considering the overall purpose of existence of the society and the nature of services rendered by it, by applying the dominant nature test succinctly laid down by the Supreme Court in Banglore Water Supply, it is but a foregone conclusion that the society is not an industry in any true sense of the word as applied under Section 2(j) of the Act."

22. The judgment in the case of **Karnani Properties Ltd.** (supra) which is sought to be relied upon by the counsel for the the third respondent is clearly distinguishable on facts inasmuch as the aforementioned case was not one of a housing society of apartment owners but it was a case of a real estate company owning mansion houses and employing workers for maintenance services and it was in this context that the activities carried on by the company were held to be within the ambit of the definition of the term "industry", and its employees were held to be "workmen". It may be noted that the judgment in the case of **Karnani Properties Ltd**. has been considered in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd. Vs. Workmen3,** and held to be distinguishable on facts.

23. In view of the foregoing discussions the underlying position which emerges is that in order for an activity to be held to be covered within the ambit of the term "industry", the activity should be an organized one and not that which pertains to private or personal employment. The distinction between such classes of workers who are employed as domestic servants to render personal services to their masters with

those covered by the definition of the term "workmen" in terms of the definition under Section 2(j) of the I.D. Act, 1947 was noticed in the case of **Bangalore Water Supply and Sewerage Board,** and the services rendered by such domestic servants engaged for providing personal services were held to be outside the purview of the activity which may be referred as being an "industry". It was held that the whole purpose of the I.D. Act, 1947 was to focus on resolution of industrial disputes and regulation of industrial relations and not to meddle with "every little carpenter in a village or blacksmith in a town who sits with his son or assistant to work for the customers who trek in".

24. This rationale and line of reasoning which was applied to exclude the small professions providing personal services would also by the same analogy apply to those who are engaged by a group of apartment owners for rendering personal services. It would not be material even if the group was not amorphous but had formed itself into an association or a society. When personal services are rendered to members of a society and the society is constituted only for the purposes of those members and the engagement of the employees is for providing such services, these activities could not be treated to be covered within the purview of the term "industry", nor the employees could be held to be "workmen".

25. In the present case, the petitioner is a society of apartment owners formed for the purposes of providing necessary maintenance facilities to its members who are the apartment owners. Such an activity in view of the settled legal position cannot be held to be an activity covered by the definition of the term "industry". Any ancillary activities which may be carried on by such a housing society would be treated to be merely an adjunct and applying the "dominant nature test" the same would not change the nature of the activity so as to bring it within the purview of the term "industry". Moreover, the organized activity in the present case which is to enable the members of the society to organize themselves better for availing certain personal services, does not possess the elements of the "triple test" referred to in the **Bangalore Water Supply and Sewerage Board** case.

26. Taking an overall view of the nature of the activities of the petitioner-society and the nature of the services rendered by it to its members who are the apartment owners and applying the "dominant nature test" laid down in the case of **Bangalore Water Supply and Sewerage Board** the conclusion is inescapable that the petitioner-society cannot be held to be carrying out activities which may bring it within the purview of the expression "industry", and its employees within the ambit of the term "workmen".

27. The reference of a dispute for adjudication to a Labour Court/Tribunal pre-supposes the existence of an industrial dispute or its apprehension as its necessary concomitant. It is, therefore, clear that before the powers under Section 10 can be invoked for making a reference of a dispute to the Labour Court/Tribunal the existence of an "industrial dispute" would be a foundational, fundamental or jurisdictional fact.

28. **Black's Law Dictionary14** defines a jurisdictional fact as a fact that must exist for a Court to properly exercise its jurisdiction over a case, party or thing.

29. **P. Ramanatha Aiyar's Advanced Law Lexicon15** defines a jurisdictional fact as follows:-

"Facts, the existence of which is necessary to the validity of the proceeding, and without which the act of the Court is a mere nullity."

30. In **Arun Kumar & Ors. Vs. Union of India & Ors.16,** it was held that "concession" under Section 17(2)(ii) of the Income Tax Act, 1961 was a jurisdictional fact, determination of which was necessary before the authority could proceed further. The observations made in the judgment are as follows:-

"74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses."

31. The requirement to decide questions as to maintainability/jurisdictional facts prior to determination on merits came up for consideration in the case of **Ramesh Chandra Sankla & Ors. Vs. Vikram Cement & Ors.17**, and it was held that jurisdictional facts have to be established before a Court or Tribunal takes up a lis on merits. The relevant observations made in the judgment are as under:-

"68. A "jurisdictional fact" is one on existence of which depends jurisdiction of a court, tribunal or an Authority. If the jurisdictional fact does not exist, the court or tribunal cannot act. If an inferior court or tribunal wrongly assumes the existence of such fact, a writ of certiorari lies. The underlying principle is that by erroneously assuming existence of jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess."

32 . In **Shrisht Dhawan (Smt.) Vs. M/s Shaw Brothers18** while considering the question of permission for limited period of tenancy under Section 21 of the Delhi Rent Control Act, 1958 it was held that error of jurisdictional fact vitiates the order. The observations made in the judgment are as follows:-

"19. ...What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume

jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad19. In Raza Textiles20 it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly..."

33. The existence of jurisdictional fact as a sine qua non for assumption of jurisdiction by a Court or Tribunal was reiterated in the case of **Carona Ltd. Vs. Parvathy Swaminathan & Sons.21**, and it was stated as follows:-

"26. The learned counsel for the appellant company submitted that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to "paid-up share capital" of a Company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the "jurisdictional fact" did not exist and the Rent Act was, therefore, applicable.

27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses."

34. The existence of jurisdictional fact has thus been held to be the *sine qua non* or the condition precedent before the Court assumes jurisdiction to decide the lis on merits.

35. In **Halsbury's Laws of England22,** it has been stated as follows:-

"...Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the jurisdictional issue; but that ruling may be reviewed by the court."

36. In the present case jurisdictional essence is the presence of an industrial dispute. The petitioner being not an "industry" and its employees being not "workmen" within the meaning of the terms as defined under the I.D. Act, 1947 there could not be said to have arisen any "industrial dispute" and the award of the Labour Court suffers from a fundamental error of jurisdiction, and is thus legally unsustainable.

37. Counsel for the petitioner has pointed out that even if the third respondent were held to be illegally retrenched the retrenchment compensation payable under Section 6N of the U.P.I.D. Act, 1947 would be an amount which would be much less than the amount which has been released in favour of the said respondent in terms of an earlier order dated 02.11.2017 passed in the present case. However, on the basis of instructions received, counsel for the petitioner has fairly submitted that the petitioner would not raise a claim to the amount which has already been released and paid to the third respondent.

38. The writ petition is accordingly allowed and the award of the Labour Court dated 22.07.2017 passed in Adjudication Case No.1493 of 2008 is set aside.

39. It is however observed that in view of the statement made by the counsel for the petitioner no claim in respect of the amount which has already been released and paid to the third respondent in terms of the order dated 02.11.2017 passed earlier would be made by the petitioner.

(2019)11ILR A1442

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Civil Misc. Writ Petition No.- 60024 of 2017

Smt. Nasareen Jahan ...Petitioner
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Kumar Singh, Sri Jai Singh Yadav

Counsel for the Respondents:
C.S.C.

A. Constitution of India - Art. 14 – Natural Justice - Fair price shop - Cancellation - Government order dated 29.07.2004 and 16.10.2014 - No enquiry as provided under GOs. - No place, date and time fixed for enquiry - Charges dealt in most perfunctory manner - Licence restored. (Para 5 & 7)

Writ Petition allowed (E-1)

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

1. On the basis of a complaint dated 5.4.2017, a preliminary enquiry was undergone on 28.4.2017 and on 23.5.2017 the agreement/licence of the petitioner to run the Fair Price Shop was suspended. The petitioner was also asked to submit her reply. On 18.8.2017, the licence/agreement to run the Fair Price Shop was cancelled and, thereafter, the Appeal which the petitioner had filed was also dismissed on 24.11.2017. The contention of the learned counsel for the petitioner is that the enquiry as is contemplated in the Government Orders dated 29.7.2004 and 16.10.2014 was not undergone. No date, place or time was fixed for the enquiry. The petitioner was never given any opportunity to cross-examine the witnesses and further the learned counsel for the petitioner submitted that if the manner in which the charges were dealt with is seen it becomes crystal clear that the orders were passed without any application of mind. The first charge was that on 28.4.2017, when the inspection was made, the Fair Price Shop Dealer was not present. It was alleged that the stock and the rate sign boards etc.

were also not displayed. The petitioner had replied that as 28.4.2017 was not a date for distribution and, therefore, she had gone to collect the essential commodities, the shop was closed. Regarding the display of notice etc. she had submitted that the allegation was wrong. Learned counsel further submits that when the conclusion after the enquiry and after the inspection of the petitioner's show cause regarding the first charge was drawn, it was simply stated that the petitioner was on the wrong. No evidence was at all taken into consideration.

2. The second charge on the petitioner was that two Antyoday Card holders, namely, Jafiran w/o Nasir and Rashma w/o Malle were given only 35 kg of food grains and kerosene oil was given to them in the alternative months. The petitioner had replied that Jafiran and Rashma were not Antyodaya Card holders in her shop and to that effect Jafiran and Rashma had also given their affidavits and had specifically stated that on 28.4.2017, no inspection was done and that they had never given any statement on 28.4.2017.

3. Learned counsel for the petitioner states that the conclusion of the Enquiry Officer that when Jafiran and Rashma were not card holders in the shop of the petitioner then they were wrongly being given 35 kg. of food grains was absolutely perverse. Learned counsel submits that the charge was that they were being given only 35kg of food grains and were given kerosene oil in the alternative months. The reply was that they were not card holders in the petitioner's shop and the conclusion was strangely drawn that the petitioner was guilty of supplying 35 kg. of food grains to Jafiran and Rashma. This learned counsel submits was hilarious.

4. The third charge appears to be that collectively certain card holders had said that they were not given their food grains and to that a reply was that the Distribution Register itself was clear that the distribution was being done properly.

5. Learned counsel for the petitioner submits that once again a strange conclusion was drawn that the petitioner was not distributing food grains properly. He submits that no enquiry was conducted in the manner as had been provided in the Government Orders and strangely enough conclusions were being drawn that the petitioner was not distributing food grains properly. Learned counsel also submitted that the approval which was given by the District Magistrate was also given in a routine manner.

6. Learned Standing Counsel, however, submitted that an enquiry was undergone and, therefore, the petitioner could not have any grievance.

7. Upon hearing the case on 24.7.2019 the case was again taken up on 31.7.2019 and upon seeing the manner in which the charges had been dealt with the Court had summoned, the Sub Divisional Officer who appeared before the Court on 2.8.2019. He, in fact, had not replied to the question put to him as to why he was deciding cases without any application of mind. The Court definitely found that the enquiry was not conducted as per the Government Orders dated 29.7.2004 and 16.10.2014. No place, date and time was fixed for the enquiry. The charges were dealt with in the most perfunctory

manner. The Appellate Court also confirmed the order of the Sub Divisional Officer without considering the submissions of the appellant.

8. It is, thus, in the considered view of the Court that the impugned orders dated 24.11.2017 passed by the Commissioner Moradabad, Mandal Moradabad and the order dated 18.8.2017 passed by the Sub Divisional Magistrate, Sambhal, District - Sambhal cannot be sustained in the eyes of law and, therefore, they are quashed.

9. The writ petition is allowed.

10. The licence of the petitioner to run the Fair Price Shop shall be restored and she shall be given the essential commodities for supplying to the public

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(2019)11ILR A1444

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C. No. 61939 of 2015

Lakhan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law-Essential Commodities Act, 1955 - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Principle of Natural Justice – The original authority as well as to the appellate authority created under the Control Order exercise powers of administrative and *quasi judicial* nature - Principles of natural justice and the duty to record reasons would get attracted to the orders passed by an such authorities - Duty to record reasons and due application of mind would also be required in case of the orders passed by the authorities exercising appellate power. - Recording of reasons for its decisions - should be clear and explicit, though not necessarily detailed and elaborate. (Para 30)

B. Constitution of India - Part IX Eleventh Schedule - Importance of the public distribution system - Panchayats may be entrusted the powers and responsibilities for implementation of schemes for economic development and social justice including 'public distribution system' - Avowed object of the public distribution system is to ensure the distribution of essential commodities in a fair and equitable manner, to the public at large - Creation of the licensing system, the mechanism for distribution of food grains through fair price shop dealers and agents is only ancillary to the same. (Para 28)

C. Essential Commodities Act, 1955 - Aim and Object - An enactment made in the interest of the general public for control of production, supply and distribution of, and trade and commerce, in certain commodities - Basic aim is to make available essential commodities to the public at large at fair price as a measure of public welfare - Object of the scheme that the Control Order, 2016 provides for an elaborate procedure for monitoring and ensuring transparency and accountability so as to ensure the delivery of the stocks of food grains under the targeted Public Distribution System to the ration card holders - Authorities are enjoined to take prompt action in respect of violation of any

condition of licence including any irregularity committed by the fair price shop owner. (Para 27 and 29)

Writ Petition dismissed (E-1)

Case law relied: -

1. Kallu Khan Vs St of U.P. & anr. 2008 (6) ADJ 453 (DB).

2. Gopi Vs St. of U.P. & ors. 2007 (6) ADJ 231 (DB).

3. Puran Singh Vs St. of U.P. & ors. 2010 (3) ADJ 659 (FB).

4. MP Industries Ltd. Vs Union of India & ors. AIR 1966 SC 671.

5. Tara Chand Khatri Vs Municipal Corp. of Delhi & ors. (1977) 1 SCC 472.

6. S.N. Mukherjee Vs Union of India (1990) 4 SCC 594.

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

1. Heard Sri Dharmendra Pratap Singh, learned counsel for the petitioner and Sri Mata Prasad, learned Standing Counsel appearing for the State respondents.

2. The present petition seeks to challenge the order dated 15.12.2014 passed by the respondent no.2 whereby the fair price shop agreement of the petitioner was cancelled and also the order dated 08.10.2015 passed by the respondent no.3 in terms of which the appeal filed by the petitioner there against under the provisions of U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 20161 has also been rejected.

3. The only argument which has been raised by the petitioner is that the order passed by the respondent no.2 cancelling his fair price shop agreement has been passed without considering his case and that the respondent no.3 has also rejected his appeal without assigning any reasons or considering the grounds taken by the petitioner in the appeal.

