THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

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

2020 - VOL. VIII
(AUGUST)

PAGES 1 TO 676

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

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(2020)08ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.07.2020

BEFORE
THE HON'BLE PANKAJ JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Special Appeal Defective No. 187 of 2020

State of U.P. & Ors. ...Appellants
Versus
Vikash Kumar Singh & Ors. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Mukund Tewari

A. Service Law - U.P. Government Servant Relaxation and Qualification Service for Promotion Rules, 2006 - Rule 4 - U.P. Service & Engineers (Irrigation Department) (Group- A) Services Rules 1990 - Rule 5(III), 8(II) - U.P. Promotion by Selection (on the posts outside the purview of Public Service Commission) Eligibility Rules, 1986 - Rule 2, 4 - U.P. Government Servant Relaxation in Qualifying Service for Promotion (First Amendment) Rules, 2013 - Rule 4

According to Rule 5(III) of the 1990 Rules the petitioners partially qualifies for the promotion on the post of Chief Engineer (Civil) (Level-II) from the post of Superintendent Engineer. The qualifying service as provided can be relaxed. The Rule 2006 has an overriding effect over Rule 1990 and Rule 1986 in order to select the most meritorious candidate after evaluating their comparative merit on the basis of annual entries for the last 10 years. The whole purpose of enacting the Rules 2006 is to provide relaxation in qualifying in service in order to select the most meritorious candidates amongst the larger number of candidates. Thus the Court uphold the Single judge's order directing for inclusion of the names of the respondents in the eligibility list or else the entire purpose of the Rules 2006 shall be defeated. (Para 24)

Special Appeal Rejected. (E-10)

List of cases cited: -

1. Keshav Chandra Joshi & ors. Vs U.O.I. & ors. (1992) Supll SCC 272

2. Suraj Prakash Gupta & ors. Vs St. of J. & K. & ors. 2007 SCC page no. 561 *(distinguished)*

3. Rajendra Kumar Aggarwal Vs. St. of U.P. & ors. (2015) 1 SCC 642

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

C.M.A. No. 39966 of 2020

1. Heard Shri Manjive Shukla, learned Additional Chief Standing Counsel and Shri Mukund Tewari, learned counsel for respondents on the delay condonation application.

2. The present special appeal is barred by 177 days.

3. Shri MukundTewari, learned counsel for respondents has very fairly submitted that he has no objection if the delay in filing the appeal is condoned.

4. On due consideration, we find that the delay has been sufficiently explained and therefore, the application for condonation of delay is allowed.

Re:- Special Appeal

1. Heard Shri Manjive Shukla, learned Additional Chief Standing Counsel and Shri MukundTewari, learned counsel for respondents.

2. The present appeal has been filed by the appellant against the judgment and order dated 11.12.2019 passed in Writ Petition No. 14962 (S/S) of 2019.

3. The petitioner/respondent no. 1 to 6 were directly appointed as Assistant Engineer (Civil) Department of Irrigation and Water Resources on 08.10.1999 in consultation with the Uttar Pradesh Public Service Commission, Allahabad and they have placed at serial no. 2417,2420, 2421, 2424, 2432 and 2436 respectively in the eligibility list.

4.Thereafter the petitioners/respondent no. 1 to 6 on 24.05.2012 were regularly promoted as Executive Engineer (Civil) in the Department of Irrigation and Water Resources and subsequently in the year 2017 they were regularly promoted as Superintending Engineer (Civil) by granting relaxation in the qualifying service under the U.P. Government Servant Relaxation and Qualifying Service for Promotion Rules, 2006 (hereinafter referred to as Rules 2006).

5. Rule 5(III) of the Uttar Pradesh Services and Engineers (Irrigation Department) (Group-A) Services Rules 1990 (hereinafter referred to as the Rules 1990) reads as under:-

"Rule 5 (iii) Chief Engineer, Civil or Mechanical-Level II.-By promotion from amongst the substantively appointed Superintending Engineers in the Civil or Mechanical Branch, as the case may be, who have completed twenty-five years' service (including at least three years' service as Superintending Engineer) on the first day of the year of recruitment;

That the above rule provides that promotion to the post of Chief Engineer (Civil) (Level-II) is to be made by promotion from amongst substantively appointed Superintendent Engineers who have completed **25 years of service** including one year of service as Superintending Engineer.

Rule 8(II) of the Rules 1990 reads as under:-

(2) Recruitment to the post of Cheif Engineer-Level-II, Chief Engineer-Level-1 and the Engineer-in-Chief shall be made on the basis of merit through a Selection Committee comprising:-

(i) Chief Secretary to the Government..... Chairman.

(ii) Secretary to the Government in Personnel

Department ..... Member.

(iii) Secretary to the Government in Irrigation Department ..... Member."

That the above rule provides that the promotion to the post of Chief Engineer Level-II shall be made on the basis of merit through a selection committee.

"Rule 8 (3) The appointing authority shall prepare an eligibility list of the candidates in accordance with the Uttar Pradesh Promotion by Selection (on posts outside the purview of the Public Service Commission) Eligibility List Rules, 1986 and place the same before the Selection Committee along with their character rolls and such other record pertaining to them, as may be considered proper."

According to the aforesaid rule, the appointing authority shall prepare an eligibility list in accordance with U.P. Promotion by Selection (on the posts outside the purview of Public Service Commission) Eligibility Rules, 1986 (hereinafter referred to as the Rules 1986) and place the same before the selection committee along with their character rolls and such other record pertaining to them as may be considered properly.

Rule 2 of the Rules 1986 provides that the rules shall have overriding effect

notwithstanding anything contrary contained in any other rules or orders. The said rule 2 of the Rules 1986 reads as under:-

2.Overriding effect:- These rules shall have effect notwithstanding anything to the contrary contained in any other rules or orders.

Rule 4 of the Rules 1986 provides that where the criteria for promotion is merit, the appointing authority shall prepare a list of senior most candidates containing as far as possible, three times the number of vacancies subject to a minimum of eight. Rule 4 of the Rules 1986 reads as under:-

"Rule 4. Preparation of eligibility list where the criteria is merit.- Where the criteria for promotion is merit, the appointing authority shall prepare a list of the senior most candidates containing names as far as possible, three times the number of vacancies subject to the minimum of eight"

6. In the year 2006, the Rules 2006 have come into effect and rule 4 of the Rules 2006 provides for relaxation in the qualifying service. The said rule 4 of the Rules 2006 reads as under:-

"Rule 4. Relaxation in qualifying service.- In case a post is filled by promotion and for such promotion a certain minimum length of service is prescribed on the lower post or posts, as the case may be, and the re3quired number of eligible persons are not available in the field of eligibility, such prescribed minimum length of service may be suitably related up to fifty percent by the government in the Administrative Department in consultation with Personnel Department of the Government, excluding the period of probation as lid down for the said lower post or posts, as the case may be."

According to the aforesaid rule 4 of the Rules 2006 in case a post is to be filled by promotion and for such promotion a certain minimum length of service is prescribed on the lower post or posts, as the case may be, and the required number of eligible persons are not available in the field of eligibility, such prescribed minimum length of service may be suitably relaxed up to fifty percent by the government excluding the period of probation.

7. In the year 2013, U.P. Government Servant Relaxation in Qualifying Service for Promotion (First Amendment) Rules, 2013 have come into force which provides in rule-4 that in the special circumstances relaxation can be granted beyond fifty percent in case a justification is made out. The aforesaid rule 4 reads as under:-

"(1) if in special circumstances, the Administrative Department finds out the justification of granting more than fifty percent relaxation in the minimum length of service prescribed on the lower post or posts as the case may be, for promotion, then in such situation a proper proposal shall be submitted by the Administrative Department through the Personnel Department before the Committee constituted as follows:

8. The government order dated 20.11.2017 (page no. 112-113) which has been issued in pursuant to the various judgments of the Supreme Court provides that in case where the criteria of promotion is merit, the appointing authority shall consider the cases of all candidates and select the most meritorious candidates after

considering the comparative merit on the basis of their annual entries of last 10 years.

9. The number of vacancies has been determined as 26 for the post of Chief Engineer (Civil) and hence, as per the Rules 1996, a total of 78 Superintending Engineers (Civil) should have been eligible for being considered for promotion to the post of Chief Engineer for which the criteria of promotion is merit.

10. For recruitment year 2018-19 on 23.07.2018 an eligibility list of 74 Superintending Engineers (Civil) was prepared and in the list the names of the petitioners/respondent no. 1 to 6 was at serial no. 60, 63, 64, 67, 72 and 74 with a note appended at the bottom stating that the petitioners do not complete 25 years of service on the post of Assistant Engineer (Civil) and it would be necessary to grant relaxation in minimum qualifying service.

11. A revised eligibility list was again prepared on 07.03.2019 for the recruitment year 2018-19 of 59 Superintending Engineers (Civil) by the opposite parties excluding the names of the petitioners as they were not completing 25 years of service on the post of Assistant Engineer (Civil). Thereafter again on 18.03.2019 a revised eligibility list for recruitment year 2018-19 of 44 Superintending Engineers (Civil) was prepared by the opposite parties excluding the names of the petitioners and lastly on 10.05.2019 another revised eligibility list of 41 Superintending Engineers (Civil) was prepared excluding the names of the petitioners/respondent no. 1 to 6.

12. Aggrieved by the exclusion of their names from the eligibility list, the petitioners/respondent no. 1 to 6 have assailed the eligibility lists dated 18.03.2019 and 10.05.2019 of the Superintending Engineers (Civil) for promotion to the post of Chief Engineer (Civil) Level-II in the Department of Irrigation and Water Resources by filing the writ petition.

13. The learned single judge after hearing the parties found that eligibility lists dated 08.03.2019 and 10.05.2019 of Superintending Engineers (Civil) for promotion to the post of Chief Engineer (Civil) Level-II of the department are arbitrary and cannot be sustained and hence quashed both the eligibility lists and a further writ of mandamus was issued commanding the competent authority to prepare the eligibility list of Superintending Engineers (Civil) including the names of the petitioners/respondent no. 1 to 6 for promotion to the post of Chief Engineer (Civil)(Level-II) granting them relaxation in minimum length of service in accordance with the Rules 2006 as amended in the year 2013.

14. A further writ of mandamus was issued commanding the opposite parties to consider the case of the petitioners/respondent no. 1 to 6 for promotion to the post of Chief Engineer (Civil) Level-II in accordance with the Rules 1990 and office circular dated 22.03.1984 as amended by Government Order dated 20.11.2017.

15. Learned counsel for the appellants submits that granting relaxation in the required minimum length of service is an executive function of the State and the said relaxation is given by the State Government after considering each and every aspect as per the provisions of the Rules 2006.

16. It is next contended that learned Writ Court ought to have directed the State Government to consider the case of the petitioners/respondent no. 1 to 6 for grant of aforesaid relaxation which is an executive function rather issuing a writ of mandamus commanding the State Government to include the names of the petitioners/respondent no. 1 to 6 by granting them relaxation under the Rules 2006.

17. Learned counsel for the appellants further submits that it is a settled preposition of law that the writ court cannot take any decision which otherwise is to be taken by the executive authority under the provisions of statutory service rules.

18. It is next contended that where the criteria for promotion is merit, the eligibility list shall be prepared in the ratio of 1:3 as far as possible, subject to minimum of eight. The language of the rule is very clear that it is not necessary for all the time to prepare the eligibility list in the ratio of 1:3 as legislature has used words "as far as possible".

19. Learned writ court has taken a view that under rule 4 eligibility list has to be prepared in the ratio of 1:3 and no deviation is possible. He has further submitted that after perusing rule 4 of the Rules 1986 it is evident that intention of the legislature is very clear and discretion lies in the hands of appointing authority. He also submits that the language used in rule 4 of the Rules 2006 enabling provision for the State Government and a government servant cannot claim relaxation in the minimum length of service as a matter of right. It is the discretion of the State Government to use it or not. Therefore, the view taken by the learned single judge that in every case of promotion the State Government has a mandate under the Rules 1986 to prepare the eligibility list in the ratio of 1:3 whereas the legislature has used words "as far as possible" and hence, the view taken by the learned Single Judge is not sustainable in the eyes of law.

20. Lastly it has been submitted that the State Government is not bound to take recourse of rule 4 of the Rules 2006 in every case of promotion.

21. Learned counsel for the appellants has relied on the judgment in support of his arguments reported in ***"(1992) Supl1 SCC 272 Keshav Chandra Joshi and others Vs. Union of India and others".*** He further has relied on the judgment reported in ***"2007 SCC page no. 561*** Suraj Prakash Gupta and others Vs. State of Jammu and Kashmir and others".

22. Per contra learned counsel for the petitioners/respondent no. 1 to 6 has made following submissions:-

That the criteria for promotion for the post of Chief Engineer (Civil) Level-II is merit on the basis of evaluation of annual entries for the post of last 10 years, hence, eligibility list should contain the candidates thrice the number of vacancies as provided in the Rules 1986.

That the qualifying service provided in rule-5(III) of the Rules 1990 is not essential requirement for promotion to the post of Chief Engineer (Civil) Level-II and it ought to be released under the Rules 2006 as it has overriding effect over the Rules 1990 and only the annual entries of past ten years are to be looked into for the purposes of promotion.

That the Rules 1986 is mandatory in nature and has overriding effect over the

Rules 1990 and therefore, the eligibility list should contain the names three times the number of vacancies as the criteria for promotion is merit because the most meritorious candidates is to be selected after evaluating their comparative merit list.

That the expression used in the Rules 1986 "as far as possible" means to the largest possible extent or to the maximum limit which can put into effect by granting relaxation in qualifying rules under the Rules 2006 while considering for promotion as the criteria is merit.

That the Rules 1986 provides that the eligibility list should contain a minimum of eight candidates which means that where the criteria for selection is merit, the eligibility list cannot have less than eight candidates even if the selection is for a single post and it cannot mean that for 26 posts of Chief Engineers an eligibility list for eight candidates can be prepared.

That the Rules 2006 has been framed with a view to provide relaxation in qualifying service so as to select the most meritorious candidates from a large number of candidates.

That the purpose of enacting the Rules 2006 would be defeated in case suitable candidates are not included in the eligibility list by providing relaxation in qualifying service as provided under the Rules 1986 for being considered for promotion where the criteria for promotion is merit.

That the State Government cannot have any grievance in case the selection of the most meritorious candidates is made from the large number of candidates, especially in view of the fact that the Rules 2006 has been enacted to grant relaxation in qualifying service in case the adequate number of candidates are not available for being considered for promotion.

It is submitted that it is not the discretion of the State Government to invoke the Rules 2006 as and when it pleases because the rule is mandatory and has overriding effect over the Rules 1990.

That the State Government cannot act arbitrarily by denying to invoke the Rules 2006 because the respondents have been given the benefit of relaxation in qualifying in service on the post of executive engineer when they were granted promotion on the post of Superintending Engineer in the Department of Irrigation.

Lastly it is submitted that names of the respondents were initially included in the eligibility list dated 23.02.2018 but were excluded in the subsequent eligibility lists dated 07.03.2014, 18.03.2019 and 10.05.2019 in violation of the Rules 1990, the Rules 1986, and the G.O. dated 20.11.2017, therefore, the eligibility lists have been rightly set aside by the learned Single Judge and direction to prepare the fresh eligibility list containing the names of the petitioner/respondent no. 1 to 6 is just, valid and proper.

He has relied on the judgment passed by the Apex Court reported in ***"2015 (1) SCC 642 Rajendra Kumar Aggarwal Vs. State of U.P. and others"***

23. Having heard learned counsel for the parties and after perusal of the record, we have noticed that the learned writ court while passing the judgment has given elaborate findings after going through each and every aspect of the relevant rules. The relevant paragraph of the order dated 11.12.2019 reads as under:-

"The question for consideration before this Court is that as to whether while preparing the eligibility list as per Rule 8 (3) of the Rules, 1990 for making promotion as per Rule 5 (iii) of Rule 1990

the modality so prescribed under Rule 4 of the Rules, 1986 may be ignored on the pretext of length of service when Rule 4 of Rules, 2006 as amended in 2013 categorically mandates that length of service may be relaxed up to 50% and even beyond 50% by the State Government if the required number of candidates are not available.

Admittedly, there are two conditions for making promotion on the post of Chief Engineer from the post of Superintending Engineer under Rule 5(iii) of 1990 Rules. First, the candidate must be substantively appointed Superintending Engineer and have completed one year service as Superintending Engineer and second, those have completed 25 years service as Assistant Engineer.

The petitioners have fulfilled first condition but are not qualifying second condition i.e. length of service of 25 years as Assistant Engineer.

Rule 8 (3) of the Rules, 1990 categorically provides that eligibility list shall be prepared as per Rules 1986. Rule 4 of 1986 Rules provides that the eligibility list shall be prepared three times the number of vacancies as far as possible, meaning thereby the department must have option to select the best Superintending Engineer as the criteria for said promotion is merit, therefore, unless the department gets ample option applying criteria of 1:3 in preparing the eligibility list, the best meritorious candidates may not be selected. Therefore, in the present case earlier the select list of 74 was prepared which was near to 78 for the total number of vacancy is 26 and applying the ratio of 1:3 at least 78 candidates should be there in the select list. Thereafter various revised select lists have been prepared decreasing the number of candidates in the select list from 59 to 44 to 41. Now as per the final revised gradation list 26 Chief Engineers, Level II are to be promoted amongst the select list of 41 persons and if in the meantime some Superintendent Engineers retire or relinquishes the job for any reason, the select list would be narrowed and in that case the proper selection on the basis of merit strictly as per the wish of the legislators may not be achieved. Admittedly, to meet out such situation Rules, 2006 have come into being providing relaxation in qualifying service which has been amended in the year 2013 and the admitted legal position is that the minimum length of service may be relaxed beyond 50% as per amended Rules, 2013.

Undisputedly, the State Government invokes such provision of relaxation to meet out these peculiar circumstances. Even in the case of the petitioners when they were promoted on the post of Superintending Engineer they were given relaxation in length of service rendered as Assistant Engineer.

As discussed above the State Government issued a Government Order dated 20.11.2017 amending its earlier office order / circular dated 22.3.1984 laying down that where the criteria for promotion is merit the most meritorious officers have to be selected after evaluating the comparative merit of all the legible candidates on the basis of their Annual Confidential Report. This government order further provides that the select list shall be prepared on the basis of benchmark so fixed by the Departmental Promotion Committee.

Therefore, the combined reading of Rule 8(3) of the Rules, 1990, Rule 4 of the Rules, 1986 and Rule 4 of Relaxation Rules, 2006 along with the Government Order dated 20.11.2017 clearly reveal that for making promotion on the post wherein the criteria is merit the select list shall be

prepared applying 1:3 ratio as far as possible and if the suitable candidates are not available in appropriate numbers, the minimum length of service of the candidates in the feeding cadre may be relaxed up to 50% or beyond 50%. In any case the very object to promote the most meritorious persons in terms of Government Order dated 20.11.2017 should be fulfilled and for the technical reasons the condition of Rule 5(iii) may not be imposed in strict sense. There is no doubt that while making promotion on a post wherein the criteria is merit, the meritorious persons should be promoted in the interest of the department and of the State Government. The technicalities should not defeat the purpose of law.

In view of the above, since Rule 4 of Rules 1986 provides that the number of candidates in the eligibility list shall be three times the number of vacancies as far as possible and the term 'as far as possible' means that the efforts should go to the greatest extent, degree or amount that is attainable. Therefore, when there is statutory prescription under Rule 4 of the Rules, 2006 regarding granting relaxation that should be resorted to so as to promote the best candidates on the post where the criteria is merit. As per my opinion the technicalities may not frustrate the purpose of law, the law must be applied as per wish of the legislatures. It may not be the wish of law that less meritorious candidates be promoted on the posts where the criteria is merit for the reason that eligibility list has been prepared consisting less number of candidates without taking resort of Relaxation Rules, 2006 (as amended in 2013).

Accordingly, I am of the considered opinion that the eligibility list dated 8.3.2019 and 10.5.2019 of Superintending Engineer (Civil) for promotion to the post of Chief Engineer (Civil) Level II of the department are not sustainable in the eyes of law being illegal and arbitrary, therefore, both the eligibility lists are hereby quashed.

A writ in the nature of mandamus is issued commanding the competent authority to prepare the eligibility list of Superintending Engineer (Civil) including the names of the petitioners for promotion to the post of Chief Engineer (Civil) (Level II) granting them relaxation in minimum length of service in accordance with Rules, 2006 as amended in the year 2013.

A writ in the nature of mandamus is also issued commanding the opposite parties to consider the case of the petitioner for promotion to the post of Chief Engineer (Civil) Level II in accordance with 1990 Rules, office circular dated 22.3.1984 as amended by Government Order dated 20.11.2017.

In the result the writ petition succeeds and is accordingly allowed.

No order as to costs."

24. After going through the judgment of the learned Single Judge and the arguments of the parties, we find no illegality in the judgment impugned. There are two conditions for making promotion on the post of Chief Engineer (Civil) (Level-II) from the post of Superintendent Engineer under Rule 5 (III) of the 1990 Rules. Firstly he should be substantively appointed Superintending Engineer and have completed one year of service as Superintending Engineer and secondly he should have completed 25 years of service as Assistant Engineer. The petitioners/respondent no. 1 to 6 though fulfils the first condition, however they lack 25 years of service as Assistant Engineers. Rule 8(II) of 1990 Rules and government order dated 20.11.2017 provides that the

criteria for promotion to the post of Chief Engineer (Civil) Level-II is merit after evaluating the annual entries for the last 10 years and the eligibility list has to contain thrice the number of candidates than the number of vacancies as provided under the Rules 1986. The qualifying service provided under Rule 5(III) of the Rules 1990 can be relaxed for promotion to the post of Chief Engineer (Civil) Level-II. The Rules 2006 has an overriding effect over the Rules 1990 and has an overriding effect over the Rules 1986, in order to select the most meritorious candidate after evaluating their comparative merit on the basis of annual entries for the last 10 years for the purpose of promotion to the post of Chief Engineer (Civil). The whole purpose of enacting the Rules 2006 is to provide relaxation in qualifying in service in order to select the most meritorious candidates amongst the larger number of candidates. The entire purpose of the Rules 2006 shall be defeated in case the suitable candidates are not included in the eligibility list by relaxing the qualifying service.

25. The judgment relied on by the State appellants are distinguishable on facts. In "Suraj Pratap Gupta and others Vs. State of Jammu Kashmir and others" the Government was carried away by sympathy for the promotees by not making direct recruitment after 1984 by restricting direct recruiters to 10 percent rather than permitting 20 percent and by deliberately promoting Chief Engineers to other 10 percent quota reserved for the direct recruiters and thus, the Government has acted in a biased manner and the consequent regularisation of the promotees held to be rightly quashed by the high court as they have illegally occupied the direct recruitment quota.

26. In the case of ***Keshav Chandra Joshi and others Vs. Union of India and others (supra)*** the apex court held that the appointments were found to have been made dehors the rules and by not appointed by the Governor according to rules and they do not become the members of service in substantive capacity and continuous length adhoc services and thus it was held that continuous length of adhoc service from the date of initial appointment cannot be counted towards seniority.

27. We are in agreement of the argument of learned counsel for petitioners/respondents 1 to 6 that the State Government cannot have any grievance in case selection of the most meritorious candidates is made from the large number of candidates especially in view of the fact that the Rules 2006 has been enacted to grant of relaxation in qualifying service in case the adequate number of candidates are not available for being considered for promotion. The state Government cannot act arbitrarily by denying to invoke the Rules 2006 and it is not the discretion of the State Government to invoke the Rules 2006 as and when it pleases, the rule is mandatory and has an overriding effect over the Rules 1990.

28. The Apex Court in the case of ***Rajendra Kumar Aggarwal Vs. State of U.P. and others (supra)*** has held as under:-

"23. So far as the present case is concerned we do not find any material to show that the State Government or the Parishad resorted to exercise of power under Regulation 20 for some unauthorized or oblique purpose. The allegation that it was only to benefit Rajendra Kumar Agrawal is ex facie incorrect because relaxation was beneficial for three officers who all were senior to Narsingh Prasad. There is no material to support the allegation that Rajendra Kumar Agrawal

was responsible for the decision by the State Government or the Parishad on account of any political or other influence over any person. To us, the exercise of power of relaxation appears to be in the interest of Parishad because the post of Chief Engineer, as held by this Court in earlier proceeding, is a single post of considerable importance. The enlargement of zone of consideration with addition of relatively senior persons would only benefit the public cause by enabling selection of most meritorious person from a larger group of eligible persons. Hence in the facts of the case, we are of the considered view that the High Court erred in inferring that the relaxation was for some dubious reasons or to benefit Rajendra Kumar Agrawal."

29. In the above case the Apex Court has held that enlargement of zone of consideration with addition of relatively senior persons would only benefit the public cause by enabling selection of most meritorious person from a larger group of eligible persons. In this case also the zone of consideration has been enlarged by adding six more persons so as to enable the State to select the most meritorious persons for the promotional post of Chief Engineer and thus, we are of the view that the State Government cannot be aggrieved as addition of some more meritorious persons in the select list would only benefit the public interest as held by the Apex Court in the aforesaid matter.

30. In view of the aforesaid discussions, we find that there is no illegality in the judgment impugned and also find that special appeal lacks merit and is accordingly dismissed.

No order as to cost.

(2020)08ILR A10
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2020

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal Defective No. 206 of 2020

Md. Arshad Khan ...Applicant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Awadh Narain Rai

Counsel for the Respondents:
C.S.C.

A. Scope - Intra-Court Special Appeal - Matters relating to the medical evaluation of candidates in a recruitment process involve expert determination and the Court should exercise caution in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated further medical evaluation. Any exercise of reassessment on the basis of procedures other than those envisaged by the recruiting agency under the relevant rules would hamper the recruitment process. (Para 8)

In the instant case the Court did not find decision of the Medical Board to be arbitrary, capricious or not in accordance with the relevant statutory recruitment rules therefore interference with the impugned order is not required. (Para 15)

Special Appeal rejected. (E-10)

List of cases cited:-

1. Vivek Kumar Vs St. of U.P. & ors. Special Appeal Defective no. 117 of 2020

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

1. The present intra court appeal has been filed seeking to assail the judgment and order dated 30.09.2019 passed by a learned Single Judge in Writ A No. 13935 of 2019 (Md Arshad Khan Vs. State of U.P. and others), whereby the writ petition has been dismissed.

2. The writ petitioner is the appellant before us.

3. The matter pertains to the process of recruitment under the Police Constable and Constable PAC (Male) Direct Recruitment-2015. The relief sought in the writ petition was for quashing of the medical examination result dated 27.02.2019 and the appellate medical board result dated 08.04.2019, whereunder the petitioner had been declared medically unfit on the ground that he suffered from the disability of 'flat foot'.

4. The learned Single Judge has taken note of the fact that pursuant to an order passed by this Court on 16.09.2019, the petitioner had been medically examined by a Medical Board constituted in terms of the direction issued and had been again found to be unfit due to 'flat foot'. The report of the Medical Board produced by the learned Standing Counsel was taken on record.

5. In view of the fact that the Medical Board, constituted in terms of the direction issued by this Court, had reaffirmed the view taken by the District Medical Board and the Appellate Medical Board, the learned Single Judge held that no interference in the matter was called for, and the writ petition was accordingly dismissed.

6. The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, in our opinion, would be extremely limited.

7. The Courts have, time and again, emphasised the need for caution when candidates seek to assail the correctness of the findings of a Medical Board constituted under a recruitment process adopted by the State authorities.

8. We may observe that although the powers of the Court under Article 226 are wide enough to issue directions in appropriate cases but such powers are required to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in a recruitment process involve expert determination and the Court should exercise caution in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated further medical evaluation.

9. Any such exercise in acceding to requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those envisaged by the recruiting agency under the relevant rules would result in the recruitment process being derailed, which would ordinarily be not permissible.

10. In a case where the recruitment process has been carried out as per prescribed statutory rules whereunder a procedure has been prescribed for testing the medical fitness of candidates by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, solely on the basis of a claim sought to be set up by a prospective candidate.

11. In the instant case, the writ petitioner having been granted another opportunity by providing for a medical examination by the Medical Board constituted in terms of directions of this Court, and having again been found to be medically unfit thereby reaffirming the view taken by the District Medical Board and the Appellate Medical Board, set up by the recruiting agency, no further indulgence is required to be granted to him in this regard. This is, more so, since it is not the case of the petitioner that the decision of the Medical Board was arbitrary, capricious or not in accordance with the procedure under the relevant statutory recruitment rules.

12. No material has been placed on record, or otherwise referred, to suggest that the opinion of the Medical Board or the Appellate Medical Board could in any manner be said to be casual, inchoate, perfunctory or vague. We are therefore of the view that the Medical Board being an expert body, its opinion is entitled to be given due weight, credence and value.

13. A similar view has been taken in a recent judgment of this Court in **Vivek Kumar Vs. State of U.P. and others1** wherein it was held that matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefor as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process.

14. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order.

15. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 30.09.2019.

16. For reasons stated above, the Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2020)08ILR A12
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2020

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal No. 206 of 2014

Director, Indian Institute of Technology, Kanpur Nagar & Anr. ...Appellants
Versus
Radha Krishna Tiwari ...Respondent

Counsel for the Appellants:
Sri Rohan Gupta, Sri Navin Sinha

Counsel for the Respondent:
Sri I.P. Singh

A. Service Law - Time Pay Scale - Financial Hand Book: Fundamental Rules 24, 25

'Annual Confidential Report' is required to be recorded in the service book of the employee once in every year. The service book was neither upto date nor entries made therein were duly authenticated till 1994. On completion of 14 years of continuous service, the respondent was entitled for 'time pay scale' subject to crossing of 'Efficiency Bar' under his Service Rules w.e.f. 01.02.1977. 'Efficiency Bar is required to be assessed on the basis of 'Annual Confidential Report'. In light of absence of any entry in the service book or any other disciplinary proceeding taken against the respondent, there

would not have been any material before the appropriate authority to assess work and conduct of the respondent. Thus, the order withholding the 'Efficiency Bar' of the respondent was not based upon any relevant material and hence bad in law. (Para 26, 27)
The appellate court did not find latches in filling the instant special appeal as the petitioner/respondent was communicated the decision of Efficiency Bar Committee withholding his 'Efficiency Bar' on 14.01.1987. Thereafter, several representations was filed before the appellant/respondent no. 2 followed by constant reminders which was finally rejected by the appellant/respondent no. 2 by order dated 19.04.1995 whereupon he had filed writ petition giving rise to special appeal. (Para 19)

Special Appeal rejected. (E-10)

List of cases cited: -

1. St. of T.N. Vs Seshachalam (2007) 10 SCC 137 *(distinguished)*

2. U.O.I. Vs M.K. Sarkar (2010) 2 SCC 59 *(distinguished)*

3. Haryana Warehousing Corporation Vs Ramavtar (1996) 2 SCC 98

4. O.P. Gupta Vs U.O.I. AIR 1987 SC 2257

5. M. Gopala Krishna Naidu Vs St. of M.P. AIR 1968 SC 240

6. St. of U.P. Vs Dr. K.U. Ansari AIR 2002 SC 208

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Heard Sri Navin Sinha, Senior Advocate assisted by Sri Rohan Gupta, learned counsel for the appellants and Sri I.P. Singh, learned counsel for the respondent.

2. This special appeal has been filed by the Indian Institute of Technology, Kanpur challenging the legality and validity of the order dated 24.01.2014 passed by learned Single Judge of this Court by which he has allowed WRIT - A No. 15535 of 1995 preferred by the petitioner/respondent Radha Krishna Tiwari before this Court.

3. Briefly stated the facts of this case are that the petitioner/respondent was appointed on the post of 'Draftsman' in Indian Institute of Technology, Kanpur (hereinafter referred to as "I.I.T. Kanpur") on 05.02.1963 and was confirmed on his post on 11.02.1964. I.I.T. Kanpur was established by the Society registered under Societies Registration Act, 1860. After coming into force of Indian Institute of Technology Act, 1961, it was incorporated in it. On completion of 14 years continuous service, the petitioner/respondent had become entitled for grant of 'time pay scale' subject to crossing of the 'Efficiency Bar'.

4. Deputy Registrar (Admin) of I.I.T. Kanpur, by his letter dated 14.01.1987, informed the petitioner/respondent that he was not allowed to cross the 'Efficiency Bar' w.e.f. 01.02.1977. The petitioner/respondent represented before Deputy Registrar (Admin) upon receiving the aforesaid letter which remained pending before him. The petitioner/respondent sent reminders on 24.01.1994, 08.02.1994 and 14.11.1994 to the Deputy Registrar (Admin) for deciding his representation. Eventually the petitioner/respondent's representation was rejected by appellant/respondent no. 2 by order dated 19.04.1995. The letter dated 19.04.1995 contained a recital that upon examination of his case file, it was found that his work was poor with no work output and hence, it was decided to hold his 'Efficiency Bar' right from 1977.

5. Challenging the aforesaid letter dated 19.04.1995 issued by the appellant/respondent no. 2, the petitioner/respondent filed WRIT - A No. 15535 of 1995 before this Court.

6. Before the writ court, it was contended by the learned counsel for the petitioner/respondent that 'Annual Confidential Report' of each employee is required to be recorded in his service book once in every year. On completion of 14 years of continuous service, the petitioner/respondent had become entitled to 'time pay scale' subject to his crossing of 'Efficiency Bar' under the Service Rules. 'Efficiency Bar' was assessed on the basis of 'Annual Confidential Report' and since admittedly, no entries were recorded in the service book of the petitioner/respondent upto 1994, there was no material before the appellant/respondent no. 2 to assess the work and conduct of the petitioner/respondent. It is further contended that the petitioner/respondent had been taking an active role in the Worker's Union and had also held posts from time to time and due to the aforesaid reason, he was not able to cross the 'Efficiency Bar'. It was further contended that Fundamental Rules provided that when the 'Time Pay Scale' becomes due, the competent authority is required to assess the efficiency of the employee for the purpose of his being allowed to cross the 'Efficiency Bar' which is a condition precedent for grant of 'time pay scale' and if the competent authority decides to withhold 'Efficiency Bar', in that case competent authority is required to communicate its decision to the concerned employee immediately and the competent authority is required to assess the 'Efficiency Bar' of the concerned employee in every year or subsequent to the year in which the 'Efficiency Bar' is withheld. The competent authority in the instant case did not assess the work and conduct of the petitioner/respondent either in the year 1977 or in the subsequent years thereafter, while letter dated 14.01.1987 was issued informing the petitioner/respondent that he was not allowed to cross the 'Efficiency Bar' w.e.f. 01.02.1977 although his service book was totally blank. It was lastly contended before the writ court that there was absolutely no material before the competent authority to assess the work and conduct of the petitioner/respondent for the purpose for the purpose of forming his opinion whether the petitioner/respondent was entitled to cross the 'Efficiency Bar' or not nor any actual order withholding the 'Efficiency Bar' was passed in the year 1977.

7. The stand of the appellant/respondent no. 2 before the writ court was that the petition which had been filed after an inordinate delay was liable to be dismissed on the ground of latches itself as the decision for withholding the 'Efficiency Bar' was communicated to the petitioner/respondent through letter dated 14.01.1987 while the writ petition was filed on 30.05.1995 and by making repeated representations, limitation cannot be enlarged as held by Supreme Court in **State of Tamil Nadu Vs. Seshachalam** reported in **(2007) 10 SCC 137** and **Union of India Vs. M.K. Sarkar** reported in **(2010) 2 SCC 59.**

8. It was also contended that no opportunity of hearing is required to be given by the competent authority to the employee with regard to whom it takes a decision to withheld 'Efficiency Bar' as held by the Supreme Court in **Haryana Warehousing Corporation Vs. Ramavtar**

reported in **(1996) 2 SCC 98.** The work of the petitioner/respondent was found to be unsatisfactory. As such, the competent authority rightly withheld the 'Efficiency Bar' of the petitioner/respondent and the decision taken by the competent authority withholding the 'Efficiency Bar' is not subject to judicial review by the Court and its exercise of its jurisdiction and the writ petition was liable to be dismissed.

9. Learned Single Judge, after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the material on record, allowed the writ petition by the impugned order and after quashing the orders dated 14.01.1987 and 19.04.1995 withholding the 'Efficiency Bar' of petitioner/respondent w.e.f. 01.02.1977, rejected his representation and directed the respondents to release the 'Efficiency Bar' and grant the other consequential benefits to the petitioner/respondent w.e.f. 01.02.1977 within a period of three months from the date of filing of certified copy of this order before the concerned authority.

10. The order passed by the learned Single Judge has been challenged by Sri Navin Sinha, learned counsel for the appellants on the following grounds :-

(1) The writ petition filed by the petitioner/respondent challenging the orders refusing to allow the grant of 'Efficiency Bar' and rejecting his representation was passed after an inordinate delay and hence, it was liable to be dismissed on the ground of latches alone.

(2) The petitioner/respondent was not allowed to cross the 'Efficiency Bar' by the competent authority as upon assessment of his entire service record, his work and conduct was not found satisfactory and it is absolutely incorrect to allege that on the date on which the decision was taken by the competent authority not to allow the petitioner/respondent to cross the 'Efficiency Bar', his ACR was blank and there was no material before the competent authority for taking decision of disallowing the petitioner/respondent to cross the 'Efficiency Bar'.

11. Per contra, Sri I.P. Singh, learned counsel appearing for the respondent made his submissions in support of the impugned order and submitted that it is evident from the own document of the appellant that the service book was filled up in the year 1995 and thereafter he was given information thereof and as far as arguments advanced by the learned counsel for the appellants that the writ petition is barred by latches is concerned, the same was rightly decided by the learned Single Judge against them by holding that before 19.04.1995 which is the date on which the petitioner's representation was rejected, he had no cause of action to file the writ petition.

12. We heard learned counsel for the parties and perused the material brought on record.

13. The first ground on which Sri Navin Sinha, learned counsel for the appellants has assailed the order passed by the learned Single Judge is that the writ petition filed by the petitioner/respondent was barred by latches as there was an inordinate delay on his part in challenging the letter dated 14.01.1987 by which he was communicated the decision of the appellant/respondent no. 2 to withhold 'Efficiency Bar' and the learned Single Judge manifestly erred in taking a view to the contrary.

14. In support of his aforesaid contention, learned counsel for the appellants has placed reliance upon the judgement of the Apex Court rendered in the case of **Seshachalam (supra)**. In the paragraph nos. 2, 3, 4 and 5 of the aforesaid case, the Apex Court has held as hereunder :-

2. Respondents herein have been working in the Secretariat of the Government of Tamil Nadu. Each and every department in the Government Secretariat prior to 1961 had a separate unit for appointment, promotion etc. The State had, however, amended the Special Rules in the year 1961 whereby all the departments in the Secretariat were made the "one unit" for the purpose of appointment and promotion. Appointments in the Secretariat at all entry level posts, i.e., Junior Assistants (subsequently re-designated as Assistants), Assistants (subsequently re-designated as Assistant Section Officers), Typist/Personal Clerks were to be made from the common list of candidates selected by the Tamil Nadu Public Service Commission. Promotion to different higher posts in different departments was also being made from amongst those employees. The Government of Tamil Nadu, however, by issuing G.O.Ms. No.1290 dated 05.06.1970 excluded the Finance and Law Departments from the "one unit" system. As a result whereof while the posts in the cadre of Assistants, Assistant Section Officers, Typists/Personal Clerks continued to be filled up from the common list of candidates, but in Finance and Law Departments, further promotions were effected from amongst the employees allotted thereto only. Appointments to Finance Department, however, were made at random and probably in terms of the option exercised by any particular candidate. Many persons, who have, thus, been ranking higher were employed in "one unit" departments whereas some of the candidates ranking lower were employed under fortuitous circumstances in the Finance Department. The employees working in the Finance Department, therefore, obtained promotions much ahead of their peers or even seniors who were discharging their duties in other departments coming within the "one unit".

3. G.O.Ms. No.3288 (Public Services Department) was thereafter issued on 29.10.1971 specifying Finance and Law Departments as separate units from the level of Superintendent (Section Officer) and above. Admittedly, however, Rule 4 of the Special Rules of the Tamil Nadu Secretariat Service was amended in that behalf. The said policy, however, is said to have been implemented. Two employees, S. Kalaiselvan and S. Sivasubramanian, filed an Original Application before the Tamil Nadu Administrative Tribunal in the year 1990 claiming promotion and scale of pay at par with those who were working in the Finance Department and who were said to be juniors to them but had been promoted to higher posts in Finance Department. The said Original Application was allowed by the Tribunal by an order dated 16.4.1993 opining that there existed no guidelines to allot any employee to the Finance Department, vis-`-vis, other departments and, thus, the employees working in other departments could not have been deprived of the benefit of promotion. It was furthermore pointed out that even Rule 4 of the Special Rules for the Tamil Nadu Secretariat Service had not been amended by the said GOMs No.1290 dated 05.06.1970.

4. The Government of Tamil Nadu thereafter amended the Service Rules with retrospective effect from 05.06.1970 by

issuing G.O.Ms. No.30 Personnel and Administrative Reforms (D) Department dated 28.1.1994. Upon issuance of the said Government Order, an application for review was filed but the same was dismissed by the Tribunal by an order dated 30.1.1995. The Government was thereafter advised to implement the order of the Tribunal by giving promotion to the concerned employees with retrospective effect from the date on which their juniors had been promoted as Assistant Section Officers in the Finance Department. Sanction was also accorded for creation of two supernumerary posts, namely, posts of Assistant Section Officers in the respective departments. Several representations thereafter were made by persons said to be similarly situated claiming promotion and parity in the scale of pay as compared to their counterparts in the Finance Department. A large number of Original Applications were also filed before the Tamil Nadu Administrative Tribunal. Upon consideration of various pros and cons, the Government of Tamil Nadu issued a GOM bearing No.126 dated 29.5.1998, relevant paragraphs whereof read as under :

"10. The Government accordingly direct that :-

(i) the pay of the seniors in One Unit who have been recruited to the Tamil Nadu Secretariat Service on or before 28.1.1994, shall be stepped up on par with their juniors in the Finance unit by upgrading the posts held by them to the Scale of pay applicable to the juniors with immediate effect.

(ii) The stepping up of their pay on par with the juniors in the Finance Unit by upgrading the posts held by them to the scale of pay applicable to the junior ordered in sub-para (1) above is purely a person-oriented upgradation and no new posts will be created for this purpose.

(iii) The upgradation sanctioned for the seniors will lapse in the event of the retirement of the individuals concerned or their promotion to the upgraded post in their normal turn.

(iv) The pay of the other seniors in the One Unit in the same cadre will be stepped up on par with immediate juniors in the Finance Unit, with effect from the date of issue of this order.

(v) In respect of the Typists/Personal Clerks/Personal Assistants, in One Unit who have not relinquished their right for promotion as Assistant Section Officer, and are still awaiting their turn for promotion as Assistant Section Officer, their pay shall be upgraded to Assistant Section Officer scale on par with their immediate junior in the Finance Unit who got his promotion as Assistant Section Officer.

11. The benefits of upgradation of pay of the seniors on par with their juniors as per Commission's Seniority list ordered in sub-paras

(i) to (iv) of Para 10 above, shall also be extended to those seniors in the Finance Unit who were recruited before 28.1.1994 and or drawing less pay than their juniors in One Unit.

12. The upgradation ordered above is subject to the following terms and conditions :

(1) The upgradation ordered will involve only stepping up of pay of the senior on par with his junior in the upgraded scale of pay.

(2) It does not entitle him to any claim for arrears of pay.

XXX XXX XXX These orders shall come into force with effect from the date of issue of the orders.

13 ...

14. The Departments of Secretariat concerned shall issue necessary

orders for upgradation of posts and for stepping-up of the pay of the Seniors in One Unit in the upgraded scales ordered in para 10 above, after obtaining necessary individual undertaking in the format enclosed from the seniors concerned to the effect that they accept the terms and conditions of this order."

15. In the aforesaid case, the respondents in the civil appeal made representations before the State of Tamil Nadu demanding fixation of their pay at par with their juniors in the Finance Department. Since the said request was not acceded to, a large number of original applications were filed before the Tamil Nadu Administrative Tribunal. By a common judgment pronounced on 20.1.2004, the Tribunal dismissed the said applications opining that the same were barred by limitation. It was held that the applicants having retired long back and having filed applications between 1998 to 2003 and the promoters having retired as Under Secretaries, Deputy Secretaries and Joint Secretaries and in some cases as Additional Secretaries, they should have raised the dispute long back when their juniors had been given promotions in the Finance Department and as the original applications were filed after 20 years, the same could not be entertained.

16. However, the High Court in the writ petition filed before it against the order of the Tribunal by its judgement dated 21.04.2006 held that the cause of action for filing the original application arose only upon issuance of GOMS No. 126 dated 29.05.1998 and in that view of the matter, it cannot be said that the original applications filed by the respondents suffered from delay and latches and/or otherwise barred by limitations as GOMS No. 126 applied also in respect of those who had retired before 29.05.1998. It was also opined that the respondents who had not been in service on or before 28.01.1994 came within the scope and ambit of the said GOMs.

17. The order passed by the High Court was challenged by the State of Tamil Nadu before the Apex Court by filing Civil Appeal No. 1938 of 2007 which was allowed by the Apex Court holding that the view taken by the High Court that the original applications preferred by the respondents therein was not barred by latches, was erroneous.

18. In the case of **Seshachalam (supra),** the Apex Court had taken note of the fact that the respondents in the Civil Appeal had retired much before the issuance of GOMS No. 126 dated 29.05.1998.

19. The aforesaid case is of no help to the petitioner/respondent. In the instant case, firstly the petitioner/respondent was communicated the decision of the Efficiency Bar Committee withholding his 'Efficiency Bar' w.e.f 01.02.1977 on 14.01.1987. The petitioner/respondent had filed a representation before the appellant/respondent no. 2 promptly which was followed by reminders dated 24.01.1994, 08.02.1994 and 14.11.1994 and his representation was finally rejected by the appellant/respondent no. 2 by order dated 19.04.1995 whereupon he had filed the writ petition giving rise to special appeal. Hence, we do not find that petitioner/respondent was guilty of any latches.

20. The second case **M.K. Sarkar (supra)** relied upon by the learned counsel

for the appellants is also not applicable to the facts and circumstances of the present case inasmuch as in the case of **M.K. Sarkar (supra)**, the respondent/petitioner had joined the Railway service on 10.02.1947 and was a subscriber to Contributory Provident Fund Scheme. Railways introduced the pension scheme vide Railway Board's letter dated 16.11.1957. Under the said scheme, those who entered Railway service on or after 16.11.1957, were automatically governed by the pension scheme. Those employees who were in service as on 1.4.1957 and those who joined between 1.4.1957 and 16.11.1957 were given an option to switch over to pension scheme instead of continuing under the Contributory Provident Fund Scheme. Those who did not opt for the pension scheme were given further opportunities to exercise options to switch over to the pension scheme, whenever the pension scheme was liberalized or made more beneficial, vide Notifications dated 17.9.1960, 26.10.1962, 17.1.1964, 3.3.1966, 13.9.1968, 15.7.1972, and 23.7.1974. The validity period of the Eighth Option under Notification dated 23.7.1974, which was from 1.1.1973 to 22.1.1975, was extended from time to time upto 31.12.1978. The respondent though aware of the introduction of the pension scheme and the options given on eight occasions between the years 1957 to 1974, consciously did not opt for the pension scheme and continued with the Contributory Provident Fund Scheme and even after taking voluntary retirement while serving as Controller of Stores with effect from 15.10.1976, did not opt for the pension scheme but received the Contributory Provident Fund dues on his retirement and more than 22 years after his retirement, he made a representation dated 8.10.1998, requesting that he may be extended the benefit of the pension scheme. He stated that he was willing to refund the amount received under the Provident Fund Scheme (by way of adjustment against the arrears of pension that would become payable to him on acceptance of his request for switch over to the pension scheme). The said request was not accepted. The respondent therefore approached the Central Administrative Tribunal, in OA No. 657 of 1999, seeking a direction to the Railway Administration to permit him to exercise an option to switch over to pension scheme. The Tribunal by order dated 11.2.2004 disposed of the application by directing the appellants to take a decision on the representation of the respondent by a reasoned order. The Chairman, Railway Board rejected the respondent's claim by passing a reasoned order dated 15.05.2004 as untenable. The order dated 15.05.2004 was challenged before the Tribunal by filing a second application which was allowed on the ground that similarly placed railway employees had been given option to switch over to the pension scheme even after the extended time for opting had expired and directed the appellant to permit respondent to opt for pension scheme. The order of the Tribunal was challenged by the Union of India before the Apex Court in WP (CT) No. 467/2005 which was dismissed by the High Court by order dated 25.01.2006. The Union of India challenged the orders of the Tribunal and the High Court before the Hon'ble Supreme Court and the Hon'ble Supreme Court set-aside the orders passed by the Tribunal and High Court and held that a claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same but where a benefit

was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit.

21. The aforesaid case is also of no assistance to the petitioner/respondent in view of the fact that the petitioner/respondent in this case has neither claimed any illegal benefit awarded to any similarly placed person nor it can be said that there was any inordinate and unexplained delay on his part in approaching this Court.

22. We do not find any merit in the aforesaid submission. The learned Single Judge rightly held that since the petitioner/respondent was communicated the decision of withholding the 'Efficiency Bar' by letter dated 14.01.1987 against which he had made representation on 21.01.1987 and thereafter sent reminders and since his representations were decided as late on 19.04.1995 and the writ petition was filed on 30.05.1995, before the communication of decision of the appellant/respondent no. 2 on the petitioner/respondent's representation, he had no cause of action for filing writ petition and hence, there were no latches.

23. In order to appreciate the second ground on which the learned counsel for the appellants has challenged the order passed by the learned Single Judge, it would be useful to extract Fundamental Rules 24 and 25 of the Financial Hand Book :-

"24. An increment shall ordinarily be drawn as a matter of course unless it is withheld.- An increment may be withheld from a Government servant by the Government, or by any authority to whom the Government may delegate this power under Rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld, and whether the postponement shall have the effect of postponing future increments.

25. Where an efficiency bar is prescribed in a time-scale the increment next above the bar shall not be given to a Government servant without the specific sanction of the authority empowered to withhold increments."

24. There is no dispute about the fact that on completion of 14 years continuous service, the petitioner/respondent became entitled for time pay scale subject to his crossing of the 'Efficiency Bar' under the service rules governing his service w.e.f 01.02.1977 and next time pay scale was due on 01.02.1987. There is also no dispute about the fact that 'Efficiency Bar' is required to be assessed on the basis of 'Annual Confidential Report' and in the absence of any entry in the service book or any other disciplinary proceeding taken against the employee, it cannot be said that there was any material before the appropriate authority to assess the work and conduct of the employee.

25. Record shows that the petitioner/respondent was not allowed to cross the 'Efficiency Bar' by the competent authority as upon assessment of his entire service record, his work and conduct was not found satisfactory. The arguments of Sri Navin Sinha has been repelled on the ground by Sri I.P. Singh, learned counsel for the respondent by arguing that it is proved from the own documents of petitioner/respondent that the competent

authority in the petitioner/respondent's case had not assessed the work and conduct of the petitioner/respondent either in the year 1977 or in the subsequent years while letter dated 14.01.1987 was issued informing the petitioner/respondent that he was not allowed to cross the 'Efficiency Bar' w.e.f. 01.02.1977 although his service book was totally blank. In this regard, it would be relevant to refer to letter dated 19.04.1995 issued under the signature of one V. Narasimhan, Registrar in paragraph no. 2 whereof that the service book of the petitioner/respondent has been brought upto date and entries are duly authenticated and he is advised to sign the service book as required. Copy of the letter dated 19.04.1995 has been brought on record as Annexure No. 9 to the writ petition.

26. Upon perusal of the letter dated 19.04.1995, it is crystal clear that before the year 1995 and issuance of the aforesaid letter, the service book of the petitioner/respondent was neither upto date nor entries made therein were duly authenticated.

27. Thus, service book of the petitioner/respondent was not filled up in 1977 and remained blank till 1994. 'Annual Confidential Report' is required to be recorded in the service book of the employee once in every year. On completion of 14 years continuous service, the petitioner/respondent was entitled for 'time pay scale' subject to crossing of 'Efficiency Bar' under his Service Rules w.e.f 01.02.1977 and next time pay scale was due on 01.02.1987. 'Efficiency Bar' is required to be assessed on the basis of 'Annual Confidential Report'. In the absence of any entry in the service book or any other disciplinary proceeding taken against the petitioner/respondent, there would not have been any material before the appropriate authority to assess work and conduct of the petitioner/respondent. The order withholding 'Efficiency Bar' of the petitioner/respondent was not based upon any relevant material. In paragraph-15, 16 and 17 of the counter affidavit bald statements have been made that Efficiency Bar Committee reviewed the efficiency of the petitioner/respondent from time to time and recommended to withhold it which has been accepted by the Director. Neither recommendation of Efficiency Bar Committee nor decision of Director has been placed on record.

28. Fundamental Rule 25 requires that in case, the employee is not able to cross 'Efficiency Bar' in the year in which time pay scale is due then in every subsequent year 'Efficiency Bar' is required to be examined. But in this case nothing has been done. Supreme Court in **O.P. Gupta Vs. Union of India, AIR 1987 SC 2257,** held that it must follow that when a prejudicial order is made in terms of Fundamental Rule 25 to deprive the government servant like the appellant of his increments above the stage of efficiency bar retrospectively after his retirement, the government has the duty to hear the concerned government servant before any order is made against him.

29. Supreme Court in **M. Gopala Krishna Naidu Vs. State of M.P., AIR 1968 SC 240** and **State of U.P. Vs. Dr. K.U. Ansari, AIR 2002 SC 208**, held that an objective consideration and assessment of all the relevant facts and circumstances is required before any order withholding 'Efficiency Bar'. Character role in Service Book is the primary material. In this case, the character role was blank till 1994. Thus there was no primary material to withhold the 'Efficiency Bar'.

30. The principles laid down by the Apex Court in the case of **Haryana Warehousing Corporation (supra)** upon which reliance has been placed by the learned counsel for the appellants has no application to the facts and circumstances of the present case inasmuch as the petitioner/respondent does not challenge the order impugned by him before the Single Judge on the ground of denial of personal hearing by the appellants.

31. Learned Single Judge while coming to the conclusion that the order withholding 'Efficiency Bar' of the petitioner/respondent was not based on any relevant material, has referred to paragraph nos. 15, 16 and 17 of the counter affidavit in which it was averred that Efficiency Bar Committee reviewed the efficiency of the petitioner/respondent from time to time and recommended to withhold the 'Efficiency Bar' which was accepted by the Director. Learned Single Judge has further observed that neither any recommendation of Efficiency Bar Committee nor decision of Director were brought on the record.

32. Thus, the second ground on which Sri Navin Sinha, learned counsel for the appellants has challenged the order passed by the learned Single Judge is also without any merit.

33. In view of the foregoing discussion, we find that the order passed by the learned Single Judge does not suffer from any illegality or legal infirmity requiring any interference by this Court.

34. This appeal lacks merit and is accordingly **dismissed.**

(2020)08ILR A22
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE RAVI NATH TILHARI, J.

Writ A No. 1525 of 2020

Jitendra Kumar Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Uttar Pradesh Constable and Head Constable Service Rules, 2017: 15(3)(gha) – Rule 15(3)(D)- **Service – Appointment/Selection** - Provides for conducting Physical Standard Test, in case the candidate who has been unsuccessful for the first time, raises objection and as the petitioners in the present case raised grievance/objection, they have right for their Physical Standard Test being conducted, once again. Since, the authorities did not pay any attention to their objection, they have failed to discharge their statutory duty infringing the petitioners' legal right to re-measurement of their chest/Physical Standard Test. (Para 17, 18, 21)

B. Constitution of India- Art. 226 – Article 226 is couched in a comprehensive phraseology and ex-facie confers a wide power on the High Court to reach injustice wherever it is found. (Para 24)

Writ petition allowed with directions for petitioner nos.1,2,3,4,5,7 and 8.

Writ petition dismissed for petitioner no. 6. (E-4)

Precedent followed:

1. Prateek Kumar & 3 ors. Vs St. of U.P. & 3 ors., Writ-A No. 1364 of 2020 decided on 25.02.2020 (Para 9)

2. Dwarka Nath Vs Income Tax Officer AIR 1966 Supreme Court 81, (Para 24)

Precedent distinguished:

1. St. of U.P. & ors. Vs Pankaj Kumar Vishnoi (2013) 11 SCC 178 (Para 8, 14)

2. Om Pal Singh Vs St. of U.P. Throu Principal Secretary, Home Lucknow & Others, passed in Service Single No. 1773 of 2020, decided on 31.01.2020 (Para 8)

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Adarsh Singh, learned counsel for the petitioners and Sri Dinesh Kumar Singh, learned Standing Counsel for the State-respondents.

2. With the consent of the learned counsel for the petitioners and learned Standing Counsel, the present writ petition is being disposed of at the admission stage.

3. The present writ petition has been filed stating that the petitioners appeared in the Physical Standard Verification Test and were disqualified on the ground that the height of the petitioners was below the prescribed minimum height of 168 cm. The petitioners preferred their objections in terms of Rule 15(3) (gha) of Uttar Pradesh Constable and Head Constable Service Rules, 2017(hereinafter referred to as "the Rules 2017") but no orders were passed on their representation.

4. The petitioners' case is that their height is above the prescribed minimum height and they have been wrongly deprived of their right for consideration for appointment.

5. This Court on 03.02.2020 passed the following order:-

"Learned counsel for the petitioners is permitted to implead "Chief Medical Officer, Gorakhpur" as respondent No. 5 in the array of parties during the course of the day.

Heard counsel for the petitioners, standing counsel for the State and perused the material on record.

In the present petition, similar controversy arises. The contention of the counsel for the petitioners is that the height of the petitioners was above the prescribed height limit of 168 centimeters, however, they have been denied only on erroneous computation of the height of the petitioners. The petitioners claim that they have certificates issued by the Medical Authorities to establish that their heights are above the prescribed limit of 168 centimeters.

In view of the contrary reports, I deem it appropriate to direct that the petitioners shall appear along with certified copy of this order before the Chief Medical Officer, Gorakhpur on 10.2.2020. The petitioners shall deposit a sum of Rs. 5,000/-, each as cost with Chief Medical Officer, Gorakhpur. The Chief Medical Officer, Gorakhpur is directed to constitute a Medical Board constituting of three Doctors of the level of Professor and Associate Professor available at the local District Hospital. The C.M.O. shall also inform the S.S.P. of the District, who shall depute an officer of the rank of Additional Superintendent of Police to remain present before the Board on 10.2.2020. The petitioners shall also produce materials in support of their identity before the Medical Board. The petitioners shall appear before the Medical Board on 10.2.2020 and would be medically examined with regard to their heights by the Board of three doctors. The report signed by the Chairman of the Board would be sent through the Chief Medical

Officer, Gorakhpur before this Court on or before 25.2.2020. This report would constitute the basis for the Court to determine as to whether the report of the Medical Board and the Appellate Medical Board is liable to be questioned or not?

Post this matter in the additional cause list on 25.2.2020 before the appropriate Court.

The matter shall not be treated as tied-up or part heard to this Court."

6. In compliance of the order dated 03.02.2020, the Chief Medical Officer, Gorakhpur submitted his report in a sealed cover envelope, which has been opened before this Court and the same has been shown to the learned counsel for the petitioners as well as learned Standing Counsel and it has not been disputed by them. As per the report the height of the petitioners no.1, 2, 3, 4, 5, 7, and 8 has been found to be 168 cm. or above.

7. Petitioner no.6 did not appear before the Board, as such, his height could not be measured in terms of the order dated 03.02.2020.

8. Learned Standing Counsel has submitted that second physical standard test could not be directed to be conducted and the report in compliance of such a direction cannot be relied upon for direction to the respondents for the reliefs prayed in the writ petition. He placed reliance on the judgment of the Hon'ble Supreme Court in **Civil Appeal Nos. 2366-2367 of 2011 (State of U.P.and others vs. Pankaj Kumar Vishnoi),** decided on 25.7.2013 (Paragraph nos. 21, 22 and 23) as well as on the case of **Om Pal Singh vs. State of U.P. Thru Principal Secretary, Home Lucknow & Others, passed in Service Single No. 1773 of 2020, decided on 31.1.2020** by this Court.

9. Learned counsel for the petitioners has placed reliance upon the judgment of this Court in **Writ A No.1364 of 2020 (Prateek Kumar and 3 others vs. State of U.P. and 3 others), decided on 25.2.2020** by this Court and has submitted that in view of the report a direction may be issued for consideration of the petitioners' case for the appointment. He submits that the judgments cited by the learned Standing Counsel were duly considered by this Court and thereafter the directions were issued in the case of Prateek Kumar(supra).

10. I have considered the submissions of the learned counsel for the parties.

11. This Court in the case of Prateek Kumar(supra) after considering paragraphs 21, 22 and 23 of the judgment in Pankaj Kumar Vishnoi (supra) as well as the case of Om Pal Singh (supra) passed the following judgment/order:-

"Heard learned counsel for the petitioners and learned Standing Counsel for the State-respondents.

The present petition has been filed alleging that the petitioners appeared in the Physical Standard Verification Test and were disqualified stating that the height of the petitioners was less than prescribed minimum height of 168 cm. The petitioners preferred their objections on the same day in terms of Rule 15(3) (gha) of Uttar Pradesh Constable and Head Constable Service Rules, 2017, however, no orders were passed thereupon as such the petitioners approached this Court alleging that the height of the petitioners is more than the prescribed minimum height of 168 cm and they have been wrongly deprived of their rights to participate in the Physical Examination Test and also to be considered for appointment.

This Court, vide its order dated 27.1.2020, had directed the height of the petitioners to be verified by a Medical Board comprising of three Senior Doctors in the presence of the representative of the Senior Superintendent of Police.

The Chief Medical Officer, Bulandshahar has submitted a report in a sealed cover in terms of the directions issued by this Court. The sealed cover was opened in the Court and the contents were perused and is taken on record.

A perusal of the report makes it clear that the height of petitioner no. 3 has been found to be 168.9 cm whereas the height of petitioners no. 1, 2 and 4 have been found to be less than 168 cm which is the qualifying height. Thus, the petition, on behalf of petitioners no. 1, 2 and 4, stands dismissed.

The Standing Counsel has placed reliance on a judgement of the Supreme Court in ***Civil Appeal Nos. 2366-2367 of 2011 (State of U.P. and others vs. Pankaj Kumar Vishnoi),*** *decided on 25.7.2013 in Para No. 21, 22 and 23 which is reproduced hereinbelow to argue that in view of the observations made as quoted above, this Court cannot issue directions on the basis of the second physical standard test conducted in terms of the earlier order passed by this Court. Para 21, 22 and 23 are quoted as under:*

21. It is accepted position that the respondent appeared in the test and could not qualify. Once he did not qualify in the physical test, the High Court could not have asked the department to give him an opportunity to hold another test to extend him the benefit of compassionate appointment on the post of Sub-Inspector solely on the ground that there has been efflux of time. The respondent after being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over.

22. In our considered opinion, the order passed by the Division Bench is wholly unsustainable and is hereby set aside. We may, however, hasten to add that it is open to the respondent to compete in the normal course if eligible for the post of Sub-Inspector for promotion in accordance with rules prescribed for promotion.

23. At this juncture, we have been apprised at the Bar that following the decision of the Division Bench which has been set aside in this appeal, in subsequent writ petitions and appeals the High Court has directed the Department to hold a second physical test and to keep the results in a sealed cover. As we have already opined that the second physical test could not have been directed to be held for the purpose of extending the benefit of compassionate appointment, the sealed covers need not be opened. Needless to say, the candidates therein are also entitled to compete for promotion in accordance with the rules.

The judgement of the Supreme Court arose from the request for appointment on compassionate grounds in which the petitioner, being a applicant failed in the Physical Examination Test and was thus not offered appointment on compassionate grounds. Paragraph 21 of the judgement of the Supreme Court records that it is the accepted position that the respondent appeared in the test and could not qualify and on that basis the observations, as recorded above, were made by the Supreme Court.

I am afraid that the ratio laid down has no applicability to the facts of the present case, as in the present case, no orders have been passed non-suiting the

petitioners on the ground their having failed the Physical Examination Test, only the petitioners were orally informed that they were non-suited on account of their height being less than the prescribed minimum height even the objections filed by the petitioners were not disposed off as such the petitioners approached this Court disputing and alleging that the height of the petitioners was above the prescribed minimum height and they based their claim on the certificates as annexed in different writ petitions and in one case a certificate issued by the recruitment agency pertaining to different recruitment. Non suited and also claimed before this Court that their height was above the prescribed minimum height.

In view of there being no stand of the State that the petitioners were non-suited on account of their height being less than the prescribed limit and the petitioners alleging that without passing any orders, the petitioners have been found

This Court directed the Physical Examination Test to be carried out by the Chief Medical Officer, Bulandshahar by constituting a team of three Senior Doctors in the presence of the representatives of the Senior Superintendent of Police, Bulandshahar, the said order has not been challenged.

Thus, the submission of the Standing Counsel is based upon the judgement in the case of State of U.P. and others vs. Pankaj Kumar Vishnoi cannot be accepted as in the present case no orders have been passed holding that the petitioners were non-suited on account of their height being less than the prescribed minimum height. It is no doubt true that the Physical Examination Test cannot be ordered as a routine, however, in the present case, no orders were passed indicating as to what what the height determined in respect of the petitioners in the Physical Verification Test and further no orders have been passed on the representation/objections filed by the petitioners on the same very day as such the petitioners exercised their rights of approaching this Court and the Court thus exercised its power in ordering a Physical Verification Test by three Member Committee. Thus, the submission of Standing Counsel placing reliance on the judgement of State of U.P. and others vs. Pankaj Kumar Vishnoi (supra) cannot be accepted in view of the facts of the present case.

The next judgement cited by Standing Counsel is by the Single Judge of this Court in case of ***Om Pal Singh vs. State of U.P. Thru Principal Secretary, Home Lucknow & Others, passed in Service Single No. 1773 of 2020,*** *decided on 31.1.2020 wherein the Court relied upon the provisions of Rule 15(3)gha of Uttar Pradesh Constable and Head Constable Service Rules, 2017 (hereinafter referred to as the 'Rules 2017') which provides for a forum for raising objection by the candidate, if he is not satisfied with the height of measurement, and in view of the said Rule, the Court refused to entertain the petitions for re-measurement of height.*

I am of the view that that the said judgement cannot be relied upon in the facts of the present case, as admittedly, no orders were passed holding that the petitioner did not have the requisite height and no orders were passed on the remedy availed by the petitioner as provided under Rule 15(3)(gha) of the Rules 2017, as such, I am not impressed by the said arguments also.

Thus, the only evidence available on the records is the report submitted by the Chief Medical Officer, Bulandshahar which indicates that the height of the

petitioner no. 3 is above the minimum prescribed height of 168 cm and there is nothing on record to disbelieve the same as the same has been conducted by three Senior members in the presence of representative of the Senior Superintendent of Police and, consequently, on the basis of the reports submitted by the Chief Medical Officer, Bulandshahar, directions are issued to the Chairman/Secretary, U.P. Police Recruitment and Promotion Board, Lucknow, (respondent no. 2) to consider the case of the petitioner no. 3 i.e. Rupendra, son of Shri Nepal, for appointment because his height is above 168 cm subject to the petitioner no. 3 fulfilling of other criteria. The said exercise is to be completed by the respondent no. 2, as expeditiously as possible, preferably within a period of four weeks from today.

Office is directed to supply a copy of the report to the Standing Counsel without payment of usual charges.