4. *Per contra*, learned Standing Counsel appearing for the State respondents submits that the order cancelling the fair price shop agreement of the petitioner has been passed after issuance of a show cause notice to the petitioner and due consideration of his reply. It has been pointed out that the respondent no.2 in the order dated 15.12.2014 has recorded its conclusion that the petitioner had indulged in large scale irregularities and in view thereof his fair price shop licence had been cancelled. It is also pointed out that the grounds taken by the petitioner in the appeal have been duly considered by respondent no.3 and the appeal has been rejected by a reasoned order.

5. Learned Standing Counsel further submits that the appellate order being an order of affirmation is not required to contain detailed and elaborate reasons and the requirement was only to give some reasons showing due application of mind by the appellate authority.

6. In order to appreciate the rival contentions it would be necessary to advert to the provisions contained under the Control Order, 2016 notified by the State Government in exercise of powers conferred under Section 3 of the Essential Commodities Act, 19552 read with the notification of the Government of India, Ministry of Consumer Affairs, Food and Public Distribution for the purposes of maintaining the supplies of foodgrains

and other essential commodities and for securing their equitable distribution and availability at fair prices under the targeted public distribution system.

7. The aforementioned Control Order, 2016 provides for identification of eligible households, issuance of ration cards to the eligible households, lifting of foodgrains by the authorized agents of the State Government from the designated depots of the Food Corporation of India (constituted under the Food Corporation of India Act, 1964), and the mechanism for distribution of the foodgrains allocated under the targeted public distribution system.

8. The "Fair Price Shop Owner" has been defined under clause 2(o) of the Control Order, 2016 to mean a person, including a co-operative society, authorized to run a fair price shop under the provisions of this order.

9. The appointment and regulation of fair price shops is provided for under clause 7 of the Control Order, 2016 and the guidelines for the operation of the fair price shops have been provided for under clause 8 thereof.

10. For ease of reference clause 7 and clause 8 of the Control Order, 2016 are being extracted below:-

"7. Appointment and regulation of fair price shops--(1) With a view to affecting fair distribution of foodgrains and scheduled commodities the State Government may issue directions under Section 3 of the Act to such number of fair price shops in an area and in the manner as it deems fit.

(2) (i) A fair price shop shall be run through such person and in such manner as the Collector, subject to the directions of the State Government may decide.

(ii) A person appointed to run a fair price shop under sub-clause (1) shall act as the agent of the State Government.

(iii) A person appointed to run a fair price shop under sub-clause (1) shall sign an agreement, as directed by the State Government regarding running of the fair price shop as per the draft appended to this order before the competent authority prior to the coming with effect of the said appointment.

(3) The Food Commissioner shall ensure that the number of ration card holders attached to a fair price shop are reasonable, the fair price shop is so located that the consumer or ration card holder does not have to face difficulty to reach the fair price shop and that proper coverage is ensured in hilly, desert, tribal and such other areas difficult to access.

(4) The State Government shall fix an amount as the fair price shop owner's margin, which shall be periodically reviewed for ensuring sustained viability of the fair price shop operations.

(5) The Food Commissioner shall put in place a mechanism to ensure the release of fair price shop owner's margin without any delay.

(6) The State Government shall allow sale of commodities other than the foodgrains and other scheduled commodities distributed under the Targeted Public Distribution System at the fair price shop to improve the viability of the fair price shop operations.

8. **Operation of fair price shops**--(1) The fair price shop owner shall disburse foodgrains to the ration card holders as per his entitlement under the Targeted Public Distribution System.

(2) A ration card holder may draw his full entitlement of food grains in more than one installment.

(3) The fair price shop owner shall not retain the ration cards after the supply of the foodgrains.

(4) The license issued by the State Government to the fair price shop owner shall lay down the duties and responsibilities of the fair price shop owner, which shall include, inter alia, --

(i) Sale of foodgrains as per the entitlement of ration card holders under the Targeted Public Distribution System at the prescribed retail issue price;

(ii) display of information on a notice board at a prominent place in the shop on daily basis regarding

(a) entitlement of food grains,

(b) scale of issue,

(c) retail issue prices,

(d) timings of opening and closing of the fair price shop including lunch break, if any,

(e) stock of foodgrains received during the month,

(f) opening and closing stock of foodgrains,

(g) the mechanism including authority for redressal of grievances with respect to quality and quantity of food grains under the Targeted Public Distribution System and

(h) toll-free helpline number;

(iii) maintenance of the records of ration card holders, e.g. stock register, issue or sale register shall be in the form prescribed by the State Government including in the electronic format in a progressive manner;

(iv) display of samples of food grains being supplied through the fair price shop;

(v) production of books and records relating to the allotment and distribution of food grains to the inspecting agency and furnishing of such information as may be called for by the designated authority;

(vi) the shop keeper shall in the end of each month submit a detailed description of receipt of foodgrain and other essential commodities, actual distribution during the month and remaining balance of stock to designated officer who will send a compilation of all such certificates under his area of appointment to the competent authority;

(vii) opening and closing of the fair price shop as per the prescribed timings displayed on the notice board.

(5) Any ration card holder desirous of obtaining extracts from the records of a fair price shop owner may make a written request to the owner along with the deposit of the fees specified by order by the State Government. The fair price shop owner shall provide such extracts of records to the ration card holder within fourteen days from the date of receipt of a request and the said fee:

Provided that the State Government may prescribe the period for which the records are to be kept for providing the ration card holder by the fair price shop owner.

(6) The State Government shall prescribe the procedure to be followed by the designated authority in cases where the fair price shop owner does not provide the records in the manner referred in sub-clause (5) to the ration card holder in the stipulated period and the designated authority in each case shall ensure that the records are provided to the ration card holder without any undue delay.

(7) The Competent Authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by

the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license.

(8) The maximum period within which proceedings relating to enquiry into irregularities committed by the fair price shop owner shall be concluded, resulting in any action as under sub-clause (7) shall be two months.

(9) In case of suspension or cancellation of the agreement, the Competent Authority shall make alternative arrangements for ensuring uninterrupted supply of food grains to the eligible households:

Provided that in case of cancellation of the agreement of the fair price shop owner, new agreement shall be issued within a month of cancellation.

(10) The State Government shall furnish complete information on action taken against a fair price shop owner under this clause annually to the Central Government in the format at Annexure-V."

11. The Control Order, 2016 provides for an elaborate mechanism for monitoring and ensuring transparency and accountability so as to ensure that the stocks of foodgrains under the Targeted Public Distribution System are not replaced or tampered with during storage, transit or any other stage till delivery to the ration card holder. The provisions relating to monitoring transparency and accountability are provided for under clause 9 and clause 10 of the Control Order, 2016 and the same are being extracted below:-

"9. Monitoring--(1) The Food Commissioner shall ensure regular inspections of fair price shops not less than once in a week by the designated authority in urban area and twice in a month in rural area by the designated authority concerned.

(2) The Food Commissioner shall ensure that stocks of foodgrains under the Targeted Public Distribution System, as issued from the Corporation godowns, are not replaced or tampered with during storage, transit or any other stage till delivery to the ration card holder.

(3) Any authority or any person authorized by The Food Commissioner in this behalf or any other person, who is engaged in the distribution and handling of foodgrains under the Targeted Public Distribution System, shall not indulge in substitution or adulteration or diversion or theft of stocks at any stage till delivery to the ration card holder.

Explanation.--For the purpose of this clause,--

(a) "diversion" means unauthorised movement or delivery of food grains released from godowns but not reaching the intended beneficiaries under the Targeted Public Distribution System.

(b) "substitution" means replacement of food grains released from godowns with the same articles of inferior quality for distribution to the intended beneficiaries under the Targeted Public Distribution System.

(4) The State Government shall set up vigilance committees for the Targeted Public Distribution System at the State, District, Block and fair price shop levels as per the provisions of the Food Security Act to perform functions as specified in the said Act as already specified in Section 9 of Uttar Pradesh Food Security Rules, 2015.

(5) Meetings of the vigilance committees shall be held at least once in

every quarter of calendar year as specified in Section 9(3) of Uttar Predesh Food Security Rules, 2015.

(6) The Food Commissioner through State Government shall send a report annually to the Central Government on the functioning of vigilance committees in the format at Annexure-VI.

(7) The number of meetings held by the vigilance committees shall be displayed on the State web portal and the action taken on issues discussed in meetings of vigilance committees shall be reviewed in the next meeting.

(8) The State Government shall notify an internal grievance redressal mechanism which shall include toll free call centres and use of State web portal.

(9) The Food Commissioner shall give wide publicity to the up-to-date details of the Grievance Redressal Officer such as name, telephone number including mobile number, office address and the grievance redressal mechanism.

(10) The State Government may appoint or designate, officers as the District Grievance Redressal Officer; as provided in the Uttar Pradesh State Food Security Rules, 2015.

(11) An appeal against the order of the District Grievance Redressal Officer shall be preferred before the State Food Commission constituted under section 16 of the Uttar Pradesh State Food Commission Rules, 2015.

(12) The Food Commissioner shall furnish a report on quarterly basis to the State Government regarding the handling of grievances in the format at Annexure-VII.

(13) The Food Commissioner shall issue and adopt a Citizen's Charter as stipulated under law or based on the model Citizen's Charter issued by the Central Government.

(14) The Food Commissioner shall prescribe a system of periodic reporting, including through electronic platform, at various levels within the State regarding the functioning of fair price shops.

(15) The Food Commissioner shall ensure monitoring of the end-to-end operations of the Targeted Public Distribution System through the electronic platform.

Explanation.--For the purpose of this sub-clause "end-to-end operations" shall include activities relating to digitization of beneficiary, ration cards, and other databases; computerization of supply chain management; setting up of transparency portal, grievance redressal mechanism and fair price shop automation.

(16) The Food Commissioner shall take necessary steps to educate the ration card holders regarding their rights and privileges by the use of electronic and print media as well as display boards outside the fair price shops.

10. Transparency and accountability--(1) All Targeted Public Distribution System related records shall be placed in the public domain and kept open for inspection to the public in the manner as may be prescribed by the State Government.

(2) Every local authority or any other authority authorized by the State Government which shall conduct or cause to be conducted periodic, social audits on the functioning of fair price shops of Targeted Pubic Distribution System and other welfare schemes after giving fifteen days notice to the said shops or schemes and concerned authorities in accordance with such guidelines as may be notified from time to time by the State Government.

(3) The State Government may, if it considers necessary, conduct or cause to be conducted social audit through independent agencies having experience in conduct of such audits."

12. In terms of clause 8(7) of the Control Order, 2016 the "Competent Authority" defined under clause 2(j) is enjoined to take prompt action in respect of violation of any condition of licence including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license. Clause 2(j) defines "Competent Authority" as meaning Collector and including Additional District Magistrate (Civil supplies), District Supply Officer and Sub-Divisional Magistrate or Area Rationing Officer.

13. In terms of clause 13(3) any person aggrieved by an order of the Competent Authority suspending or cancelling the fair price shop agreement may file an appeal to the Appellate Authority namely the Divisional Commissioner, the Joint Commissioner/Deputy Commissioner (Food) authorized by him in writing to hear and dispose the appeal within thirty days of the date of receipt of the order and the Appellate Authority shall, as far as practicable, dispose the appeal within a period of sixty days.

14. It may also be taken note of that the commodities which are being distributed through the public distribution system are essential commodities within the meaning of Section 2(a) of the Act, 1955. The 1955 Act was enacted in the interest of general public for control of the production, supply and distribution of, and trade and commerce, in certain commodities. It was enacted by the Parliament in exercise of concurrent jurisdiction under Entry 33, List III, Schedule VII of the Constitution which reads as under:-

"33. Trade and commerce in, and the production, supply and distribution of,--

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute."

15. The objectives of the scheme of distribution of essential commodities in terms of the Control Orders issued under the Act, 1955 were succinctly laid down in the case of **Kallu Khan Vs. State of U.P. & Anr.3** in the following terms:-

"19. It would be appropriate to consider the basic idea of distribution of essential commodities under the 1955 Act and the system of appointment of agents in furtherance of discharge of the aforesaid function. It cannot be disputed that even before 73rd Amendment of the Constitution the Government has undertaken the responsibility of distribution of essential commodities to public at large at controlled or fair price. The purpose of the said responsibility is obvious. The majority of the citizens in the country live either below poverty live

or almost at par or little above thereof. They are not able to meet their two times meals by the meagre income they earn and, therefore, the market forces, if are allowed to operate freely without any protection to such persons, probably majority of such people would be forced to die of starvation and they may not be able to survive at all. This experience we had even before independence and immediately after independence when the hoarders created a situation of scarcity of food items causing virtual revolution in different parts of the country at times. Various social and welfare measure were taken by the then Government and one of the major decision taken with the intervention of Parliament is enactment of 1955 Act conferring power upon the Government to control production, supply and distribution of, and trade and commerce in certain commodities, namely, essential commodities as defined under Section 2(1) of 1955 Act. Therefore, the basic idea and intention of the legislature under the Act is to make available essential commodities to the public at large at fair price except of the cases where the availability and equitable distribution would be necessary for defence of India or for any efficient conduct of military operations. The Act intends to provide welfare measure for availability of essential commodities to public at large at fair price and rest of the machinery or mechanism is incidental for achieving the aforesaid goal. The appointment of fair price shop dealers, therefore, as such, is not the primary objective of 1955 Act but it is a channel by which the objective of making essential commodities available to public at large at fair price is to be achieved. It is always permissible and open to the Government to make the essential commodities available to public at large at fair price through the agencies or instrumentalities of its own namely, its own officers or officials or by creating a department or alike. Simultaneously, instead of undertaking the said job on its own it can discharge the aforesaid obligation through private persons or bodies by appointing them as its agents. Bereft of the authority conferred upon such agents by the Government for distribution of essential commodities at fair price, such persons had no fundamental or legal right of dealing with such essential commodities on behalf of the Government to distribute to public at large the essential commodities at fair prices, though on their own, in their private capacity, it is always open to them to make the commodities which are essential commodities under the Act available to public at large at fair price without having any corresponding burden upon the Government if there is no otherwise prohibition under any other law and the statutory provisions otherwise controlling the production, storage etc. of such essential commodities are observed by them..."

16. It may be apposite to refer to the provisions of Part IX of the Constitution introduced in terms of 73rd Constitutional Amendment whereunder provisions pertaining to "Panchayat" were inserted providing for its constitution, composition, reservation of seats, duration of Panchayats, disqualification for membership, powers, authority and responsibilities of Panchayats, elections to the Panchayats etc. The aforesaid 73rd Amendment of the Constitution came into force on 24.04.1993. For the purpose of present case it would be appropriate to refer Article 243-G which reads as under:-

"243G. Powers, authority and responsibilities of Panchayats.--Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to--

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

17. The Eleventh Schedule as referred to in Article 243G contains a list of the matters which may be entrusted to the Panchayats and item 28 thereof reads as under:-

"28. Public distribution system."