So far as petitioners no. 1, 2 and 4 are concerned, the writ petition is dismissed and the petitioner no. 3 is concerned, the writ petition is disposed off in terms of the order passed above."

12. Learned Standing Counsel does not dispute the judgment of this Court in the case of Prateek Kumar(supra). It has also not been disputed that the petitioners' objections/representations were not decided. It has also not been disputed that the order dated 03.02.2020 passed in the present writ petition has not been challenged. He has also not disputed the report of CMO, Gorakhpur. The only ground raised by him is on the strength of the judgment in the case of Pankaj Kumar Vishnoi (supra) of Supreme Court and Om Pal Singh(supra) of this Court, but without disputing the judgment of this Court in the case of Prateek Kumar (supra) which has considered the aforesaid judgments.

13. However, I also proceed to consider the judgments cited by learned Standing Counsel.

14. In the case of **State of U.P. and others vs. Pankaj Kumar Vishnoi, reported in (2013) 11 SCC 178,** upon which learned Standing Counsel has placed reliance, the respondent therein was granted compassionate appointment on the post of Constable and he had joined the same on 28.6.2003. Later on, physical test was conducted in the year 2005 for the post of Sub Inspector (Civil Police) in which the said respondent had participated but was unsuccessful, as a result of which, his candidature for the post of Sub Inspector (Civil Police) was rejected. The respondent filed a writ petition for the grant of compassionate appointment on the post of Sub Inspector (Civil Police), without being subjected to appear in physical test and interview. The writ petition was dismissed but special appeal filed against the order of the learned Single Judge, was allowed, directing the authorities to grant compassionate appointment after subjecting the respondent to physical test once again. The matter reached to the Apex Court. The Apex Court held that once compassionate appointment was given on the post of Constable, for the second time, no compassionate appointment on the post of Sub Inspector (Civil Police) could be given, particularly, when respondent did not succeed in physical test.

15. In the case of Pankaj Kumar Vishnoi(supra)the orders/letter-circular issued by Inspector General in pursuance of Rule 8(2) of the Rules 1974, as involved in that case, provided that the candidate selected to the post of Sub Inspector (Civil Police) should carry physical competency and fitness. A perusal of the circular, as

quoted in paragraph 17 of the judgment in the case of Pankaj Kumar Vishnoi(supra), does not show that there was any provision for re-physical examination test, to extend the benefit of compassionate appointment for the second time. As such, the candidate could not have claimed as a matter of right, physical test after having been disqualified in first physical test, in view of Rule 8(2) of the Rules, 1974 read with the circular of Inspector General, which circular, as held by the Apex Court, did not travel beyond the Rules but it was in furtherance of the same.

16. So far as the present case is concerned Rule 15(3)(D) of the Uttar Pradesh Police Constable and Head Constables Service Rules, 2017 is being reproduced hereunder:-

"(D) If any candidate is not satisfied with his Physical Standard Test, he/she may file an objection on the same day after the test. For clearing all such objection; the Board shall nominate one Additional Superintendent of Police at every place and Physical Standard Test of all such candidates will be conducted again by the Committee in the presence of the said nominated Additional Superintendent of Police. All those candidates who are again found unsuccessful in the Physical Standard Test, will be declared unfit for recruitment and no further appeal will be entertained in this regard."

17. Thus as per Rule 15(3)(D) of the Rules 2017, if any candidate is not satisfied with his Physical Standard Test, he may file an objection on the same day, after the test. For clearing all such objections; the Board shall nominate one Additional Superintendent of Police at every place and Physical Standard Test of such candidates will be conducted again, by the Committee, in the presence of the said nominated Additional Superintendent of Police. If the candidate is again found unsuccessful, he will be declared unfit for recruitment and no further appeal will be entertained in this regard. In the present case, the Rule itself confers right on the candidates, who having been found unfit in the first Physical Standard Test, to file objection on the same day, after the test, for conducting second Physical Standard Test.

18. In the present case, the petitioners being not satisfied with their Physical Standard Test raised objection on the same day, and requested the authorities that their Physical Standard Test be held once again, in terms of Rule 15(3)(D), but no attention was paid to the objections of the petitioners.

19. The judgment in case of Pankaj Kumar Vishnoi(supra) of the Apex Court is, thus, distinguishable, as in the present case, the provision exists for conducting Physical Standard Test, once again, for which the petitioners made request before the authorities. Besides, the present case is not a case of appointment on compassionate ground. In the case of Pankaj Kumar Vishnoi (supra), the respondent therein had been given benefit of appointment on compassionate ground on the post of Constable and as such the same benefit could not be given to him for the second time, for the post of Sub Inspector (Civil Police).

20. The judgment in the case of Om Pal Singh (supra) relied by the learned Standing Counsel is also distinguishable, as in the said case, the petitioner therein had written to the authorities in his own hand writing that he was satisfied with the

manner his height had been measured. In the present case, the petitioners have specifically stated in paragraph 11 of the writ petition that none of the authorities have paid any heed to their request of re-measurement/re-test for Physical Standard in a fair and proper manner in presence of a superior police authority. The case of Om Pal Singh is, thus, not of any help to the respondents.

21. Once Rule 15(3)(D) of the Rules 2017, provides for conducting Physical Standard Test, in case the candidate who has been unsuccessful for the first time, raises objection and as the petitioners in the present case raised such grievance/objection, they have right under Rule 15(3)(D) of the Rules 2017 for their Physical Standard Test being conducted, once again. Since, the authorities did not pay any attention to their objection, although they ought to have done so, in view of Rule 15(3)(D) of the Rules 2017, the authorities have failed to discharge their statutory duty infringing the petitioners' legal right to re-measurement of their chest/Physical Standard Test.

22. The submission of the learned Standing Counsel that this Court could not direct holding of Physical Standard Test for the petitioners for the second time, and the report of the Board submitted through the Chief Medical Officer, Gorakhpur, for that reason, cannot be considered for issue of direction in favour of the petitioners, deserves to be rejected as misconceived. The order passed by this Court dated 03.02.2020 by which the directions were issued to the Chief Medical Officer, Gorakhpur to constitute a Medical Board, consisting of three Doctors of the level of Professor and Associate Professor available at the District Hospital, for medical examination of the petitioners, and submission of the report signed by the Chairman of the Board, through the Chief Medical Officer, Gorakhpur, has not been challenged before the appropriate forum.

23. Besides, Rule 15(3)(D) of the Rules 2017 provides for holding of Physical Standard Test for the second time, by the committee, in the presence of the nominated Additional Superintendent of Police, as nominated by the Board. If the Board failed to nominate one Additional Superintendent of Police and Committee failed to conduct Physical Standard Test again, in the presence of such nominated Additional Superintendent of Police, in spite of the petitioners' objection with respect to their first Physical Standard Test, this Court has ample power and jurisdiction under article 226 of Constitution of India to direct the petitioners' re-examination by the Medical Board consisting of three Doctors of the level of Professor and Associate Professors to enforce the petitioners' statutory right, violated by the respondents, for advancement of justice. The direction given by this Court by order dated 03.02.2020, took care of Rule 15(3)(D) inasmuch as the re-examination was directed to be conducted in the presence of an officer of the rank of Additional Superintendent of Police to be deputed by the Senior Superintendent of Police of the district, which is also the requirement of the said Rule.

24. Hon'ble Supreme Court of India, in the case of **Dwarka Nath vs. Income Tax Officer AIR 1966 Supreme Court 81,** has held that Article 226 is couched in a comprehensive phraseology and ex-facie confers a wide power on the High Court to reach injustice wherever it is found. The paragraph-4 of Dwarka Nath's case (supra) is being reproduced as under:

"4. We shall first take the preliminary objection, for if we maintain it, no other question will arise for consideration. Article 226 of the Constitution reads :

"... every High Court shall have power, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the high court to reach injustice wherever it is found. The constitution designedly used a wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with the those in England, but only draws in analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary from of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in T.C. Basappa v. Nagappa, 1955-1 SCR 250":(AIR 1951 SC 440) and Irani v. Stae of Madras, 1962-(2) SCR 169:(AIR 1961 SC 1731).'

25. In the case of Prateek Kumar (supra), this Court directed for consideration of the case of the petitioner no.3 therein, for appointment as his height was found above 168 cm on the basis of the report submitted by the Board through the Chief Medical Officer, under the orders of this Court passed in that writ petition.

26. In view of the above, I find that the benefit as extended to the petitioners of Writ A No.1364 of 2020 (Prateek Kumar and 3 others vs. State of U.P. and 3 others), decided on 25.2.2020 by this Court, deserves to be given to the petitioner nos. 1, 2, 3, 4, 5, 7 and 8 of this writ petition in the following terms.

27. The writ petition is, therefore, allowed with the following directions, with respect to petitioner nos.1, 2 3, 4, 5, 7, and 8.

1. The petitioner nos. 1,2,3,4,5,7 and 8 shall be permitted to appear for next stage of recruitment i.e. Physical Efficiency Test, as provided by Rule 15(4) of the Rules 2017, and thereafter, if found successful in Physical Efficiency Test, they shall be considered for selection and final merit list. The petitioners shall be

considered in next stages, in accordance with Rule 15(4) of the Recruitment Rules, considering that the petitioners have been found successful in the Physical Standard Test, conducted by the Board constituted in terms of the order dated 03.02.2020 passed by this Court. This exercise shall be done as expeditiously as possible and preferably within a period of six weeks from the date a certified copy of this order is produced before the Chairman/`Secretary, the Uttar Pradesh Police Recruitment and Promotion Board, 19C, Tulsiganga Complex Vidhan Sabha Marg, Lucknow, respondent-4

2. Office is directed to supply a certified copy of the report to the learned Standing Counsel free of cost who shall transmit it to respondent-4/ Chairman/`Secretary, the Uttar Pradesh Police Recruitment and Promotion Board, 19C, Tulsiganga Complex Vidhan Sabha Marg, Lucknow.

3. The said report shall form part of the record of the present writ petition as well.

28. The writ petition is **dismissed** with respect to petitioner-6.

(2020)08ILR A31
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Wrti A No. 4677 of 2020
connected with other cases

Ruksar Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailendra Kumar Tripathi, Sri Anurag Dubey, Sri Shashi Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Vikram Bahadur Singh

A. Service Law – Selection/Recruitment - Appendix-I to the U.P. Basic Education (Teachers) Service Rules 1981 (as amended vide (Twentieth Amendment) Rules, 2017 w.e.f. 09.11.2017; GO dated 01.12.2018: Schedule II; Advertisement issued by the Examination Regulatory Authority, U.P., Prayagraj, dated 05.12.2018.

The petitioners qualified the written examination. They committed mistakes while filling up various particulars, personal, educational and others, in their online registration form. Respondents refused to allow the correction and rectification of those mistakes. Hence, this writ is before the Court to command the respondents to permit the petitioners to rectify their mistakes. According to petitioners, mistakes have occurred on account of a 'human error' and therefore, it is arbitrary not to permit them to reform those errors. (Para 7)

Court held that **each candidate necessarily must bear the consequences of his failure to fill up the application form correctly.** In matters of public affairs, like the process of recruitment to posts under the State, there has to be an element of certainty. The process of recruitment must proceed on the foundation of firm and reliable data. A public recruitment cannot be permitted to be a shaky affair with shifting positions of aspirants about their candidature. If this were to be permitted, it would introduce uncertainties in the recruitment process leading to its embarrassment. (Para 56, 57, 58, 62)

B. Principle of *sub-silentio* – Precedents, *sub-silentio* and without argument, are of no merit – The decision has a value of precedent, where it lays down a principle governing a point that arises for consideration

in a subsequent decision. A *fortiori* a decision that does not enunciate a principle of law in the context of facts involved after consideration of arguments must be regarded not binding on a Court before which the relevant point subsequently arises. The decision is regarded to pass *sub silentio.* (Para 41, 42)

Writ petitions dismissed. (E-4)

Precedent followed:-

1. St. of U.P. & anr. Vs Synthetics and Chemicals Limited & anr., (1991) 4 SCC 139 (Para 41)

2. Divisional Controller, KSRTC Vs Mahadeva Shetty & anr., (2003) 7 SCC 197 (Para 42)

3. Ram Manohar Yadav Vs St. of U.P. & 3 ors., Special Appeal No. 834 of 2013, decided on 30.05.2013 (Para 53)

4. Smt. Arti Verma Vs St. of U.P. & 2 ors., Special Appeal Defective no. 123 of 2014, decided on 05.02.2014 (Para 55)

5. Ashutosh Kumar Srivastava & 60 ors. Vs St. of U.P. & 2 ors., Writ-A No. 4070 of 2020, decided on 30.05.2020 (Para 57, 59)

6. Ramhari Gurjar Vs St. of U.P & 2 ors., Writ-A No. 4087 of 2020, decided on 11.06.2020 (Para 58, 59)

7. Deepti Singh Vs St. of U.P. & 2 ors., Writ-A No. 4552 of 2020, decided on 23.05.2020 (Para 63)

Precedent distinguished:

1. Bharti Vs St. & ors. and connected matters, Rajasthan HC in SB Civil Writ Petition No. 4798 of 2012, decided on 13.09.2012 (Para 13, 16)

2. Km. Archana Rastogi Vs St. of U.P. & ors., 2012 (3) ADJ 219 (Para 28, 29, 35)

3. Amar Bahadur & 25 ors., Writ-A No. 4321 of 2020, decided on 19.06.2020 (Para 30)

4. Pinkee Vs St. of U.P. & 2 ors., Writ-A No. 4088 of 2020, decided on 04.06.2020 (Para 31, 34, 35)

5. Anshuman Singh & ors. Vs.. St. of U.P. through Additional Chief Secretary, Basic Education & ors., Service Single No. 9597 of 2020, decided on 22.06.2020 (Para 32, 35)

6. Rakesh Kumar Vs St. of U.P. & 2 ors., Writ-A No. 4065 of 2020, decided on 30.05.2020 (Para 33, 35)

7. Babita Pandey & 3 ors. Vs St. of U.P. & 4 ors., Writ-A No. 5632 of 2019, decided on 12.04.2019 (Para 36)

8. Sachin Sharma & 3 ors. Vs St. of U.P. & 3 ors., Writ-A No. 19162 of 2018, decided on 10.09.2018 (Para 37)

9. Suman Vaishya Vs Managing Director U.P. Cooperative Bank Ltd. Lko. & anr., Writ-A No. 18271 of 2018, decided on 28.08.2018 (Para 38)

10. Rajesh Kumar Gupta Vs St. of U.P. & 3 ors., Writ-A No. 19606 of 2018, decided on 14.09.2018 (Para 39)

11. Punit Tiwari Vs St. of U.P. through Principal Secretary, Basic Education, Lko. & ors., Service Single No. 9126 of 2020, decided on 16.06.2020 (Para 20)

12. Dheerender Singh Paliwal Vs U.P.S.C., (2017) 11 SCC 276 (Para 44 to 47)

13. Smt. Rajni Shukla Vs U.O.I. & 3 ors., Writ-A No 40159 of 2016, decided on 08.03.2017 (Para 48)

14. Sanjay Raj Vs St. of U.P. & ors., 2013 (2) ADJ 558 (Para 50)

15. Mritunjay Kumar Mishra & anr. Vs St. of U.P. & anr., Writ-A No. 3347 of 2019, decided on 07.03.2019 (Para 54)

16. Jai Karan Singh & 52 ors. Vs. St. of U.P. through Secretary & 4 ors., Special Appeal No. 90 of 2018, decided on 25.04.2018 (Para 54)

17. Kanchan Bala & ors. Vs St. of U.P. & ors., 2018 (2) AWC 1233 (Para 55)

(Delivered by Hon'ble J.J. Munir, J.)

1. "To err is human; to forgive, divine," wrote Alexander Pope in "An Essay on Criticism". He said this all about criticism of poetry; more about the critics approach to the work of others. Is it possible to apply the idea as a principle of remedial resort in legal matters? More particularly, can this idea inspire a selecting body or the employer, inviting applications for appointment to public posts, to allow candidates to correct mistakes in their application forms about data - figures and categories - whereon the relative merit of competing candidates depends?

2. These writ petitions were heard together as common questions of facts and law are involved. Accordingly, all the writ petitions are being decided by this judgment.

3. The petitioner, Ruksar Khan and others in the connected writ petitions are all candidates who have applied for posts of Assistant Teachers in Primary Schools maintained by the Uttar Pradesh Basic Education Board. They have applied in response to an advertisement dated 05.12.2018, inviting applications from eligible candidates, who wish to participate in the Assistant Teachers Recruitment Examination, 2019, convened by the Examination Regulatory Authority, Prayagraj. The applications were required by the advertisement to be submitted online for registration of candidates intending to participate in the selection examination. In these applications, the candidates were required to fill up important personal details, educational qualifications etc., mentioning particulars such as roll numbers, relative to which a particular educational qualification was earned, the marks secured and the relative total marks, Special Reservation Category, if any, and the like. The advertisement bore a bold caution, figuring as a centrepiece, that makes candidates aware about a declaration they would have to make, while filling up the online registration form. It reads (translated into English from Hindi vernacular):

"I have done a printout of the online registration form and compared the entries made there with the original documents and found them to be correct and that I fully agree to finally submit/save my registration form (application). After submission/ final saving, I shall not be entitled to any opportunity to amend my application."

4. The selection for the post of Assistant Teachers in question is a two-tier process. The first is a written examination of eligibility on the basis of which candidates out of the total applicants, are to be selected for the next and the final stage of the recruitment process. Those selected in the written examination would be called for counselling. The counselling would involve allocation of quality points and weightage, worked out on the basis of marks secured by a candidate in different examinations, leading to certificates/ degrees specified, such as High School, Intermediate, Graduation, etc. Weightage in numerical terms is reserved for such candidates who have served as *Shiksha Mitra* in Junior Basic Schools run by the Basic Education Board.

5. Broadly speaking, the 40% component of quality points and weightage would depend on the score determined during counselling based on the prescribed formula shown in tabular form hereinafter, whereas the remainder 60% component would be based on a candidate's marks earned in the written examination. The merit of a candidate would be the aggregate of 60% of marks earned in the written examination and the rest worked out in terms of quality points and weightage. The precise division of marks, quality points and weightage between the written examination and counselling, including the formula according to which it is to be determined, is set out in Appendix-I to the U.P. Basic Education (Teachers) Service Rules, 1981 [as amended vide (Twentieth Amendment) Rules, 2017 w.e.f. 09.11.2017]. Appendix-I *(supra)* is reproduced below:

"APPENDIX-I

[See Rule 14(3)]

Quality points and weightage for selection of candidates

1.	High School	Percentage of Marks in the examination x 10 / 100
2.	Intermediate	Percentage of Marks in the examination x 10 / 100
	Graduation Degree	Percentage of Marks in the examination x 10 / 100
4.	B.T.C. Training	Percentage of Marks in the examination x 10 / 100
5.	Assistant Teacher Recruitment Examination	Percentage of Marks in the examination x 60 / 100
6.	***Weightage*** *Teaching experiences as shikshamitra or as teacher working as such in junior basic schools run by Basic Shiksha Parishad.*	*2.5 marks per completed teaching year, up to maximum 25 marks, whichever is less.*

Notes 1 - If two or more candidates have equal quality points, the name of the candidate who is senior in age shall be placed higher in the list.

2. If two or more candidates have equal quality points and age, the name of the candidate shall be placed in the list in English alphabetical order."

6. The selection would be based on the inter se merit of candidates, juxtaposed against the total number of posts advertised. Here, the total number of posts is 69,000. A total number of

4,31,466 candidates applied and were registered. Of them, 4,09,530 appeared in the written examination. Out of those who took the written examination, 1,46,060 candidates qualified and have been called for the next stage of recruitment, that is counselling.

7. The petitioners, who are seventeen in number have qualified the written examination, except one. They say that they have committed mistakes while filling up various particulars, personal, educational and others, in their online registration form. They want to correct and rectify those mistakes which the respondents have refused to allow. They ask this Court to command the respondents to permit the petitioners to rectify mistakes committed while filling up their online registration forms. All the petitioners say that these mistakes have occurred on account of a "human error'. It is, therefore, arbitrary not to permit them to reform those errors. A summary of the mistakes which each of the seventeen petitioners have committed, while uploading their online registration forms are shown below in tabular form:

Sr. no.	**Writ Petition**	**Brief particulars of mistake(s) sought to be corrected**
1.	WRIT - A No. - 4677 of 2020	Qualified (97/150) - Non-mention of physically handicapped category.
2.	WRIT - A No. - 4613 of 2020	Qualified (109/150) - Seeking correction of marks of Graduation as 1027 in place of 927.
3.	WRIT - A No. - 4872 of 2020	Qualified - (108/150) - Seeking correction of marks of Secondary School Examination, Senior School Certificate Examination and B.Sc. as 315, 320 and 905 in place of 63, 64 & 67, respectively.
4.	WRIT - A No. - 4535 of 2020	Qualified (99/150) - Seeking correction of roll number of B.A. IIIrd Year as 635857 in place 635771680 and also to correct the marks of B.Ed. Certificate as 376/600 in place of 661/800.
5.	WRIT - A No. - 4540 of 2020	Qualified (94/150) - Seeking correction of marks of Intermediate Examination as 373 in place of

		273.
6.	WRIT - A No. - 4656 of 2020	Qualified - (105/150) - Seeking correction of marks of Graduation as 656 in place of 682.
7.	WRIT - A No. - 4666 of 2020	Qualified - (104/150) - Seeking correction of marks of Intermediate as 283/500 in place of 383/500, roll number of B.Ed. as 4058/J in place of 14583 and roll number of U.P. TET as 3517638970 in place of 35176338970.
8.	WRIT - A No. - 4700 of 2020	Qualified - (106/150) - Seeking correction of father's name as Krishnapal Singh in place of Munni and mother's name as Munni in place of Krishnapal Singh.
9.	WRIT - A No. - 4731 of 2020	Qualified - (104/150) - Seeking correction of roll number of High School as 035892 in place of 835892.
10.	WRIT - A No. - 4742 of 2020	Not Qualified according to General Category- (93/150) - Seeking correction of category as OBC in place of General.
11.	WRIT - A No. - 4774 of 2020	Qualified - (100/150) - Seeking correction of marks in Graduation as 1901 in place 2551.
12.	WRIT - A No. - 4790 of 2020	Qualified - (92/150) - Seeking to be treated in the category of Freedom Fighters as he acquired his degrees in the said category.
13.	WRIT - A No. - 4934 of 2020	Qualified - (108/150) - Seeking correction of roll number in Graduation as 12313101485 in place of 2313101485 and correction of marks of B.Ed.

		(Practical) as 359 in place of 259.
14.	WRIT - A No. - 4935 of 2020	Qualified - (101/150) - Seeking correction of marks of B.Ed. (Theory) as 303 in place of 200 and Total Marks of B.Ed. (Practical) as 200 in place of 303.
15.	WRIT - A No. - 4938 of 2020	Qualified - (94/150) - Seeking correction of marks of Graduation as 978 in place of 987.
16.	WRIT - A No. - 4827 of 2020	Qualified - (92/150) - Seeking correction of marks of B.T.C. as 1475 in place of 1472.
17.	WRIT - A No. - 4881 of 2020	Qualified - (102/150) - Seeking correction of marks of Graduation as 2200 in place of 2220.

8. The case of Chitra, the writ petitioner in Writ - A No.4742 of 2020 is different from others in that, that she has not qualified the written examination. She says that this is on account of the fact that she has not been able to fill up the relevant entry in the application form claiming her OBC status. It is her case that in the event she is permitted to reform that mistake, the marks she has earned in the written examination would render her qualified in the OBC category. This is so because the cut-off marks for qualification of an OBC candidate in the written examination are lower and she has crossed that threshold by her earned score. It may be true that being a non-selected candidate in the written examination, this petitioner's candidature may be remoter than others, but that has no bearing on the issue involved in this petition. Like the selected candidates in the written examination, this petitioner too asks to reform her mistake in her application form, uploaded and finally submitted online. Therefore, no different issues are required to be examined so far as Writ - A No.4742 of 2020 is concerned.

9. Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri Anurag Dubey, Sri Shivendu Ojha, Sri Pankaj Kumar, learned Counsel for the petitioners and S/ Sri Pramod Kumar, Shantanu Khare, J.S. Pandey, Vishesh Rajvanshi, J.K. Tripathi, Ashish Pandey, Harindra Prasad, Seemant Singh, Ramesh Kumar Shukla, Santosh Kumar Tiwari, Pankaj Kumar, learned Counsel also appearing for the petitioners in various writ petitions, Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Pankaj Rai & Sri Suresh Singh, learned Additional Chief Standing Counsel and Sri S.C. Dwivedi, learned Standing Counsel appearing on behalf of the State respondents in all the writ

petitions and S/ Sri Vikram Bahadur Singh, Arun Kumar, Mohd. Shere Ali, P.D. Tripathi, A.K. Yadav, learned Counsel appearing for the respondent, Basic Education Board.

10. Sri R.K. Ojha, learned Senior Advocate assisted by Sri Anurag Dubey, learned Counsel for the petitioner in the leading writ petition submits that the case of the petitioner here gives rise to a slightly different proposition than those involved in the other writ petitions. It is pointed out by the learned Counsel that the petitioner, Ruksar Khan appeared in the written examination held on 16.01.2019. The recruitment process is a long drawn one that passes through nine stages. These nine stages or steps, as learned Counsel for the petitioner here chooses to describe, are these:

"Step I - Notification of Vacancies

(Dt. 05.12.2018)
Step II - Registration
Step III - Deposit of Fee
Step IV - Filling of Application Form
Step V - Issuance of Admit Card
Step VI - Written Examination (06.01.2019)
Step VII - Result declared (12.05.2020) &
146060 candidates declared eligible
Step VIII - Filling of form to prefer the
districts
Step IX - Counseling (final merit would be
the aggregate of 60% of the qualifying marks as well as 40% based on academic qualification)"

11. This petitioner is said to have become entitled to claim in the horizontal category of "physically handicapped' on account of low vision that she developed due to an accident, after she filled up her registration form on 06.01.2019. She was issued a disability certificate by the Medical Authority at Budaun, on 16.03.2020. The certificate mentions that this petitioner has 45% permanent disability (low vision in both eyes). It is specified in the certificate to be a condition known as "both eye high myopia with macular hole left eye". It is submitted by the learned Counsel for the petitioner that since she developed this physical handicap after she had filled up the registration form, she could not mention or claim under the physically handicapped category. She has secured 97 marks and qualified the written examination, the result whereof has been declared on 12.05.2020. It is pointed out that the petitioner had become a 45% permanently disabled person before filling up her form regarding preference for the district. Learned Counsel submits that the respondents are not permitting a change in the category from General to Physically Handicapped, because of non-mention at the time of submission of her online registration form. The respondents urge, according to the petitioner, the unqualified prohibition on any change or amendment to entries in the form once it is finally submitted/ uploaded.

12. Learned Counsel for the petitioner submits that this stance would render the finality clause about entries in the registration form unreasonable and violative of Articles 14 and 16 of the

Constitution, inasmuch as the desired change is based on a subsequent event that entitles the petitioner to a horizontal reservation category. Learned Counsel emphasizes that the petitioner's case is different from others, inasmuch as in all the other writ petitions, the mistakes, though cases of sheer human error were about a state of facts existing and known to each petitioner at the time when the respective application forms were filled up. Here, the state of facts changed pending the recruitment process. Therefore, according to the learned Counsel for the petitioner, it would be unreasonable to hold the petitioner bound by the non-amendability condition in the advertisement and elsewhere. Sri M.C. Chaturvedi, learned Additional Advocate General on other hand submits that the condition prohibiting any change to an entry made in the application form, once finally submitted and uploaded, is absolute. It admits of no exception. According to him, in individual cases it may cause hardship, but those cases, like the petitioner claims, would be rare. The rule is made bearing in mind the majority or the bulk of cases, where mistakes in the application forms finally uploaded were well-known to the applicants when they submitted the form online. He emphasizes that for the rare kind of case that the petitioner pleads, the rule does not make allowance. To carve out an exception for a minuscule minority of cases about a change necessitated by an event subsequent, would disturb the entire recruitment process. Mr. Chaturvedi, therefore, submits that the case of this petitioner is in no way different from the other petitioners. It is to be dealt with on the same principles.

13. The petitioner's submission here, to treat her case differently from others, draws inspiration from a decision of the Rajasthan High Court in **SB Civil Writ Petition no.4798 of 2012, Bharti vs. State and others** and connected matters, decided on 13th September, 2012. It was a case where the petitioners in each of the four writ petitions had applied for posts of Teachers Grade-II in the subjects of Mathematics, English, Science and Social Science. After submission of their application forms, the petitioners lost their husbands. There was a horizontal reservation provided for widows. The petitioners desired to claim that reservation which was denied by the selecting body or the employers. The Court held them entitled to claim benefit of the change on account of a supervening event, in the following words:

"The submission of learned counsel for the petitioners is that the petitioners are admittedly widows and such an unfortunate event is required to be considered by the respondents while making appointment to the posts concerned. It is asserted that the object to earmark certain vacancies for widows is nothing but an effort to rehabilitate and empower them by providing employment. The consideration of the petitioners shall be nothing but satisfaction of the object for earmarking the vacancies. Learned counsels to substantiate their contention placed reliance upon a Single Bench judgment of this Court in Ms. Jamna Rajpurohit v. State of Rajasthan & Ors., SBCivil Writ Petition No.8899/2012, decided on 29.8.2012. In the case aforesaid while dealing with the similar circumstances a coordinate Bench of this Court held as under:-

"It is true that the petitioner applied for consideration of her

candidature for recruitment on the post of Teacher Grade-III (Second Level) under the General category because on the date on which she filled up her form her husband was alive and, later on, admission card was issued to her for appearing in the written-examination and, in pursuance of that, she appeared in the written-examination on 02.06.2012. Unfortunately, her husband died on 18.06.2012, therefore, immediately the petitioner preferred representation to the respondents for changing her category from General to Widow; but, the prayer of the petitioner was rejected ostensibly in view of clause 19(1) of the advertisement.

It is not in dispute that the petitioner applied under the General category but it is also correct that before declaration of result her husband died on 18.06.2012 which is a natural calamity. Therefore, obviously the fact of death of petitioner's husband was to be considered by the authorities of the welfare State in view of the fact that women fall under the weaker section of the society as per Article 16 of the Constitution of India. The petitioner is only asking for considering her candidature for appointment as Teacher Grade-III (Second Level) under the "Widow" category as per her merit in the written-examination.

In my opinion, the decision has not been taken by the authority concerned objectively because the respondents themselves are changing category at their own for the candidates belonging to SC/ST/OBC to General category if they secure marks to compete as per their merit with General category and considering those reserve category candidates under the General category; meaning thereby, the candidates belonging to SC/ST/OBC category are getting benefit of change of category from reserve class to General if found meritorious, then, same analogy can be put into operation for young widows also.

Further, it is important to take judicial note of the fact that unlike other reserve categories the status falling under the "Widow" category purely rests upon happening of an event in the course of life of a woman and no sooner husband of a woman dies she is rendered widow for all purposes including her consideration for employment purposes under the widow category and denial shall rather render the proceedings vitiated and violative of the Constitutional provision. Therefore, the concerned authority was under obligation to exercise its power for granting relief to the petitioner. However, it has not been done in this case."

In the instant matter too the petitioners became widows after submitting the application forms but before completion of process of selection. As such, their case is also required to be treated in accordance with the law laid down by this Court in the case of Ms. Jamna Rajpurohit *(supra)*."

14. The petitioner's contention would surely carry much weight had her case rested upon specific particulars about the accident and the precise time that she acquired the physical disability, entitling her to a change in status to a physically handicapped candidate. A perusal of the writ petition shows that the assertions are woefully vague about what kind of accident did befall the petitioner; the date, place and circumstances of the accident. It would be apposite in this connection to refer paragraphs nos.11,

12, 13 and 14 of the writ petition, that carry the relevant averments. These read:

"11. That it is pertinent to mention here that during the aforesaid process of examination and before announcement of its result the petitioner became a case of low vision due to an accident and her case was diagnosed by District Medical Authority of Budaun as her both eye high myopia with macular hole left eye. The District Medical Authority, Budaun has issued Disability Certificate 16.03.2020 to the petitioner wherein it has been mentioned that she has 45% Permanent in relation to her (both eye) as per guidelines. Copy of the disability certificate of the petitioner dated 16.03.20 is being annexed herewith and marked as **ANNEXURE NO.7** to this writ petition.

12. That it is appropriate to submit here even though the petitioner applied in general category while before announcement of result the petitioner became a case of low vision due to an accident and her case was diagnosed by District Medical Authority of Budaun as her both eye high myopia with macular hole left eye resultantly she became 45% permanent disable as 45% permanent in relation to her (both eye) as per guidelines.

13. That the petitioner became 45% permanent disable before the filling of the application of preference of districts through online while there was no option in the system to change her category from general to reserve category of physical handicapped so did not change her category.

14. That the petitioner became 45% permanent disable during the course of the process of the aforesaid examination."

15. There is also on record a representation by the petitioner dated 18.05.2020, addressed to the Examination Regulatory Authority, Prayagraj claiming benefit of the physically handicapped category, based on the supervening permanent disability. A perusal of the said representation shows that there is not as much as a whisper about the date, place, time or circumstances of the accident. All that is said in the representation is expressed in the following words (in Hindi vernacular):

"निवेदन इस प्रकार है कि मैंने शिक्षक भर्ती चयन प्रक्रिया में चयन के समय मैंने सामान्य श्रेणी में आवेदन किया था लेकिन आवेदन करने के पश्चात् कुछ समय बाद मेरी आँखों में चोट लग गई। डॉक्टर को दिखाने के बाद डॉक्टरों के पैनल ने यह पाया कि मेरी आँखों में Permanent विकलांगता आ गई है जो अब सही नहीं हो सकती तथा बदायूँ मुख्य चिकित्सा अधिकारी द्वारा निर्धारित बोर्ड ने मुझे विकलांग घोषित कर दिया और 45% विकलांगता का प्रमाण-पत्र मुझे प्रदान किया गया।"

(Emphasis by Court)

16. This Court finds that in the absence of the slightest detail or particulars about the accident that the petitioner claims to have caused a supervening permanent disability, she is not entitled to ask for a change in the midst of the recruitment process. The principle enunciated by the Rajasthan High Court in **Bharti vs. State** *(supra)* would not come to the petitioner's rescue. The consequence is that the petitioner's case is to be treated at par and on the same parameters as the other petitioners,

who committed a mistake by a wrong mention or non-mention of a particular fact or figure in the application form when they uploaded it, though it was well within their knowledge at the time.

17. The submission of the learned Counsel appearing for the petitioners is that omissions or mistakes in the application forms committed by the petitioners are the result of what may be called "human error'. The petitioners do not stand to gain by the flawed entries. It is emphasized by Mr. Ojha, learned Senior Counsel that the application forms submitted online are to be subjected to verification by human agency, cross-checking the entries on a comparison with the original certificates/ degrees/ documents issued by the Board/ University/ Issuing Institutions. According to Mr. Ojha, therefore, the petitioners cannot stand to gain by entering some wrong particulars, that is to his/ their advantage, or if the facet of advantage be not there, an incorrect entry, in any case, would be detected during scrutiny. Learned Counsel further submits that these aberrations that are the products of sheer human error come about in consequence of the ground realities in the Indian social milieu. Mr. Ojha says that the hard reality cannot be ignored that majority of candidates applying for the posts in question hail from a rural background. Even if they come from urban areas, they are not truly urbane. They are not affluent young men or women who sit in the comfort of their homes, to fill up their individual forms on a privately owned computer facility. According to him, these application forms are filled up through public and common facilities, like cybercafes, where an indifferent third party - a commercial computer operator enters handwritten data relating to scores of candidates into individual computer generated online application forms. Cramped spaces and strained resources, in these circumstances, are often responsible for mistakes of the kind, escaping attention of an anxious candidate peeping over the operator's shoulder. Illustratively, he points out that in Writ - A No.4872 of 2020, in the column relating to total marks secured by the petitioner in his High School, Intermediate and Graduation examinations, the percentage figure of those marks has been entered by a sheer human error. These are, therefore, products of mistake, that ought to be permitted rectification of.

18. Mr. Ojha further submits that the anxiety of an employer ought to be about selecting the best possible talent available, particularly, in public employment. That consideration ought not to be lost by excluding a meritorious candidate for a non-substantial and inconsequential lapse attributable to human error. Mr. Ojha has, particularly, emphasized that cases of an incorrect entry in the online application form would be different from cases of an incorrect entry made in an OMR Sheet. In case of an OMR Sheet, according to the learned Senior Counsel, there is no human agency to recheck the accuracy of the entries made. The OMR Sheets are processed and evaluated exclusively by a computer facility, where an incorrect entry cannot be corrected. A permission to rectify and reform, therefore, in the case of an OMR Sheet, would lead the entire evaluation to go haywire. Mr. Ojha, therefore, urges that all those Authorities that repel a candidate's right to a change of entries made by him in the

OMR Sheet proceed on a different principle that has no application here.

19. Mr. Seemant Singh, Mr. Anurag Dubey, Mr. Shivendu Ojha, Mr. Pankaj Kumar, Mr. Pramod Kumar, Mr. Shantanu Khare, Mr. J.S. Pandey, Mr. Vishesh Rajvanshi, Mr. J.K. Tripathi, Mr. Ashish Pandey, Mr. Harindra Prasad, Mr. Ramesh Kumar Shukla and Mr. Santosh Kumar Tiwari have elaborately addressed this Court with reference to facts of the respective causes in which they appear. Broadly on principle, they have advanced a submission that a mistake that is obvious to the eye as a product of human error, ought to be permitted reform of. They have also submitted that in the absence of demonstrable *mala fides* or fraud, which is a remote possibility, the candidate ought not be penalized for a mere human error. All the learned Counsel have, in one voice, distinguished these cases from those where an incorrect entry has been made in an OMR Sheet.

20. Sri M.C. Chaturvedi, learned Additional Advocate General appearing for the State and S/ Sri Vikram Bahadur Singh, Arun Kumar, Mohd. Shere Ali, P.D. Tripathi and A.K. Yadav, learned Counsel appearing for the Basic Education Board, all reiterate their stand in answer to the petitioners' submission noticed in the earlier part of this judgment. They say that once an application form is finally submitted online, the agreed conditions do not permit any change to be made to the entries there.

21. This Court must record the fact that Mr. Chaturvedi, learned Additional Advocate General and the other learned Counsel representing the Basic Education Board, have opposed the motion to admit this petition to hearing. They have urged that it is a matter that does not require affidavits to be put in on behalf of the respondents for the position of law is clear. They say that the facts in each of the writ petitions that are almost common, do not entitle the petitioners to relief, given the position of law that governs rights of parties. Broadly speaking, there are three kinds of mistakes that the various petitioners have committed: the first is the wrong mention or non-mention of a reservation category; the second is a correction to the marks mentioned in one or the other relevant examinations; and the third is an incorrect mention of the roll number in one or the other relevant examinations. It merits notice that the recruitment process for the posts of these 69,000 Assistant Teachers in various schools of the Basic Education Board commenced with a Government Order no.2056/68-4-2018, Shiksha Anubhag-4, dated 01.12.2018, carrying guiding principles applicable to the selections. The aforesaid Government Order vide paragraph no.17, sub-paragraphs 2, 3, 4 and 6 enumerates the following instructions for candidates:

"17. ऑन लाइन आवेदन-

(1) x x x x

(2) ऑन लाइन आवेदन करने के लिए तकनीकी एवं परिचालन सम्बन्धित निर्देश वेबसाइट पर उपलब्ध कराये जायेंगे। अभ्यर्थियों को यह सलाह दी जाती है कि वह निर्धारित वेबसाइट पर ऑनलाइन आवेदन करने से पूर्व अनुदेशों को सावधानीपुर्वक पढ़ लें।

(3) अभ्यर्थियों को अपने ऑनलाइन आवेदन की अंकित प्रविष्टियों में संशोधन का कोई अवसर देय नहीं होगा। इसके लिए अनिवार्य है कि अभ्यर्थी रजिस्ट्रेशन को सबमिट (Submit)/

फाइनल सेव (Final save) करने से पूर्व उसका प्रिंट लेकर, ऑनलाइन अंकित प्रविष्टियों का अभिलेखों से मिलान अवश्य कर ले।

(4) अभ्यर्थियों से रजिस्ट्रेशन को सबमिट (Submit)/ फाइनल सेव (Final save) करने से पूर्व इस आशय के घोषणा पत्र को चयन करना अनिवार्य होगा कि - "मैंने ऑनलाइन आवेदन के अंतर्गत किये गये रजिस्ट्रेशन का प्रिंट निकाल कर उसमें की गयी प्रविष्टियों का मिलान मूल अभिलेखों से कर लिया है एवं उसे सही पाया है तथा मै अपने रजिस्ट्रेशन को फाइनल सेव करने हेतु पूर्णतः सहमत हूँ, फाइनल सेव होने के उपरान्त मुझे अपने आवेदन में संशोधन करने का कोई अवसर देय नहीं होगा।"

(5) x x x x

(6) अभ्यर्थी द्वारा ऑनलाइन पंजीकरण सबमिट (Submit)/ फाइनल सेव (Final save) करने के उपरान्त किसी ब्यौरे में परिवर्तन/ सुधार के लिए अनुरोध को किसी भी परिस्थिति में स्वीकार नहीं किया जायेगा। किसी भी कारण से पुष्टिकरण पृष्ठ में अभ्यर्थी द्वारा भरे गए किसी त्रुटिपूर्ण ब्यौरे से उत्पन्न किसी भी परिणाम के लिए परीक्षा संस्था उत्तरदायी नहीं होगा। अभ्यर्थी द्वारा ऑनलाइन भरा गया संशोधित विवरण ही अन्तिम होगा और भविष्य में ऑनलाइन कोई बदलाव नहीं किया जायेगा।"

22. In Schedule-II appended to the Government Order dated 01.12.2018, there are detailed instructions about the manner in which a candidate is to proceed, step by step in order to submit his application form online. Paragraphs nos.1, 2 and, in particular, paragraph no.7 of the Schedule are relevant. These are extracted below:

"परिशिष्ट-II

ऑनलाइन आवेदन करने के लिए अनुदेश -

सहायक अध्यापक भर्ती परीक्षा के लिए आवेदन करने वाले उम्मीदवार से अपेक्षा है:

1. सहायक अध्यापक भर्ती परीक्षा हेतु अभ्यर्थी द्वारा विवरण ऑनलाइन भरे जाएंगे और आवेदन पत्र भरते समय नवीनतम रंगीन फोटो (जो 6 माह की अवधि से अधिक पुराना न हो) हस्ताक्षर युक्त (केवल जेपीईजी प्रारूप में) का स्कैन अपलोड किया जाएगा। अभ्यर्थी को आवेदन करने से पहले अभ्यर्थी की तस्वीर (जेपीईजी प्रारूप) और हस्ताक्षर स्कैन करके रखने की सलाह दी जाती है।

2. सूचना बुलेटिन को ध्यानपूर्वक पढ़ना और उसमें दी गई सभी अपेक्षाओं से अवगत होना।

3. x x x x

4. x x x x

5. x x x x

6. x x x x

7. ऑनलाइन आवेदन पत्र प्रस्तुत करने की विधि

> वेबसाइट पर लॉगआन करें।

> "Apply on line" लिंक पर जाएं और उसे खोलें।

> आवेदन पत्र ऑनलाइन प्रस्तुत करने के लिए अनुदेशों एवं प्रकिया को ध्यानपूर्वक पढ़ें। इस पृष्ठ के अंत में ऑनलाइन आवेदन के लिए निम्नलिखित चार लिंक दिए गए हैं:

(क) ऑनलाइन आवेदन फार्म भाग -1 भरें और पंजीकरण संख्या नोट करें।

(ख) शुल्क का भुगतान निर्दिष्ट बैंक के नवीनतम तकनीक के माध्यम से करें।

(ग) ऑनलाइन आवेदन फार्म भाग- III में स्कैन फोटो इमेज अपलोड करें।

(घ) पुष्टीकरण पृष्ठ का प्रिंट लें और अपने पास सुरक्षित रखें।

> प्रथम लिंक को खोलें, अनुदेशों का सावधानीपूर्वक अनुसरण करें और सूचना प्रस्तुत करें। इस पृष्ठ के अंत में दो लिंक "Next" और " Reset" दिए गए हैं। यदि आप संतुष्ट है कि भरी गई सूचना सही है तब "Next" क्लिक करें अन्यथा "Reset" पर क्लिक करें। "Next" खोलने के बाद, प्रस्तुत सूचना की जांच की जा सकती है और यदि सूचना सही है तो "Final submit" के लिए जाएं अन्यथा "Back" के लिए जाएं।

> डेटा की अंतिम प्रस्तुति के बाद, प्रोग्राम आपको स्वतः शुल्क भुगतान के लिए तीसरे लिंक के लिए ले जाएगा।

> अनुदेश का पालन करें और शुल्क प्रस्तुत करें। शुल्क की सफलतापूर्वक प्रस्तुति के

बाद, प्रोग्राम आपको पुष्टीकरण पृष्ठ का प्रिंटआउट लेने के लिए चौथे लिंक पर ले जाएगा।

> अभ्यर्थियों को अपने ऑनलाइन आवेदन की अंकित प्रविष्टियों में संशोधन का कोई अवसर देय नहीं होगा। इसके लिए अनिवार्य है कि अभ्यर्थी रजिस्ट्रेशन को सबमिट (Submit)/ फाइनल सेव (Final save) करने से पूर्व उसका प्रिंट लेकर, ऑनलाइन अंकित प्रविष्टियों का अभिलेखों से मिलान अवश्य कर ले।

> आवेदन पत्र की ऑनलाइन प्रस्तुति, शुल्क के भुगतान, और पुष्टिकरण पृष्ठ का प्रिंट लेने के लिए सभी लिंकों का अलग से भी प्रयोग किया जा सकता है।

> आवेदन पत्र प्रस्तुत करने शुल्क का भुगतान करने और कम्प्यूटर सृजित पुष्टिकरण पृष्ठ के प्रिंटिंग की सुविधा प्रत्येक स्लॉट के अंतिम दिवस को निर्धारित अवधि में बंद कर दी जाएगी। अतः अभ्यर्थियों को निर्धारित अवधि के अन्दर प्रकिया पूर्ण करना आवश्यक है।

> नियत तिथि के अंदर ऑनलाइन आवेदन पत्र की सफलतापूर्वक प्रस्तुति के बाद भी, यदि कम्प्यूटर सृजित पुष्टीकरण पृष्ठ अंतिम तिथि को प्राप्त नही होता है अथवा बिना अपेक्षित शुल्क के प्राप्त होता है तो अभ्यर्थी का आवेदन पत्र रद्द समझा जाएगा।"

23. The advertisement issued by the Examination Regulatory Authority, U.P., Prayagraj, dated 05.12.2018 is of great relevance which carries as part of it, the requirement of a declaration set out in the advertisement that every candidate is required to make when he/ she submits his/ her online application form. This declaration has been extracted in the opening part of this judgment.

24. The attention of this Court has been drawn to two of the application forms submitted by Rajesh Kumar and Pooja Yadav, who are the petitioners in Writ - A No.4535 of 2020 and Writ - A No.4540 of 2020, respectively. There is a declaration carried at the foot of each of the applications, in the following words:

"**घोषणाः** मैं शपथपूर्वक अभिकथन करता/करती हूँ कि ऑनलाइन रजिस्ट्रेशन/आवेदन में भरी गयी समस्त प्रविष्टियाँ मेरे मूल अभिलेखों पर आधारित हैं तथा मेरे संज्ञान में सही एवं सत्य हैं। निर्धारित तिथि तक नियत शुल्क (विकलांग अभ्यर्थियों को छोड़कर) जमा करने पर ही मेरा ऑन लाइन आवेदन सहायक अध्यापक भर्ती - 2019 हेतु विचारणीय होगा। मुझे विज्ञापन की दी गई समस्त शर्तें मान्य हैं। आवेदन करने की तिथि को मेरे पास आवेदन पत्र में उल्लिखित समस्त अंक पत्र/ प्रमाणपत्र/ आरक्षण एवं विशेष आरक्षण सम्बन्धी प्रमाणपत्र उपलब्ध हैं। यदि परीक्षा के पूर्व अथवा बाद में जाचोंपरांत कोई भी विवरण असत्य अथवा गलत पाया जाता है तो सम्बन्धित अधिकारी को मेरा अभ्यर्थन निरस्त करने तथा मेरे विरुद्ध वैधानिक कार्यवाही करने का अधिकार होगा। यदि कोई भी सूचना गलत पायी गई तो उसका सम्पूर्ण उत्तरदायित्व मेरा होगा।

मैने फोटोयुक्त रजिस्ट्रेशन का प्रिंट निकाल कर उसका मिलान मूल अभिलेखों से कर लिया है एवं उसे सही पाया है तथा मैं अपने रजिस्ट्रशन को सबमिट करने हेतु पूर्णतः सहमत हूँ, फाइनल सबमिट होने के उपरांत मुझे अपने आवेदन में कोई संशोधन करने का अवसर देय नहीं होगा।

मेरे द्वारा एक से अधिक ऑनलाइन आवेदन पूरित किये जाने पर, मेरे द्वारा पूर्व में किये गये समस्तद आवेदन को निरस्त करते हुए सहमति प्रदान की जाती है कि केवल अंतिम ऑनलाइन आवेदन को ही मान्य किया जाय।"

(Emphasis by Court)

Admittedly, there is an identical declaratory made by each of the petitioners, while uploading/ submitting their online application forms.

25. A reading of the Government Order, initiating the recruitment process, the advertisement for the posts of Assistant Teachers in Basic Schools to be filled up through the Assistant Teachers Recruitment Examination, 2019 issued by the Examination Regulatory Authority, U.P., Prayagraj and the online registration form that each of these petitioners filled up, unequivocally speak about a declaration to be made by every candidate applying, that he/ she, has after filling up the form online, taken a printout of the same and compared the particulars entered there with his/ her original documents. He/ she has found those entries to be correct and is agreeable to save those entries. The declaration postulates a further undertaking by the candidate that after the online form is finally saved, the applicant shall have no opportunity to amend or change the particulars entered there. It is not just that, that the declaration is hidden away in the Government Order to remain unnoticed by a candidate's eye. It is prominently published as part of the advertisement dated 05.12.2018, inviting applications for the posts in question. The candidates who have submitted the application form have made a separate declaration in the terms indicated in the Government Order and the advertisement. Thus, by the declaration made, each of the candidates have bound themselves by a solemn declaration for every word of it. This Court noticed that the declaration is not a formal utterance. It requires the candidates to say that after filling up the form online, he/ she has done a print and compared the entries made by him/ her in the hard copy with his/ her original documents. The declaration is, therefore, one that guarantees action by the applicant in going about a checking exercise as to particulars mentioned in his/ her application form. To add to this, is the second Schedule to the Government Order dated 01.12.2018 carrying detailed instructions about the manner in which the online application form is to be filled up.

26. It would be noticed there that very detailed guidelines have been issued about the manner to go about the exercise of submitting the application form. It indicates the choice of 'Reset', if the information appearing is not correct. The option may be used to rectify an error. It is once that a candidate is satisfied that the information appearing is correct that he/ she may move on with filling up his/ her application form by clicking the option, 'Next'. In the event any information filled up is not accurate, there is an option appearing on the site, 'Back' that affords a candidate opportunity to rectify errors. It is upon clicking the option, "Final submit' that the application form would stand uploaded and submitted. Before doing so, is the option as well as the requirement to print a copy of the filled up form and cross-check every entry there with one's original documents.

27. With so much of an elaborate exercise involved in the uploading of an examination form that constitutes final submission, it would be the most callous conduct of a candidate that alone could lead to an error about the particulars filled up. It would be in the opinion of

this Court an act almost of negligence to go wrong about an entry. The procedure prescribed for the filling up of a form makes provision for exclusion of every human error. An error, therefore, if not attributable to malice or fraud in this transaction, would as said above be an act bordering on the candidate's negligence.

28. Learned Counsel for the petitioners have called in aid of their submission that a wrong mention of marks in the application form ought to be condoned and permitted to be rectified as a human error, the decision of a Division Bench of this Court in **Km. Archana Rastogi vs. State of UP and others, 2012 (3) ADJ 219**. They have placed reliance on paragraph no.7 of the report in **Km. Archana Rastogi** *(supra)*, where it is held:

"7. From perusal of the column 13 of the advertisement (Annexure-5 to the writ petition), it will be seen that along with the Application Form the candidates were also required to submit their High School and other certificates in support of the declaration of marks made by them in column 10 of the advertisement. Thus, the High School Examination Certificate having been appended to the Application Form it cannot be said that there was no material before the competent authority to verify the actual marks obtained by the appellant-petitioner. In fact, the testimonials in support of the education qualification are, as a matter of fact, required to be filed for purposes of verification of the statement and declaration made in column 10 of the advertisement and, in such circumstances, the High School Certificate of the appellant-petitioner being before the competent authority, even if the appellant had, through human error mentioned her marks obtained in her High School Certificate as 256, the competent authority ought to have verified the same from the High School marks shown in the High School Certificate appended to the appellant's Application Form. Apparently, this was not done and the candidature of the appellant was rejected in a most cursory and arbitrary fashion relying purely upon the declaration made in the Application Form. It may further be noticed that by mentioning her High School marks in the application form as 256 instead of 356 the appellant-petitioner did not stand to gain any ulterior benefits and it is not a case where the appellant-petitioner deliberately tried to mislead the respondents for any personal gain. These facts have not been considered at all by the competent authority while rejecting the representation of the appellant-petitioner. However, as we have already mentioned that since the original testimonials were appended to the application form, the competent authority ought to have given credence to the High School Examination Certificate appended to the Application Form of the appellant rather than ignoring the same and arbitrarily rejecting the candidature of the appellant-petitioner merely on the basis of lesser marks wrongly disclosed in the Application Form."

29. The decision of their Lordships of the Division Bench in **Km. Archana Rastogi** *(supra)* was rendered in the context of the Special BTC Training, 2008, wherefrom the petitioner was excluded on account of a wrong mention of her marks in her High School as 256

in place of 356. What appears from the decision is that the examination form was submitted, apparently not online, along with a copy of the High School and other certificates enclosed. It was in the context of the aforesaid method of submission obtaining at the time, that the Division Bench laid down the proposition that the competent Authority ought to have given credence to the High School Examination Certificate appended to the application form, rather than rely on an incorrect mention of lesser marks in the application form. The present is a completely different mechanism of submission and, therefore, a very different context in which the law has to determine rights of parties. Here is a case of an online submission of the application form with no testimonials attached. Rather, it is the candidate who has been burdened with the obligation to declare that after entering all particulars in the online application form, he has printed a copy thereof and compared it with the original documents. There is a specific declaration further made that the candidate, after final submission of the form, shall have no right to ask for any correction or amendment to the particulars mentioned there. The principle on which their Lordships of the Division Bench decided **Km. Archana Rastogi** *(supra)* is not at all attracted here.

30. Learned counsel for the petitioners have next placed reliance upon a decision of a learned Single Judge of this Court in **Writ - A No.4321 of 2020, Amar Bahadur and 25** others and connected matters decided on 19.06.2020. This case relates to the examination that is subject matter of this petition. Learned Counsel have drawn pointed attention of this Court to the disposition of **Amar Bahadur** *(supra).* By that decision, the writ petition was allowed, holding thus:

"I consider to appropriate to deal with the writ petition No. 4321 of 2020 first.

In this case, all the petitioners are stated to have qualified on the basis of the written examination. They have made mistakes while filling up their marks obtained by them in various qualifying examinations. Some, as noticed above, they filled lower marks while other have filled higher marks than actually obtained. The petitioners in this petition, in my opinion would be governed by the order passed in Writ Petition No. 4088 of 2020 which reads as follows:-

"From perusal of the same, it is clear that after the petitioner was found selected, she has to face the aforesaid Selection Committee. I am of the opinion that for the mistake, which was committed by the petitioner, she should place the aforesaid facts before the aforesaid Selection Committee at the time of councelling. If petitioner will place the aforesaid facts before the Selection Committee constituted under Rule 16 of the Rules 1981, the Selection Committee will look into the same sympathetically and pass appropriate orders for the correction of roll number in the application form of the petitioner."

This petition, therefore, is liable to be allowed on the same reasoning as extracted above."

31. A perusal of the said decision shows that in accepting a case of human error or mistake, the learned Judge has in turn relied upon a decision of this Court

in **Writ - A No.4088 of 2020, Pinkee vs. State of U.P. and 2 others, decided on 04.06.2020,** noted in the relevant part of the judgment extracted above. There is no further reasoning apart from reliance on the decision in **Pinkee** *(supra)*. Now, the decision in **Pinkee** *(supra)* does not answer the point involved here as it was never argued, considered or decided. More about this decision is said later in this judgment. The decision in **Pinkee** *(supra)* is, therefore, one that is confined to its facts. For the same reason, the decision in Amar Bahadur *(supra)* also turns on its own facts. It does not lay down any principle or indicate reasons that would serve as binding precedent.

32. Learned Counsel for the petitioners have pressed into service the decision of a learned Single Judge of this Court sitting at Lucknow in **Service Single No.9597 of 2020, Anshuman Singh and others vs. State of U.P. through Additional Chief Secretary, Basic Education and others, decided on 22.06.2020.** This decision relates to the present examination, where there were mistakes by one petitioner in filling up his marks obtained in the High School and by the other in his TET. The learned Judge disposed of the matter at the admission stage, in terms of the following directions:

"Considering the facts and circumstances, this Court is of the opinion that no gainful purpose would be served by keeping this petition pending, accordingly the petition is disposed of with a direction to the respondent no.4, who shall consider the pending representation of the petitioners no.1, 2 and 3 as brought on record as annexure nos.8, 9 and 10. In case if the respondent no.4 requires any information to substantiate and verify the records, they shall inform the petitioners of the same by giving reasonable opportunity to enable the petitioners to provide the necessary testimonial to substantiate their submissions regarding the error in filling the online form and may provide the correct details which may be verifed by the authority concerned. This Court further directs that the entire exercise be completed within a period of one month from the date a certified copy of this order is placed before the authority concerned."

33. Two other decisions that have been relied upon by the learned Counsel for the petitioners are decisions of learned Single Judges in **Writ - A No.4065 of 2020, Rakesh Kumar vs. State of U.P. and 2 others, decided on 30.05.2020** and **Pinkee** *(supra)*. In **Rakesh Kumar** *(supra)*, the relevant part of the judgment, which again was a matter that was disposed of at the admission stage, reads thus:

"After some arguements, the petitioner has confined his prayer only to the effect that the representations submitted by him before the authorities dated 16.5.2020 as well as 20.5.2020, copy of which is appended as annexure 7 to the writ petition, be decided expeditiously.

Without entering into the merits of the case, petitioner is directed to submit a fresh representation along-with copy of the earlier representations dated 16.5.2020 as well as 20.5.2020 as well as self attested computer generated copy of this order downloaded from the official website of High Court Allahabad before the Secretary, U.P. Basic

Education Board, Prayagraj/respondent no.3 within a period of one week from today, the respondent no.3 will pass appropriate orders on the same expeditiously and preferably within a period of three weeks thereafter, in accordance with law."

34. In **Pinkee** *(supra)*, it has been held:

"It appears from perusal of the record that the petitioner duly participated in Assistant Teacher 3 Recruitment Examination 2019 under O.B.C. category candidate. She was declared duly qualified by the respondent-Board and while declaring her result it was found that by way of mistake a wrong roll number has been typed out by her in the application form. After the petitioner was declared successful, for the purpose of appointment a Selection Committee was constituted. In this regard Rules were duly framed by the State Government namely the U.P. Basic Education (Teachers) Service Rules, 1981. Under Rule 16 of the Rules, 1981 it is provided that for selection of candidates for appointment to any post, the candidate should appear before a Selection Committee comprising of four persons as indicated in Rule 16 itself. Subsequently, vide notification dated 31.8.2012 Rule 17 was also incorporated in the Rules of 1981. The Rules 16 and 17 of the Rules 1981 are reproduced hereinbelow :- (quoted portion omitted).

From perusal of the same, it is clear that after the petitioner was found selected, she has to face the 4 aforesaid Selection Committee. I am of the opinion that for the mistake, which was committed by the petitioner, she should place the aforesaid facts before the aforesaid Selection Committee at the time of councelling. If petitioner will place the aforesaid facts before the Selection Committee constituted under Rule 16 of the Rules 1981, the Selection Committee will look into the same sympathetically and pass appropriate orders for the correction of roll number in the application form of the petitioner."

35. Now, so far as the decisions in **Anshuman Singh** *(supra)* and **Rakesh Kumar** *(supra)* are concerned, a reading of the same would show that there is no reason assigned by the learned Judges in those cases for the directions made. The decisions, therefore, must be held confined to the facts obtaining there. So far as the decision in **Pinkee** *(supra)* is concerned, the reasoning, on which it proceeds, is somewhat similar to the Division Bench in **Km. Archana Rastogi** *(supra)*. The learned Judge appears to have taken the view that the mistake about incorrect mention of her roll number relating to her Graduation Examination ought to be considered by the statutory selection committee under Rule 16 of the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981, who would assess her merit finally. The selection committee were directed to look into the petitioner's case sympathetically and pass appropriate orders regarding correction of the relevant roll number in the application form. A perusal of the decision in **Pinkee** *(supra)* shows that His Lordship's attention was perhaps not invited to the very meticulous process through which the online examination form has to be submitted for the Assistant Teachers Recruitment Examination, 2019. The point involved was neither raised, argued

or decided. The decision, therefore, insofar as the point involved here is concerned, must be held to pass *sub silentio*. It would, therefore, not be binding precedent as later explained in this judgment.

36. Further reliance has been placed on a decision of this Court in **Writ - A No.5632 of 2019, Babita Pandey and 3 others vs. State of U.P. and 4 others, decided on 12.04.2019.** The said decision relates to the Assistant Teachers Recruitment Examination, 2018, where it is held on facts evident from the short judgment, thus:

"In the similar situation, a circular dated 11.10.2018 had been issued by the Secretary, U.P. Basic Shiksha Parishad, Allahabad to all the District Basic Education Officers providing for corrections in the On-line application forms. Attention of the Court is invited to page '88' of the paper book to submit that corrections can be made by filing an application alongwith the affidavit.

On another query made by the Court as to whether the petitioner has approached the competent authority in the light of the circular dated 11.10.2018, it is admitted that they have not applied so far.

Sri Arun Kumar, learned counsel for the respondent nos. 3 and 4, however, does not dispute the assertion of the petitioner that corrections can be sought by them by filing appropriate affidavits in the light of the circular dated 11.10.2018.

For the aforesaid, without entering into the merits of claim of the petitioners, a liberty is granted to the petitioners to approach the Secretary, U.P. Basic Shiksha Parishad, Allahabad, by moving proper applications, strictly in accordance with the circular dated 11.10.2018."

This Court notices that the decision in **Babita Pandey** *(supra)* relates to the Assistant Teachers Recruitment Examination, 2018. It appears that the rules governing the said examination, carried in a certain circular dated 11.10.2018, made provision for corrections to be made in an application submitted by a candidate online. The rules governing corrections to incorrect entries in the application form being different for the Examination of 2018, the decision in **Babita Pandey** *(supra)* would be of no relevance here.

37. There is then reliance placed on another decision of this Court in **Writ - A No.19162 of 2018, Sachin Sharma and 3 others vs. State of U.P. & 3 others, decided on 10.09.2018.** From a reading of the judgment, it is not clear whether it relates to the Assistant Teachers Recruitment Examination, 2018 or 2019. To all seeming, it relates to the year 2018, where rules about correction were different from the present examination. Apart from the said fact, the decision does not assign any reason for the directions made. It does not show that the point involved here was raised, argued and decided.

38. There is still another decision in **Writ - A No.18271 of 2018, Suman Vaishya vs. Managing Director U.P. Cooperative Bank Ltd. Lucknow and another, decided on 28.08.2018.** It relates to non-consideration of the petitioner's case there about appointment under the Dying-in-Harness Rules. The petitioner's representation, claiming

consideration, was ordered to be decided. The decision has absolutely no relevance here.

39. Learned Counsel for the petitioners have also banked upon the decision of this Court in **Writ - A No.19606 of 2018, Rajesh Kumar Gupta vs. State of U.P. and 3 others, decided on 14.09.2018.** This case relates to a cause of action about correction to an online application form, submitted by a candidate for the post of an Assistant Teacher in Primary Schools, managed by the respondent, Basic Shiksha Parishad. It is, however, not clear whether the directions issued to the respondents to correct the "human error' committed by the petitioner there, while submitting his online application form, relate to the recruitment of 2018 or 2019. Apparently, going by the date of the decision, it relates to the recruitment of 2018, where the rules about correction were very different. Even otherwise, the decision does not assign reasons for the directions made. It would, therefore, not have the force of precedent.

40. Relating to the present examination, learned Counsel for the petitioners have relied on another decision of a learned Single Judge of this Court sitting at Lucknow in **Service Single No.9126 of 2020, Punit Tiwari vs. State of U.P. through Principal Secretary, Basic Education, Lucknow and others,** decided on 16.06.2020. The relevant part of the decision in **Punit Tiwari** *(supra)* is extracted below:

"2. The petitioner claims that he had filled a form for the competitive examination held to recruitment of assistant teacher. The said examination was conducted by the respondent no.3 - Secretary, Examination Regulatory Authority, Allenganj, Allahabad. While filling up that form the petitioner, by mistake, filled the marks awarded in the BTC as 155 in place of 1155.

3. Nevertheless, the petitioner participated in the examination and he was also declared successful in the written examination, as per the averment made in paragraph 15 of the writ petition, he has not participated in the counselling.

4. The grievance then arises that the petitioner is not being allowed counselling owing to the discrepancy in the marks actually obtained by him in the BTC examination being 1155 and the marks that had been filled up in the online form, being 155.

5. The petitioner then submits that such an error in filing of the online form is purely clerical and therefore rectifiable and that appointment may not be denied for that reason alone.

6. In view of the above, no useful purpose would be served in keeping the present petition pending. It is disposed of with a direction that in case the petitioner has not participated in the counselling, the respondent no.3 shall provide the petitioner one opportunity to make rectification of the details filled up in the online form as per correct details found recorded in the documents relied in support of details filled in the online form. Such opportunity and correction, if any, may be provided to the petitioner within a period of one month from today."

A perusal of the decision in **Punit Tiwari** *(supra)* would show that though it involves facts and a cause of action, identical to those involved in a number of writ petitions here, the learned Judge has not assigned reasons for the

directions made. It appears that the point involved was not argued in the said case. The decision in **Punit Tiwari** *(supra)* would, therefore, not have the force of precedent.

41. It must be said, about the various decisions relied upon by the learned Counsel for the petitioners, where after a short statement of facts giving rise to the cause, directions have been issued, that these decisions do not carry the force of precedent. A decision has the value of precedent, where it lays down a principle governing a point that arises for consideration in a subsequent decision. A *fortiori* a decision that does not enunciate a principle of law in the context of facts involved after consideration of arguments must be regarded not binding on a Court before which the relevant point subsequently arises. The decision is regarded to pass *sub silentio*. The principle of *sub silentio* is a well acknowledged principle that relieves a Court of the obligation of precedent, where the decision relied does not indicate a consideration of the kind. A classical statement about the law relating to the principle of *sub silentio* is to be found in the decision of the Supreme Court in **State of U.P. and Another vs. Synthetics and Chemicals Limited and Another, (1991) 4 SCC 139. In State of U.P. vs. Synthetics and Chemicals Ltd.** *(supra)*, the principle is enunciated in the concurring judgment of R.M. Sahai, J. thus:

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." *(Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. [(1989) 1 SCC 101] The bench held that, "precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Shama Rao v. Union Territory of Pondicherry* [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a

general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

42. The principle was again explained by the Supreme Court in **Divisional Controller, KSRTC vs. Mahadeva Shetty and another, (2003) 7 SCC 197**. It was held in Divisional Controller, KSRTC *(supra)*:

"23. So far as *Nagesha case* [(1997) 8 SCC 349] relied upon by the claimant is concerned, it is only to be noted that the decision does not indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents *sub silentio* and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority."