18. It would be important to notice at this stage that even prior to 73rd Amendment, Village Panchayat system was already recognised and well established in the State of Uttar Pradesh and was governed by U.P. Panchayat Raj Act, 1947. Consistent with the amendment made in the Constitution, the Act of 1947 was also amended and Section 15 which provides for functions of Gram Panchayat was also substituted by U.P. Act No.9 of 1994. It would be appropriate to reproduce the relevant part of Section 15 as under:-

"15(xxix) Public distribution system:

(a) Promotion of public awareness with regard to the distribution of essential commodities.

(b) Monitoring the public distribution system."

19. The objectives of the public distribution system and its importance in the scheme of distribution of essential commodities to the public at large was emphasized in **Gopi Vs. State of U.P. & Ors.4** in the following terms:-

"25. Realising the importance of the Public Distribution System, Parliament while bringing about the 73rd constitutional amendment included the Public Distribution System as one of the primary functions of the Gram Panchayat and it has been incorporated in Article 243-G of Part 9 of the Constitution. The Public Distribution System is obviously a avowed function of the State in order to ensure the distribution of essential commodities fairly. The object is clearly to provide benefit to the public at large in order to ensure supply of essential commodities which is necessary for the sustenance of daily life. The aforesaid object, therefore, has to be fulfilled keeping in view the intention of the legislature which is to promote public awareness and ensure distribution of essential commodities. In essence, the object is to provide benefit to the public at large. As a necessary corollary to the same, the object is not to set up any trade for the benefit of any individual. It may be that by virtue of this licensing system, an individual also gets the opportunity to benefit himself by setting up a fair price distribution unit. However, such a licence does not fall within the category of a

fundamental right to carry on trade and business as understood under Article 19(1)(g) of the Constitution of India. The Government Order which has been issued under the provisions of the Essential Commodities Act, is to regulate the supply and distribution of essential commodities fairly. The suspension of such a licence, pending inquiry is a step in the process of eliminating any such discrepancy which affects the public at large. The authorities while proceeding to suspend a licence, have the authority to attach a fair price shop to another Agency, in order to ensure that the public at large does not suffer on account of such suspension. Thus, viewed from any dimension, the power of suspension if exercised bonafidely in public interest does not by itself cause prejudice to a licensee inasmuch as he has a remedy by filing an appeal against such an order and even otherwise upon the satisfaction of the authority after hearing the objections, the authority can still restore the licence subject to a satisfactory reply being submitted by the licensee.

20. The aforementioned judgments in the case of **Kallu Khan Vs. State of U.P. & Anr. and Gopi Vs. State of U.P. & Ors.** were subsequently approved by a Full Bench of this Court in **Puran Singh Vs. State of U.P. & Ors.5.**

21. The records of the present case reflect that the proceedings against the petitioner were initiated with the issuance of a show cause notice dated 25.11.2014 in terms of which the petitioner was given a list of charges, in response to which the petitioner furnished his explanation on 01.12.2014 and upon a detailed and point-wise consideration of the reply submitted by the petitioner the respondent no.2 came to the conclusion that serious irregularities had been committed by the petitioner in running the fair price shop allotted to him which amounted to violation of the guidelines issued by the Government and from a consideration of the material on record the charges against the petitioner stood proved and accordingly the fair price shop agreement was cancelled vide order dated 15.12.2014.

22. The appeal filed there against was taken up before the respondent no.3 and the grounds raised by the petitioner were considered and thereafter the records of the case from the respondent no.2 were also called for and upon due consideration of the material on record and after grant of opportunity of hearing to the petitioner including the explanation furnished before the respondent no.2/licensing authority and the order cancelling the fair price shop agreement the appellate authority has recorded its conclusion that the licensing authority had discussed the material evidence in respect of each of the charge and in view of the same there was no error in the order passed by the licensing authority nor any material facts were brought up in the appeal so as to indicate that the charges against the petitioner were not proved and in view of the entirety of the circumstances the appellate authority held that there was no occasion to interfere in the order passed by the licensing authority and accordingly the appeal was dismissed.

23. The question with regard to the requirement of assigning elaborate and detailed reasons by administrative/*quasi judicial* authorities exercising appellate or revisional powers came up for

consideration in the case of **Madhya Pradesh Industries Ltd. Vs. Union of India & Ors.6,** and it was held that the appellate or revisional authorities are required to give reasons succinctly but in a case of affirmance where the original tribunal has given adequate reasons the appellate tribunal may dismiss the appeal or the revision simply by agreeing with those reasons. It was stated that what is essential is that reasons shall be given by the revisional or appellate tribunal expressly or by reference to those given by the original tribunal and the nature and the elaboration of the reasons would depend upon the facts of each case. The relevant observations made in the judgment are as follows:-

"9. ...That apart, when we insist upon reasons, we do not prescribe any particular form or scale of the reasons. The extent and the nature of the reasons depend upon each case. Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case..."

24. The nature and extent of the duty to assign reasons by a *quasi judicial* authority and the requirement to pass a speaking order in issuing an order of affirmance was considered in the case of **Tara Chand Khatri Vs. Municipal Corporation of Delhi & Ors.7,** and it was stated that while it may be necessary for a disciplinary or administrative authority exercising *quasi judicial* functions to state the reasons in support of its order if it differs from the conclusions arrived at by the authority passing an original order; however it would be laying down the proposition a little too broadly to say that even an order of concurrence was required to be supported by elaborate reasons. The observations made in the judgment are being extracted below:-

"20. ...we would like to make it clear that while it may be necessary for a disciplinary or administrative authority exercising quasi-judicial functions to state the reasons in support of its order if it differs from the conclusions arrived at and the recommendations made by the enquiring officer in view of the scheme of a particular enactment or the rules made thereunder, it would be laying down the proposition a little too broadly to say that even an order of concurrence must be supported by reasons. It cannot also, in our opinion, be laid down as a general rule that an order is a non-speaking order simply because it is brief and not elaborate. Every case, we think, has to be judged in the light of its own facts and circumstances.."

25. The application of principles of natural justice and recording of reasons by an authority exercising *quasi judicial* functions again came up for consideration in the case of **S.N. Mukherjee Vs. Union of India8,** and it was held that an authority exercising *quasi judicial* functions must record reasons for its decisions which should be clear and explicit though not necessarily elaborate; however it was reiterated that this requirement is greater at the original stage

and at the appellate or revisional stage while affirming the original decision the authority need not give separate reasons if it agrees with the reasons in the original order. The observations in this regard made in the judgment are being extracted below:-

"36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

26. It is thus seen that the Control Order, 2016 was notified by the State Government for the purposes of maintaining the supplies of foodgrains and other essential commodities and for securing their equitable distribution and availability at fair prices under the targeted public distribution system. The provisions under the Control Order for identification of eligible households, issuance of ration cards, lifting of foodgrains by the authorized agents from the designated depots, are aimed at creating a mechanism for distribution of the foodgrains allocated under the targeted public distribution system.

27. It may also be taken note of that the Control Order, 2016 was notified in exercise of powers under Section 3 of the Essential Commodities Act, 1955, an enactment made in the interest of the general public for control of production, supply and distribution of, and trade and commerce, in certain commodities. The basic aim of the enactment is to make available essential commodities to the public at large at fair price as a measure of public welfare. The machinery and the mechanism provided for the purpose by way of appointment of fair price shop dealers is only incidental for achieving the aforementioned goal of making the essential commodities available to public at large at fair price.

28. The importance of the public distribution system has been emphasized

with the introduction of Part IX of the Constitution in terms of 73rd Amendment and the matters listed under the Eleventh Schedule in relation to which the Panchayats may be entrusted the powers and responsibilities for implementation of schemes for economic development and social justice includes 'public distribution system' as one of the items. It may be essential to reiterate that the avowed object of the public distribution system is to ensure the distribution of essential commodities in a fair and equitable manner to the public at large. The creation of the licensing system and the mechanism for distribution of foodgrains through dealers and agents is only ancillary to the same.

29. It is in furtherance of the object of the scheme that the Control Order, 2016 provides for an elaborate procedure for monitoring and ensuring transparency and accountability so as to ensure the delivery of the stocks of foodgrains under the Targeted Public Distribution System to the ration card holders. The authorities are enjoined to take prompt action in respect of violation of any condition of licence including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license. The Control Order, 2016 also provides a forum of appeal to any person aggrieved by the order of the competent authority suspending or cancelling the fair price shop agreement and it provides for disposal of the appeal after due hearing.

30. The authorities under the aforementioned mechanism created under the Control Order, 2016 exercise powers which are of an administrative and *quasi judicial* nature and the principles of natural justice and the duty to record reasons would get attracted to the orders passed by such authorities. The duty to record reasons would be there in case of the orders to be passed by the authorities exercising appellate power also. An order of affirmation passed by the appellate authority would also require due application of mind and recording of reasons for its decisions which should be clear and explicit though not necessarily detailed and elaborate.

31. In the instant case the proceedings against the petitioner were initiated with the issuance of a show cause notice in terms of which the petitioner was given a list of charges and the explanation furnished in response thereto was considered point-wise and in a detailed manner by the authority before coming to the conclusion that serious irregularities had been committed in running the fair price shop which constituted violation of the guidelines issued by the Government and the charges against the petitioner having been proved the fair price shop agreement was cancelled. The appeal filed there against was taken up by the appellate authority and the grounds raised by the petitioner were considered and thereafter the records of the case from the licensing authority were also called for and upon due consideration of the material on record and grant of opportunity of hearing to the petitioner including the explanation furnished before the licensing authority and the order cancelling the fair price shop agreement the appellate authority proceeded to record its conclusion that the order passed by the licensing authority contained an elaborate discussion with regard to the material evidence in respect of each of the charge and in view of the

same there was no error in the order passed by the licensing authority nor any material facts were brought up in the appeal so as to indicate that the charges against the petitioner were not proved and considering the entirety of the circumstances the appeal was dismissed.

32. For the foregoing reasons the orders passed by the licensing authority as also the appellate authority cannot be faulted with.

33. The writ petition thus fails and is accordingly dismissed.

(2019)11ILR A1457

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 64093 of 2010 connected with other cases

Nagar Nigam Gorakhpur ...Petitioner
Versus
Lal Bahadur Singh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Gopal Narain, Sri Shyam Narain, Sri Sudhanshu Narain

A. Civil Law-Payment of Gratuity Act, 1972 - UP Municipal Corporation Act, 1959 - Section 458 (1)(f) - Issue as to whether in matter of payment of gratuity to employees of Nagar Mahapalika, provision of Regulation, 1990 framed under Act, 1959 prevail over Act, 1972.

Held: - Payment of Gratuity Act, 1972 works to exclude the Regulations in the matter of payment of gratuity to the employee - In absence of notification of State Government issued u/s 5(1) of the Act, employer cannot claim exemption from regime of the Act, 1972. (Para 2, 14 & 15)

Petition of employer dismissed (E-1)

Case law relied: -

1. Nagar Ayukt Nagar Nigam Vs Meraj Ahmad & anr. 2019 (162) FLR 278.

2. Nagar Ayukt Nagar Nigam, Kanpur Vs Mujib Ullah Khan & anr. (2019) 6 SCC 103.

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri Sanjay Kumar Tripathi, learned counsel for the petitioner in the present writ petition and in connected matters and Sri Sudhanshu Narain, learned counsel appearing on behalf of respondent-employee No. 1 here, and on behalf of each of the respondent-employees in connected matters. Learned Standing Counsel has been heard on behalf of respondent Nos. 2 and 3 here and, likewise, on behalf of the State-respondents in the connected writ petitions.

2. The question involved in the present writ petition as well as all other connected matters is whether the Nagar Mahapalika Gorakhpur *"Akendriyat - Sevanivratti Labh Viniyam, 1990"* framed under Section 458 (1)(f) of the U.P. Municipal Corporations Act, 1959 would prevail in the matter of payment of gratuity to employees of the Nagar Mahapalika, Gorakhpur over the provisions of the Payment of Gratuity Act, 1972?

3. Respondent No. 1, Lal Bahadur Singh was appointed with the Nagar Nigam Gorakhpur on 27.03.1973, as a *Safai* Supervisor. He retired from the said

post upon attaining the age of superannuation on 31.03.2006, completing 33 years of service. He retired from the post of a *Safai* Supervisor. The respondent was paid gratuity in the sum of Rs. 66,175/-, in accordance with the provisions of Nagar Mahapalika, Gorakhpur *"Akendriyat Seva Labh Viniyam 1990"* (for short, the 'Regulations'). Respondent no. 1 (for short the 'Employee') claimed that he was entitled to payment of gratuity under the Act that would reckon to a figure of Rs. 1,31,974/-; instead, he had been paid gratuity under the Regulations, in the sum of Rs. 65,175/-. He, therefore, claimed the difference between his entitlement under the Act and the sum paid to him by the petitioner, Nagar Nigam Gorakhpur (for short, the 'Employer') on that count under the Regulations, together with interest @ 12% per annum. The claim of the petitioner to gratuity aforesaid was registered on the file of the Controlling Authority, Payment of Gratuity Act as PG Case No. 56 of 2006. The aforesaid claim was made through an application dated 31.07.2006.

4. The Employers filed written statement, dated 31.03.2007 before the Controlling Authority, taking a case that the Employee had been paid his gratuity in accordance with his entitlement, of course, under the Regulations. It was further urged that the said payment of gratuity falls within the definition of a final settlement, and, as such, no claim for payment of gratuity before the Authority under the Act, is maintainable. It was specifically repudiated by the Employers that gratuity can be claimed by the Employee, in the sum of Rs. 1,31,974/- calculated in terms of the Act. They said that the Employee's entitlement to gratuity is governed by the Regulation, and not the Act.

5. The Controlling Authority by an order, dated 06.02.2008 allowed PG Case No. 56 brought by the employee, and ordered the arrears of gratuity, being a sum of Rs. 66,799.00 with effect from 01.03.2006, to be paid to the employee, alongwith simple interest @ 8% per annum. A sum of Rs. 200/- was awarded in costs. The Employers aggrieved by the order of the Controlling Authority, dated 06.02.2008, filed Civil Misc. Writ Petition No. 23800 before this Court. The aforesaid writ petition was summarily dismissed on 17.03.2009, on ground of there being an equally efficacious alternative remedy available by way of an appeal under the Act, to the Appellate Authority. The Employers, therefore, filed an appeal from the order of the Controlling Authority, dated 06.02.2008, on 19.05.2009, under Section 7(7) of the Act. The aforesaid appeal was registered on the file of the Appellate Authority under the Act, as Appeal No. 1 of 2010. The Employer filed an objection/reply on 22.03.2010, in the appeal last mentioned, carried to the Appellate Authority by the Employee. The Appellate Authority, vide an order dated 24.07.2010, proceeded to dismiss the Employers appeal and affirmed the order of the Controlling Authority, dated 06.02.2008.