43. The decisions of this Court relied upon by the learned Counsel for the petitioners in **Punit Tiwari** *(supra)*, Amar Bahadur *(supra)*, **Rakesh Kumar** *(supra)*, **Pinkee** *(supra)* and **Anshuman Singh** *(supra)* are all decisions which must be held to pass *sub silentio* and, therefore, not binding precedent.

44. The learned Counsel appearing for the petitioners have reposed faith in the decision of their Lordships of the Supreme Court in **Dheerender Singh Paliwal vs. Union Public Service Commission, (2017) 11 SCC 276**, where it has been held:

"14.Having considered the respective submissions and having noted the dictum of this Court as noted above, we are of the view that in the light of the prescription noted in the advertisement, the particulars furnished by the appellant in response to the said advertisement and the production of the degree certificate for having secured the BSc degree with Zoology as the subject at a later point of time there was substantial compliance with the requirement to be fulfilled in the matter of the essential qualifications possessed by the appellant. Therefore, applying the principle set down by this Court, the respondent Commission ought to have considered the application and more so when the appellant was already in the services of the Forensic Science Laboratory as Senior Scientific Assistant and his essential qualifications were very

much on record in the form of résumé and therefore pursuant to the direction of the Tribunal when the respondent Commission interviewed the appellant and found him fit to be selected and appointed for the post of Senior Scientific Officer in all fairness should have appointed the appellant.

15.In the first place, it must be stated that it is not a case of the appellant not possessing the required essential qualifications but was of only not enclosing the certificate in proof of the added qualification of Zoology as one of the subjects at BSc level, from a recognised University. In the application when once the appellant, marked "1' against Column 9 and thereby confirmed that he possesses the essential qualification, namely, the postgraduate qualification as well as the degree level qualification, if at all there was any doubt about any of the qualification, the appellant should have been called upon to produce the required certificate in proof of such essential qualification. In fact in this context, when we refer to the interview proceedings of the appellant as well as two other candidates we find that the appellant produced the original BSc/MSc degree in Zoology and also submitted the attested photocopy of BSc Zoology degree. The outcome of the said interview was that the appellant should be cleared of his selection. Insofar as other two candidates, namely, Miss Babyto and Miss Imrana, are concerned, we find that the production of their caste certificate was not in the prescribed pro forma initially, nevertheless those candidates were allowed to produce the original caste certificate issued by the competent authority and after verifying the same by accepting the attested photocopies of such caste certificates, their cases were cleared. Therefore, when such a course was adopted by the respondent Commission in regard to those two candidates there is no reason why the candidature of the appellant alone was kept in suspension, though he also cleared interview process. Even assuming such clearance was not made awaiting the outcome of the order of the Tribunal, when the Tribunal upheld his selection and directed the respondent to issue necessary orders for appointment, in all fairness the respondent Commission should have issued the order of appointment. We are of the view that such an approach of the respondent Commission was unfair having regard to the very trivial issue, namely, a non-production of an added qualification as part of the essential qualification at the degree level which the appellant did possess and for mere asking, the appellant could have readily produced the same through his employer."

45. The decision of their Lordships in **Dheerender Singh Paliwal** *(supra)*, on facts shows that the appellant's candidature for the post of a Senior Scientific Officer (Biology) in the Forensic Science Laboratory, Home Department, Government of Dellhi was rejected by the Union Public Service Commission on ground that he had not annexed the degree of B.Sc. Zoology, which was an essential qualification that the candidate claimed to possess. The instructions were strict and required the degree or diploma or other certificates of educational qualification to be attached either by way of attested copies or self-certified copies. There was a further stipulation that in case copies of the certificates are not enclosed with the application, it is liable to be rejected.

46. By a particular note in the instructions, it was mentioned that in regard to educational qualification, mark sheets in lieu of educational certificate will not be accepted by the Commission. The appellant before their Lordships was not called for interview for reason that he had not attached the required copy of his degree of B.Sc. with Zoology. He approached the Central Administrative Tribunal which permitted him to be interviewed, provisionally by an interim order. Lateron, his Original Application was allowed by the Tribunal. On a writ petition being carried to the High Court, the Division Bench reversed the judgment. It was, thus, that the candidate appealed by Special Leave to the Supreme Court, where their Lordships held in favour of eschewing technicalities and approved his candidature notwithstanding the lapse in strict adherence to the selecting body's instructions, while submitting his application form.

47. It would be noticed that the decision of their Lordships is not about a case where facts in the application form are incorrectly mentioned. It is about omission to support the application with requisite documents. Also, it is in the context of a selection by the Public Service Commission for posts where applications to all seeming were submitted in hard copies. It is also not about a case where the candidate had made a declaration that everything mentioned in the application form was accurate, certified to be so on a comparison with the original documents. It also did not involve the candidate declaring that after submission of his application, he would not be entitled to seek correction/ rectification of any particulars entered there. This kind of a declaration, in fact, would not at all be required except in case of an online submission of applications with the candidature of a vast number to be processed. The principle in **Dheerender Singh Paliwal** *(supra)* is about the effect of non-annexation of supporting documents, but not about incorrect mention of particulars in the application form. The ratio in **Dheerender Singh Paliwal** *(supra)* would, therefore, not at all be attracted to the petitioners' case.

48. Reliance has also been placed on a decision of this Court in **Writ - A No.40159 of 2016, Smt. Rajni Shukla vs. Union of India and 3 others, decided on 08.03.2017.** It was held in **Smt. Rajni Shukla** *(supra)* by their Lordships of the Division Bench following the decision of the Supreme Court in **Dheerender Singh Paliwal** *(supra)* thus:

"11. The facts and circumstances of the case in hand are similar to that of **Dheerender Singh Paliwal**'s case *(supra)*. The petitioner was having required degree of post graduation on the relevant date and she had mentioned in her application form that she was possessing the required degree of post graduation. Petitioner should have been called upon to produce the required certificate in proof of her essential qualification, if there was any doubt about her qualification. It is 6 not in dispute that no other candidate was higher in rank to the petitioner for being considered to be appointed on the post of Statistical Investigator, Grade-III. Considering the facts and circumstances of the case, denial of appointment to the petitioner for the post of Statistical

Investigator, Grade-III, merely on the ground that she did not attach the required certificate of master degree alongwith application form, can not be justified in the eyes of law."

49. Again, **Smt. Rajni Shukla** *(supra)* is not an authority for the principle about incorrect mention of particulars by a candidate in his/ her application form. The petitioner in that case had correctly mentioned the fact that she possessed a Post Graduate Degree, but had failed to attach a copy of the said degree along with the application form. It was in the context of the said facts that the Court came to the petitioner's rescue by holding her candidature, for the post of a Statistical Investigator, Grade-III, valid. The decision in **Smt. Rajni Shukla** *(supra)* also turns on a principle very different from the one involved here.

50. The petitioners have in the last relied upon a decision of a Single Judge of this Court in **Sanjay Raj vs. State of U.P. and others, 2013(2) ADJ 558.** In **Sanjay Raj** *(supra)*, it has been held:

"10. It is trite law that even in the administrative matter, if decision adversely affect a person's legal right or interest, the decision must be taken fairly and reasonably. Even in absence of any provision for giving opportunity the principle of natural justice is in built.

11. Procedural fairness (Procedural due process) has received a new meaning after Maneka Gandhi case (1978) 1 SCC 248. Denial of natural justice itself is arbitrary and unfair exercise of power. It is true that in case of S.L.Kapoor Vs. Jagmohan (1980) 4 SCC 379 and Aligarh Muslim University Vs. Mansoor Ali Khan (2000) 7 SCC 529, the Supreme Court has carved out exceptions of Natural Justice and evolved the " useless formality" theory. But exception, as spell out in those cases can not be applied in all cases. In the case at hand, the exception, where on admitted facts only one conclusion is possible, court may not issue futile writ is not applicable. In the present case, an educated young man who is at the threshold of his career has suffered serious prejudice by the impugned action of the respondents.

12. It is true that in the advertisement a clear method for calculation of the marks is mentioned. The petitioner, it appears, that inadvertently ignored the said clause of advertisement. He had mentioned his marks on the basis of existing norms applicable in the years 2004 in Special B.T.C. Training Course. However, it is equally true that he has enclosed all the mark sheets along with his application form. While, calculating the marks, the authority concerned ought to have ignored the mistake of the petitioner or a notice ought to have been issued to the petitioner giving an opportunity to correct the obvious human error committed by him in filing up the form. One of the requirements was to enclose all the necessary documents and mark sheets. Statements of the marks in marksheet are final not the entry in application form. While filing the form human error can not be completely ruled out, especially, from inexperienced young candidates. They should not be penalized so harshly for such error. A candidate whose marks are above cut of marks and is in merit list, deserves an opportunity before his candidature is rejected only on some error. There was

no element of misrepresentation and petitioner would not get any benefit for his act."

51. While it is true that **Sanjay Raj** *(supra)* was a case where the petitioner had incorrectly mentioned his marks relating to the degree of Bachelor of Physical Education in his application form for the Special BTC Training Course, 2007, it does not appear from the decision that on the facts there, there were any instructions of the kind to candidates that involved a declaration by them. It also does not appear that **Sanjay Raj** *(supra)* was a case where the application form was submitted online involving the selecting body with massive data to process. Also, the application form there appears to have been submitted in hard copy with the mark-sheets attached. It was, thus, a decision rendered under completely different facts and system of processing. That principle would not be attracted here, where much turns on the caution and care that candidates are required to exercise in the process of submitting their application forms. The declaration too that the candidates are required to make here, distinguishes the present case.

52. There is one submission which Mr. Ojha, learned Senior Counsel made very forcefully during the hearing. It is about the conditions in which aspiring candidates fill up their application forms online. According to him, these forms are not filled up in the comfort of the candidate's home, working on his personal computer facility. It is done by proxy in overcrowded public facilities, like a cyber-café, where there is a high and logical chance for human errors to creep in while the application forms are finally submitted online. For a fact, it may be true in a few or in a substantial number of cases, but once a candidate has accepted on his undertaking that he has compared the entries made in the application form in the manner prescribed by taking out a print and comparing it with the original, there is no avenue to look at the proxy hand of a third party computer operator and make allowance for his mistake. Moreover, if this argument were to be accepted, the smooth conduct of the recruitment process to public posts, in large numbers, would go awry.

53. Shri M.C. Chaturvedi, learning Additional Advocate General and the learned Counsel appearing for the Basic Education Board have placed reliance on a decision of the Division Bench of this Court in **Special Appeal No.834 of 2013, Ram Manohar Yadav vs. State of U.P. and 3 others, decided on 30.05.2013.** Oddly, the petitioners have relied on the said decision too. In **Ram Manohar Yadav** *(supra)*, it has been held:

"If prospective teacher can not even correctly fill up the simple on line application form for his employment, it is obvious what he is going to teach if appointed. There are certain decisions cited on this issue. But none of them deal with this aspect whether under the discretionary jurisdiction of the Court under Article 226 of the Constitution of India such incompetent persons should be allowed to play with the future of the next generation.

Therefore, we are of the opinion that the petitioner/appellant should wait till he attains sufficient maturity and learns to be more careful in filling up the applications for jobs. ....."

54. Learned Counsel for the respondents have placed further reliance on a decision of this Court in **Writ - A No.3347 of 2019, Mritunjay Kumar Mishra And Another vs. State Of U.P. And Another, decided on 07.03.2019.** In the said decision, this Court did not accept the petitioners' plea seeking correction to application forms submitted by them for posts of Assistant Teachers. They were qualified to apply in the subject of Social Science, but by a claimed human error, mentioned Science instead. This Court refused to accept the petitioners' request for a correction drawing largely upon the reasoning of a Division Bench of this Court in **Special Appeal No.90 of 2018, Jai Karan Singh and 52 others vs. State of U.P. through Secretary and 4 others, decided on 25.04.2018. Now, Jai Karan Singh** *(supra)* is an authority about correction of mistakes relating to particulars entered in the OMR Sheet. It does not concern a case of mistake in writing particulars on an application form. This Court does not think that much would turn on the reasoning of an authority that relates to mistakes in the OMR Sheet, as distinguished from mistakes in the online application form that are sought to be corrected. This is so because mistakes in OMR Sheets do not involve the intervention of a human agency to check and verify. These, therefore, provide no opportunity to rectify mistakes. This position is accepted by Mr. R.K. Ojha, learned Senior Counsel appearing for the petitioners. The issue here is not at all about mistakes in filling up particulars in OMR Sheets.

55. This Court is of opinion that decisions relating to rectification of mistakes, all made in OMR Sheets, would have no bearing on the issue involved here. The decision in **Mritunjay Kumar Mishra** *(supra)* must be held confined to its facts, for the point that arises here, though involved, was not presented to the Court for consideration. The point, therefore, must be held to pass *sub silentio*. Reliance has also been placed by the respondents upon the decision of this Court in **Jai Karan Singh** *(supra)* which is a decision, as already said, relating to a claim for rectification of mistakes in the OMR Sheet that has no application here. For the same reason the decision in **Kanchan Bala and others vs. State of U.P. and others, 2018 (2) AWC 1233**, relied upon by the learned Counsel for the respondents, would also not be attracted.

56. Learned Counsel for the respondents has laid much emphasis on the decision of a Division Bench of this Court in **Special Appeal Defective No.123 of 2014, Smt. Arti Verma vs. State of U.P. and 2 others, decided on 05.02.2014.** Attention of the Court has been drawn to **Smt. Arti Verma** *(supra)*, where it is held:

"In the present case, the appellant claimed the benefit of Freedom Fighters category. The contention that this was as a result of an error committed by the Computer Operator cannot simply be accepted for the reason that the appellant would necessarily be responsible for any statement which he made on line. If the Courts were to accept such a plea of the appellant, that would result in a situation where the appellant would get the benefit of a wrong category if the wrong claim went unnoticed and if noticed, the appellant could always turn around and claim that

this was as a result of human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is 3 clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed. Moreover, in the present case, the appointment was of a contractual nature for a period of eleven months. Hence, considering the matter from any perspective, the learned Single Judge was not in error in dismissing the petition under Article 226 of the Constitution."

57. Attention of this Court has been next called to a decision of this Court in **Writ - A No.4070 of 2020, Ashutosh Kumar Srivastava and 60 others vs. State of U.P. and 2 others, decided on 30.05.2020.** The said decision relates to the present recruitment, that is to say, the Assistant Teachers Recruitment Examination, 2019. In the said decision too corrections were sought to application forms by candidates, where there were errors about marks mentioned in their respective forms relating to different examinations. The plea urged was the same as the one here about the mistakes being the product of human error and not deliberate lapses. The Court after a copious review of authority held:

"20. The error committed by the candidates cannot be said to be human in nature. The petitioners should have read the instructions that were issued time and again and should have correctly filled the entries relating to the marks obtained by them in their previous examinations. The contention that this was an error committed by the Computer Operator cannot simply be accepted. If the Courts were to accept such a plea of the petitioners, then this would result in a situation where the petitioners would get the benefit of a wrong if the wrong claim went unnoticed and if noticed the petitioners could always turn around and claim that this was a result of a human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. From perusal of the record, I am of the opinion that the error/errors committed by the petitioners are neither minor nor are human error/errors."

58. Learned Counsel for the respondents in the last relied on a decision of this Court in **Writ - A No.4087 of 2020, Ramhari Gurjar vs. State of U.P. and 2 others, decided on 11.06.2020. Ramhari Gurjar** *(supra)* is again a case that relates to the Assistant Teachers Recruitment Examination, 2019. It is also about a claim for rectification of a mistake in the application form committed by the petitioner there in Column-10 of the form. It appears that the petitioner was entitled to a horizontal reservation under the Physically Handicapped Quota, but failed to fill up the relevant entry. That is what he sought to rectify. Refusing the prayer, this Court after a careful examination of the process to fill up and submit an application form held:

"10. In **Ashutosh Kumar Srivastava** *(Supra)* also prayer was for

granting an opportunity to rectify the incorrect entries made by the petitioners in their online application form of ATRE-2019. It was further prayed that respondents be directed to consider the claim of the petitioner for selection on the basis of original education testimonials. After considering various Hon'ble Division Bench and Hon'ble Supreme Court Judgments rendered in the cases of **Km. Archana Rastogi Vs. State of U.P. And others 2012 (3) ADJ 219, Km. Richa Pandey V. Examination Regulatory Authority and Another decided on 18.02.2014, Ram Manohar Yadav V. State of U.P. And 3 others decided on 30.05.2013, Arti Verma V. State of U.P. And 2 others, Kanchan Bala & 172 Ors. V. State of U.P. & 4 Ors., Jai Karan Singh and 52 others Vs. State of U.P. And 4 others and Karnataka Public Service Commission and Ors. Vs. B.M. Vijaya Shankar and Ors. reported in AIR 1992 SC 952,** the petition was dismissed. I do not wish to burden my judgment by quoting or refering to them again. However, paragraphs 18 and 20 of **Ashutosh Kumar Srivastava** *(Supra)* are quoted as under:-

"18. In so far as the cases cited by the learned counsel for the petitioners are concerned, the same will not help the petitioners since in large number of cases observations were duly made by different Division Benches of this Court that in case any mistake was committed by the candidates during the course of examination, the writ court will not interfere in the matter.

20. The error committed by the candidates cannot be said to be human in nature. The petitioners should have read the instructions that were issued time and again and should have correctly filled the entries relating to the marks obtained by them in their previous examinations. The contention that this was an error committed by the Computer Operator cannot simply be accepted. If the Courts were to accept such a plea of the petitioners, then this would result in a situation where the petitioners would get the benefit of a wrong if the wrong claim went unnoticed and if noticed the petitioners could always turn around and claim that this was a result of a human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. From perusal of the record, I am of the opinion that the error/errors committed by the petitioners are neither minor nor are human error/errors."

(Emphasis Supplied)

11. Insofar as the observation of Hon'ble Division Bench in Raghuvendra Pratap Singh *(Supra)* is concerned, the same are of no help to the petitioner as admittedly, the question of claim of *Shiksha Mitra*s to grant benefit of weightage in the 1981 Rules was under consideration and, thus, the said judgment turns on its own facts and is clearly not applicable in this case in the light of the facts of this case and the issue involved herein. Insofar as claiming the benefit of horizontal reservation under the Physically Handicapped Quota is concerned, this column always existed in recruitment process and once it has not been claimed at the initial stage, the petitioner cannot be permitted to claim reservation under the special category, provision for disclosure whereof was provided at the initial stage itself."

59. This Court must remark here that the decisions in **Ashutosh Kumar**

Srivastava *(supra)* and **Ramhari Gurjar** *(supra)* squarely apply on facts and principle.

60. This Court has elaborated the bold and resounding caution administered to candidates at the pre-submission stage of the application forms about ensuring accuracy of the entries relating to the particulars filled up there. To recapitulate briefly, the caution is carried in the Government Order dated 01.12.2018, on the basis of which the present recruitment process commenced. There is again a clear instruction mentioned in the advertisement dated 05.12.2018. Most of all, the online application form carries a dynamic mechanism where a candidate after filling up all entries, is required to take out a print and compare the entries made in the online application form with his original documents. He has been obliged to make a declaration that he has cross-checked the entries in the printout, compared it with his original documents and certifies them to be accurate. There is then a specific undertaking given at the time of finally uploading the form online that the candidate will not have any opportunity to seek rectification or correction to the application form, finally submitted.

61. This Court has noticed the details of this meticulous procedure earlier, and also, the fact that there are guidelines that show that until final submission of the form, there is all opportunity to rectify, amend and correct.

62. In matters of public affairs, like the process of recruitment to posts under the State, there has to be an element of certainty. The process of recruitment must proceed on the foundation of firm and reliable data. A public recruitment cannot be permitted to be a shaky affair with shifting positions of aspirants about their candidature. If this were to be permitted, it would introduce uncertainties in the recruitment process leading to its embarrassment. It has also to be borne in mind that where a number of posts have to be filled up, expeditious conclusion of the recruitment process requires an unhassled and unhindered course to be run. It is bearing, thus, objectives all legitimate, in mind that the candidates have been held bound down by the entries they make in the application forms. This cannot be permitted to be set at naught by falling back upon the rather out of place consideration for "human error'. There is an added feature about those cases where mistake is an omission to claim a reservation category. The process of recruitment has gone ahead, where 1,46,060 candidates have been selected in the written examination held by the Examination Regulatory Authority, U.P., Prayagraj. The next stage of recruitment, that is, counselling is underway or completed, in the hands of the Basic Shiksha Parishad. The Basic Shiksha Parishad had published a notification for the purpose way-back on 16.05.2020 and initiated the process of final selection. To permit a candidate at this stage to claim a reservation category, which he/ she has omitted to mention in the online application form, would introduce a new aspirant in the concerned reservation pool, and in all probability may lead to displacement of a candidate, already selected. It would work grave injustice and inequity.

63. I had occasion to consider the issue about rectification to an application form relating to the present examination,

where the error sought to be corrected was about an unclaimed reservation category, in **Writ - A No.4552 of 2020, Deepti Singh vs. State of U.P. and 2 others, decided on 23.06.2020.** In **Deepti Singh** *(supra)*, it was held:

"This Court has keenly considered the matter. It is true that the mistake on the petitioner's part of not mentioning her horizontal reservation category may be inadvertent but the terms and conditions in the form do not permit the petitioner to reform the same lateron, once she has filled up and submitted the examination form, without claiming something as important as a reservation category. A reservation category is one that places the petitioner in a special selection pool of 2% candidates. Once the recruitment process has gone ahead, a selectee in that pool whose result has been declared or on way would be disturbed because the petitioner now makes her claim, if permitted. This kind of a late reform of the petitioner's candidature entitling her to seek selection under a reservation category cannot be permitted in the opinion of this Court."

64. In view of what has been said above, this Court does not find any good ground to interfere.

65. In the result, these writ petitions fail and are **dismissed**. There shall be no order as to costs.

(2020)08ILR A63
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 8379 of 2003

Shashi Prakash Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.S. Misra, Sri Arun Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999: Rule 7, 9(4) - – Departmental Enquiry - Non holding of oral inquiry before imposing major penalty and removal would vitiate the entire proceeding including order of punishment – Initial burden is on the department to prove charges. In case of procedure adopted for inflicting major penalty, department must prove charges by oral evidence also. In the present case, the charges are such which have to be proved by evidence otherwise mere leveling of charge cannot be said to be self-proved and no reverse onus can be placed upon employee to disprove the charge. (Para 12, 25, 26, 31)

B. Punishment not prescribed in Rules cannot be imposed upon a delinquent employee as a result of departmental enquiry. (Para 32, 33)

Writ petition allowed. (E-4)

Precedent followed:

1. Meenglas Tea Estate Vs The Workmen, AIR 1963 SC 1719 (Para 13)

2. St. of U.P. Vs C.S. Sharma, AIR 1968 SC 158 (Para 14)

3. P.N.B. Vs A.I.P.N.B.E. Federation, AIR 1960 SC 160 (Para 15)

4. A.C.C. Ltd. Vs Their Workmen, (1963) II LLJ. 396 (Para 15)

5. Tata Oil Mills Co. Ltd. Vs Their Workmen, (1963) II LLJ. 78 (SC) (Para 15)

6. S.C. Girotra Vs United Commercial Bank 1995 Supp. (3) SCC 212 (Para 16)

7. Subhas Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541 (Para 17)

8. Subhas Chandra Sharma Vs U.P. Co-operative Spinning Mills & ors. 2001 (2) UPLBEC 1475 (Para 18)

9. St. of U.P. Vs Saroj Kumar Sinha (2010) 2 SCC 772 (Para 19)

10. Roop Singh Negi Vs P.N.B., (2009) 2 SCC 570 (Para 20)

11. Rajesh Prasad Mishra Vs Commissioner, Jhansi Division, Jhansi & ors. 2010 (1) UPLBEC 216 (Para 21)

12. Subhash Chandra Gupta Vs St. of U.P., 2012 (1) UPLBEC 166 (Para 22)

13. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348, Uma Shankar Vs. Registrar, 1992 (65) FLR 674 (All.) (Para 23)

14. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570 (Para 24)

15. S.B.I. & ors. Vs. T.J. Paul, 1999 (3) JT 385 (Para 32)

16. Vijay Singh Vs St. of U.P. & ors., JT 2012 (4) SC, 105 (Para 32)

Petition challenges order dated 01.04.2002, passed by Additional Commissioner (Administration) Trade Tax, U.P., Lucknow. Order dated 07.05.2002. Order dated 12.11.2002 passed by Commissioner Trade Tax, U.P., Lucknow.

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

1. Heard Sri Arun Kumar, learned counsel for petitioner and learned Standing Counsel for State of U.P.

2. This writ petition under Article 226 of Constitution of India has been filed by sole petitioner Shashi Prakash Shukla assailing order dated 01.04.2002 (Annexure-26 to writ petition) passed by Additional Commissioner (Administration) Trade Tax, U.P., Lucknow, imposing punishment of temporarily stoppage of five increments; Censure and non-posting of petitioner on any sensitive post for five years; order dated 07.05.2002 (Annexure-29 to writ petition) rejecting petitioner's application for review of aforesaid punishment order, and lastly, order dated 12.11.2002 (Annexure-33 to writ petition) passed by Commissioner Trade Tax, U.P. Lucknow, rejecting petitioner's representation against punishment order.

3. Facts, in brief, giving rise to present writ petition are that petitioner was appointed as Junior Clerk on ad hoc basis on 28.02.1977 in the Department of Sales Tax (now known as 'Department of Trade Tax'). Subsequently, he was appointed as Clerk on temporary basis vide order dated 13.03.1979, issued by Assistant Commissioner (Administration) Sales Tax, Gorakhpur Region, Gorakhpur. He was regularized in 1983 on the post of Clerk. He was promoted and transferred as Senior Clerk in October, 1993 and posted as Accounts Clerk. While working in the capacity of Accounts Clerk, petitioner noticed anomalies in the payment of salary to staff and reported those irregularity to Deputy Collector (Collection), Sales Tax, Gorakhpur. This caused annoyance to Senior Officers. Petitioner fell ill on 30.03.1994 and sought casual leave but it was rejected by respondent-7. Petitioner was directed to handover charge of Accounts Clerk to Head Clerk Tabarak

Ali. Aforesaid order was not served upon petitioner and instead report was lodged at Police Station Cantt. Gorakhpur on 31.03.1994 under Section 409 IPC alleging that petitioner had fled away with record and cash of Rs.1500/- from office. Report was registered as Case Crime No.359 of 1994. Petitioner joined office on 31.03.1994 but was not informed about above incident. On 02.04.1994, petitioner got information of registration of FIR against him from a news item of local newspaper. Thereafter he applied for bail in the Court of Chief Judicial Magistrate, Gorakhpur. Vide order dated 18.04.1994, Magistrate directed petitioner to handover charge of Accounts Clerk to Deputy Collector (Collection) Sales Tax, Gorakhpur by 22.04.1994 and granting interim bail to petitioner, he fixed 23.04.1994 for bail. Petitioner submitted an application dated 19.04.1994 requesting Deputy Collector (Collection) Sales Tax, Gorakhpur to take charge of Accounts Clerk from him but the then Deputy Collector (Collection) Sales Tax, Gorakhpur avoided to take charge from petitioner. Ultimately he could handover charge of Accounts Clerk to Sri Tabarak Ali, Head Clerk on 27.04.1994. Petitioner's bail application was rejected by Chief Judicial Magistrate, Gorakhpur vide order dated 12.05.1994. Thereafter petitioner was enlarged on bail by District Judge, Gorakhpur vide order dated 13.05.1994. In Case Crime No.359 of 1994, Investigating Officer submitted final report before Magistrate on 29.06.1994.

4. In the first week of June, 1994, petitioner was transferred from Gorakhpur to the Office of Deputy Commissioner (Collection) Sales Tax, Faizabad and therefrom he was transferred to Sales Tax Office-A, Bahraich.

5. While serving at Bahraich, petitioner received a charge-sheet dated 07.10.1994 containing nine charges as under:-

*"**आरोप संख्या–1***

*डिप्टी कलेक्टर (संग्रह) व्यापार कर कार्यालय में उपायुक्त (शा0) व्यापार कर गोरखपुर के आदेश द्वारा **स्थानान्तरित हुए थे परन्तु लम्बे समय तक चिकित्सा अवकाश पर जानबूझकर चले गये,** जिससे सरकारी कार्य में बाधा उत्पन्न हुआ। साक्ष्य के रूप में आदेश की प्रमाणित प्रति संलग्न है।"*

"Charge No. 1

Under the order of the Deputy Commissioner (Sha.) Trade Tax, Gorakhpur, you were transferred to the Office of the Deputy Collector (Collection) Trade Tax but you proceeded on long medical leave, which caused obstruction in official duties. A certified copy of the order is enclosed as evidence."

*"**आरोप संख्या–2***

*आपके डिप्टी कलेक्टर (संग्रह) व्यापार कर गोरखपुर के आदेश सं0 365 दिनांक 3.11.93 द्वारा लेखा तथा स्थापना पटल का चार्ज श्री बृज किशोर पाण्डेय ना0त0 द्वारा प्राप्त कराया गया था **किन्तु चार्ज में कोई हस्ताक्षर करके प्राप्त नहीं करायी गयी है।** साक्ष्य के रूप में पत्रांक 365 दिनांक 30.11.93 की प्रमाणित प्रति संलग्न है।"*

"Charge No. 2

Under order no. 365 dated 03.11.1993 issued from the Office of the Deputy Collector (Collection) Trade Tax, you were given the charge of Accounts and Establishment Counter by Shri Brij Kishore Pandey, Na.T. but the said charge has not been received with signature. A certified copy of letter no.

365 dated 30.11.1993 is enclosed as evidence."

"आरोप संख्या–3

आप ***प्रायः कार्यालय देर से आते रहे। दिनांक 4, 7, 17 व 22.3.94*** *को उपस्थित पंजिका* ***पर अनुपस्थित किया गया था, किन्तु आप द्वारा ओवर राईटिंग करके हस्ताक्षर बना दिया गया, जो अनियमित है।*** *साक्ष्य के रूप में उपस्थिति पंजिका की प्रमाणित प्रति संलग्न है।"*

"Charge No. 3

You often reported late to office. On 4, 7, 17 and 22.03.1994, you were marked absent in the attendance register but you made your signatures by overwriting there, which is irregular. A certified copy of the attendance register is enclosed herewith as evidence."

"आरोप संख्या–4

आपको ***चार्ज के रूप में रू0 1500 कैश निम्न प्रकार से दिया गया था, परन्तु दिनांक 30.3.94 को जांच के समय उक्त नोट नहीं पाया गया:–***

रू0 100 ग 12 त्र 1200.00
रू0 50 ग 5 त्र 250.00
रू0 10 ग 4 त्र 40.00
रू0 5 ग 2 त्र 10.00
————————
योग 1500.00
————————

साक्ष्य के रूप में तथा ***एफ0आई0आर0 की प्रमाणित प्रति संलग्न है।"***

"Charge No. 4

In the charge, you were given cash in the following denominations but the said notes were not found on 30.03.1994 during inquiry:

Rs. 100 x 12 = 1200.00
Rs. 50 x 5 = 250.00
Rs. 10x x 4 = 40.00
Rs. 5 x 2 = 10.00
Total 1500.00

A certified copy of FIR is enclosed as evidence."

"आरोप संख्या–5

आपको ***लेखा पटल से हटा कर चार्ज मुख्य लिपिक को देने के लिये निर्देश हुये थे, किन्तु आपने चार्ज नहीं दिया जो आदेशों की अवहेलना है*** *तथा कर्मचारी आचरण नियमावली के नियम–3 के विरूद्ध है। आदेशों की प्रमाणित प्रति संलग्न है।"*

"Charge No. 5

You were removed from accounts counter and were directed to give its charge to the Head Clerk but you did not do so, which is violation of the orders and is against Rule 3 of Servant Conduct Rules. Certified copy of the orders is attached herewith."

"आरोप संख्या–6

आप ***जीप सम्बन्धी कुछ कागजात तथा बिल कार्यालय से लेकर फरार हो गये।*** *अन्ततः दिनांक* ***31.3.94 को आपके विरूद्ध प्रथम सूचना रिपोर्ट दर्ज करायी गयी, जिसकी प्रमाणित प्रति संलग्न है।*** *पत्रवाहक द्वारा आदेश लेकर हस्ताक्षर नहीं किया गया। बयान की प्रमाणित प्रति संलग्न है।"*

"Charge No. 6

You absconded from the office with some papers and bill related to jeep. Finally, on 31.03.94, first information report against you was lodged, the certified copy of which is attached. Having received order from the messenger, no signature was made thereon, the certified copy of which is attached."

"आरोप संख्या–7

आप द्वारा श्री एस0पी0सिंह वि0क0अ0 (संग्रह) गोरखपुर का माह फरवरी, 1994 का वेतन समय से भुगतान नहीं किया गया। *श्री सिंह द्वारा लिखित पत्र की प्रमाणित प्रति साक्ष्य के रूप में संलग्न है।"*

"Charge No. 7

No payment of salary for the month of February, 1994 was made by you to Shri SP Singh, Sales Tax Officer (Collection), Gorakhpur. The certified copy of the letter written by Shri Singh is attached herewith as evidence."

"आरोप संख्या–8

उपायुक्त (शा0) व्यापार कर गोरखपुर द्वारा भी दिनांक 13.4.94 को आपको ***निर्देश दिया गया था कि आलमारी का चार्ज प्रत्येक दशा में मुख्य लिपिक को प्राप्त करा दें, किन्तु आप द्वारा चार्ज नहीं दिया गया।*** *साक्ष्य के रूप में पत्रांक 14 दिनांक 13.4.94 की प्रमाणित प्रति संलग्न है।"*

"Charge No. 8

Deputy Commissioner (Sha.), Trade Tax, too, instructed you on 13.04.1994 to hand over the charge of the almirah to Chief Clerk in any case, but you did not hand over the charge. As evidence, the certified copy of the letter no. 14 dated 13.04.1994 is attached herewith."

"आरोप संख्या–9

आप दिनांक 12.5.94 को उपस्थित पंजिका पर हस्ताक्षर कर प्रातः 11.00 बजे कार्यालय से बिना किसी सूचना के गायब हो गये। *इस सम्बन्ध में आपका स्पष्टीकरण पत्रांक मेमो दिनांक 18.5.94 द्वारा मांगा गया था, किन्तु आप द्वारा कोई उत्तर नहीं दिया गया। ज्ञात करने पर यह पाया गया कि आप दिनांक 12.5.94 को कोर्ट में मुकदमें के सिलसिले में उपस्थित थे एवं उक्त दिनांक को कारागार में अवरूद्ध हो गये थे एवं दिनांक 13.5.94 तथा 14.5.94 को बिना किसी सूचना तथा अवकाश प्रार्थना पत्र के गायब रहे। अधीक्षक श्रेणी–। जिला मण्डल कारागार, गोरखपुर के रिपोर्ट दिनांक 23.5.94 के अनुसार आप कारागार में दिनांक 12.5.94 तक रहे। साक्ष्य के रूप में कारागार अधीक्षक गोरखपुर द्वारा प्रमाणित पत्र की छाया प्रति संलग्न है।"*

"Charge No. 9

You, having made signature on the attendance register on 12.05.94 at 11:00 a.m., were absent from the office without any information. In this regard, you were asked to give explanation through the memo dated 18.05.94, but you did not give any reply. On being probed, it was found that you were present in a court on 12.05.94 in relation to a case, and on the said date you were detained in the jail. On 13.05.94 and 14.05.94, you remained absent without any information and casual leave application. As per the report dated 23.05.94 of the Superintendent-1, District Divisional Jail, Gorakhpur, you remained in the jail till 12.05.94. As evidence, photocopy of the letter certified by Jail Superintendent, Gorakhpur is attached herewith."

(Emphasis added)

(English Translation by Court)

6. Petitioner for the purpose of defence, sought inspection of record and submitted application dated 31.01.1995 to Assistant Commissioner (Assessment) Trade Tax, Faizabad and thereafter sent reminders dated 28.12.1995, 01.01.1936, 18.01.1996 and 02.04.1996.

7. Chief Judicial Magistrate, Gorakhpur vide order dated 30.10.2000 accepted final report dated 29.06.1994 in Case Crime No.359 of 1994.

8. Applications submitted by petitioner for inspection of record were not replied and no inspection was allowed. Having no option, petitioner submitted reply to charge-sheet on 29.11.2001. No further enquiry was held as petitioner had no information from Enquiry Officer. Instead he received a letter dated 24.01.2002 under Rule 9(4) of Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 *(hereinafter referred to as "Rules, 1999")* accompanied by enquiry report dated 16.01.2002. Enquiry Officer held charges-1, 2, 4 and 7 not proved; charges-3, 5, 8 and 9 proved and charge-6 partly proved. Petitioner submitted

application dated 19.02.2002 requesting Disciplinary Authority to grant one month's further time to file reply to enquiry report. However, he could not submit reply even within one month and in the meantime, respondent-3 (Disciplinary Authority) passed order of punishment dated 01.04.2002 imposing punishment of withholding of five increments temporarily; Censure and non-posting of petitioner on a sensitive place for five years.

9. Thereafter, petitioner submitted an application dated 08.04.2002 for recall of punishment order dated 01.04.2002 which was rejected vide order dated 07.05.2002 passed by respondent-3. Petitioner preferred Writ Petition No.29159 of 2002 which was disposed of vide order dated 26.07.2002 with a direction that petitioner himself avail remedy of appeal. Consequently, petitioner preferred an appeal which has been dismissed by respondent-2 vide order dated 12.11.2002.

10. Learned counsel for petitioner contended that punishment of withholding of five increments temporarily and Censure though minor punishment but it is not the ultimate punishment which will decide procedure for enquiry, inasmuch as, while issuing charge-sheet to petitioner, Authorities have to follow procedure for enquiry necessary for imposing even major penalty. That is why, Enquiry Officer was appointed, charge-sheet was given but Enquiry Officer did not afford adequate opportunity of defence to petitioner, inasmuch as, despite repeated letters, inspection of documents was not allowed to petitioner even copies of documents were not supplied to him which were the evidence relied in support of charge-sheet, no oral enquiry was conducted; no date, time or place was fixed wherein Department could have adduced evidence to prove charges and thereafter no date, time or place was fixed to give opportunity of defence to petitioner. Therefore, entire proceedings are illegal and in violation of procedure prescribed in Rule 7 of Rules, 1999 and impugned order is liable to be set aside.

11. A counter affidavit has been filed by respondents wherein it is admitted in para-17 that after considering petitioner's reply to the charge-sheet, Enquiry Officer submitted report, thus, in effect, it is admitted that no date, time or place was fixed by Enquiry Officer for holding oral enquiry. It is only on the basis of charge-sheet and reply submitted by petitioner, Enquiry Report has been submitted. Such procedure is not consistent with the procedure prescribed in Rule 7 of Rules, 1999. In such cases, oral enquiry is mandatory wherein Department is under an obligation to prove charge and thereafter Enquiry Officer is under obligation to give opportunity to delinquent employee to submit his defence.

12. Now the sole question up for consideration is "whether non holding of oral inquiry before imposing major penalty and removal would vitiate the entire proceeding including order of punishment."

13. In **Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719,** Supreme Court observed "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by

which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted.

14. In **State of U.P. v. C. S. Sharma, AIR 1968 SC 158,** Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. Court also held that in the enquiry, witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence.

15. In **Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160,** (vide para 66), Court held that in such enquiries evidence must be recorded in the presence of charge-sheeted employee and he must be given an opportunity to rebut the said evidence. Same view was taken in **A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396, and in Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).**

16. In **S.C. Girotra v. United Commercial Bank 1995 Supp. (3) SCC 212,** Court set aside a dismissal order which was passed without giving employee an opportunity of cross-examination.

17. This Court in **Subhas Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541**, said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that ***date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence.*** *If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all.* ***All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."***

(emphasis added)

18. The above judgment was followed by another Division Bench in **Subhas Chandra Sharma v. U.P. Co-operative Spinning Mills and others reported 2001 (2) UPLBEC 1475** where Court held:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the

employee request, for it or not. *For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000."*

(emphasis added)

19. In **State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772,** Court said :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. ***Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.***

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

(emphasis added)

20. Similar view was taken in **Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570,** where Court said:

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. ***No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."***

(emphasis added)

21. In **Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported 2010 (1) UPLBEC 216,** this Court observed, as under, after detail analysis of authorities on the subject:

"Now coming to the question, what is the effect of non-holding of oral

inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541."

22. In another case in **Subhash Chandra Gupta v. State of U.P., 2012 (1) UPLBEC 166,** a Division Bench of this Court, after survey of law on this issue, observed as under:

"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for ***imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof.*** *The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.*

A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008 (3) ESC 1667 ***held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:-***

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

(emphasis added)

23. Even if employee refuses to participate in the enquiry, employer cannot straightaway dismiss him, but he must hold an ex-parte enquiry where evidence must be led as held in **Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).**

24. A Division Bench of this Court in **Mahesh Narain Gupta v. State of**

U.P. and others, (2011) 2 ILR 570 had also occasion to deal with the same issue. It has held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in exparte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

(emphasis added)

25. The principal of law emanates from the above judgments are that initial burden is on the department to prove charges. In case of procedure adopted for inflicting major penalty, department must prove charges by oral evidence also.

26. In the present case, I have quoted the charges above and a perusal thereof clearly shows that charges are such which have to be proved by evidence otherwise mere leveling of charge cannot be said to be self-proved and no reverse onus can be placed upon employee to disprove the charge.

27. For example, in charge-1, allegation is that petitioner proceeded on medical leave deliberately. Evidence relied is the order of transfer. Transfer by itself is not a charge and charge is that petitioner has proceeded on medical leave deliberately for a long time and caused obstruction in official duty. "Whether petitioner was actually ill or not" is a question of fact which has to be proved by Department to prove the charge that petitioner was not actually ill but absented deliberately for a long time. Neither such evidence is referred to nor relied nor it is the case of respondents that it was adduced before Enquiry Officer.

28. Charge-2 states that document dated 03.11.1993 was meant to receive by Brij Kishore Pandey, Naib Tehsildar but petitioner did not put his signature. The fact that said document was actually meant to receive to petitioner has to be proved by person who alleged to have got it received by petitioner but not such witness has been examined. Hence, charge-2 is also not proved at all.

29. Charge-3 states that petitioner used to come late. On 4, 7, 17 and

22.03.1994, he was marked absent but by overwriting he signed attendance register. The fact that petitioner was actually made overwriting on the attendance register is a question of fact which has to be proved by some evidence, not by mere overwriting but by some person who has to prove that overwriting was done by petitioner and none else. No such evidence in this regard was adduced.

30. Charge-4 says that certain notes of particular denomination constituting Rs.1500/- in cash was given to petitioner but said denomination was not found. It is not clear "whether there is some deficiency in cash count or no cash was found at all". If mere denomination was changed but amount of cash, as handed over, was available, then there is no misconduct at all. In this respect, no evidence has been produced except FIR which admittedly resulted in final report accepted by Magistrate and mere FIR even otherwise is no evidence at all.

31. Similar is the position in respect of other charges. I am not discussing the same in detail but suffice it to mention that Authorities in this case have conducted disciplinary proceeding in absolutely illegal and vexatious manner. It appears that Authorities are not at all either aware as to how Departmental Enquiry has to be conducted or have no idea of Service Rules and Law on the subject of departmental enquiry and, therefore, proceedings in question are nothing but a sheer harassment to petitioner.

32. Moreover, in the present case, one of the punishment that petitioner shall not be posted on any sensitive post for five years is not the punishment prescribed in Rules and, therefore, imposition of said punishment is wholly without jurisdiction. Counsel for petitioner placed reliance on Supreme Court's decision in **State Bank of India and others Vs. T.J. Paul, 1999(3) JT 385** and a recent decision in **Vijay Singh Vs. State of U.P. and others, JT 2012(4) SC 105,** wherein Court has said that punishment not prescribed in Rules cannot be imposed upon a delinquent employee as a result of departmental inquiry. Court in para 11 of the judgement in **Vijay Singh (supra)** said:

"11. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: Bachhittar Singh v. State of Punjab & Anr., AIR 1963 SC 395; Union of India v. H.C. Goel, AIR 1964 SC 364; Mohd. Yunus Khan v. State of U.P. & Ors., (2010) 10 SCC 539; and Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors., (2011) 5 SCC 142).

Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant."

33. Despite repeated query, learned Standing Counsel could not dispute about the fact that punishment imposed upon petitioner for non-posting on any sensitive post for five years is not a punishment prescribed in Rules.

34. In the circumstances, impugned order cannot be sustained and writ petition has to be allowed.

35. Accordingly, writ petition is allowed. Impugned orders dated 01.04.2002, 07.05.2002 and 12.11.2002 are hereby set aside. Petitioner shall be entitled for all consequential benefits.

(2020)08ILR A74
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 20396 of 2019
&
Writ-A No. 21469 of 2019
&
Writ-A No. 162 of 2019

Manoj Kumar & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri A.K.S. Parihar

A. Service Law- The Uttar Pradesh Secondary Education Services Selection Rules, 1998: Rule 12(3)- U.P. Secondary Education Service Selection Boards Act, 1982- Sections 3, 9, 34(2), 35- Recruitment/Selection – Bonafide and unintentional mistake, in absence of any statutory prohibition; cannot disentitle the petitioners from evaluation of their answers to questions in Part-II of the two subjects opted by them in Part-I of the OMR answer sheet. (Para 16)

The petitioners have opted two subjects in Part-I and marked answers to questions of those subjects in the respective sections in Part-II. Inadvertently and unintentionally, they also marked one or two circles in another section/subject in Part-II. This can only be described as human error. The petitioners should have been careful, but a little inadvertence like the present one cannot deprive them from evaluation of their answers to questions of the subject opted, particularly when there is no statutory prohibition u/R 12 of the Rules, 1998. (Para 10, 18)

In view of Rule 12(3) of the Rules, 1998, the Board cannot refuse to evaluate answer sheet of a candidate (even if it is assumed that the instructions as printed on the OMR answer sheets have been lawfully framed by the Board and have statutory force), if there is no defect in Part-I of the OMR answer sheet which relates to identity of candidate and subject opted etc. and the answer paper does not suffer from any major defect. (Para 15)

B. The instructions given in the OMR answer sheets cannot be made basis to refuse to evaluate answer sheets of the petitioners merely on the ground that they marked circles of one or two questions of a subject other than the two subjects opted by them in Part –I of the OMR answer sheet. The mistake committed by petitioners is a minor human error. They are merely claiming for evaluation of answers to the questions of the two subjects opted by them in Part–I of the OMR answer sheet. The answers marked by them in one or two circles of another section/subject (other than the opted two subject), can neither be evaluated nor the petitioners are claiming its evaluation which are merely liable to be ignored. (Para 19, 20)

Writ petitions disposed off with directions. (E-4)

Precedent followed:

1. Hanuman Dutt Shukla & ors. Vs St. of U.P. & ors., (2018) 16 SCC 447 (Para 11)

2. Price Water, Coopers (P) Ltd. Vs CIT, (2012) 11 SCC 316 (Para 17)

Precedent distinguished:

1. Karnataka Public Service Commission Vs B.M. Vijay Shankar AIR 1992 SC 952 (Para 8)

2. Kumari Richa Pandey Vs Examination Regulatory Authority & anr., Special Appeal Defective No. 117 of 2014, decided on 18.02.2014 (Para 8)

3. Rama Manohar Yadav Vs St. of U.P. & 3 ors., Special Appeal No. 834 of 2013, decided on 30.05.2013 (Para 8)

4. Km. Bandana Vs St. of U.P. & anr., Writ-A No. 1452 of 2019, decided on 14.02.2019 (Para 8)

5. Mritunjay Kumar Mishra & anr. Vs St. of U.P. & anr., Writ-A No. 3347 of 2019, decided on 07.03.2019 (Para 8)

6. Shiv Prasad Dubey & 39 ors. Vs St. of U.P. & anr., Writ-A No. 19486 of 2019, decided on 07.12.2019 (Para 8)

7. Meena Diwakar Vs St. of U.P. & 2 ors., Writ-A No. 154 of 2020, decided on 10.01.2020 (Para 8)

8. Sukhvir Singh Vs St. of U.P. & anr., Writ-A No. 445 of 2020, decided on 27.01.2020 (Para 8)

Precedent cited:

1. Rajesh Kumar Yadav & 20 ors. Vs St. of U.P. & 2 ors., Writ-A No. 26173 of 2018, decided on 17.12.2018 (Para 8)

Petition challenges result/select list dated 25.10.2019, declared/published by U.P. Secondary Education Service Selection Board, 23, Allenganj, Prayagraj.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri Prakash Chandra Tripathi and other learned counsels for the petitioners and Sri A.K.S. Parihar, learned standing counsel for the State respondents.

Facts:-

2. Briefly stated facts of the present case are that pursuant to advertisement No. 01 of 2016 inviting applications for recruitment on the post of Trained Graduate Teachers, the petitioners submitted applications. They were issued admits cards. They appeared in the written examination. The OMR (Optical Mark Reader) Answer sheet for written examination was in two parts, briefly as under:-

Part-I

(i) Name of the two subjects attempted.

(ii) Test booklet series.

(iii) Roll Number.

(iv) Subject Code.

(v) Questions booklet series.

Part-II

(i) Questions on four subjects, namely Geography, History, Economics and Civics in separate blocks each containing 63 questions with multiple answer choice.

3. The Answer sheet contained instructions / advisory which are reproduced below:-

"IMPORTANT INSTRUCTIONS FOR MARKING RESPONSES ON ANSWER SHEET

1. Use only Black Ball Point Pen for darkening the circles.

*2. Candidate **must fill** the Roll No., Subject Code and Question Booklet series (A,B,C or D) in the answer sheet failing which his candidature will be automatically be rejected.*

3. Signature should be made within the box.

4. Darken only one circle for each question out of the 4 options as explained below:-

Correct Method of Marking Response

.....

Wrong Method of Marking Response

.....

5. Marking should be DARK and should completely fill the circle so that letter/ number inside the circle is not visible.

*6. **Make marks only in the spaces provided. Please do not make any stray mark on the answer sheet.***

7. Rough work, if any must be done on the specified place of the question booklet.

8. Do not fold the Answer Sheet. It may lead to difficulty in evaluation.

*9. **Answer sheet will be processed by electronic means. Invalidation of Answer Sheet due to incomplete / incorrect filling will be the sole responsibility of the candidate.***

10. Please handover the Answer Sheet to the invigilator before leaving the examination hall.

11. Overwriting or erasing will be treated as multiple marking and no mark for that question would be awarded

*12. **Please do not right or mark on this answer paper outside the demarcated areas. It may invalidate your Answer Sheet.***

13. Please see the method of marking your Subject Code, Roll No. and Booklet Series."

4. The selection for the aforesaid recruitment is being carried by Uttar Pradesh Education Service Selection Board, Prayagraj, under the provisions of **The Uttar Pradesh Secondary Education Services Selection Rules, 1998** (herein after referred to as the Rules, 1998). Rule 12(3) of the Rules, 1998 is relevant for the purposes of present controversy which **is reproduced below:-**

*"The **Board shall evaluate the Answer sheets** through examiner to be appointed by the Board or through computer and the examiner shall be paid honorarium at the rate to be fixed by the Board."*

5. In paragraph 15 of the leading writ petition, the petitioners have stated that the OMR Answer sheet consist of two parts. This fact has been admitted in the counter affidavit of Sri Naval Kishore, Deputy Secretary, Uttar Pradesh Secondary Education Service Selection Board, Prayagraj. Certain important averments have been made by the petitioners in paragraphs 16, 17, 21, 22, 23, 25 & 27 of the writ petition which have been replied by the respondent Board in paragraph 5 of the counter affidavit. The averments made in paragraph 28 of the writ petition have been replied by the respondent Board in paragraph 6 of the counter affidavit. All these paragraphs of the writ petition and the counter affidavit are reproduced below:-

Writ Petition	Counter affidavit
"16. That the Petitioner have appeared in the examination and filled up their respective OMR sheets. For kind convenience of this Hon'ble Court, the Petitioners are annexing detailed Chart containing names, father's name, Roll number, Booklet Series , two subjects opted from Civics, Geography, History and Economics, total numbers of questions attempted and expected marks. For kind perusal of this Hon'ble Court, true Copy of the detailed chart containing details of the Petitioners is being filed herewith and marked as Annexure -3 to this writ petition. 17. That, as stated above, all the **petitioner** while filled up OMR sheets, they **duly filled up first part of OMR sheets and there is no defects in the first para of OMR sheets at all.** 21. That by perusal of the instructions given in OMR sheets it is very much clear that if there is any defect in first para of OMR sheet then candidature will be cancelled as per instructions no.2 of OMR sheet. 22. That in **instruction nos. 6 and 12** of OMR sheets it is clear that items are only related with respect to the fact that if some mark is made on other part of OMR sheets, so it is **not attracted to the petitioners.** 23. That it is also relevant to mention that if overwriting is made in two places then mark will not be allotted to the candidates and it is also not case of the petitioners. 25. That once it is clear that in first part of OMR sheet, **the petitioners** have opted questions of particular sections then **they cannot be denied for awarding marks against the correct answer of the correct questions.** 27. That by perusal of the instructions it is also clear that candidature will be cancelled if booklet series and subjects are not properly opted and mentioned and by perusal of this part of OMR sheet of the petitioners it is clear that the Petitioners have opted subjects and also put their	5. That in reply to the contents of paragraph nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 & 27 of the writ petition it is stated that advertisement no. 1 of 2016 for trained graduate teacher in social science was issued. Written examination was held and result was declared on 25.10.2019. In column no. 9 it was averred that invalidation of answer sheet due to incomplete / incorrect filling will be the sole responsibility of the candidate. For the subject social science, two options were to be filled out of geography, history, economics and civics. Since the petitioners have answered the question of other subjects also, therefore evaluation of that answer may not be done due to violation of the instruction averred in column no. 12. In column no. 12 the instruction in given as' please do not write or mark on this answer paper outside the demarcated areas, it may invalidate your answer sheet. In Special Appeal No. 834 of 2013 this Hon'ble Court has clearly held that in case a teacher could not fill application form correctly and his appointment is made, this will effect the carrier of students. The operative part of the order dated 30.5.2013 passed in Special Appeal No. 834 of 2013 are quoted below:- *"We are not inclined to interfere in this special appeal because interference in such matters would result in thoroughly incompetent or utterly negligent persons becoming teachers and spoiling the future of the children whom they will teach.* *If prospective teacher can not even correctly fill up the simple on line application form for his employment, it is obvious what he is going to teach if appointed. There are certain decisions cited on this issue. But none of them deal with this aspect whether under the discretionary jurisdiction of the Court under Article 226 of the Constitution of India such incompetent persons should be allowed to play with the future of the next generation.* *Therefore, we are of the opinion that the petitioner / appellant should wait till he attains sufficient maturity and learns to be more careful in filling up the applications for jobs. The appeal is therefore, dismissed."*

booklet series and signatures properly, therefore, candidatures of the Petitioners cannot be cancelled and copies properly checked.	
28. That it is also relevant to mention that earlier the Respondent no.2 has issued an **advertisement no.01/2013 for appointment of Assistant Teacher in L.T. Grade for Social Science Subjects in other sections against few questions and it was checked properly and their names were found place in the select list. For example the** person namely Mr. Akhand Singh has applied for the post of Assistant Teacher in L.T. Grade for Social Science Subject against the advertisement no.01/2013 having Roll no. 020915720 and who has marked in one section which he has not opted against few questions, however, his copy has properly checked and managed by the Board and his name was also found in the select list. For kind perusal of this Hon'ble Court, True/ photostat Copies of the advertisement no.01/ 2013 and OMR sheet along with relevant part of result/ select list containing name of Mr. Akhand Singh are being filed herewith and marked as Annexure-6 to this Writ petition."	6. That in reply to the contents of paragraph no. 28 of the writ petition it is submitted that petitioners cannot claim parity of any mistake done earlier and since they have violated the instruction nos. 6, 9 & 12 hence their answer sheet have been held invalid. Instruction nos. 6, 9 & 12 are as follows:- Instruction No. 6 Make marks only in the spaces provided. Please do not make any stray mark on this answer sheet. Instruction No.9 Answer sheet will be processed by electronic means. Invalidation of Answer sheet due to incomplete / incorrect filling will the sole responsibility of the candidate. Instruction No. 12 Please do not write or mark on this Answer paper outside the demarcated areas. It may invalidate your Answer Sheet."

6. Perusal of the copies of OMR Answer sheets collectively filed by the petitioner as Annexure 4 to the writ petition, shows that most of the petitioners have darkened one or two circles of a subject other than the two subjects opted by them in Part-I of the OMR Answer sheet. The Board has not evaluated such Answer sheets on the ground that such candidates have violated instruction nos. 6, 9 & 12 of the instructions accompanying the Answer sheet. Hence, the petitioners have filed the **present writ petition praying for the following reliefs** as mentioned in the leading writ petition:-

"(a) A writ order or direction in the nature of certiorari quashing the impugned result / select list dated 25.10.2019 (Annexure -5 to the writ petition) declared / published by the respondent no. 2.

(b) A writ order or direction in the nature of mandamus commanding the respondent no. 2 to evaluate OMR sheets of the petitioners.

(c) A writ order or direction in the nature of mandamus commanding the respondent no. 2 to declare result of the petitioners and also call for interview and further selection be made in

accordance with procedure as provided, after declaration of the result of the petitioners."

Submissions on behalf of the petitioners:-

7. Learned counsel for the petitioners submits that OMR Sheet / Answer Sheet is in two parts. In the **first part,** if there is any error, then as per instructions, the Answer Sheet / OMR Sheet is not to be evaluated and the candidature will automatically be rejected. The **second part** of the OMR Sheet / Answer Sheet contains questions to be answered by a candidate. If there is no error in the first part of the OMR Sheet, but there is some minor mistake in marking answers to questions in the second part of the OMR Sheet then the respondent - U.P. Secondary Education Selection Board cannot say that entire answers given in the OMR Sheet shall not be evaluated at all. The stand taken by the learned standing counsel that OMR Sheet cannot be evaluated even in case of minor human errors, is contrary to the instructions of the respondent.

Submissions on behalf of the respondents:-

8. Learned sanding counsel submits that error of any kind in the OMR Sheet committed by a candidate shall result in rejection of the candidature or non evaluation of the OMR Sheet. In support of his submissions, learned standing counsel has relied upon a judgment of Hon'ble Supreme Court in the case of Karnataka Public Service Commission Vs. B.M. Vijaya Shankar AIR 1992 SC 952 (paragraph 2) and judgments of this Court in Kumari Richa Pandey Vs. Examination Regulatory Authority & another in Special Appeal Defective No. 117 of 2014 decided on 18.2.2014, Special Appeal No. 834 of 2013 (Ram Manohar Yadav Vs. State of U.P. & 3 others) decided on 30.5.2013, Writ-A No. 1452 of 2019 (Km. Bandana Vs. State of U.P. & another) decided on 14.2.2019, Writ-A No. 3347 of 2019 (Mritunjay Kumar Mishra & another Vs. State of U.P. & another) decided on 7.3.2019, Writ-A No. 19486 of 2019 (Shiv Prasad Devey & 39 others Vs. State of U.P. & another) decided on 7.12.2019, Writ-A No. 26173 of 2018 (Rajesh Kumar Yadav & 20 others Vs. State of U.P. & 2 others) decided on 17.12.2018, Writ-A No. 154 of 2020 (Meena Diwakar Vs. State of U.P. & 2 others) decided on 10.1.2020 and Writ-A No. 445 of 2020 (Sukhvir Singh Vs. State of U.P. & another) decided on 27.1.2020.

Discussion and Findings:-

9. I have carefully considered the submissions of learned counsels for the parties.

10. The respondents have neither stated in the counter affidavit nor placed any material before this Court which may indicate that the aforequoted instructions of the OMR Answer sheet has statutory force. There is no statutory provision which disentitles a candidate from evaluation of his Answer sheet, who, by inadvertence or due to human error marked one or two answer circles of a subject other than the two subjects opted by him in the first part of the OMR Answer sheet.

11. In the case of **Hanuman Dutt Shukla & others Vs. State of U.P. &**

others (2018) 16 SCC 447 (paragraphs 7 & 8), the Hon'ble Supreme Court noted / observed as under:-

"7. It is submitted by Mr. P.P. Rao, learned Senior Counsel and other learned Senior Counsel / counsel appearing for the parties that as per the Recruitment Rules framed by the State Government to appoint the eligible candidates to the posts, referred to supra, there is not prohibition to disentitle a candidate from evaluating the answer sheets, who used whitener or blade in the relevant blocks in the OMR sheet (answer sheet). ***The said advisory note given by the Selection Board cannot be treated as a rule to declare such candidates who have used whitener or blade in the relevant blocks in the OMR / answer sheet as ineligible for evaluating their answer sheets. The statement is in conformity with the Recruitment Rules and it would further support the stand taken by the learned Advocate General, representing the respondent State of U.P. In making submission on the basis of written suggestions.***

8. The appeals are disposed of in the aforesaid terms on the basis of the statement made by the learned Advocate General on the instructions received from the Principal Secretary (Home) and the legal submissions referred to supra."

12. It is admitted fact of the case that the petitioners have opted two subjects and darkened the circles accordingly in Part-I of the OMR Answer sheet. **In Part-II of the OMR Answer sheet, they answered the questions of the two subjects opted by them, but inadvertently darkened one or two circles of a third subject,** due to which their answer sheets have not been evaluated.

13. **Thus, there arise two Questions in these writ petitions;**

(a) whether the Rules, 1998 prohibits the Board to evaluate such OMR Answer sheets in which in Part-II the petitioners have inadvertently and unintentionally darkened answer circle of one or two questions of a subject other than the two subjects opted by them in Part-I of the OMR Answer sheet?

(b) Whether even on the basis of instruction nos. 6, 9 & 12 accompanying the OMR Answer sheet, the respondents can refuse to evaluate the Answer sheets of the petitioners?

Question-(a)

14. "The Uttar Pradesh Secondary Education Service Selection Board" (herein after referred to as the Board) has been constituted under Section 3 of the U.P. Secondary Education Service Selection Boards Act, 1982 (herein after referred to as the Act, 1982). **Its powers and duties are described in Section 9** which includes in clause (a) preparation of guidelines on matters relating to the method of direct recruitment of teachers. **The Board has been conferred power to make Regulations with the prior approval of the State Government to lay down the procedure to be followed for discharging its duties and performing functions under the Act.** Sub-section (2) of Section 34 provides that the **Regulations made under sub-section (1) shall not be inconsistent with the provisions of the Act or the Rules made under Section 35.** The Rules, 1998 has been enacted in exercise

of powers conferred under Section 35 of the Act, 1982.

15. **Rule 12(3) of the Rules, 1998 mandates the Board to evaluate answer sheets** through examiner to be appointed by the Board or through computer. Neither any material has been placed before me by learned counsels for the parties nor it has been argued by them that the instructions mentioned on the OMR Answer sheets are statutory or have statutory force. Even if it is assumed that the instructions as printed on the OMR Answer sheets have been lawfully framed by the Board and have statutory force yet in view of Rule 12(3) of the Rules, 1998, the Board cannot refuse to evaluate answer sheet of a candidate if there is no defect in Part-I of the OMR Answer sheet which relates to identity of candidate and subject opted etc. and the answer paper does not suffer from any major defect.

16. There are four sections in part-II of the OMR Answer sheet. Each section contained 63 questions on each of the four subjects in four separate blocks on the same page. The petitioners were required to answer questions in Part-II of those two subjects opted by them in Part-I and they answered it, but inadvertently they darkened one or two answer circle of questions of another subject. **Such bonafide and unintentional mistake, in the absence of any statutory prohibition; cannot disentitle the petitioners from evaluation of their answers to questions in Part-II of the two subjects opted by them in part-I of the OMR Answer sheet.** Rule 12(3) of the Rules, 1998 mandates Board to evaluate answer sheets of the written examination. It does not prohibit evaluation of answer sheets. **Therefore, if by inadvertence a candidate has committed an unintentional / bonafide minor mistake in Part-II of the Answer sheet as aforesaid, then the Board cannot refuse to evaluate the entire questions answered by the petitioners.**

Human Error:-

17. The concept of human error or inadvertent error has been explained in brief by Hon'ble Supreme Court in ***Price Water, Coopers (P) Ltd. Vs. CIT (2012) 11 SCC 316*** (paragraph 15), as under:-

"The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. ***This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error.*** *That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income."*

(emphasis supplied)

18. The petitioners have opted two subjects in Part-I and marked answers to questions of those subjects in the respective sections in Part-II. Inadvertently and unintentionally, they

also marked one or two circles in another section / subject in Part-II. This can only be described as human error. The petitioners should have been careful, but a little inadvertence like the present one cannot deprive them from evaluation of their answers to questions of the subject opted, particularly when there is no statutory prohibition under Rule 12 of the Rules, 1998.

Question-(b)

19. The instructions given in the OMR Answer sheets cannot be made basis to refuse to evaluate Answer sheets of the petitioners merely on the ground that they marked circles of one or two questions of a subject other than the two subjects opted by them in the first part of the OMR Answer sheet. The mistake committed by the petitioners is a minor human error. They are merely claiming for evaluation of answers to the questions of the two subjects opted by them in the part-I of the OMR Answer sheet. The answers marked by them in one or two circles of another section / subject (other than the opted two subjects), can neither be evaluated nor the petitioners are claiming its evaluation which are merely liable to be ignored

20. The petitioners have stated in paragraph 17 of the writ petition that they have duly filled up Part-I of the OMR Answer sheet and there is no defect in the first part. In paragraph 18 of the writ petition, the petitioners have stated that ***in haste*** they had filled up the answers to some questions of a subject other than the two subjects opted by them in part-I. In paragraphs 25 & 27 of the writ petition, it has been stated that the correct answers of the questions of the section (subject) opted by the petitioners in part-I, cannot be denied to be awarded marks. These paragraphs have been replied by the respondents in paragraph 5 of the counter affidavit in which they have not denied it.

21. In paragraphs 21, 22 & 23 of the writ petition, the petitioners have stated that if there is any defect in part-I of the OMR Answer sheet, then candidature will be cancelled as per instruction no. 2. Instruction nos. 6 & 12 of the OMR Answer sheet relate to facts when some mark is made on other part of the OMR Answer sheet, which are not attracted to the petitioners. Therefore, the instructions relating to overwriting shall not be attracted in the case of the petitioners. These paragraphs 21, 22 & 23 of the writ petition have been replied by the respondent Board in paragraph 5 of the counter affidavit, but no specific denial has been made.

22. Perusal of the **instruction no. 2** shows that candidature of a candidate will automatically be rejected if he fails to fill up the roll numbers, subject code and question booklet series in the answer sheet. This instruction is attracted to the first part of the OMR Answer sheet.

23. **Instruction no. 6** provides for making marks only in the spaces provided. The petitioners have put marks in the spaces provided. Therefore, this instruction has not been violated.

24. **Instruction no. 9** is advisory in nature which provides for invalidation of Answer sheet due to incomplete / incorrect filling. This clause is also referable to part-I of the OMR Answer sheet.