6. Aggrieved by the order dated 24.07.2010 passed by the Appellate Authority under the Act and the order dated 06.02.2008 passed by the Controlling Authority, the present writ petition has been filed by the Employers.

7. Here, it would be apposite to detail that all the connected matters have

been filed on identical facts by the Employers against their retired employees who have claimed gratuity under the Act, in preference to what they have been paid under the Regulations. Claims of each such employee to a higher sum of gratuity, calculated in accordance with the provisions of the Act, over and above that paid under the Regulations by the Employers, have been allowed together with interest on the arrears of outstanding due on account of the difference. Likewise, in all connected writ petitions, the Employers appeal against the respective determinations made by the Controlling Authority under the Act have been dismissed by the Appellate Authority. This Court may record here that this petition was admitted to hearing on 27.07.2011 and parties have exchanged affidavits. Most of the connected matters too, have been admitted to hearing by orders of various dates. However, fourteen of these writ petitions have not been formally admitted. Nevertheless, identical questions of fact being involved, these petitions too have been heard by consent of learned counsel appearing for the parties. Since all matters connected to this petition, whether admitted or not, are founded on identical questions of facts and law, no pleadings have been exchanged in the connected matters. Those matters, therefore, are being heard and determined on the pleadings here.

8. It would be an exercise in futility to detail facts of each case that would be no more than a repetition, except the essential particulars. The essential particulars relating to the connected matters are depicted in tabular form, hereinunder:-

Sl. No.	Writ Petition No.	Name of Employee	Designation	Gratuity paid by Employers under the Regulations	Gratuity determined and held payable under the Act by the Authorities	Gratuity held by the Authorities payable under the Act (substantive sum of difference determined without according on account	Date of impugned order passed by the Controlling Authority under the Act	Date of impugned order passed by the Appellate Authority under the Act	Date of filing the Writ Petition before this Court	Date of the order of interim stay and connecting petition	Date of admission to hearing

						of interest awarded)					
1	64266 of 2010	Hanuman Mishra	Clerk	89,100/-	2,47,159/-	1,58,059/-	18.02.2008	24.07.2010	25.10.2010	27.10.2010	27.07.2011
2	64267 of 2010	Budhu	Chowkidar	60,225/-	1,27,778/-	67,553/-	06/02/08	24.07.2010	25.10.2010	27.10.2010	27.07.2011
3	64268 of 2010	Shaukat	*Safai* Worker	51,000/-	97,591/-	46,591/-	06/02/08	24.07.2010	25.10.2010	27.10.2010	27.07.2011
4	64269 of 2010	Smt. Meniya	*Safai* Worker	16,219/-	34,528/-	18,309/-	06/02/08	24.07.2010	25.10.2010	27.10.2010	27.07.2011
5	64270 of 2010	Saddar Prasad	Khalasi	55,193/-	1,12,915/-	57,722/-	06/02/08	24.07.2010	25.10.2010	27.10.2010	27.07.2011
6	64271 of 2010	Smt. Sumitra Devi	Chaprasi	55,192/-	1,00,638/-	45,446/-	06/02/08	24.07.2010	25.10.2010	27.10.2010	27.07.2011
7	64272 of 2010	Shankar Lal	Vaxinator	63,937/-	1,28,205/-	64,268/-	24.08.2008	24.08.2010	25.10.2010	27.10.2010	27.07.2011
8	64273 of 2010	Ram Keval Yadav	Chawkidar	61,380/-	1,56,163/-	94,783/-	25.02.2008	24.07.2010	25.10.2010	27.10.2010	27.07.2011
9	14866 of 2011	Ram Dulare	Head Clerk	52,161/-	1,45,130/-	92,969/-	29.03.2008	04/11/10	09/03/11	11/03/11	27.07.2011
10	14867 of 2011	Ram Adhar	Beldar	NIL	91,440/-	91,440/-	06/02/08	04/11/10	09/03/11	11/03/11	27.07.2011
11	14869 of 2011	Bhagwan Das	Chaprasi	55,193/-	92,506/-	37,313/-	31.05.2008	04/11/10	09/03/11	11/03/11	27.07.2011
12	14871 of 2011	Smt. Meniya	*Safai* Worker	46,909/-	66,044/-	19,135/-	06/02/08	04/11/10	09/03/11	11/03/11	27.07.2011
13	14872 of 2011	Smt. Asharfi Devi	Beldar	Nil	1,10,770/-	1,10,770/-	27.02.2008	04/11/10	09/03/11	11/03/11	27.07.2011

14	16318 of 2011	Ram Adhar	Chaukidar	58,410/-	1,25,707/-	67,297/-	06/02/08	04/11/10	15.03.2011	17.03.2011	27.07.2011
15	16321 of 2011	Banshi	Pipe Line Khalashi	55,192/-	1,01,196/-	46,004/-	06/02/08	04/11/10	15.03.2011	17.03.2011	27.07.2011
16	16324 of 2011	Smt. Shahidun Nisha	*Safai* Worker	49,612/-	99,152/	49,540/-	29.03.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
17	16325 of 2011	Smt. Sant Raji Devi	Beldar	Nil	1,02,461/-	1,02,461/-	27.02.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
18	16328 of 2011	Smt. Zubaida	*Safai* Worker	51,011/-	93769/-	42,758/-	29.03.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
19	16330 of 2011	Sant Prasad Chaurasiya	Pump Driver	59,070/-	88,678/-	29,608/-	06/02/08	04/11/10	15.03.2011	17.03.2011	27.07.2011
20	16331 of 2011	Mohu	Beldar	60,225/-	1,26,346/-	66,121/-	06/02/08	04/11/10	15.03.2011	17.03.2011	27.07.2011
21	16333 of 2011	Dinesh Kumar Dhar Dubey	Head Clerk	80,850/-	2,23,370/-	1,42,520/-	26.02.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
22	16334 of 2011	Smt. Vijai Kumari	*Safai* Worker	57,337/-	1,22,098/-	64,761/-	27.02.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
23	16337 of 2011	Jagdish Gupta	Chaprasi	36,800/-	63,267/-	26,467/-	28.05.2008	04/11/10	15.03.2011	17.03.2011	27.07.2011
24	16342 of 2011	Harendra Kumar	Pump Driver	66,412/-/-	1,40,905/-	74,993/-	06/02/08	04/11/10	15.03.2011	17.03.2011	17.03.2011
25	16528 of 2011	Satya Narayan Yadav	Pump Operator	61,360/-	1,31,113/-	69,733/-	29.03.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
26	16531 of 2011	Gaya Pras	Chaukidar	Nil	95,535/-	95,535/-	23.10.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011

		ad									
27	16533 of 2011	Smt. Samjira Devi	Beldar	Nil	1,05,230/-	1,05,230/-	27.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
28	16536 of 2011	Rasool	*Safai* Worker	54,374/-	1,40,732/-	86,358/-	25.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
29	16538 of 2011	Shah Mohammad	Sweeper	60,225/-	1,20,871/-	60,646/-	06/02/08	04/11/10	16.03.2011	18.03.2011	27.07.2011
30	16539 of 2011	Rasul analias Rasuliya	*Safai* Worker	55,488/-	1,12,652/-	57,164/-	25.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
31	64095 of 2010	Sripat Lal	*Safai* Supervisor	66,412/-	1,44,692/-	78280/-	06.02.2008	24.07.2010	23.10.2010	26.10.2010	27.07.2011
32	16539 of 2011	Rasul an @ Rasuliya	Safai Worker	55,488/-	1,12,,652/-	57,164/-	26.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
33	16541 of 2011	Haushla Pras	Pump Operat	53,793/-	1,04,062/-	50,269/-	06/02/08	04/11/10	16.03.2011	18.03.2011	27.07.2011
		ad Shukla	or								
34	16542 of 2011	Tribuwan Lal Srivastava	Lekha Lipik	75,900/-	1,16,723/-	40,823,	29.03.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
35	16545 of 2011	Nazzi	*Safai* Worker	Nil	1,08,571/-	1,08,571/-	31.05.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
36	16546 Of 2011	Smt. Savitri Devi	Chaukidar	Nil	1,56,780/-	1,56,780/-	23.10.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
37	16549 of 2011	Kranti Jiwan	Pump Driver	66,412/-	1,68,600/-	1,02,188/-	19.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
38	16550 of 2011	Smt. Abida Khatoon	Chaprasi	48,200/-	79,230/-	38,430/-	27.02.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
39	16551 of 2011	Ram Brikish	Chaprasi	59,254/-	1,37,160/-	77,906/-	26.02.2008	04/11/10	16/03/11	18.03.2011	27.07.2011
40	16553	Smt	Bel	Nil	1,05,230	1,05	27.0	04/1	16.0	18.0	27.0

	of 2011	. Kalindar Devi	dar		/-	,230 /-	2.2008	1/10	3.2011	3.2011	7.2011
41	16554 of 2011	Khadim Husain	Pump Operator	65,175 /-	1,47,971 /-	82,796 /-	29.03.2008	04/11/10	16.03.2011	18.03.2011	27.07.2011
42	16677 of 2011	Munna	*Safai* Worker	58,410 /-	1,26,652 /-	68,242 /-	18.02.2009	22.11.2010	16.03.2011	18.03.2011	27.07.2011
43	17263 of 2011	Shyam Bahadur	Head Rokariya	72,500 /-	97,038/-	24,538 /-	29.03.2008	04/11/10	23.03.2011	25.03.2011	27.07.2011
44	29821 of 2014	Smt. Ram Rati Devi	Operator	59,695 /-	1,17,969 /-	58,274 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
45	29824 of 2014	Smt. Munna	*Safai* Karmchari	56,265 /-	1,19,838 /-	63,576 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
46	29822 of 2014	Chantha	*Safai* Karmchari	56,000 /-	1,00,488 /-	44,488 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
47	298	S	B	42	1,26	84	25	25	24	27	N
	25 of 2014	mt. Akhtaran	eldar	,000 /-	,046 /-	,046 /-	.11.2010	.02.2014	.05.2014	.05.2014	otadmitted
48	29827 of 2014	Kamar Jahan	Fitter	65,175 /-	1,30,451 /-	65,276 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
49	29828 of 2014	Tulla	*Safai* Karmchari	60,225 /-	1,58,261 /-	98,036 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
50	29830 of 2014	Smt. Rosha n Aara	Senior Clerk	62,929 /-	1,49,252 /-	86,323 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted
51	29833 of 2014	Molhu	Labour	53,047 /-	1,10,090 /-	57,043 /-	25.11.2010	25.02.2014	24.05.2014	27.05.2014	Not admitted

9. The submission of the learned counsel for the petitioner is that retirement benefits payable to the Employee under the Regulations are more to the Employee's advantage, when compared with gratuity payable under the Act. He submits, therefore, that the Employee is not entitled to claim gratuity calculated in accordance with the Act. It is also urged by Sri Sanjay Kumar Tripathi, learned Counsel for the Employers that under the Regulations, the employees are also entitled to pension, in addition to gratuity. As such, the Regulations are clearly more

advantageous to the Employee compared to what his entitlement would be, under the Act. It is argued that the Authorities have not at all taken into account the fact that under the Regulations, the employees are entitled to gratuity and pensionery benefits, not less favourable than benefits obtaining under the Act.

10. It is also argued that the provisions of the Act are not applicable to the Employers as they are a state establishment, incorporated under an Act of the State legislature, that is to say, the U.P. Municipal Corporations Act, 1959 (for short the, 'Act of 1959'). Regulations framed by them in exercise of their statutory powers under Section 548(1)(f), together with the parent statute, have to be regarded as a special law vis-a-vis the Act, in the matter of payment of gratuity. As such, the provisions of the Act would stand excluded by the Regulations framed under the Act of 1959. The two Authorities below, in the submission of Sri Sanjay Kumar Tripathi, have manifestly erred in law, where they failed to notice this exclusion of the Act, by a special statute. It is on the fringes of these thematic submissions that learned counsel for the petitioner has urged that the Appellate Authority has gone wrong in his observation, where he says in the order impugned passed by him that the relevant regulations were not shown to him. It is submitted that the Regulations framed under the Act, relating to payment of gratuity, pension and other benefits, all framed under the Act of 1959, were clearly brought to his notice.

11. There is one submission put forward by Sri Sanjay Kumar Tripathi, that is away from the rest hereinabove recorded. He has urged that the Authorities have calculated gratuity payable to the employee under the Act, by including in the last wages drawn, the sum of money paid towards House Rent Allowance and City Compensatory Allowance. It is his submission that the said allowances could not be included, while determining the last wages drawn for the purpose of calculating gratuity payable under the Act. Learned counsel for the Employers points out that under the Act, 'wages' are inclusive of all emoluments, including Dearness Allowance, but excludes Bonus, Commission, House Rent Allowance, Over Time Wages and any other allowances. This, according to Sri Sanjay Kumar Tripathi, is how wages have been defined under Section 2(s) of the Act, which have to serve as the basis while calculating "15 days wages based on the rate of wages last drawn by the employee", to borrow the phraseology of the statute, under Section 4(2) of the Act. This submission of Sri Tripathi, shall be dealt with, independent of the other submissions in this judgment.

12. Sri Sudhanshu Narain, learned counsel for the Employers on the other hand submits that the question whether the Employee is entitled to gratuity under the Regulations, framed by the Employer in exercise of powers under Section 548(1)(f) of the Act of 1959 or under Section 4(2) of the Act, is no longer *res integra* in view of the decision of this Court in **Nagar Ayukt Nagar Nigam vs. Meraj Ahmad and another1,** where precisely the same issue was the one that was raised by the Nagar Nigam, Kanpur. In the aforesaid decision, this Court, while dealing with an identical submission, that stemmed from a case about an exemption for the Nagar Nigam

from the provisions of the Act in that case, owning to more favourable terms claimed to be offered by the Nagar Nigam Kanpur, it was held by this Court:

10. Sri Y.S. Sachan, learned Counsel for the petitioner submits that the definition of an employee under the Act, read with section 5 thereof, leads one to the inevitable conclusion that an employee of any establishment, like the petitioner-Nigam who under its rules is entitled to receive gratuity on terms not less favourable than the benefits conferred under the Act, would render such an establishment being exempt from the applicability of the Act. He urges that the Retiral Dues and General Provident Fund Regulation, 1962 framed by the petitioner-Nigam are more favourable to its employees, circumstanced as respondent No. 1, in the matter of entitlement to gratuity than the provisions of the Act, attracting the exemption clause under section 5 of the Act. This Court is afraid that the submission cannot be accepted.

11. On a plain reading of section 2(e) of the Act in applicability of the Act is there only in relation to the such employees of the Central Government or the State Government, who hold a post that is governed by any Act or any Rules providing for payment of gratuity. This Court has no doubt that the question of inapplicability of the Act is very different from exemption from its operation. The Act on its own term is alone inapplicable in case of such persons who hold a post under the Central or a State Government that is governed by an Act or Rules providing for payment of gratuity; no other class of employees has been placed in a category to whom the Act is inapplicable. There is no manner of doubt that the petitioner-Nigam is neither the Central Government or a State Government. It is a Corporation established under a State enactment. Therefore, an employee of the Corporation can never fall in the class to whom the Act may be held inapplicable.

12. Exemption is quite another matter that is dealt with under section 5 of the Act. Section 5 of the Act, reads thus:

"5. Power to exempt--

[1] The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

[2] The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

[3] A notification issued under sub-section (1) or sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of this Act, but no such notification shall be

issued so as to prejudicially, affect the interests of any person."

13. Exemption may be sought by any establishment, factory, mine, oilfield etc. and that exemption may be granted by the appropriate Government as defined under section 2(a)(ii). The appropriate Government would mean the State Government. Exemption under section 5(1) of the Act may be granted by the appropriate Government by notification, and subject to such conditions as specified there. In case, employees of such establishment, factory, mine etc. are in receipt of gratuity or pensionary benefits conferred under the services Rules, in order to avail an exemption from the provisions of the Act, an establishment like the petitioner-Nigam have to establish that the State Government by notification have exempted them from the operation of the Act under section 5(1) or under section 5(2) of the Act, in case of a particular employee, or a class of employees. There is no such case much less pleading to show that the petitioner-Nigam has been granted an exemption by the State Government, under section 5(1) of the Act. In the absence of an exemption granted by a notification duly made by the State Government, the mere fact that the terms of gratuity offered by the petitioner-Nigam are more beneficial to an employee like the first respondent here, would not automatically entitle the petitioner to an exemption from the provisions of the Act, by pleading or establishing before the Authority or the Court, the better terms of gratuity available under their service rules. The exemption can come from a notification under section 5 of the Act issued by the appropriate Government alone, and in no other way. That being the case, the petitioner is not entitled to say that exemption from operation of the Act is there merely because they say or can establish before the Authority or this Court that under the Retiral Dues and General Provident Fund Regulation, 1962 (as amended up to date) the terms of gratuity offered to their employees, like the first petitioner, are more beneficial than those available under section 4(2) of the Act.

14. This view of the law accords with the guidance of the Hon'ble Supreme Court in Municipal Corporation of Delhi v. Dharam Prakash Sharma, 1999 (81) FLR 867 (SC), where it was held by their Lordships thus:

"2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned Counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us

to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules."

13. It was, further held by this Court, in relation to the issue of applicability of the Act to the Nagar Nigam, Kanpur in **Nagar Ayukt Nagar Nigam vs. Meraj Ahmad** *(Supra)*, particularly, taking note of a decision of the Supreme Court in **Nagar Ayukt Nagar Nigam, Kanpur vs. Mujib Ullah Khan and another2**, thus:

24. The issue relating to the applicability of the Act to the petitioner-Nagar Nigam has been very recently examined by the Supreme Court in Nagar Ayukt Nagar Nigam, Kanpur v. Mujib Ullah Khan and another, MANU/SC/0457/2019 : 2019 (161) FLR 503 (SC) which incidentally is a decision on an Appeal by Special Leave carried by the petitioner-Nigam from the decision of this Court in Nagar Ayukt, Nagar Nigam, Kanpur v. Mujib Ullah Khan *(supra)* referred to in the earlier part of this judgment. Their Lordships have clearly held the petitioner-Nigam and its employees to be amenable to the Act by virtue of a notification dated 8th January, 1982 issued by the Central Government in exercise of powers under section 1(3)(c) of the Act. The decision aforesaid of their Lordships in Nagar Ayukt, Nagar Nigam, Kanpur v. Mujib Ullah Khan and another *(supra)* (the Hon'ble Supreme Court's decision) lays down the law in this regard, to which a wholesome and contextual reference finds detail in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Report, where it is held:

"6. The appellant relies upon section 3 of the U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 (1962 Act) which is to the effect that such Act will have no application to the office of Government or Local Bodies. Therefore, on the strength of such statutory provision, it was argued that the Act would not be applicable in respect of the Municipalities. The appellant is not a factory, mine, oilfield, plantation, port and railway company and that there is no

notification as stipulated under Clause (c) of section 1(3) of the Act. Therefore, the employees of the Municipalities are entitled to the gratuity in terms of the Regulations framed in exercise of powers of section 548 of the 1959 Act and not under the Act.

7. On the other hand, learned Counsel for the respondent pointed out that the Central Government has published a notification in terms of section 1(3)(c) of the Act on 8.1.1982 to extend the applicability of the Act to the Municipalities. Thus, the Act is applicable to the Municipalities. The relevant provisions of the Act read as under:

"1. Short title, extent, application and commencement.--(1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Provided that in so far as it relates to plantations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It shall apply to-

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."

8. A perusal of the above provisions would show that the Act is applicable to : (1) every factory, mine, oilfield, plantation, port and railway company; and (2) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, the said provision has two conditions, viz. (i) a shop or establishments within the meaning of a State law and (ii) in which ten or more persons are employed; and (3) the establishments or class of establishments which Central Government may notify.

9. The appellant is not covered by clauses (a) and (b) of section 1(3) of the Act. Clause (a) is not applicable on the face of the provisions, but even clause (b) is not applicable in view of section 3(c) of the 1962 Act as such Act is not applicable to the offices of the Government or local authorities. The Local Authorities means a municipal committee, district board etc or entrusted with the control or management of a municipal or local fund in terms of section 3(31) of the General Clauses Act, 1897.

10. In terms of the above said section 1(3)(c) of the Act, the Central Government has published a notification on 8.1.1982 and specified Local Bodies in which ten or more persons are employed, or were employed, on any day of the preceding twelve months as a class of establishment to which this Act shall apply. The said notification dated 08.01.1982 reads as under:--

"New Delhi, the 8th January, 1982

NOTIFICATION

S.O. No. 239....-In exercise of the powers conferred by clause (c) of sub-section (3) of section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specified

"local bodies' in which ten or more persons are employed, or were employed, on any day preceding twelve months, as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification in the Official Gazette.

Sd/.

(R.K.A. Subrahmanya)

Additional Secretary

(F. No. S-70020/16/77-FPG)"

11. We find that the notification dated 8.1.1982 was not referred to before the High Court. Such notification makes it abundantly clear that the Act is applicable to the local bodies i.e., the Municipalities. Section 14 of the Act has given an overriding effect over any other inconsistent provision in any other enactment. The said provision reads as under:

"14. Act to override other enactments, etc.--The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

12. In view of section 14 of the Act, the provision in the State Act contemplating payment of Gratuity will be inapplicable in respect of the employees of the local bodies."

14. It is the Employer's case that they are a Nigam which clearly falls within the definition of "local bodies", envisaged under the Notification, dated 8th January, 1982, issued by the Central Government in exercise of their powers under Clause (c) of sub Section (3) of Section 1 of the Act, referred to in the decision of their Lordships in **Nagar Ayukt Nagar Nigam, Kanpur vs. Mujib Ullah Khan and another** *(Supra).* It is not the case of the Employer, pleaded anywhere, that they employ less than ten persons. Since the Employers have not taken that case of employing less than ten persons anywhere, it is reasonably inferable that they employ more than ten hands; their establishment is a Nagar Nigam, where judicial notice may be taken of the fact that an establishment of a local body, like a Nagar Nigam, has a workforce, far stronger in numbers than the figure of ten. Clearly, going by the principle laid down by their Lordships in **Nagar Ayukt Nagar Nigam, Kanpur vs. Mujib Ullah Khan and another** *(Supra)*, the Employers are an establishment, to whom the provisions of the Act shall apply by virtue of the Notification of 8th January, 1982, issued by the Central Government, under Section 1(3)(c) of the Act. Once the Employers are an establishment, to whom the Act applies, the overriding effect of Section 14, thereafter, would exclude the provisions of the Regulations framed by the Employers, by virtue of their powers under Section 548(1)(f) of the Act of 1959. The inapplicability of the Act of 1959, and a *fortiorari*, any regulation framed under it, in the matter of payment of gratuity to an employee of the establishment to which the Act is applicable, has been laid down to be the law in **Nagar Ayukt Nagar Nigam, Kanpur vs. Mujib Ullah Khan and another** *(Supra)* by the Supreme Court. Incidentally, the said decision relates to *para materia* Service Regulations of the Kanpur Nagar Nigam, framed by the said

Nigam in exercise of powers under Section 548(1)(f) of the Act of 1959, which is the source of power exercised by the Employers, while framing the Regulations, relating to gratuity here. Thus, there can be no doubt that so far as the applicability of the Act and its overriding effect vis-a-vis the Regulations is concerned, the Act works to exclude the Regulations, in the matter of payment of gratuity to the Employee.

15. The Employer has not come up with a case that any kind of exemption has been granted to them by the appropriate Government, which under the Act would mean the State Government, acting under Section 5(1). There is no such case pleaded by the Employers, either before the Authorities below or before this Court. In the absence of a notification by the State Government, issued under Section 5(1) of the Act, the Employer cannot claim exemption from the regime of the Act, in so far as entitlement to gratuity of their employees is concerned, including its calculation and determination. In this view of the matter, it must be held that the provisions of the Act are applicable in the matter of calculation and determination of gratuity payable to the Employee by the Employer, to the exclusion of the Regulations framed under the Act of 1959. Thus, it must be held that the two Authorities below have rightly applied the Act and calculated gratuity payable to the Employee, in accordance with the provisions of the Act.

16. Now, this Court may proceed to consider the other submission of Sri Sanjay Kumar Tripathi, learned counsel for the Employer that the Authorities have calculated gratuity payable to the employee under the Act, by including in the last wages drawn, the sum of money paid towards House Rent Allowance and City Compensatory Allowance, which are not part of the Employee's wages as defined under Section 2(s) of the Act. He submits that once House Rent Allowance and City Compensatory Allowance are not part of wages as defined under Section 2(s) *(supra)*, the last wages drawn cannot be calculated, including those components of the Employee's emoluments, for the purpose of determining the gratuity payable under Section 4(2) of the Act.

17. In this connection, the Court has looked into the written statement filed on behalf of the Employers in PG Case No. 56 of 2008. This case that the last wages drawn for the purpose of calculation of gratuity have been wrongly put forward by the Employee in his claim, annexed as a schedule to his application dated 31.07.2006, has nowhere been pleaded. It is not said on behalf of the Employers that the components of House Rent Allowance and City Compensatory Allowance have been incorrectly included to reckon the sum of last wages drawn by the employee, in his application made to the Controlling Authority. Post the impugned order dated 06.02.2008, passed by the Controlling Authority, the Employers assailed it in appeal under Section 7(7) of the Act. This Court has also carefully looked into the memorandum of the appeal, annexed as Annexure 5 to the writ petition. The memorandum carries as many as nine grounds of appeal. In none of these grounds has a case been raised that the Controlling Authority, while determining the gratuity payable to the employee under Section 4(2) of the Act, has reckoned as part of the wages last

drawn for the purpose of calculation of gratuity payable to the employee under Section 4(2) of the Act, any sum of money like House Rent Allowance or City Compensatory Allowance, which does not qualify for wages under the Act. The said plea has been taken for the first time before this Court in paragraph 20 of the writ petition, but not before the two Authorities below. Prima facie from the record, it is not apparent that House Rent Allowance or City Compensatory Allowance has been added to the wages last drawn by the Authorities, while calculating gratuity payable to the employee under Section 4(2) of the Act. The issue, therefore, is a pure question of fact which cannot be permitted to be raised for the first time before this Court in a writ petition.

18. This Court may record here that the same position on facts and the state of pleadings holds true for the other employees, in the connected writ petitions. In the above premises, this Court does not find any good ground to interfere with the impugned orders.

19. In the result, all the writ petitions are **dismissed** with costs. Interim orders passed, are hereby vacated.

(2019)9ILR A1471

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 1914 of 2019

Chandra Shekhar Azad Univ.of Agri.& Tech.,Kanpur ...Petitioner

Versus

Regi. Provi. Fund Comm-II, Kanpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Tripathi, Sri Satyendra Chandra Tripathi

Counsel for the Respondents:
Sri Sachindra Upadhyay, Sri Kartikeya Saran

A. Constitution of India - Art. 226 – Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7-A, 7-B, 7-I - Writ - Alternative remedy against an order rejecting review - of Employee's Provident Funds & Miscellaneous Provisions Act, 1952 - Section 7-B makes it clear that no appeal shall lie against an order rejecting a review application - In Writ petition against such review order, the original order passed u/s 7-A would not be under scrutiny and order rejecting review application would leave order u/s 7-A not only intact, but there would be no merger with the order passed u/s 7-B – Here, the petitioner challenged both orders passed u/s 7-A as well as u/s 7-B - In review order the Court proceeded to open up the entire case of parties vis-a-vise determination of Petitioner's liability on merit - This bring the impugned order into that class which is envisaged u/s 7-B(5) and therefore appealable u/s 7-I of the Act. (Para 13, 14, 15, 16 & 18)

Writ petition dismissed (E-1)

Cases relied on: -
1. M/s Bharat Polychem Ltd. Vs Regional Provident Fund Commissioner (2011) SCC Online Del 2981

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioners, Chandra Shekhar Azad University Of Agriculture And Technology, Nawabganj, Kanpur, represented through its Vice Chancellor, have challenged an order passed by the

Regional Provident Fund Commissioner-II, Employees Provident Fund Organization, Kanpur, dated 08.02.2018, under Section 7-A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (for short, the Act) and various statutory schemes framed thereunder, assessing a sum of Rs.9,76,94,899/- to be payable by the petitioners to their employees - casual hands and contractual employees. A further order, that has been challenged by the petitioners is one passed by the same Authority on an application for review made under Section 7-B of the Act, which has come to be rejected by an order dated 12.04.2018. Treating the second order to be a sequel to the first part of the same cause of action, this writ petition under Article 226 of the Constitution has been filed.