25. **Instruction no. 12** instructs not to right or mark on the Answer paper outside the demarcated areas. The petitioners have not written or marked outside the demarcated area. Nothing of this kind has been pointed out on facts by the respondents in their counter affidavit.

26. The judgment relied upon by the learned counsel for the respondents are of no help to them. In the case of ***Karnataka Public Service Commission*** (supra) relied by learned counsel for the respondents, the facts were that roll number was written not only on the space provided therefor, but also on the cover page of the answer book and on all pages inside the answer book. Therefore, the Commission was held to be justified in not evaluating the answer book. Such are not the facts of the present writ petition. In the case of ***Kumari Richa Pandey*** (supra), the candidate had not filled up the column of language in which she had attempted answers in OMR Answer sheet. In the case of ***Ram Manohar Yadav*** (supra), there was failure on the part of the candidate to fill up correctly the simple online application form for employment. In the case of ***Kumari Bandana*** (supra), the candidate failed to fill up correct subject. In the case of ***Mritunjay Kumar Mishra*** (supra), the facts were that the petitioner wrongly mentioned the subject in the first part. In the cases of ***Shiv Prasad Dubey*** (supra), ***Meena Diwakar*** (supra) and ***Sukhvir Singh*** (supra), the facts were that candidates wrongly filled up their roll numbers. Thus, all the judgments relied by the learned counsel for the respondents are distinguishable and have no bearing on the facts of the present case.

27. The petitioners have stated in paragraph 28 of the writ petition that in similar circumstances the OMR Answer sheet of some candidate who appeared in examination for recruitment pursuant to advertisement No. 01 of 2013, have been evaluated. This statement of fact has not been denied by the respondent in paragraph 6 of the counter affidavit which has been reproduced above. Therefore, the respondents cannot deny similar treatment to the petitioners.

28. The stand taken by the respondents for non evaluation of OMR Answers sheets of the petitioners, is not sustainable for one more reason. Instruction no. 11 provides that overwriting or erasing will be treated as multiple marking and no mark for that question would be awarded. Therefore, had the petitioners erased the mark inadvertently put by them in the circle of answers to questions of a non opted subject, then as per instruction no. 11 no mark was to be awarded. Petitioners are not claiming for marks for darkening a wrong circle. Therefore, such marking in the circle by inadvertence merely needs to be ignored.

Conclusion:-

29. For all the discussions made above, I hold that if a candidate correctly fills up the mandatory information in Part-I of the OMR Answer sheet, does not write or mark on his answer paper outside the demarcated area and hands over the answer sheet to the Invigilator before leaving the examination hall, then subject to instruction no. 11, the Part-II of the OMR Answer sheet bearing answers to the questions of the subject opted in Part-I, has to be evaluated in terms of Rule 12(3) of the Rules, 1998.

29. For all the reasons aforesaid, all the writ petitions are **disposed off** with the directions to the respondent no. 3 to

evaluate OMR Answer sheet of such petitioners who have answered in Part-II of the OMR Answer sheet the questions of the two subjects opted by them, but inadvertently also marked one or two circles of another subject. Those petitioners who are found successful in the aforesaid written examination, shall be called for interview. Thereafter, their results shall be declared in accordance with law.

(2020)08ILR A84
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2020

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 20793 of 2019

Prakash Chandra ...Petitioner
Versus
Sri Ritesh Bhargava ...Respondent

Counsel for the Petitioner:
Sri Pramod Kumar Srivastava, Sri Deepak Singh

Counsel for the Respondent:
Sri Krishna Mohan Garg

A. Civil Law - Rent Control and Eviction – Vacation of shop - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Sections 21(a), 21(2), 30; U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972: Rule 16(2)(a) & (b); Hindu Succession Act, 1956: Section 3.

Bonafide need - Landlord is the best judge of his need and Court may not interfere in the matter. It is the choice of the landlord to choose the place for the business, which is most suitable for him. (Para 49, 50)

In the present case, undisputedly landlord is not having any another accommodation whereas petitioner is having alternative accommodation at 49/99 Naughara, Kanpur Nagar.

B. Comparative hardship – It is necessarily required on the part of tenant to make full endeavour to search alternative accommodation to prove his comparative hardship after receiving copy of release application.

The fact that the petitioner never made any effort for searching alternative accommodation coupled with law laid down by the Apex Court as well as this Court, no relief can be granted to the petitioner on the ground of comparative hardship. (Para 53 to 55)

C. Evidence Law - Evidence Act, 1872- Section 58 – Admissions in pleading or judicial admissions, admissible u/s 58 of the Evidence Act, 1872 made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. Any admissions made by the party to the suit in earlier proceeding are also admissible against him. (Para 44)

Petitioner tenant has never disputed tenancy and also filed case u/s 30 of the Act, 1972 in the capacity of tenant, therefore, he cannot be permitted to take new plea and further no denial of tenancy is required by the landlord-respondent in light of Section 58 of the Evidence Act, 1872. (Para 46)

Petitioner never raised the issue before the Prescribed Authority or Appellate Authority, where it could be proved by placing evidence whether he is tenant or not, therefore, he cannot be permitted to raise this issue before the High Court in the writ petition. The contention of the learned counsel for the petitioner is also not acceptable that he has raised the issue in the written statement that tenancy is continued from 1960, which was not denied by landlord-respondent in light of S. 58 of Evidence Act. Once the tenancy is accepted, there was no need to landlord to deny the same as the facts admitted need not be proved. (Para 47)

D. Co-owner has full right to file suit for eviction against the tenant and even consent of co-owner is not required to file suit. (Para 56)

Writ petition dismissed. (E-4)

Precedent followed:

1. Rajasthan St. Road Transport Corporation & anr. Vs Bajrang Lal, (2014) 4 SCC 693 (Para 25)

2. S.U. Ashram Vs ADJ, [2016 (1) ARC 861 (Para 26, 43, 49)

3. Heeralal Vs Kalyan Mal & ors., AIR 1998 Supreme Court, 618 (Para 27, 43)

4. Nagindas Ramdas Vs Dalpatram Iccharam @ Brijram & ors., AIR 1974 Supreme Court 471 (Para 28, 43)

5. Thimmappa Rai Vs Ramanna Rai & ors., (2007) 14 SCC 63 (Para 29, 43)

6. Rishi Kumar Govil Vs Maqsoodan & ors., (2007) 4 SCC, 465 (Para 30, 50)

7. Arvind Kumar Mishra Vs Jitendra Kumar Gupta & ors., [2016 (1) ARC 634 (Para 31)

8. Salim Khan Vs IV A.D.J., Jhansi & ors., 2006 (1) ARC 588 (Para 31, 53)

9. Ganga Devi Vs D.J., Nainital & ors., 2008 (2) ARC 584 (Para 31, 53)

10. Sarju Prasad Vs VIII A.D.J., Faizabad & ors., 2007 (2) AWC 1068 (L.B.) (Para 32, 51, 54)

11. Bachchu Lal Vs IXth A.D.J. Kanpur & ors., 2006 (4) AWC 3467 (Para 33, 54)

12. India Umbrella Manufacturing Co. & ors. Vs Bhaganamdei Agarwalla (Dead) by Lrs. Savitri Agarwalla (Smt) & ors., (2004) 3 SCC, 178 (Para 34, 56)

13. Shabbir Ahmed Vs Syed Mohammad Ali Ahmed Kabir, 2016 (1) ARC 275 (Para 35, 56)

14. K.V.S. Ram Vs Bangalore Metropolitan Transport Corporation, (2015) 12 SCC 39 (Para 36, 57)

Precedent distinguished:

1. Ramesh Chandra Yadav Vs Second Additional District Judge, Jalaun at Orai & ors., 2013 (1) AWC, 566 (Para 10, 41)

2. Kiran Singh Vs Chaman Paswan, 1954 AIR (SC) 340 (Para 11, 41)

3. Gurucharan Singh Vs Kamla Singh & ors., 1977 AIR, 5 (Para 12, 41)

4. G.M. Contractor Vs Gujarat Electricity Board, 1972 AIR (SC) 792 (Para 13, 41)

5. Chandra Bhushan Khanna &ors. Vs Brij Nandan Singh and another, 1978 AIR (Ald) 459 (Para 14, 41)

6. Chiranjilal Shrilal Goenka (Deceased) Through Lrs. Vs. Jasjit Singh, (1993) 2 SCC 507 (Para 15, 41)

Petition challenges order dated 24.09.2019, passed by Additional District Judge, Kanpur Nagar and judgment and order dated 06.04.2017, passed by prescribed Authority/Judge, Small Causes Court, Kanpur.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Pramod Kumar Srivastava and Sri Deepak Singh, learned counsel for the petitioner and Sri K.M. Garg, learned counsel for the respondent.

2. By way of present writ petition, the petitioner is challeging the order dated 24.09.2019 passed by XII Additional District Judge, Kanpur Nagar in Rent Appeal No. 26 of 2017-Prakash Chandra Vs. Ritesh Bhargawa and judgment and order dated 06.04.2017 passed by prescribed Authority/Judge Small Causes Court, Kanpur in Rent

Case No. 18 of 2014 (Ritesh Bhargawa Vs. Prakash Chandra), under Section 21(a) of Uttar Pradesh (Urban Buildings (Regulation of Letting, Rent and Eviction Act), 1972 (U.P. Act No. 13 of 1972) (hereinafter referred to as the Act, 1972).

3. The brief facts of the case are that the landlord-respondent has filed release application under Section 21(a) of the Act, 1972 on the ground of bonafide need for vacation of shop No. 50/05 Naughara, Kanpur Nagar, which was registered as Rent Case No. 19/14 in the court of Prescribed Authority. After issuance of notice, pleadings have been exchanged by fililng written statement, affidavit and rejoinder affidavit. The Prescribed Authority has framed three issues, which are as follows:-

(i) Whether there is a relationship of landlord or tenant betwen the parties?

(ii) Whether the need of landlord of the shop in question is bonafide?

(iii) Whether the comparative hardship of the landlord is greater than the tenant?

4. Considering the entire pleadings as well as evidence on record, release application was allowed by the Prescribed Authority vide order dated 6.4.2017 with direction to the tenant-petitioner to vacate the shop in question within 60 days. Against the said order, Rent Appeal No. 26 of 2017 was preferred and after hearing both the parties, same was dismissed by the Appellate Authority vide order dated 24.9.2019 affirming the judgment of the Prescribed Authority with direction to vacate the shop in question within 60 days. Hence, this writ petition.

5. Sri P.K. Srivastava, learned counsel for the petitioner has assailed both the orders on three grounds; the first ground is the maintainability of release application, second ground is bonafide need and third ground is comparative hardship. The main emphasis is about the maintainaibility of the writ petition.

6. Learned counsel for the petitioner submitted that original tenant of the disputed shop was Sri Laxmi Chandra, grandfather of the petitioner, who took the shop in tenancy from the grandfather of the landlord-respondent in the year 1960. Sri Laxmi Chandra died in the year 1979 leaving behind surviving two sons including father of the petitioner and three daughters. After death of Laxmi Chandra, shop was inherited to his legal heirs as provided under Section 3 of the Hindu Succession Act, 1956. Father of the petitioner is still alive and petitioner is not tenant, therefore, the Prescribed Authority lacks jurisdiction and release application filed by respondent under Section 21(a) of the Act, 1972 against the petitioner is not maintainable. He next submitted that he has taken specific plea in written statement that the shop in question was let out in tenancy of grandfather of petitioner in the year 1960. Earlier rent was being paid at the rate of Rs. 30/- per month and later on from time to time, rent was increased and lastly it was being paid at the rate of Rs. 1300/- per month. He next submitted that there is no denial of this fact in replica, therefore, under the provisions of Order 8 Rule 5 C.P.C., it is treated to be correct. He next submitted that though this plea of maintainability was not taken either in the written statement filed in the rent case or rent appeal filed before the appellate

authority, but it goes to the gross root of the case, therefore, it was open for him to take this plea at any stage even before the last court. He again submitted that once the release application filed under Section 21(2) of the Act, 1972 is not maintainable, the Prescribed Authority has no jurisdiction to pass the impugned order. Orders of the Prescribed Authority as well as Appellate Authority are nulity and cannot be sustained in the eye of law.

7. Learned counsel for the petitioner next submitted that the Prescribed Authority has not given correct finding for bonafide need in favour of the landlord-respondent. He further submitted that the release application has been filed on the ground that the shop in question is needed as his business is growing. It is never stated that he wants the disputed shop to grow his business. The courts below made out a new case for the landlord-respondent that he needs the shop in question to grow his business and released the shop for such alleged need. The court below further committed an error in holding the need of the landlord-respondent as bonafide only because the petitioner did not search alternative accommodation during the pendency of the case. The landlord-resdpondent has failed to adduce any documentary evidence with regard to his growing business. He also submitted that there was pleading in the written statement that the landlord do not need the shop in question for growing his bussiness, but the same was not considered and perverse finding has been given. He next submitted that paragraph 32 of the counter affidavit filed by petitioner before Prescribed Authority has not specifically been denied by the respondent in his rejoinder affidavit. He has taken specific plea that the landlord-respondent is having sufficient additional space i.e. big underneath and staircase, which can also be used for storing purposes, which was not denied in written statement, therefore, under the provisions of Order 8 Rule 5 C.P.C. it would be treated as correct.

8. He next submitted that so far as comparative hardship is concerned, the courts below have decided this issue on the ground that the petitioner has not made any effort to search any alternative accommodation. This may be one of the circumstance, but not the sole ground to decide the comparative hardship against the tenant. Rule 16(2)(a) & (b) of U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Rules, 1972 (hereinafter referred to as the Rules, 1972) framed under the Act, 1972 provides guidelines to the court for deciding the comparative hardship and finding recorded on the issue of comparative hardhsip is contrary to Rule 16(2) of the Rules, 1972. He also submitted that the petitioner has an alternative accommodation, therefore, under such legal facts, the order dated 6.4.2017 passed by the Prescribed Authority is bad in law and liable to be set aside.

9. Learned counsel for the petitioner further submitted that the landlord-respondent is not the sole owner of the shop in question and there are other co-owners of the shop in question, therefore, he cannot maintain release application alone without having the consent of other co-owners. In case respondent is co-owner of the shop in question, even then he can not file release application to vacate the shop in question under the settled provisions of law.

10. In support of his arguments, learned counsel for the petitioner has cited judgments of the Apex Court as well as this Court. He has placed reliance upon the judgment of this Court in the case of ***Ramesh Chandra Yadav Vs. Second Additional District Judge, Jalaun at Orai and others, 2013 (1) AWC, 566.*** Paragraph 7 of the said jujdgment is quoted below:-

"7. He, however, could not dispute that the building in question having been constructed and completed in 1977, in 1983, ten years having not passed, Act No. 13 of 1972 was not applicable by virtue of Section 2 (2) of Act, 1972. That being so the Prescribed Authority under Section 21 of Act, 1972 lacked patent jurisdiction. A jurisdiction cannot be conferred even by consent of parties. It is an elementary principle. Where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties. No waiver or acquiescence on their part can make up the patent lack or defect of jurisdiction. If the decision/order of Court/authority is void for want of jurisdiction over the subject matter, it cannot operate as res judicata; so as to make that judgment conclusive between the parties, since the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of Section 11 of the Civil Procedure Code. Something which is wholly without jurisdiction, that is nullity in the eyes of law, no principle of law would come to confer any kind of effectiveness to such proceedings so as to have any legal consequences."

11. Next judgment relied upon by learned counsel for the petitioner is ***Kiran Singh Vs. Chaman Paswan, 1954 AIR (SC) 340***. Paragraph 6 of the said judgment is quoted below:-

"6. The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of section II of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be' determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position."

12. He has placed reliance upon the judgment of the Apex Court in the case of ***Gurucharan Singh Vs. Kamla Singh and others, 1977 AIR, 5***. Paragraphs 8 and 9 of the said judgment are quoted below:-

"8. Before we examine this quintessential aspect presented before us will complex scholarship by Shri S. C. Misra we Had better make. short shrift of certain other questions raised by him. He

has desired ` us, by way of preliminary objection, not to give quarter to the plea, founded on s. 6 of the Act, to non-suit his client, since it was a point raised be nova at Letters Patent state. The High Court have thought to this objection but overruled it, if we may say so rightly. The Court narrated the twists and turns of factual and legal circumstances which served lo extenuate the omission to urge the point earlier but hit the nail on the head when it held that it was well-settled that a pure question of law going to the root of the case and based on undisputed or proven facts could be raised even before the Court of last resort, provided the opposite side was not taken by surprise or otherwise unfairly prejudiced. Lord Watson, in Connecticut Fire Insurance Company v. Kavanach,(1) stated the law thus:

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea." (1) [1892] A. C. 473, 480.

17-L925SupCI /75 We agree with the High Court that the new plea springs from the common case of the parties, and nothing which may work injustice by allowance of this contention at the late stage of the Letters Patent Appeal has been made out to our satisfaction. Therefore, we proceed to consider the impact and applicability of s.6 of the Act to the circumstances of the present case."

13. He has also placed reliance upon the judgment of the Apex Court in the case of ***G.M. Contractor Vs. Gujarat Electricity Board, 1972 AIR (SC) 792***. Paragraph 2 of the said judgment is quoted below:-

"2. It is stated that this ground goes to the very root of the matter but was not raised before the High Court. The appellants objected to this fresh ground being allowed to be taken up, but we consider that as this ground goes to very root of the matter it should be allowed after the appellants are compensated by costs."

14. He has also placed reliance upon the judgment of this Court in the case of ***Chandra Bhushan Khanna and others Vs. Brij Nandan Singh and another, 1978 AIR (Ald) 459.*** Paragraph 5 of the said judgment is quoted below:-

"5. As noticed earlier, the nature of the suit has to be determined on the allegations made in the plaint. In the present case the plaintiff came to the court on the allegation that the relationship of lessor and lessee, which existed between the plaintiff and Ram Ratan Lal Khanna, was terminated by a valid notice before the latter's death. On the termination of his tenancy he could claim only the protection provided by U.P. Act No. 3 of 1947. On his death,

however, his heirs did not inherit any right or interest in the property as the statutory tenancy rights which Sri Khanna had after the termination of his contractual tenancy was not inheritable. There is no assertion in the plaint that the plaintiff and the defendants stood in the relationship of lessor and lessee at any stage. On the plaint allegation it is obvious that the suit was not cognizable by the Court of Small Causes as envisaged in Article 4 of the second Sch. The suit was rightly instituted in the court of Munsif and its transfer to the Court of Small Causes on the enforcement of U.P. Act No. 37 of 1972 was illegal. It is true that both the parties submitted to the illegal transfer of the suit to the Court of Small Causes and no objection to the jurisdiction of the court was raised either in the trial court or in the revisional court but since the Court of Small Causes lacked inherent jurisdiction to entertain the suit, the acquiescence or even consent of the parties could not confer jurisdiction on it. Acquiescence waiver or consent of the parties may be relevant in objections relating to the pecuniary or territorial jurisdiction of the court but these factors have no relevance where the court lacks inherent jurisdiction. The Privy Council in Ledgard v. Bull (1886) 1'3 Ind App 134) observed as follows:--

"When the Judge has no inherent jurisdiction, over the subject matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process, ... But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which if objected to at the time, would have led to the dismissal of the suit."

Jurisdiction cannot be conferred on a court by consent, acquiescence or waiver where there is none nor can it be ousted where it is. Lack of inherent jurisdiction strikes at the very authority of the court to pass any decree, and renders the decree a nullity. Since: the Judge Small Causes lacked inherent jurisdiction to try the present suit, the decree passed by the courts below must be held to be a nullity."

15. The next judgment relied upon by learned counsel for the petitioner is ***Chiranjilal Shrilal Goenka (Deceased) Through Lrs. Vs. Jasjit Singh, 1993 (2) SCC 507.*** Paragraph 18 of the said judgment is quoted below:-

"18. It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the root to its jurisdiction of lacks inherent jurisdiction is a corum non judice. A decree passed by such a court in a nullity and is nonest. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. In ***Bahadur Singh & Anr. v. Muni Subrat Dass & Anr., [1969] 2 SCR 432*** *an eviction petition was filed under the Rent Control Act on the ground of nuisance. The dispute was referred to the arbitration. An award was*

made directing the tenant to run the workshop upto a specified time and thereafter to remove the machinery and to deliver vacant possession to the landlord. The award was signed by the arbitrators, the tenant and the landlord. It was filed in the court. A judgment and decree were passed in terms of the award. On expiry of the time and when the tenant did not remove the machinery nor delivered vacant possession, execution was levied under Delhi and Ajmer Rent Control Act. It was held that a decree passed in contravention of Delhi and Ajmer Rent Control Act was void and the landlord could not execute the decree. The same view was reiterated in ***Smt. Kaushalya Devi and Ors. v. KL. Bansal, AIR 1970 SC 838. In Ferozi Lal Jain v. Man Mal & Anr., AIR 1979 SC 794*** *a compromise dehore grounds for eviction was arrived at between the parties under section 13 of the Delhi and Ajmer Rent Control Act. A decree in terms thereof was passed. The possession was not delivered and execution was laid. It was held that the decree was nullity and, therefore, the tenant could not be evicted. In* ***Sushil Kumar Mehta v. Gobind Ram Bohra (dead) through his Lrs. JT 1989 (SUPPI.) SC.329*** *the Civil Court decreed eviction but the building was governed by Haryana Urban (Control of Rent & Eviction Act 11 of 1973. It was held that the decree was without jurisdiction and its nullity can be raised in execution. In* ***Union of India v. M/S. Ajit Mehta and Associates. Pune and Ors., AIR 1990 Bombay 45*** *a Division Bench to which Sawant, J. as he then was, a member was to consider whether the validity of the award could be questioned on jurisdictional issue under section 30 of the Arbitration Act. The Division Bench held that Clause 70 of the, Contract provided that the Chief Engineer shall appoint an engineer officer to be sole arbitrator and unless both parties agree in writing such a reference shall not take place until after completion of the works or termination or determination of the Contract. Pursuant to this contract under section 8 of the Act, an Arbitrator was appointed and award was made, Its validity was questioned under section 30 thereof. The Division Bench considering the scope of Sections 8 and 20(4) of the Act and on review of the case law held that Section 8 cannot be invoked for appointment of an Arbitrator unilaterally but be available only under section 20(4) of the Act. Therefore, the very appointment of the Arbitrator without consent of both parties was held void being without jurisdiction. The Arbitrator so appointed inherently lacked jurisdiction and hence the award made by such Arbitrator is nonest. In* ***Chellan Bhai's case Sir C. Farran, Kt., C.J. of Bombay High Court*** *held that the Probate Court alone is to determine whether probate of an alleged will shall issue to the executor named in it and that the executor has no power to refer the question of execution of Will to arbitration. It was also held that the executor having propounded a Will, and applied for probate, a caveat was filed denying the execution of the alleged Will, and the matter was duly registered as a suit, the executor and the caveatrix subsequently cannot refer the dispute to arbitration, signing a submission paper, but such an award made pursuant thereto was held to be without jurisdiction."*

16. Sri K.M. Garg, learned counsel for the respondent has vehemently opposed the submission raised by learned counsel for the petitioner and submitted

that so far as maintainability of the release application is concerned, in the written statement, petitioner has admitted that he is tenant in the aforesaid shop at the rate of Rs. 1300/- per month and in subsequent paragraph of the written statement, it is also stated that he is paying rent continuously and regularly to the landlord-respondent. He is not defaulter in payment of rent and no rent is due against the tenant. In the written statement, it is also stated that there are other co-owners of the shop in question, therefore, as tenant he has filed Misc. Case No. 672/70/2014 (Prakash Chandra Gupta Vs. Ritesh Bhargav), under Section 30 of the Act, 1972, which is pending for disposal. He next submitted that the petitioer can not go beyond his pleadings taken in written statement. No application at any point of time has been filed by petitioner to amend the written statement and even before the appellate authority, he has not taken this ground. Now at this stage, the ground taken by the petitioner contrary to his pleadings in the written statement, is not acceptable. In fact, he is taking a new plea after specifically accepting himself to be a tenant before the Prescribed Authority and Appellate Authority and taking entirely a new ground before the writ Court cananot be accepted at this stage.

17. He further submitted that even assuming it without admitting that the petitioner-tenant is not a tenant, then he has no locus standi to maintain this writ petition as he is not the person aggrieved with the order passed by the courts below. Therefore, this writ petition is liable to be dismissed on the ground of maintainability and no relief can be granted in his favour.

18. He also submitted that in case the respondent being co-owner of the shop in question is not the exclusive owner, even though he can file the release application to release the shop in question under the settled provisions of law.

19. He next submitted that admissions in the pleadings are admissible under Section 58 of the Indian Evidence Act and the same is binding on the party that makes them waiver of provision. It is not required to be proved.

20. So far as bonafide need is concerned, he submitted that the respondent has space in his shop which is below the stairs and the landlord-respondent is using this space to keep the goods relating to the packaging. The courts below after considering the evidence on record have categorically recorded finding that the shop in question is required bonafidely to the landlord-respondent. He next submitted that undisputedly the petitioner-tenant is having alternative accommodation for doing his business at 49/99 Naughara, Kanpur Nagar, therefore, the courts below have rightly decided the issue of bonafide need in favour of the landlord-respondent. He next submitted that in light of law laid down by the Apex Court as well as this Court, landlord is best judge of his need and the Court may not interfere in the matter. The courts below have also considered that the petitioner has not made any effort to search the alternative space and recorded finding in favour of the landlord while deciding the bonafide need.

21. He further submitted that so far as comparative hardship is concerned, as per finding recorded by the prescribed Authority, it is undisputed fact that the petitioner has not made any effort to

search alternative space coupled with the fact that the landlord is owner of another accommodation at 49/99 Naughara, Kanpur Nagar. Therefore, courts below have rightly decided this issue in favour of landlord-tenant.

22. He next submitted that writ of certiorari can only be issued for correcting the errors of jurisdiction committed by inferior court or tribunal. Writ of certiorari is not supervisory jurisdiction and the Court cannot be treated to act an appellate court.

23. He also submitted that while deciding the comparative hardship , the courts below have considered the Rule 16(2)(b) of Rules, 1972 provides for considering the need of landlord also and order of the Prescribed Authority is in accordance with same. Once the petitioner is having alternative accommodation, Rule 16 of the Rules, 1972 would not be applicable.

24. In support of this contention, he has placed reliance upon several judgments of the Apex Court as well as this Court.

25. He has placed reliance upon a judgment of Apex Court in the case of ***Rajsthjan State Road Transport Corporation and another Vs. Bajrang Lal, (2014) 4 Supreme Court Cases 693***. Paragraphs 14 and 15 of the said judgment are quoted below:-

"14. It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the plaint and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. (Vide: M/s. Larsen & Tourbo Ltd. & Ors. v. State of Gujarat & Ors., AIR 1998 SC 1608; National Building Construction Corporation v. S. Raghunathan & Ors., AIR 1998 SC 2779; Ram Narain Arora v. Asha Rani & Ors., (1999) 1 SCC 141; Smt. Chitra Kumari v. Union of India & Ors., AIR 2001 SC 1237; and State of U.P. v. Chandra Prakash Pandey, AIR 2001 SC 1298.)

15. In M/s. Atul Castings Ltd. v. Bawa Gurvachan Singh, AIR 2001 SC 1684, this Court observed as under:-

"12. The findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law."

(See also: Vithal N. Shetti & Anr. v. Prakash N. Rudrakar & Ors., (2003) 1 SCC 18; Devasahayam (Dead) by L. Rs. v. P. Savithramma & Ors., (2005) 7 SCC 653; Sait Nagjee Purushotam & Co. Ltd. v. Vimalabai Prabhulal & Ors., (2005) 8 SCC 252, Rajasthan Pradesh V.S. Sardarshahar & Anr. v. Union of India & Ors., AIR 2010 SC 2221; Ritesh Tiwari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823; and Union of India v. Ibrahim Uddin & Anr. (2012) 8 SCC 148)."

26. Next judgment relied upon by learneada counsel for the respondent is ***S.U. Ashram Vs. ADJ, [2016 (1) ARC 861***. Paragraphs 14, 15, 17 and 18 are quoted below:-

"14. Second ground of challenge to the maintainability of the release application urged by the learned counsel for the petitioner is that the release application has been filed against an unknown entity i.e. the petitioner no. 2. The necessary party is the petitioner

no. 1 who has not been impleaded in the release application. The petitioner no. 1 is a registered society which has opened its Branch Office namely Shri Gandhi Ashram, Mandawar. The release application against Shri Gandhi Ashram, Mandawar was not maintainable and the order of eviction passed against it can not be executed against the petitioner no. 1 which is a legal entity being a registered co-operative society.

15. This objection of the learned counsel for the petitioner is not acceptable for the simple reason that in paragraph 1 of the written statement filed by the petitioner nos. 2 had admitted the landlord-tenant relationship.

16. Now on the merits of the release application, the application has been filed for the need setup by the landlord therein that he required the shop in question for his business. The tenant contested the release application on the ground that the landlord had another shop at Chandak which is a near by place but has not been able to establish that the landlord was in vacant possession of any other shop at Mandawar where the landlord wanted to do his business.

17. It is well-settled that it is choice of the landlord to do his business at a particular place. The tenant or the Court for that matter cannot be a guide to instruct the landlord to do his business at Chandak itself. Moreover the finding of fact is that there is categorical refusal of the landlord that he was doing grocery business in a shop at Chandak which could not be rebutted by the tenant by leading cogent evidence.

18. On the comparative hardship, the categorical finding is that the opposite party had failed to establish that it had made an effort to get an alternative place. The record proves that other shops were available in the vicinity which could have been taken on rent by the opposite party/tenant."

27. Next judgment relied upon by learned counsel for the respondent is ***Heeralal Vs. Kalyan Mal and others, AIR 1998 Supreme Court, 618. Paragraphs 9 and 10*** of the said judgment are quoted below:-

"9. Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25th January 1991 between the parties but the nature of agreement was sought to be explained by him by amending the written statement by submitting that it was not agreement of sale as such but it was an agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondents. Even that apart the said decision of two learned judges of this Court runs counter to a decision of a Bench of three learned judges of this court in the case of Modi Spinning & Weaving Mills Co. Ltd. & Anr. v. Ladha Ram & Co. [(1977) 1 SCR 728: (AIR 1977 SC 680). In that case Ray, CJ., Speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff complete from the admissions made by the defendants in the written statements

cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 07th April 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under order Vi Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist- cum-distributor. Such amendment was rejected by the Trial Court and the said rejection was affirmed by the High Court in Revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned judges of this the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned judges that decided the case in Akshaya Restaurant (supra). In the latter case it was observed by the Bench of two learned judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in Akshaya Restaurant (1995 AIR SCW 2277) (supra) proceed on an assumption tat it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three member Bench of this Court in Modi Spinning (AIR 1977 SC 680) (supra) is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case and cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view."

28. Next judgment relied upon by learned counsel for the respondent is ***Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram and others, AIR 1974 Supreme Court 471.*** Paragraph 26 of the said judgment is quoted below:-

"26. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of

which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the. foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

29. He has also relied upon the judgment of the Apex Court in the case of ***Thimmappa Rai Vs. Ramanna Rai and others, (2007) 14 Suupreme Court Cases 63.*** Paragraph 23 of the said judgment is quoted below:-

"23. An admission made by a party to the suit in an earlier proceedings is admissible as against him. Such an admission being a relevant fact, the courts below in our opinion were entitled to take notice thereof for arriving at a decision relying on or on the basis thereof together with other materials brought on records by the parties. Once a party to the suit makes an admission, the same can be taken in aid, for determination of the issue having regard to the provisions of Section 58 of the Indian Evidence Act."

30. He has also placed reliance upon a judgment of the Apex Court in the case of ***Rishi Kumar Govil Vs. Maqsoodan and others, (2007) 4 Supreme Court Cases, 465.*** Paragraph 19 of the said judgment is being quoted below:-

"19. In Ragavendra Kumar v. Firm Prem Machinary and C0., it was held that it is the choice of the landlord to choose the place for the business which is most suitable for him. He has complete freedom in the matter. In Gaya Prasad v. Pradeep Shrivastava, it was held that the need of the landlord is to be seen on the date of application for release. In Prativa Devi (Smt.) v. T.V. Krishnan, it was held that the landlord is the best Judge of his requirement and Courts have no concern to dictate the landlord as to how and in what manner he should live. The bona fide personal need is a question of fact and should not be normally interfered with. The High Court noted that when the Prescribed Authority passed the order son of the respondent-landlady was 20 years old and the shop was sought to be released for the purpose of settling him in business. More than 20 years have elapsed and the son has become more than 40 years of age and she has not been able to establish him as she has still to get the possession of the shop and the litigation of the dispute is still subsisting. The licence for repairing fire arms can only be obtained when there is a vacant

shop available and in the absence of any vacant shop, licence cannot be obtained by him. Therefore, the High Court came to the conclusion concurring with that of the Prescribed Authority and Appellate Authority that the need of the landlady is bona fide and genuine. Considering the factual findings recorded by the Prescribed Authority, Appellate Authority and analysed by the High Court, there is no scope for any interference in this appeal which is accordingly dismissed. However, considering the period for which the premises in question was in the occupation of the appellant time is granted till 31st December, 2007 to vacate the premises subject to filing of an undertaking before the Prescribed Authority within a period of 2 weeks to deliver the vacant possession on or before the stipulated date. There will be no order as to costs."