2. This writ petition was filed against the Regional Provident Fund Commissioner-II, Kanpur and the Employees Provident Fund Organization through the Regional Provident Fund Commissioner-II, Kanpur. The beneficiaries of the two orders of assessment and review under the Act passed by respondent no.1, who are a total of 641 employees, have not been impleaded to the writ petition, or even a representative number of them. This Court vide order dated 21.04.2019 required the respondents to the writ petition to file a counter affidavit within four weeks with a direction that the assessed sum of Provident Fund and other dues, that had been deposited by the petitioners may be invested in an interest bearing term deposit with a Nationalized Bank to abide by final orders in the writ petition. A counter affidavit on behalf of the respondents was filed on 2nd April, 2019. The petitioners were granted three weeks' time to file a rejoinder affidavit, vide order dated 01.04.2019. However, no rejoinder affidavit was filed on 30.04.2019, 20.05.2019, or until 21.05.2.2019, which were the various dates fixed in the matter before the Court. On 21.05.2019, the writ petition was heard finally with the consent of learned counsel appearing for all parties, and judgment was reserved. At this stage, it may be mentioned that of all the 641 employees who are beneficiaries of the two orders passed by the respondent no.1, under challenge in this petition, some filed an impleadment application on 18th May, 20199, which is an application on behalf of 111 of the 641 beneficiary employees. The said employees supported their application for impleadment with a detailed affidavit and documents, on which they wish to rely before this Court. The said impleadment application filed by Sri Satyendra Chandra Tripathi, Advocate on behalf of the 111 employees, would be a representation of all the 641 beneficiary employees, in whose favour, orders under challenge in this petition have been passed. The aforesaid application numbered as Civil Misc. (Impleadment) Application No.4 of 2019 was also taken on record for orders at the time of hearing of the writ petition. In order to curtail prolixity of procedure, no orders granting formal impleadment were made on the said application. However, Sri Satyendra Chandra Tripathi, learned Advocate, on behalf of the 111 employees, was heard fully in support of the applicants' case as proper parties, in accordance with the provisions of Chapter XXII, Rule 5-A of the Rules of Court. Sri Tripathi consented also to the aforesaid course of action, and addressed the Court on merits.

3. Heard Sri Sanjay Kumar Tripathi, learned counsel for the petitioners, Sri Kartikeya Saran, learned Advocate appearing on behalf of respondent nos.1 and 2 and Sri Satyendra Chandra Tripathi,

learned counsel appearing on behalf of some of the beneficiary employees, under Chapter XXII, Rule 5-A of the Rules of Court.

4. Sri Kartikeya Saran, learned counsel appearing for the Employees Provident Fund Organization has come up with a preliminary objection that this writ petition is not maintainable, inasmuch as, the impugned order dated 08.02.2018 passed by respondent no.1, under Section 7-A of the Act, is appealable under Section 7-I to the Employees' Provident Funds Appellate Tribunal (for short, the Tribunal). Sri Satyendra Chandra Tripathi, learned counsel appearing for the beneficiary employees, has also supported the said preliminary objection. In answer to the preliminary objection as to maintainability of this writ petition, Sri Sanjay Kumar Tripathi, learned counsel for the petitioners has submitted that though the order dated 08.02.2018 is appealable under Section 7-I of the Act, but the subsequent order dated 12.04.2018, passed by respondent no.1 on the petitioners' Review Application preferred under Section 7-B of the Act, is not an appealable order. He submits that the two orders are part of the same cause of action, the subsequent order dated 12.04.2018 being a sequel to the first. It is his submission that once the second of the two orders, that is to say, the one made on the Review Application is not appealable, the order dated 08.02.2018, which is the substantive order of assessment under Section 7-A, cannot be severed from the order subsequently made on the Review Application. Thus, in the submission of Sri Sanjay Kumar Tripathi, learned counsel for the petitioners, this writ petition would be competent and maintainable against both the orders impugned.

5. Sri Kartikeya Saran, learned counsel for respondent nos.1 and 2 in reply submits that the order of review is not an order, that summarily rejects the Review. It may not have formally granted the Review by an order expressed in those words, but that is what it has substantially done. A perusal of the impugned order, in the submission of Sri Saran, passed on the Review Application under Section 7-B, would show that the entire decided case has been reopened, and dealt with afresh all pleas of the petitioners urged in opposition to assessment under the Act. Learned counsel for respondent nos.1 and 2 submits, therefore, that the order passed on the Review Application under Section 7-B, would fall under sub-Section (5) of Section 7-B aforesaid, and an appeal against it, would be maintainable under Section 7-I, as if it were an order made under Section 7-A. In support of his contention, he has relied upon a decision of the Delhi High Court in **M/s. Bharat Polychem Ltd. vs. Regional Provident Fund Commissioner, 2011 SCC OnLine Del 2981.** Whether the petition is not liable to be entertained in view of an alternative remedy being available against both orders as Sri Kartikeya Saran urges, would shortly be decided. But before that is done, a brief reference to the facts of the case leading to the two orders impugned, would be necessary. It would also be necessary to refer to the content, substance and tenor of the two orders for the purpose of determining whether the suggested alternative remedy, under Section 7-I of the Act is open to the petitioners.

6. Shorn of unnecessary detail, the petitioners who are a University, governed by the provisions of the Agriculture and Technology University Act, 1958, and in receipt of grant from the State Government, have come up with a case that they are governed by an Act and Rules framed thereunder, regulating the service conditions of their employees. It is urged that the Act governing the University, or Rules governing service conditions of their employees, do not make provision for payment of Provident Fund or Pension to daily-wage employees, like the applicants for impleadment here, or others like them in whose favour respondent no.1 has passed the impugned order of assessment, dated 08.02.2018. A reading of the petition shows that they had raised challenge to the applicability of the Act at an initial stage when the respondent, Employees Provident Fund Organization issued a letter dated 02.02.2010, requiring them to provide information sought there for the purpose of assessment under the Act, through Writ - C No.24264 of 2010, filed before this Court. The said writ petition was primarily founded on the premise that the provisions of the Act are not applicable to the petitioners, the University. This Court, however, dismissed the said writ petition holding that the objection was premature, and if adjudicated, would amount to prejudging the issue. The petitioners were granted liberty to file a reply to the said letter within two weeks requiring the respondent, Employees Provident Fund Organization to take a decision in the matter after consideration of the petitioners' reply. It appears that no reply to the letter dated 02.02.2010 was filed, and on 09.02.2010, the petitioners were allotted Code no. UP-47245, acting on the basis of letter no.1727, dated 21.01.2010, written by the petitioners to the State Government with a copy addressed to the second respondent, where it was indicated that the petitioners have employees more than 20. An Enforcement Officer of the Corporation visited the petitioner-University, and submitted a report, dated 27.01.2016, along with a list of 663 employees, who were not covered under the General Provident Fund or other Government Provident Fund Scheme. These employees were indicated to be casual hands, retained on contract, by the petitioner-University. It was on the basis of the said report that a notice, dated 11.07.2017 was issued by respondent no.1 under Section 7-A of the Act to the petitioners, informing them that they were covered under the provisions of the Act and Schemes framed thereunder, initiating an inquiry under Section 7-A of the Act.

7. It is the petitioners' case that during the course of inquiry under Section 7-A, the Enforcement Officer examined various records of the petitioners, and drew up a report dated 10.01.2018. The statement of the Enforcement Officer was recorded in the Section 7-A proceedings on 11.01.2018. The Enforcement Officer is said to have stated that the date of coverage of assessment agaisnt the petitioner establishment be shifted back to 01.01.2000, whereas in the notice under Section 7-A of the Act, the indicated period of coverage was from 21.01.2010 to 31.05.2017, relating to 663 employees. Now, during inquiry the number of employees was reduced to 641, but the period was expanded. On the basis of inquiry under Section 7-A of the Act, an order dated 08.02.2018 was passed assessing a sum of Rs.9,76,94,899/-

against the petitioners, towards outstanding dues of Provident Fund and other related Schemes under the Act, for the period 01.01.2004 to 31.05.2017, reckoned on the basis of a strength of 641 beneficiary employees. The petitioners appear to have filed an Application for Review on 27.03.2018, under Section 7-B of the Act before respondent no.1, seeking review of his order dated 08.02.2018, made under Section 7-A. The said Application for Review has come to be rejected by means of an order, dated 12.04.2018.

8. Aggrieved, the present writ petition has been filed.

9. The petitioners on merits have challenged both orders primarily on grounds that the period of assessment has been enlarged from what it was in the notice dated 11.07.2017, issued under Section 7-A of the Act. It is the petitioners' contention that the assessment order could not have enlarged the period of coverage, from what was mentioned in the notice under Section 7-A, inasmuch as, a fresh notice for the extended period would have to be issued, or proceedings taken afresh under Section 7-A. Regarding this requirement of issuing a fresh notice, or undertaking a fresh inquiry in case of expansion of the period of coverage as mentioned in the notice under Section 7-A of the Act, the petitioners have relied upon guidelines for *quasi-judicial* proceedings under Section 7-A of the Act, dated 06.08.2014, issued by the Employees Provident Fund Organization, Head Office, New Delhi, in particular, guidelines (k) and (m).

10. Regarding the order dated 12.04.2018 rejecting the Review Application, it is urged on behalf of the petitioners that the Review has been thrown out merely because it was not in the prescribed Form no.9, which could not be a ground to reject a Review, without provision of opportunity to the petitioners to file in proper form. It is also said in assail of the order passed under Section 7-B that the Review has been rejected as barred by time, whereas it is manifestly within time. It is also urged with particular emphasis that the first respondent ought to have decided the Review Application made by the petitioners under Section 7-B on merits, granting review of the order dated 08.02.2018. According to the petitioners, after grant of review, fresh orders under Section 7-A should have been passed under the circumstances as there were good grounds to grant review and re-hear parties in the substantive proceedings.

11. This Court may say at once that so far as the impugned order dated 08.02.2018 is concerned, the same is an order of assessment passed under Section 7-A, and is clearly appealable to the Tribunal under Section 7-I of the Act. There is no quarrel about that issue, and the learned counsel for the petitioners also does not dispute that proposition.

12. What is in issue is whether the Order 7-B is appealable by virtue of Section 7-B(5) of the Act. Here, it would be gainful to refer the provisions of Section 7-B of the Act, that are quoted in *extenso:*

"7-B. Review of orders passed under Section 7-A.--(1) Any person aggrieved by an order made under sub-section (1) of Section 7-A, but from which no appeal has been preferred under

this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provided that,--

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under Section 7-A."

(Emphasis by Court)

13. A reading of the provisions of Section 7-B of the Act makes it clear that an Application for Review that is rejected, leads to an order from which no appeal lies. If an order rejecting an Application for Review were to be challenged, certainly a writ petition would be competent from that order alone. In that challenge, the Court would be required to see whether the Authority was right in rejecting the Application for Review. In a petition of that kind, the order passed under Section 7-A of the Act, that has not been reopened by granting the Review, would not be under scrutiny of this Court. This would be so because an application under Section 7-B of the Act rejecting an Application for Review would leave the order under Section 7-A not only intact, but there would be no merger with the order passed under Section 7-B, in such a case. It is only that awaiting decision of this Court as to legality of the order rejecting an application under Section 7-B, this Court may consider restraining consequences of the order under Section 7-A of the Act by way of recovery etc, with or without terms, in aid of the writ petition before it, to judge the validity of the Section 7-B order. Again, to emphasize, in that situation the order under Section 7-A would not be under challenge. In that situation alone, a writ petition would not be confronted with the bar of alternative remedy under Section 7-I of the Act. In the event, however, the Review were to be formally granted, and the order

originally made under Section 7-A laid open with a fresh order to follow after hearing parties, there would be clearly a merger of the earlier order with that passed under Section 7-B. And, if this were the nature of the order passed under Section 7-B, it would be appealable under Section 7-I, going by the provisions of Section 7-B(5) of the Act. There is yet another class of cases, which Sri Kartikeya Saran and Sri Satyendra Chandra Tripathi, learned counsel for the respondents and the beneficiary employees, respectively urge would fall under Section 7-B(5) of the Act. This is those class of cases where without expressly granting the Review, the Authority seized of the Review Application, does not summarily turn it down, but at the stage of considering the Review Application, passes an order that deals with the merits of the assessee's case. In the submission of the learned counsel, this kind of an order would fall under Section 7-B(5) as the order passed is one under Review, from which an appeal would lie, treating it to be an original order under Section 7-A of the Act.

14. This Court has scrutinized the impugned order dated 12.04.2018 passed under Section 7-B of the Act. The tenor of the said order, which runs into some ten pages and a little more, makes it manifest to be one where the Regional Provident Fund Commissioner has not simply rejected the Application for Review. He has, no doubt, said that the said application is liable to be rejected on grounds of limitation and for non-compliance with the prescribed form, but has, thereafter, proceeded to open up the entire case of parties *vis-a-vis* determination of the petitioners' liability on merits. He has set out the complete history of proceedings before the Authority and this Court. He has also referred to the evidence of parties, including the fact that the establishment representatives had no objection to shifting back the date of coverage for the petitioners (establishment). He has referred to the stand of the two representatives of the establishment recorded on 01.02.2018, that is to say, M/s. A.K. Srivastava and Yogendra Singh, who appeared on behalf of the petitioners before the Authority. It is recorded that these representatives of the establishment stated that they have no objection to the report submitted by the departmental representatives on 11.01.2018. The findings are clearly ones recorded on the merits of the assessment, which may be quoted *verbatim*:

"As per the report of the Enforcement Officer, the covrage date of the establishment needed to be shifted back i.e. w.e.f. 01.01.2004. **The establishment representatives had no objection on the issue of shifting back the date of coverage of the establishment. Therefore, the date of coverage of establishment was shifted back to 01.01.2004**. (This is well recorded in file)

Due to the shifting of date of coverage of the establishment, the inquiry (under section 7A of the Act) period was also extended i.e. from 01/2004 to 31.05.2017, to which establishment representatives had no objection.

A copy of Enforcement Officers report taken on record as PWX-11/1/2018 along with details of quantification was provided/ handed over to the establishment representatives to file

objections, if any on or before next date of hearing, which was fixed for 01.02.2018.

On 01.02.2018, Sh. A.K. Srivastava & Sh. Yogenda Singh appeared on behalf of establishment. The establishment representatives stated that they have no objections to the report submitted by departmental representative on 11.01.2018(taken on record as PWX-11/1/2018). **The establishment representatives further stated that they have cross-verified the same with their record and confirm the dues.** Sh. Sanjay Bajpai, E.O. appearing on behalf of department submitted a copy of Ministry of Labour, Government of India letter dated 08.01.1989 and Copy of Judgement/ order of Hon'ble High Court of Himacha Pradesh date 13.03.1997 in CWP 1930 of 1996, which was taken on record. Sh. Bajpai stated that the EPF & MP Act, 1952 is very much applicable on the establishment. He further stated that EPF department tried its best to convince the university authorities regarding Employees Enrollment Campaign, 2017 but the University authorities did not take interest. It was further requested by the departmental representative that in light of no objection to the report and acceptance of dues by the establishment representatives, dues may be assessed and establishment may be directed to deposit the same.

It is also observed as under:

a) No Provident Fund or Pension Benefits to casual/ contract employees/ daily wagers

Large number of employees (641 employees) have been engaged by the establishment since long (since 2004) on Casual/ Contract/ daily wages basis in or in connection with the work of the establishment but these employees have not been extended social security benefits in form of Provident Fund or Pension i.e. the establishment does not have scheme for providing P.F. or Pension benefits to these employees. However, the regular employees of the establishment are enjoying the social security benefits. The establishment should have extended social security benefits to all these contractual/ daily wagers employees.

b) Applicability of the EPF & MP Act, 152 (sic 1952**)**

(i) There is no dispute to the fact that these employees are engaged by the establishment in connection with the work of the establishment and they fall under the definition of "employees" as per section 2f of the EPF & MP Act, 1952.

(ii) It would be worthwhile to reproduce section 16 of the EPF & MP Act, 1952 (quoted portion omitted)

(iii) In this regard, the department contends that Ministry of Labour, Government of India vide letter No. S-35025/15/88-SS-II Dated 8th January 1989 clarified regarding departmental undertakings and statutory bodies falling in the categories specified in Section 16(1)(b) and 16(1)(c) as under:-

"(iv) There may be establishments which employ large number of casual/ contingent staff, who are not entitled to the benefit of provident fund or pension. The casual/ contingent staff of such establishment will continue to be covered under the Act but their regular employees who are entitled to the benefit of provident fund/ pension should be excluded from the purview of the Act"

In the instant case large number of employees engaged by the establishment but they have not been

extended Provident Fund or Pension benefits to these employees.

(iv) In similar case of Himachal Pradesh Nagar Vikas Pradhikaran Vs. Regional Provident Fund Commissioner in C.W.P. No. 1930 of 1996, Hon'ble High Court of Himachal Pradesh, Shimla in its order dated 13th March 1997 observed w.r.t. section 16 of EPF & MP Act, 1952 as under:-

"13. It is very significant to note that the section does not stop with referring to any establishment belonging to or under the control of the Central Government or the State Government. There is a qualification in the section expressly mentioning that the employees thereof are entitled to the benefit of contributory provident fund or old-age pension in accordance with any scheme or rule framed under that Act by such Government.

In the absence of both the requirements being fulfilled up neither clause (b) nor clause (c) can be invoked. In the present case, admittedly, the petitioner does not have any scheme or rule by which the daily wagers employed by the petitioner are entitled to the benefit of contributory provident fund or old-age pension. In such circumstances, the petitioner cannot claim the benefit of section 16(1)(b) or (c).

14. The view expressed by the respondent in his order that the petitioner is not entitled to get exemption from the provisions of the Act is, therefore, correct.

(v) The establishment **M/s Chandra Shekhar Azad University of Agriculture & Technology, Kanpur** did raise the issue of applicability before Hon'ble High Court of Judicature at Allahabad and filed a Writ Petition No. Writ-C No.24264 of 2010. Hon'ble High Court vide order dated 03/05/2010 directed as under:-

"Feeling aggrieved by the letter dated 2.2.2010 issued by the Employees' Provident Fund Organization asking the petitioners to furnish certain informations detailed therein, the present writ petition has been filed.

Shri P.Padia, learned counsel for the petitioner submits that the provisions of Employees Provident Fund Act are not applicable to the petitioner-University.

Shri P.Padia, learned counsel for the petitioner submits that he will certainly submit the reply of the said letter Whether the provisions of the said Act are applicable or not will amount pre-judging of the issue at this stage. **The reply may be filed within a period of two weeks and the final decision may be taken after taking into consideration the reply filed by the petitioner shortly thereafter.**

The writ petition is pre mature as was rightly pointed out by Shri D.Singh, learned counsel for the respondent.

The petition is dismissed accordingly."

But as directed by Hon'ble High no such reply was filed by the establishment, **M/s Chandra Shekhar Azad University of Agriculture & Technology, Kanpur.**

(vi) During the course of Inquiry under section 7A of the Act, no question of applicability of EPF & MP Act, 1952 on the establishment was raised. Further during the inquiry no objection to departments report (taken on record as PWX-11/1/18) and quantification of dues was raised.

After affording sufficient, reasonable and ample opportunity, oorder

U/s 7A was passed on 08.02.2018 and the same was duly communicated to the establishment. The establishment duly authorized representatives neither had any objections to the dues assessed nor had any objections to the shifting back of coverage date. The issue of applicability has been appropriately dealt in the 7A order."

15. The remarks carried in the concluding portion of the impugned order, and also somewhere in the beginning to the effect that the application has not been submitted in the prescribed format, or within the statutory period of limitation, as well as those that say that the order dated 08.02.2018 passed under Section 7-A, has dealt with the petitioners' contention properly, approving that order would not lead to an inference that the order dated 12.04.2018 is an order that rejects the Review Application without reopening the case on merits. The order dated 12.04.2018 does a complete review of the petitioners' case on merits, without formally saying that the Review stands granted, and then proceeding to record those findings. This, in the opinion of this Court, would clearly bring the impugned order into that class which is envisaged under Section 7-B(5) of the Act; it is an order passed under review, to employ the phraselogy of the statute. Such an order is clearly appealable under sub-Section (5) of Section 7-B of the Act. The decision of the Delhi High Court relied upon by Sri Kartikeya Saran in **M/s. Bharat Polychem Ltd.** *(supra)* precisely says that, where it is held in paragraphs 8 and 9 of the report:

"8. The counsel for the respondents has contended that the order under Section 7A was appealable and the petitioner having not preferred appeal thereagainst, the same has attained finality. A perusal of Section 7B and particularly sub-section (5) thereof also shows that though no appeal lies against an order rejecting an application for review but appeal is permitted against an order passed under review as if the order passed under review were the original order under Section 7A.

9. A perusal of the order dated 16th March, 2007 shows that APFC literally reviewed the order dated 17th May, 2006 and reached a conclusion that there was no error as pointed out in the order dated 17th May, 2006. An appeal against such an order would lie under Section 7B(5) (supra). This writ petition is not maintainable for said reason."

(Emphasis by Court)

16. In this view of the matter, this Court finds and holds that the impugned order dated 12.04.2018 is appealable under Section 7-I of the Act. The impugned order dated 08.02.2018 is concededly so appealable.

17. In this view of the matter, against both orders, the petitioners have an equally efficacious alternative remedy by way of an appeal before the Tribunal under Section 7-I of the Act.

18. This writ petition is, accordingly, **dismissed on the ground of availability of an alternative remedy**. The sum of money deposited by the petitioners and invested in accordance with the interim order dated 24.01.2019, shall remain invested for a period of two months next. In case during the said period, an appeal is filed by the petitioners

to the Tribunal, the sum of money deposited as aforesaid, shall abide by further orders to be made by the Tribunal. In case no appeal is filed within said period of time, it shall be open to the respondent authorities to proceed in accordance with law. There shall be no order as to costs.

(2019)9ILR A1481

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 15743 of 2018

Amit Kumar Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Neeraj Kumar Rai, Umesh Pratap Singh

Counsel for the Respondent:
A.S.G., Ajay Kumar Pandey, P.K. Srivastava

A. Service law- Compassionate Appointment- BSNL- Scheme for grant of-is binding-father worked as phone mechanic-died-claim for compassionate appointment rejected-under clause 10(a) and 16(c) of the scheme, the competent authority was under obligation to consider the financial condition of the family-compassionate appointment cannot be claimed as a matter of rigt. Tribunal rightly dismissed claim petition in light of proven financial status of the family of the deceased.

B. While considering the application for compassionate appointment in the light of policies framed therein and judgments on this issue, the benefits received by the family on account of family welfare measures including family pension and death gratuity as well as income from other resources are required to be considered. (Para 12, 13,14)

Petition dismissed (E-6)

List of cases cited:

1. State of Himachal Pradesh and Anr.Vs. Shashi Kumar (2019) 3 SCC 653: (2019) 1 SCC (L&S) 542

2. Govind Prakash Verma Vs. LIC,(2005) 10 SCC 289:2005 SCC (L&S) 590

3. Umesh Kumar Nagpal Vs. State of Haryana, (1994) 4 SCC (L&S) 930

4. SBI Vs. Kunti Tiwarh, (2004) 7 SCC 271 : 2004 SCC (L&S) 943

5. Punjab National Bank Vs. Ashwini Kumar Taneja, (2004) 7 SCC 265: 2004 SCC (L&S) 938

6. SBI Vs. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92

7. Mumtaz Yunus Mulani Vs. State of Mah.,(2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077

8. Union of India Vs. Shashank Goswami, (2012) 11 SCC 307: (2013) 1 SCC (L&S) 51

9. SBI Vs. Surya Narain Tripathi, (2014) 15 SCC 739 : (2015) 3 SCC (L&S) 689

10. Canara Bank Vs. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539

11. M. Mahesh Kumar Vs. Canara Bank, 2003 SCC Online Ker 657 : (2003) 98 FLR 1030

12. SBI Vs. Jaspal Kaur, (2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578

(Delivered by Hon'ble Saurabh Lavania, J.)

1- Heard learned Counsel for the petitioner and learned Counsel for the respondents.

2- The petitioner has filed the present writ petition, for the following main reliefs:-

"1. To issue a writ, order or direction in the nature of certiorari thereby quashing the impugned judgment and order passed by the Central Administrative Tribunal dated 12.04.2017 and Rejection Order dated 23.07.2015 passed by O.P. No. 4 Assistant General Manager, Lucknow, contained Annexure No. 1 and 9 to the writ petition.

2. To issue a Writ, Order or Direction in the nature of Mandamus Commanding the Opp. Parties to consider the case of the petitioner for Appointment under Scheme for Compassionate Appointment dated 09.10.1998, in the interest of Justice."

3- The brief facts of the case are that father of the petitioner was working in Bharat Sanchar Nigam Ltd. on the post of Phone Mechanic. On 15.07.2005, the father of the petitioner died and the petitioner moved an application dated 23.02.2006 for compassionate appointment before the General Manager Telicom, BSNL, Faizabad and the same was forwarded to the Chief General Manager, Telecom, U.P. (East) Circle, Lucknow. Thereafter, vide letter/order dated 21.01.2018, the High Power Committee rejected the application of the petitioner for compassionate appointment. Thereafter, aggrieved by the said order dated 21.01.2018, the petitioner filed the Original Application No. 404 of 2009 before the Central Administrative Tribunal (in short "Tribunal") and the same was allowed by the order dated 06.05.2011. The Tribunal directed the opposite parties to consider the case of the petitioner afresh in view of Circular dated 09.10.1998. The relevant portion of the order dated 06.05.2011, is reproduced below:-

" Finally, therefore, in view of the aforesaid facts and circumstances, this O.A. deserves to be and is accordingly allowed. The impugned order dated 21.1.2008 (Annexure -1) alongwith minutes of the High Power Committee dated 11.12.2007 passed by the respondent authorities, so far it relates to the applicant, are hereby set aside. The respondents are directed to consider the case of the applicant afresh in view of the relevant O.M./circulars which were in force at the relevant time, ignoring the subsequent circular letter dated 27.06.2007 which cannot have retrospective effect. As the matter is already become quite old, it is desirable that this matter is finalized within a reasonable period say within 6 months from the date of certified copy of this order is produced by the applicant to the respondents. No order as to costs."

4- Thereafter, the order dated 06.05.2011 passed by the Tribunal in O.A. No. 404 of 2009 , was challenged by the opposite parties by filing Writ Petition No.1877(SB) of 2011 (Bharat Sanchar Nigam Ltd. Versus Amit Kumar Singh) and the same was also dismissed by this Court vide order dated 03.11.2011, which reads as under:-

"We have heard learned counsel for parties and perused the pleadings of writ petition.

Learned counsel for petitioner, Bharat Sanchar Nigam Limited, submitted that the direction to reconsider the case of respondent as given vide the impugned order is contrary to a judgment

of Hon'ble the Apex Court reported in 2007 (1) ESC 66 (SC) (State Bank of India & Others vs. Jaspal Kaur) which has laid down the ratio that unless the financial condition is entirely penury, compassionate appointment cannot be made. In the said case, the financial condition of the applicant was not found to be one of destitution and besides the Bank had already paid a sum of Rs. 4,57,607.00 as terminal benefits apart from payment of a pensionary benefit of Rs. 2055/- per month.

On a careful consideration of rival submissions, we do not find any merit in the case for the reason that the Tribunal has only directed the Corporation to reconsider the case of the respondent and has not issued any direction to give appointment on compassionate ground.

Thus, the Writ Petition is dismissed."

5- Thereafter, the opposite parties challenged the order of this Court dated 03.11.2011 by filing Special Leave Petition (C) No. 13043 of 2012 and the same was dismissed vide order dated 18.02.2015. Thereafter, the petitioner, in relation to appointment on compassionate ground, submitted the representation before the concerned authorities alongwith the orders of this Court, but no action was taken by them. Thereafter, the petitioner filed Contempt Petition No. 58 of 2015 before the Tribunal and thereafter the opposite party no. 4 rejected the representation/application of the petitioner by its order dated 23.07.2015.

6- Aggrieved by the order dated 23.07.2015, the petitioner preferred a claim petition O.A. No. 475 of 2015 under Section 19 of Administrative Tribunal Act 1985, before the Tribunal, with the following reliefs:-

"1. Issuing/passing of an order or direction setting aside the impugned decision dated 23.07.2015 passed by the respondent No. 4 communicated vide letter/order dated 04.08.2015, issued by the respondent No. 3 (as contained in Annexure No. A-1), after summoning the original records.

2. Issuing/passing of an order or direction to the respondents to consider the case of the applicant afresh for appointment on compassionate grounds and to appoint the applicant on any post according to his eligibility and educational qualification, etc. within a period of two months."

7- Tribunal after considering the pleadings given by the learned Counsel for the parties and on the material on record, vide order dated 12.04.2017,dismissed the claim petition . The relevant portion of the order dated 12.04.2017, is reproduced below:-

"15. After taking into consideration the rival submissions of the parties, this Tribunal is of the view that this petition lacks merit and liable to be dismissed on following grounds:

(i) that the applicant's family received the terminal benefits of approximately six lakh coupled with family pension of more than three thousand per month apart from D.A. (ii) the fact that the income from the cultivation is Rs. 3000/- per month has not been rebutted and the same was based on the report of Revenue Authorities i.e. SDE (HRD) Faizabad. Same was also reflected in the income certificate issued by the Tehshildar, Amdbedkarnagar.

(iii) the applicant's family purchased a house as is evident from the report after the death of the deceased employee.

(iv) both the sons are major and the applicant is residing in a rented accommodation near township of NTPC, Ambedkarnagar on monthly rent of Rs. 2500/- which shows that the applicant has sufficient means to survive and the family cannot be said to be living in penurious condition.

(v) that the entire agricultural land which has been shown in extract Khatoni is not the same but has been shown as only 0.5 acres.

(vi) that the property possessed and shown in the inspection report has not been specifically denied and rejoinder has been filed by simply denying the allegation. Due to evasive denial the facts pleaded in CA amounts to be admitted by the applicant.

16. In view of the above, the O.A. sans merit and is accordingly dismissed. There shall be no order to cost."

8- Assailing the orders impugned, the learned Counsel for the petitioner submits that the concerned authorities and Tribunal, both, rejected the claim of the petitioner for compassionate ground after considering the terminal/pensionary benefits received, on account of death of his father, by the family of the petitioner, income from agricultural and other aspect and as such Tribunal as well as concerned authorities erred in law and fact both, as the reasons of rejection of claim of the petitioner for appointment on compassionate ground are beyond the scope of scheme of compassionate appointment dated 09.10.1998 (in short "Scheme of 1998") (Annexure No. 10 to the writ petition). The reasons for rejection of claim of the petitioner for compassionate appointment cannot be taken into account as per Scheme of 1998.

9- Per contra, the learned Counsel for the respondents submitted that the reasons considered while rejecting the claim of the petitioner for compassionate appointment can be taken into account, as per Scheme of 1998. Thus, there is no illegality in the order dated 12.04.2017 of the Tribunal as well as order 23.07.2015 passed by respondent no. 4.

10- We have considered the submissions of learned Counsel for the parties and perused the records.

11- We find from Scheme of 1998 (Annexure No. 10 to the writ petition), particularly Clause 10(a), 16(c), that while considering the case for providing compassionate appointment, the competent authority is under obligation to consider the financial condition of the family. Clause 10(a) and 16(c) are quoted herein under for ready reference:-

"10(a) In deserving cases even where there is already an earning member in the family, a dependent family member may be considered for compassionate appointment with prior approval of the Secretary of the Department/Ministry concerned who, before approving such appointment, will satisfy himself that grant of compassionate appointment is justified having regard to number of dependents, assets and liabilities left by the Government Servant, income of the earning member as also his liabilities including the fact that the earning member is residing with the family of the Government Servant and whether he should not be a source of support to other members of the family.

16 (c) The Scheme of compassionate appointments was conceived as far back as 1958. Since then a number of welfare

measures have been introduced by the government which have made a significant difference in the financial position of the families of the Government Servants dying in harness/retired on medical grounds. An application for compassionate appointment should, however, not be rejected merely on the ground that the family of the Government Servant has received the benefits under the various welfare schemes. While considering a request for appointment on compassionate ground a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family, ages of the children and the essential needs of the family, etc.

12- In the facts of the case we would like to refer the judgment of the Hon'ble Apex Court passed in the case of **State of Himachal Pradesh and Another Versus Shashi Kumar, reported in (2019) 3 SCC 653: (2019) 1 SCC (L&S) 542**.

The Hon'ble Apex Court after considering the policy of compassionate appointment and relevant judgments on the issue, held that benefits received by family on account of welfare measures including family pension and death gratuity as well as income from other resources are required to be considered. The Hon'ble Apex Court further held that there is no right to compassionate appointment. The terms of policies framed for providing compassionate appointment must be implemented. The relevant paragraphs of the judgment are as under:-

"18. While considering the rival submissions, it is necessary to bear in mind that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. Dependants of a deceased employee of the State are made eligible by virtue of the policy on compassionate appointment. The basis of the policy is that it recognises that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. Where the authority finds that the financial and other circumstances of the family are such that in the absence of immediate assistance, it would be reduced to being indigent, an application from a dependent member of the family could be considered. The terms on which such applications would be considered are subject to the policy which is framed by the State and must fulfil the terms of the policy. In that sense, it is a well-settled principle of law that there is no right to compassionate appointment. But, where there is a policy, a dependent member of the family of a deceased employee is entitled to apply for compassionate appointment and to seek consideration of the application in accordance with the terms and conditions which are prescribed by the State.

19. The policy in the present case which was formulated on 18-1-1990 categorically speaks of providing employment assistance to dependants of government servants who have died while in service, "leaving their families in indigent circumstances". The policy, in other words, is designed to meet the needs

of those families where the death of a government servant has left them in indigent circumstances, requiring immediate means of subsistence. The policy recognises in Para (10) that the benefits which are received by a family on account of welfare measures are required to be considered. Among them, the policy stipulates that family pension and death gratuity are required to be taken into account in assessing the financial circumstances of the family. The policy does not preclude the dependants of a deceased employee from being considered for compassionate appointment merely because they are in receipt of family pension. What the policy mandates is that the receipt of family pension should be taken into account in considering whether the family has been left in indigent circumstances requiring immediate means of subsistence. The receipt of family pension is, therefore, one of the considerations which is to be taken into account. Para (10)(c) of the policy sets out the measures provided by the State which have a bearing on the financial need of the family.

20. In view of the clear terms of the policy, we are of the view that the High Court was in error in issuing a mandamus to the Government to disregard its policy. Such direction could not have been issued by the High Court. The High Court has drawn sustenance in issuing a mandamus in the above terms from a decision of this Court in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** . That was a case of compassionate appointment where in the course of the proceedings before the High Court, a learned Single Judge had directed Life Insurance Corporation, which was the employer of the deceased employee, to make an enquiry and submit a report on whether the members of the family engaged in gainful employment were also supporting the family of the deceased employee. This Court, in an appeal against the judgment of the High Court rejecting the petition for compassionate appointment, observed that the officer who had enquired into the matter in pursuance of the order of the learned Single Judge completely omitted to furnish any report on the points which were required by the High Court to be investigated. The High Court rejected the petition on the ground that the family was in receipt of family pension and other amounts towards terminal benefits. Reversing the view of the High Court, a two-Judge Bench of this Court held thus: (Govind Prakash Verma case **[Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] , SCC p. 291, para 6)**

"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules."

21. The decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** 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 non-manual 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."

22. Specifically in the context of considering the financial circumstances of the family of the deceased employee, several judgments of this Court have elaborated on the principles to be followed.

23. The decision in **SBI v. Kunti Tiwary [SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943]** involved an interpretation of an Office Memorandum dated 7-8-1996 circulated to all banks in the light of the decision in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** . The Indian Banks Association adopted the directions of this Court in the scheme which was proposed for the appointment of heirs of deceased employees. The scheme contemplated that in order to determine the financial condition of the family, the following amounts would have to be taken into account: (Kunti Tiwary case **[SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943] , SCC p. 273, para 7**)

"7. ... (a) Family pension.

(b) Gratuity amount received.

(c) Employee's/Employer's contribution to provident fund.

(d) Any compensation paid by the Bank or its Welfare Fund.

(e) Proceeds of LIC policy and other investments of the deceased employee. (f)

Income of family from other sources.

(g) Employment of other family members.

(h) Size of the family and liabilities, if any, etc."

Eventually, this recommendation was accepted in the scheme. In the light of these recommendations and the scheme, this Court observed that where the family of a deceased employee was not left without means of livelihood, the claim for compassionate appointment could not be sustained. It may be noted that in that case it was on a review of the overall financial position of the family, including amounts received towards terminal benefits that the decision was taken.

24. The decision of this Court in **Punjab National Bank v. Ashwini Kumar Taneja [Punjab National Bank v. Ashwini Kumar Taneja, (2004) 7 SCC 265 : 2004 SCC (L&S) 938**] followed the same principle. While reiterating the view which was taken in **Kunti Tiwary [SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943]** , this Court held that the scheme specified the amounts which were required to be taken into consideration.

25. The decision in **SBI v. Somvir Singh [SBI v. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92**] has noticed the scheme for appointment of dependants of deceased employees on compassionate grounds framed by State Bank of India. The Court expressly held that the authorities were not in error in taking account of the terminal benefits, investments and the monthly family income including the family pension paid by the Bank. The view of this Court finds expression in the following extract: (SCC p. 784, para 12)

"12. The competent authority while considering the application had taken into consideration each one of those factors and accordingly found that the dependants of the employee who died in harness are not in penury and without any means of livelihood. The authority did not commit any error in taking the terminal benefits and the investments and the monthly family income including the family pension paid by the Bank into consideration for the purposes of deciding as to whether the family of late Zile Singh had been left in penury or without any means of livelihood. The scheme framed by the appellant Bank in fact mandates the authority to take those factors into consideration. The authority also did not commit any error in taking into

consideration the income of the family from other sources viz. the agricultural land."

In the view of this Court, the only issue to be considered was whether the claim for compassionate appointment had been considered in accordance with the scheme. The income of the family from all sources was required to be taken into consideration according to the scheme. This having been ignored by the High Court, the appeal filed by the Bank was allowed.

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.

27. In **Union of India v. Shashank Goswami [Union of India v. Shashank Goswami, (2012) 11 SCC 307 : (2013) 1 SCC (L&S) 51]** , this Court considered a circular issued by the Office of the Comptroller and Auditor General of India in terms of which the total income of the family from all sources, including terminal benefits received, was required to be taken into account. Income limits were specified in the circular for Group "B', Group "C' and Group "D' posts. Taking note of the fact that a family pension has been authorised to the widow of the deceased employee, this Court held that the case of the dependant did not fall within the income limits meant for Group "C' posts.

28. The same principle has been reiterated in another decision of a Bench of two Judges of this Court in **SBI v. Surya Narain Tripathi [SBI v. Surya Narain Tripathi, (2014) 15 SCC 739 : (2015) 3 SCC (L&S) 689]** . While adverting to a submission of the learned counsel based on the decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** , this Court noted thus: (Surya Narain Tripathi case **[SBI v. Surya Narain Tripathi, (2014) 15 SCC 739 : (2015) 3 SCC (L&S) 689] , SCC p. 741,** paras 8-9)

"8. He relied upon the judgment of this Court in **Govind Prakash Verma v. LIC [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590**] where a view has been taken that the compassionate appointment cannot be refused on the ground that another member of the family had received appropriate employment and the service benefits were adequate. We may humbly state that this view runs counter to the view which was taken earlier in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** which was not cited before the Court in **Govind Prakash [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] .** The subsequent two judgments which were referred above also take the same view as in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930**] . Mr Vikas Singh

has drawn our attention to the judgment in **SBI v. Somvir Singh [SBI v. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92]** where the 1998 Scheme has been considered.

9. In all the matters of compassionate appointment it must be noticed that it is basically a way out for the family which is financially in difficulties on account of the death of the breadearner. It is not an avenue for a regular employment as such. This is in fact an exception to the provisions under Article 16 of the Constitution. That being so, if an employer points out that the financial arrangement made for the family subsequent to the death of the employee is adequate, the members of the family cannot insist that one of them ought to be provided a comparable appointment. This being the principle which has been adopted all throughout, it is difficult for us to accept the submission made on behalf of the respondent."

29. Now, it is in this background that it would be necessary to advert to the decision in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539]** . A scheme for compassionate appointment of 8-5-1993 was prevalent in Canara Bank when the employee died on duty in October 1998. Faced with the rejection of an application for compassionate appointment, the High Court was moved in a writ petition in which a learned Single Judge issued [**M. Mahesh Kumar v. Canara Bank, 2003 SCC OnLine Ker 657 : (2003) 98 FLR 1030]** a direction for reconsideration of the claim for appointment. During the pendency of the appeal before the Division Bench, the scheme for compassionate appointment was replaced by a new scheme providing for ex gratia in lieu of appointment. The main issue which fell for consideration before this Court was whether the subsequent scheme which was formulated in 2005 providing for ex gratia payment would govern or whether the application would have to be disposed of on the basis of the earlier scheme of 1993. It may be noted that the application for compassionate appointment in that case had been rejected on the ground that the family of the respondent was not in indigent circumstances, as required by the scheme for compassionate appointment of 1993.

30. Dealing with the applicability of the subsequent scheme, a Bench of two Judges of this Court held, following the earlier decision in **SBI v. Jaspal Kaur [SBI v. Jaspal Kaur, (2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578]** , that the cause of action to be considered for compassionate appointment arose when the earlier scheme was in force. Hence, the claim could not be decided on the basis of the subsequent scheme which provided only for the payment of ex gratia. Moreover, as a matter of fact, the subsequent scheme was superseded in 2014 by reviving the scheme for the provision of compassionate appointment.

31. Hence, the issue which has been dealt with in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539]** is whether the application for grant of compassionate appointment could have been rejected on the basis of a scheme which had come into force after the date of submission of the application. That, as this Court observed, was the main question which fell for consideration. The Bench of two Judges, however, also noted that it was urged on behalf of the appellant Bank that the family of the respondent was in receipt of family pension. This, the Court

held, was of no consequence in considering the application for compassionate appointment.

32. The learned Senior Counsel appearing on behalf of the appellants has sought to distinguish the above observations, in the judgment in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539] ,** by submitting that it is not the case of the State of Himachal Pradesh that mere receipt of family pension would disable an applicant from submitting an application for compassionate appointment or preclude consideration of the claim. On the contrary, the submission which is urged is that the scheme requires consideration of all relevant sources of income and hence, receipt of family pension would be one of the criteria which would be taken into consideration in determining as to whether the family of the deceased employee is in indigent circumstances. We find merit in this submission for the simple reason that it is in accord with the express terms of the scheme of 18-1-1990 as modified by the State. The scheme contemplates that payments which have been received on account of welfare measures provided by the State including family pension are to be taken into account. Plainly, the terms of the scheme must be implemented.

33. For these reasons, we have come to the conclusion that the High Court was not justified, based on the decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** in issuing a direction to the State to act in a manner contrary to the express terms of the scheme which require that the family pension received by the dependents of the deceased employee be taken into account."

13- Learned Counsel for the petitioner could not point out any other good reason or ground to establish that the reasoning given by the Tribunal and respondent no. 4, while rejecting the claim of the petitioner, is unjustified and illegal.

14- Keeping in view the provision of the scheme of 1998 and the observations made by the Hon'ble Apex Court in the judgment passed in the case of **State of Himachal Pradesh(Supra)**, we hold that there is no illegality in the order dated 12.07.2017 passed by the Tribunal and order dated 23.07.2015 passed by respondent no. 4. For the aforesaid reason, we do not find a fit case for interference.

15- The petition is misconceived and hence dismissed accordingly.