31. Next judgment relied upon by learned counsel for the respondent is ***Arvind Kumar Mishra Vs. Jitendra Kumar Gupta and others, [2016 (1) ARC 634.*** Paragraphs 20 to 25 of the judgment are quoted below:-

"20. In the present case, courts below have given categorical finding of fact that the tenant did not make any effort to search an alternative accommodation immediately after filing of the release application and even during the pendency of appeal, so the said facts were sufficient to tilt the balance of the comparative hardship against the tenant, in view of the law as laid down by Hon'ble Supreme Court in the case of ***B.C. Bhutada V. G.R. Mundada, A.I.R. 2003 SC 2713; 2003 SCFBRC 167*** *wherein it was held that bona fide requirement implies an element of necessity. The necessity is a necessity without regard to the degree to which it may be. For the purpose of comparing the hardship the degree of urgency or intensity of felt need assumed significance.*

21. In the above authority it has also been held in para 13, that tenant must show as to what efforts he made to purchase or take on rent other accommodation after filing of the release application which is quoted below:-

" ***In Piper V. Harvey, 1958(1) All ER 454,*** *the issue as to comparative hardship arose for the consideration of Court of appeals under the Rent Act, 1975. Lord Denning opined; "when I look at all the evidence in his case and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, to look for another house, either to but or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship." Hudson, L.J. ,opined: " the tenant has not been able to say any thing more than the minimum which every tenant can say, namely, that he was in fact been in occupation of the bungalow, and that he has not at the moment any other place to go to. He has not , however, sought to prove any thing additional to that by way of hardship such as unsuccessful attempts to find other accommodation, or, indeed, to raise the question of his relative financial incompetence as compared with the landlord." On such state of the case, the Court answered the issue as to*

comparative hardship against the tenant and ordered his eviction."

22. In the case of ***Salim Khan V. IVth Additional District Judge, Jhansi and others , 2006(1) ARC 588*** *has held that in respect of comparative hardship, tenant did not show what efforts they made to search alternative accommodation after filing of release application. This case sufficient to tilt the balance of hardship against them Vide* ***Bhutada V. G.R. Mundada 2003 Supreme Court 2713; 2005(2) ARC 899.*** *Moreover, rent of Rs. 6/- per month which the tenants are paying is virtually as well as actually no rent. By paying such insignificant rent they must have saved a lot of money. Money saved is money earned. They must, therefore, be in a position to take another house on good rent. Further, they did not file any allotment application for allotment of another house. Under Rule 10(3) of the Rules framed under the Act, a tenant, against whom release application has been filed, is entitled to apply for allotment of another house immediately. Naturally such person is to be given preference in the matter of allotment. Respondents did not file any such allotment application. Thus, the question of comparative hardship has also to be decided against the tenants. (See. also* ***Raj Kumar Vs. Lal Khan, 2009 (2) ARC 740 and Ashis Sonar and other Vs. Prescribed Authority and others 2009 (3) ARC 269.)***

23. In the case of ***Jagdish Chandra Vs. District Judge, Kanpur Nagar and others 2008 2 ARC 756*** *this Court after relying on the judgment given by the Apex Court in the case of* ***Bega Begam and others Vs. Abdul Ahad Khan 1979 AIR SC 272 : 1986 SCFBRC 346*** *held as under:-*

"In every case where an order of eviction is passed the tenant will come on the street. The fact that all tenants will come on street if eviction is ordered, is not at all relevant for consideration of a comparative hardship of the respective parties. It is for the tenant to find out alternative accommodation. In absence of any material to show that any attempt was made by the such tenant to find out alternative accommodation release application cannot be rejected on ground that such tenant would suffer greater hardship if the release application is allowed."

24. Further, Under Rule 16 of the Rules framed under the Act, various parameters have been provided while considering the comparative hardship of the landlord qua the tenant. The Apex Court in the case of ***Ganga Devi Vs. District Judge, Nainital and others, 2008(2) ARC 584*** *while considering the said scheme provided in Rule 16 has held that :-*

"The Court would not determine a question only on the basis of sympathy or sentiment. Stricto sensu equity as such may not have any role to play."

25. In the instant case as stated above, the appellate court had held that the tenant has not made any effort for search of alternative accommodation and it is settled proposition of law that the equity follows law and so does sympathy. If the factors mentioned in Rule 16 are considered, taking into consideration the facts of this case, no doubt it is an old tenancy but there is nothing to show that any real efforts were made by the tenant to find another accommodation, since the date of moving of release application. (See also ***Govind Narain Vs. 7th Additional District Judge, Allahabad***

and others [2008(1) ARC 526] and Rani Devi Jain Vs. Badloo and another[2008 (3) ARC 351]) *and he has already got a shop in his possession during the pendency of litigation. So the argument as raised by learned counsel for petitioner on the basis of the Rules 16 (2) (A) of the Rules has got no force, rejected."*

32. He has also placed reliance upon the judgment of this Court in the case of ***Sarju Prasad Vs. VIIIth Additional District Judge, Faizabad and others, 2007 (2) AWC 1068 (L.B.)*** Paragraphs 9 to 14 of the said judgment are quoted below:-

"9. In the present case, both the courts below have recorded concurrent findings of facts and have arrived at the conclusion that the need of the landlady was bona fide and genuine. The landlady had a large family consisting of six sons and their dependents. As far as the jurisdiction of the prescribed authority is concerned, the same stood cured as an appeal was filed before the appellate authority, i.e., Additional District Judge, Faizabad. The appellate court has also appreciated the material on record and was of the same opinion that the landlady's need was bona fide, genuine and pressing. The tenant would not suffer greater hardship than the landlady who was having a large family consisting of six grown-up sons. The case of the landlady is squarely covered by the judgment of this Court as in Atma Ram v. Vith Additional District Judge and Ors. 2006 (1) ARC 168.

10. There is force in the submission made by the learned Counsel for the respondent landlady that on the basis of de facto doctrine and the appellate authority's order, now it cannot be said that the release of the shop was not justified. The above submission is strengthened by the judgments as in Gokaraju Rangaraju v. State of Andra Pradesh; (1981) 3 SCC 132, M/s. Beopar Sahayak (Pvt.) Ltd. and Ors. v. Vishwa Nath and Ors. 1987 (2) ARC 145 : 1987 (2) AWC 1219 (SC) and Union of India and Anr. v. Charanjit S. Gill and Ors., (2000) 5 SCC 742.

11. It is well-settled that the landlord is the best Judge to assess his residential requirement. He has complete freedom in this matter. Neither the tenant, nor the Court can suggest to the landlord other means to satisfy his need so that the tenant may continue in possession unless those means are equally viable. It is unnecessary to make an endeavour as to how the landlord could have adjusted himself (vide Vishnu Kant Goswami v. IInd A.D.J., Allahabad and Ors. 2006 (1) ARC 282 ; Braham Kumar and Ors. v. Raja Ram and Ors. 2006 (1) ARC 93 and Kaushal Kumar Gupta v. Bishun Prasad and Ors. 2006 (1) ARC 73).

12. Both the learned courts below have rightly held that the landlady's need was quite bona fide as she required the shop for establishing some of her sons, who were six in number. A son cannot be compelled to join his father, uncle or other family members in their business in other shops. The landlady's one son or two sons could start business of their own choice from the shop in question independently. Certainly her need was greater than that of the petitioner-tenant. Her case finds support from the judgments as in Hari Narain (Sri) v. VIth A.D.J., Kanpur and Ors. 2006 (1) ARC 81 ; Sushila v. Iind Addtional District Judge, Banda and

Ors. 2003 (1) ARC 156 (SC) ; Kafeel Ahmad v. Smt. Satvindra Kaur 2006 (1) ARC 459 : 2006 (2) AWC 1299; Nandani Devi (Smt.) v. 1st Additional District Judge, Varanasi and Ors. 2005 (1) ARC 58 ; Kelawati (Smt.) v. Special Judge (E.C. Act), Moradabad and Ors. 2006 (1) ARC 78 and Abdul Naim Quraishi v. Masi Uddin Khan 2005 (1) ARC 316 : 2005 (2) AWC 1260.

13. It is also evident that the tenant did not make any effort to search an alternative accommodation. This was sufficient to tilt the balance of comparative hardship against the tenant, (vide B. C. Bhutada v. G.R. Mundada AIR 2003 SC 2713 and Hashmat Ali v. VIth A.D.J. Kanpur Nagar and Ors. 2006 (1) ARC 65).

14. Learned counsel for the petitioner has failed to persuade this Court to take a different view from what has been taken by the learned courts below. It is well-settled that in exercise of power under Article 226 of the Constitution of India, the High Court will not sit in appeal over the findings arrived at by the prescribed authority and affirmed by the appellate authority, as has been held by the Apex Court in Ranjit Singh v. Ravi Prakash 2004 (1) ARC 613 (SC) : 2004 (2) AWC 1721 (SC)."

33. He has also placed reliance upon the judgment of this Court in the case of ***Bachchu Lal Vs. IXth A.D.J. Kanpur and others, 2006 (4) AWC 3467.*** Paragraph 6 of the said judgment is quoted below:-

"6. In respect of comparative hardship tenant did not show that he made any efforts to search alternative accommodation after filing of the release application. This was sufficient to tilt the balance of comparative hardship against the tenant. The appellate court while allowing the appeal was very much impressed by the fact that for about 65 years the shop in dispute was in tenancy occupation of tenant. Mere long possession is not sufficient to reject the release application. The rent is Rs. 31.25/- per month. For a shop in Kanpur Nagar such rent is rather ridiculous. It is virtually as well as actually no rent. By paying such highly inadequate rent, tenant must have saved lot of money, which he might have been required to pay as proper rent. Money saved is money earned. Moreover, the tenant was doing business from the shop in Kanpur for 65 years. Accordingly he must be in a position either to purchase the shop or to take on good rent another shop. In this direction no efforts were made by the tenant. It is admitted that Radhey Shyam is doing business from another shop. In view of this his hardship is nil. This is an additional ground to allow the release application."

34. He also placed reliance upon the judgment of Apex Court in the case of ***India Umbrella Manufacturing Co. and others Vs. Bhaganamdei Agarwalla (Dead) by Lrs. Savitri Agarwalla (Smt) and others, (2004) 3 Supreme Court Cases, 178***. Paragraph 6 of the said judgment is quoted below:-

"6. Having heard the learned counsel for the parties we are satisfied that the appeals are liable to be dismissed. It is well settled that one of the co- owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. (See: Sri Ram Pasricha Vs. Jagannath & Ors., Dhannalal Vs. Kalawatibai (SCC para

25). This principle is based on the doctrine of agency. One co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co- owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. In the present case, the suit was filed by both the co-owners. One of the co-owners cannot withdraw his consent midway the suit so as to prejudice the other co-owner. The suit once filed, the rights of the parties stand crystallised on the date of the suit and the entitlement of the co- owners to seek ejectment must be adjudged by reference to the date of institution of the suit; the only exception being when by virtue of a subsequent event the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law."

35. Learned counsel for the respondent has again relied upon a judgment of this Court in the case of ***Shabbir Ahmed Vs. Syed Mohammad Ali Ahmed Kabir, 2016 (1) ARC 275.*** Paragraph 15 of the said judgment is quoted below:-

"15. In view of the above discussion, on the facts of the present case, it is held that the petitioner's status in the property in dispute will not change with the purchase of a portion of the property from one of the co-owner. His status, vis-a-vis the applicant-landlord, will remain that of the tenant and there would be no question of obtaining his consent as against him. Further, as the other co-owner was not available, there was no question of taking his consent. The release application was perfectly maintainable even in the absence of the consent of the other co-owner. There is no merger of the interest of the lessee/petitioner with that of the interest of lessor/respondent-landlord in the whole of the property and hence, the tenancy cannot be said to have been determined under Section 111(d) of the Transfer of Property Act. The release application was perfertly maintainable and was rightly decided by both the Courts below on its merit."

36. He has also placed reliance upon the judgment of the Apex Court in the case of ***K.V.S. Ram Vs. Bangalore Metropolitan Transport Corporation, (2015) 12 Supreme Court Cases 39***. Paragraph 11 of the said judgment is quoted below:-

"11. In Syed Yakoob vs. K.S. Radhakrishnan, the Constitution Bench of this Court considered the scope of the High Court's jurisdiction to issue a writ of certiorari in cases involving challenge to the orders passed by the authorities entrusted with quasi-judicial functions under the Motor Vehicles Act, 1939. Speaking for the majority of the Constitution Bench, Gajendragadkar, J. observed as under: (AIR pp. 479- 80, para 7) "7. ...A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without

giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

37. Learned counsel for the petitioner in rejoinder submitted that the petitioner has alternative accommodation of 25% area for shop in house no. 49/49, Naughara, Kanpur, but the courts below have failed to consider that the said shop is not in ownership of the petitioner, but in ownership of his father and uncle. Further Rule 16(2)(b) of the Rules, 1972 States that the alternative accommodation must be suitable accommodation to which the tenant can shift his business without substantial loss. Both the above condiions have not been considered by the courts below, hence the finding recorded by them on the comparative hardship is illegal and unsustainable in law.

38. I have considered the rival submissions of the learned counsel for the parties, judgment of the courts below and also judgments of Apex Court and this Court relied upon by the counsels for the parties.

39. The main emphasis of learned counsel for the petitioner is upon the maintainability of the writ petition. To proceed with to decide this issue, it is necessary to record here that it is undisputed that the petitioner has accepted his tenancy before the prescribed authority as well as appellate authority. It is also undisputed that in capacity of tenant, he has also filed Misc. Case No. 672/70/2014 (Prakash Chandra Gupta Vs. Ritesh Bhargav) under Section 30 of the Act, 1972, which is still pending.

40. Basic submission of the learned counsel for the petitioner is that jurisdiction cannot be conferred upon the

court by consent, acquiescence or waiver and further if new ground goes to the very root of the matter, the same can be raised at any point of time even before the last court though it has not been raised earlier. In support of his contention, he has placed reliance upon the different judgments of the Apex Court as well as this Court. I have perused the aforesaid judgments and none of the judgment is having the similar or near to similar facts as involved in the present controversy. In fact, in the judgment relied upon by learned counsel for the petitioner, it is not the case that after filing the written statement before the prescribed authority accepting the tenancy and also before appellate court, a new plea was taken before the High Court or last court.

41. In the matter of **Ramesh Chandra Yadav (supra)**, fact of the case was entirely different, where the release application was filed under Section 21 of the Act, 1972, which was partly allowed directing the defendant nos. 1 and 2 to handover possession of vacant premises to plaintiff no. 1 i.e. respondent no. 3. Later on, respondent no. 3 filed another suit seeking eviction on the ground that the Act, 1972 shall not be applicable upon the premises in question since it was completed in the year 1977. The court held that in such circumstances, there would be no resjudicata. In this case, fact was not disputed and further there was nothing like filing of written statement admitting the fact and later on denying the same. In the case of **Kiran Singh (supra)**, the fact is having no similarity with present case. In this matter, the Court was lacking jurisdcition due to incorrect valuation of suit in light of Suits Valuation Act, therefore, it is not relevant in the case of the petitioner. In the case of **Gurucharan Singh (supra)**, the Court has held that it is well settled that a pure question of law going to the root of the case and based on undisputed or proven facts could be raised even before the Court of last resort. Here the issue is entirely different. **Emphasis of the Court is upon undisputed and proven fact**. It is not undisputed or proved that petitioner was not tenant, contrary to that, it is undisputed before the prescribed authority and appellate authority that the petitioner is tenant. In fact denial of tenancy is disputed fact which is not proved either before the prescribed authority or appellate authority as it has never been raised. In the matter of **G.M. Contractor (supra),** the facts are altogether different, which were arsing out of a contract and certain undertaking, therefore, the same would not be applicable in the present case. Similarly, in the case of **Chandra Bhushan Khanna (supra),** the fact was altogether different as earlier the case was filed before the Court of Munsif, later on, it was transferred to the Court of Small Causes, which was having no jurisdiction. Both the parties have contested under the bonafide belief that the Small Causes Court is having jurisdiction and they have no occasion to take objection on the ground of maintainbility. Apart from that, in that case it was undisputed that there was no relationship of tenant and landlord, but here tenancy is being disputed by petitioner first time before High Court earlier accepting it. Denial of tenancy is highly disputed by landlord-respodent before this Court. Therefore, this judgment would not help the petitioner. Here, it cannot be said that by consent of

parties, jurisdiction was conferred upon the Court. In fact, it is required upon the petitioner to raise issue before the Court to enable it to record finding of fact about tenancy upon the objection raised by landlord-respondent. Again in the case of **Chiranjilal Shrilal Goenka (supra),** the fact was entirely different in which an arbitrator was appoined with the consent of parties, which was ultimately found contrary to law. Therefore, this judgment relied bupon by learned counsel for the petitioner would also not come to help the petitioner.

42. It is not the case that petitioner has raised a pure legal issue before the Court. In fact, he had taken a plea accepting the tenancy and contested the case, but after loosing the same before the Prescribed Authority and Appellate Authority taking U-turn, he has taken entirely different plea which was earlier never raised. Apart from that, undisputedly, he is enjoying privilage of tenant by filing Misc. Case No. 672/70/2014 (Prakash Chandra Gupta Vs. Ritesh Bhargav) under Section 30 of the Act, 1972, which is still pending. Therefore, in light of such facts, conduct of the petitioner cannot be appreciated and he can not be permitted to take benefit of his own wrong.

43. In the case of **Rajasthan State Road Transport Corporation (supra)**, it was clearly held that it is required on the part of a party to plead the case and produce/adduce the sufficient evidence to substantiate its submission made in the plaint and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas.

44. In the matter of **S.U. Ashram (supra)**, the Court was also of the same view and held that the objection of the learned counsel for the petitioner is not acceptable only for the reason that he has admitted landlord-tenant relationship in his written statement. The Apex Court in the case of **Heeralal (supra)** has stated that amendment sought in the written statement was of such nature as to displace the plaintiff's case could not be allowed. In the matter of **Nagindas Ramdas (supra),** the Apex Court has again taken very same view and held that admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleading or judicial admissions, admissible under Section 58 of the Evidence Act, 1872 made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The Court again in the matter of ***Thimmappa Rai (supra)*** has taken the same view relying upon the Section 58 of the Evidence Act, 1872 and held that any admissions made by the party to the suit in earilier proceeding are also admissible against him.

45. Section 58 of the Evidence Act is quoted below:-

"58 Facts admitted need not be proved. --No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

46. After going through the facts of the case and law laid down by the Apex Court as well as this Court, it is very much clear that the petitioner tenant has never disputed tenancy and also filed Misc. Case No. 672/70/2014 (Prakash Chandra Gupta Vs. Ritesh Bhargav), under Section 30 of the Act, 1972 in the capacity of tenant, therefore, he cannot be permitted to take new plea in light of law discussed above and further no denial of tenancy is required by the landlord-respondent in light of Section 58 of the Evidence Act, 1872.

47. Considering the judgments of Apex Court as well as this Court, it is very much clear that petitoner has never raised this issue before the Prescribed Authority or Appellate Authority, where it could be proved by placing evidence whether he is tenant or not, therefore, he cannot be permitted to raise this issue before the High Court in the writ petition. The contention of the learned counsel for the petitioner is also not acceptable that he has raised the issue in the written statement that tenancy is continued from 1960, which was not denied by landlord-respondent in light of Section 58 of Evidence Act. Once the tenancy is accepted, there was no need to landlord to deny the same as the facts admitted need not be proved.

48. Alternative argument of learned counsel for the landlord-respondent is also having force where he has stated that in case petitioner is not the tenant, then he has no authority to maintain this writ petition as he is not the aggreived person. There is no doubt that once the petitioner is accepting that he is not tenant and his father is tenant then, he has no right to file this writ petition, only his father could invoke this remedy or any other remedy available under the law. Therefore, in that case, this writ petition would not be maintinable in light of law laid down by the Apex Court as well as this Court and the Court cannot grant any relief in favour of petitioner.

49. So far as bonafide need is concerned, there is specific finding of fact about the need of shop in question in favour of landlord-respondent, which cannot be normally interfered by this Court. The landlord-respondent has taken specific plea that his business is growing, therefore, he is in need of shop in question coupled with the fact that undisputedly petitioner is having alternative accomodation i.e., 49/99 Naughara, Kanpur Nagar. The Apex Court as well as this Court has repeatedly held that landlord-respondent is best judge of his need and Court may not interfere in the matter. This Court in the matter of **S.U. Ashram (supra)** has rejected the plea of tenant that landlord is having another shop on the ground that he could not establish that landlord was in possession of any other shop at the place in dispute and landlord is wanted to do his business on his own choice at a particular place. In the present case, undisputedly landlord is not having any another accomodation whereas petitioner is having alternative accomodation at 49/99 Naughara, Kanpur Nagar.

50. In the case of **Rishi Kumar Govil (supra)**, the Apex Court relying upon the different judgments has held that it is the choice of the landlord to choose the place for the business, which is most suitable for him.

51. This Court in the case of **Sarju Prasad (supra)** has clearly held that both the Courts below have recorded

concurrent finding of fact and have arrived at the conclusion that need of shop of landlord was bonafide and genuine, which cannot normally be interfered considering the settled position of law. In exercise of power under Article 226 of the Constitution, the High Court will not sit in appeal against the finding arrived at by the Prescribed Authority and confirmed by the Appellate Authority. The Appellate Authority after considering the evidence available on record made it clear that alternative shop is not available to landlord-respondent. The petitioner before this Court could not bring any such fact or law which intend this Court to exercise jurisdiction under Article 226 of the Constitution for bonafide need in his favour.

52. Thereafter, in light of facts of the present case and law laid down by the Apex Court as well as this Court, this Court cannot exercise the power under Article 226 of the Constitution of India in favour of petitioner for bonafide need, which is not getting support by findings of the Prescribed Authority as well as Apeallate Authority .

53. So far as comparative hardship is concerned, it is undisputed fact that the petitioner has never attempted to search alternative space for shifting his business and law is very well settled on this point. The Apex Court as well as this Court has repeatedly held that it is necessarily required on the part of tenant to make full endeavour to search alternative accomodation to prove his comparative hardship after receiving copy of release application. In the matter of **Rajasthan State Road Transport Corporation (supra),** the Court has clearly held that it is required on the part of tenant to make effort for searching alternative accomodation. Again in the matter of **Salim Khan (supra)**, this Court, relying upon the judgments of the Apex Court as well as this Court, was of the view that it is required on the part of petitioner to search accomodation after filing the release application and in the present case there is no dispute that the petitioner had never made any effort to search alternative accomodation. Not only this, the Court has also considered the Rule 16 of the Rules, 1972 and considering the another judgment of **Ganga Devi (supra),** Court has taken the view that Rule 16 of Rules, 1972 would not come in the rescue of petitioner, in case, petitioner-tenant has not made any effort to search another accomodation. Here in the present case, there is no dispute on the point that petitioner has not made any effort to search alternative accomodation.

54. In the matter of **Sarju Prasad (supra),** this Court has again taken the same view and held that in case effort was not made for alternative accomodation, this would be sufficient to tilt the balance of comparative hardship against the tenant. This view was again repeated by this Court in the case of **Bachchu Lal (supra)** and held that to prove the comparative hardship, it is necessarily required to make effort to search alternative accomodation, which is absolutely missing in the present case.

55. Therefore, in light of fact that petitioner has never made any effort for searching alternative accomodation coupled with law laid down by the Apex Court as well as this Court, no relief can be granted to the petitioner on the ground of comparative hardship.

56. Learned counsel for the petitioner has also raised this issue that the landlord is only co-owner of the shop in question, therefore, he cannot file release application, which is not acceptable in light of judgment of Apex Court in the case of **India Umbrella Manufacturing Co. (supra) & Shabbir Ahmed (supra).** In both the matters, the Court has clearly held that co-owner have full right to file suit for eviction against the tenant and even consent of co-owner is not required to file suit. Therefore, this argument of the learned counsel for the petitioner is not acceptable and no relief can be granted on this ground too.

57. There is finding of fact by both the courts below in favour of the landlord-respondent and in light of law laid down by the Apex Court in the matter of **K.V.S. Ram (supra)** the Court has taken clear view that finding of fact recorded by Tribunal cannot be challenged in proceeding for a writ of certiorari on the ground that the relevant facts and material evidence adduced before the Tribual was insufficient or inadequate to sustain the impugned finding. Case of landlord-respondent is getting full support from this judgment.

58. In view of the above facts and law laid down by the Apex Court as well as this Court, I am of the view that no good ground for interference is made out by the petitioner. The judgment and orders dated 24.09.2019 passed by XII Additional District Judge, Kanpur Nagar in Rent Appeal No. 26 of 2017ent and 06.04.2017 passed by prescribed Authority/Judge Small Causes Court, Kanpur in Rent Case No. 18 of 2014 are affirmed. The writ petition is accordingly **dismissed**. No order as to cost.

59. However, considering the long tenancy of the petitioner-tenant, he is granted time till 30th November, 2020 to vacate the shop in question subject to filing an undertaking on affidavit before the Prescribed Authority within a period of two weeks from today to deliver the possession of shop in question on or before the stipulated date i.e. 30 November, 2020.

(2020)08ILR A107
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.07.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 24022 of 2018

Kapil Dev Chaturvedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vyas Narayan Shukla

Counsel for the Respondents:
C.S.C.

A. Civil Law - Gratuity Act, 1972 - Recoveries under the Act is only permissible under exceptional circumstances. The petitioner was getting higher grade pay till his retirement in the year 2015. Post his retirement upto 7 months not even a single penny was paid which intelled extremely harsh consequences. The petitioner was compelled to agree for lower grade pay of Rs. 4,800/- instead of Rs. 5,400/- and also for adjusting the payment of excess amount. It was under these compelling circumstances the petitioner, who was solely dependent on post-retiral dues and his pension volunteer to give in writing for such recoveries. The Court find that no person of ordinary prudence would accept such things in writing for making recoveries and fix the pension in lower grade pay than what he had been

getting till the last date in service. Therefore much value cannot be given to such letter. (Para 8, 11)

Writ Petition allowed. (E-10)

List of cases cited:-

1. St. of Punj. & ors. Vs. Rafiq Masih (White Washer)(2015) 4 SCC 334 *(followed)*

(Delivered by Hon'ble Manish Kumar, J.)

(1) The present writ petition has been filed by the petitioner for quashing of the order dated 21.01.2016 passed by Opposite Party No.3, the District Development Officer, District - Sultanpur, directing the Opposite Party No.4 the Senior Treasurer, District - Sultanpur to recover/adjust the excess payment made to the petitioner amounting to Rs.2,48,673/- from his gratuity amount and for a direction to the Opposite Party No.2 to make payment of gratuity amount along with interest, which has been recovered/adjusted by the impugned order dated 21.01.2016.

(2) The petitioner retired from the post of Gram Vikas Adhikari (Class-III Post) on 31.01.2015. An order dated 31.10.2012 was issued by Opposite Party No.3, in which, the name of the petitioner found place at Sr. No.10, by which, the Grade Pay of the petitioner was upgraded from Rs.4,800/- to Rs.5,400/- w.e.f. 01.12.2008 in pursuance of the Government Orders issued from time to time and, thereafter, the petitioner had started getting the Grade Pay of Rs.5,400/- till the date of his retirement.

(3) Learned counsel for the petitioner has submitted that after about one year of the retirement of the petitioner, the impugned order dated 21.01.2016 has been issued by the Opposite Party No.3 directing the Opposite Party No.4 to recover/adjust the excess payment made to the petitioner i.e. Rs.2,48,673/- from the gratuity amount along with interest. It is further submitted that the order dated 21.01.2016 has been passed in contravention of principles of natural justice, since prior to the passing of the order, neither any show cause notice was given to the petitioner, nor any opportunity of hearing was provided.

(4) Learned counsel for the petitioner has also placed reliance on the judgement of Supreme Court in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer), reported in [(2015) 4 SCC 334],** to submit that no recovery can be made from the Class III and retired employees or the employees who are due to retire within one year, of the order of retirement and, that the case is squarely covered by the said judgment.

(5) On the other hand, learned State Counsel has made twofold submissions. Firstly, that the impugned order dated 21.01.2016 has been passed in pursuance of the order dated 04.09.2013 passed by the Commissioner, Rural Development, Lucknow, U.P., wherein, it was instructed that the sanction of Grade Pay of Rs.5,400/- to the petitioner was against the provisions of relevant Government Orders and directed for making recovery of the amount paid in excess to the petitioner, a copy of which has been enclosed as Annexure No. CA-2 to the counter affidavit. Secondly, that the petitioner on 06.07.2015 requested the Opposite Party No.3 for fixation of his Grade Pay as Rs.4,800/- and to sanction

his pension after making deductions of the amount paid to him in excess due to wrong fixation of grade pay. It was only, thereafter, that the Opposite Party No.3 vide its letter dated 10.09.2015 referred the pension matter to the Additional Director, Treasuries and Pension, Faizabad Division, Faizabad for sanctioning the pension, gratuity, etc. along with the proposal to adjust the amount paid in excess to the tune of Rs.2,48,673/-.

(6) Heard Shir Vyas Narayan Shukla, learned counsel for the petitioner and learned State Counsel for the opposite parties.

(7) As far as first argument of learned State Counsel is concerned, the Commissioner did not utter a single word as to how and in what manner Government Orders were violated while passing order dated 31.10.2012 by which higher grade pay was given to the petitioner. The order was passed on 4.9.2013, but higher grade pay was continued to be paid to the petitioner till his retirement in the year 2015. The order dated 04.09.2013 is addressed to the District Development Officer, Allahabad, even its copy was not endorsed to the petitioner.

(8) As far as the second argument is concerned, it is to be noted that the petitioner retired on 31.01.2015 and upto July, i.e. for about 7 months of retirement not even a single penny was paid, which intelled extremely harsh consequences to the petitioner, rather he was required, as stated in Para-4 of the rejoinder affidavit (not disputed by the State), if the petitioner wanted sanction of his pension, the petitioner had to give an application with the prayer that the petitioner agreed for Grade Pay of Rs.4,800/- in place of Grade Pay of Rs.5400/- and also for adjusting the payment of excess amount. It was under these compelling circumstances that the petitioner succumbed to such pressure to overcome his penury condition as a retired person, who would be only dependent on his post-retiral dues and his pension and he was finding it difficult to make his both ends meet. Otherwise, there was no occasion to give any such thing in writing by a person of ordinary prudence. No person may himself, all of a sudden and without any reason, volunteer to give in writing for making recoveries, etc. and fix the pension in lower grade pay than what he had been getting till the last date in service. Therefore, much value cannot be attached to such a letter. The position as explained about the said letter in the rejoinder affidavit cannot be outrightly said to be implausible, specially in the circumstances of hardship which the petitioner was going through during that period.

(9) However, be that as it may, the legal position is also well settled in the case of ***State of Punjab and others Vs. Rafiq Masih (White Washer) (supra),*** law is clearly laid down as to the circumstances in which recoveries from retired employees is impermissible (emphasis supplied). The relevant para is quoted hereinbelow: -

"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to

herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post. '

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(10) The specific pleading and submission on behalf of the petitioner is that prior to the passing of the impugned order, at no point of time, any opportunity was provided to the petitioner, the same has neither been denied, nor disputed in the counter affidavit. The position as emerges from the record is that there is no allegation of misrepresentation or fraud on the part of the petitioner in the matter.

(11) The order for deduction from the gratuity has been passed unmindful of the Provisions of Gratuity Act, 1972, which does not permit recovery from the gratuity amount except with certain exception. The case of the petitioner does not fall under those exceptions.

(12) In view of the discussion held hereinabove, the impugned order dated 21.01.2016 cannot be sustained and it is set aside and the opposite parties are directed to release the amount of Rs.2,48,673/- with 7% interest to the petitioner, calculated w.e.f. 31.01.2015 i.e. the date of retirement of the petitioner till the date of actual payment made. The opposite parties are further directed to make payment within a period of three months from the date of service of the copy of this order.

(13) The writ petition is accordingly **allowed.** No order as to the costs.

(2020)08ILR A110
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 38612 of 2017

Constable Rinku Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Umar Khan

Counsel for the Respondents:
C.S.C.

A. Service Rule – Constitution of India - Article 226 – Departmental/Disciplinary Enquiry - The role of the Court in the matter of departmental proceedings is very limited

and the Court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. (Para 13)

It cannot be said that the inquiry proceeding is vitiated or that there is any violation of principles of natural justice, as the prescribed rules/due procedure has been followed and ample time and opportunity was granted to the petitioner to file his reply to the charges. Punishment awarded has also not been found to be disproportionate to the charges. (Para 15, 16, 17)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Sanjay Kumar Singh Vs U.O.I. & ors., (2011) 14 SCC 692 (Para 13 (i))

2. Lalit Popli Vs. Canara Bank, (2003) 3 SCC 583 (Para 13 (ii))

Petition assails orders dated 13.05.2016, passed by Senior Superintendent of Police, District Moradabad; 03.11.2016, passed by Deputy Inspector General of Police, Moradabad Zone, Moradabad and order dated 31.01.2019, passed by Inspector General of Police, Bareilly Zone.

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

१. याची आरक्षी ना0पु0 रिंकू कुमार ने वर्तमान याचिका के माध्यम से वरिष्ठ पुलिस अधीक्षक, जनपद मुरादाबाद द्वारा पारित आदेश दिनाँक १३.५.२०१६, जिससे द्वारा याची को १० दिवस के वेतन के समतुल्य अर्थदण्ड से दण्डित किया गया था तथा पुलिस उपमहानिरिक्षक, मुरादाबाद परिक्षेत्र, मुरादाबाद द्वारा पारित आदेश दिनांक ३.११.२०१६, जिससे द्वारा याची द्वारा दायर की गई अपील निरस्त कर दी गई थी तथा पुलिस महानिरिक्षक, बरेली जोन द्वारा पारित आदेश ३१.१.२०१९, जिसके द्वारा याची द्वारा दायर की गई पुनरीक्षण याचिका अस्वीकार कर दी गई थी, आक्षेपित किये गये है।

२. संक्षेप मे प्रकरण के तथ्य है कि, क्षेत्राधिकारी, कोतवाली, जनपद, मुरादाबाद ने इस प्रकरण में याची व अन्य के विरूद्ध प्रारम्भिक जांच आख्या दिनांक ३०.९.२०१४, वरिष्ठ पुलिस अधीक्षक को प्रेषित की, जिसमें निम्न आरोप व जांच के उपरान्त निम्न निष्कर्ष को उल्लेखित किया गया था।

<u>आरोप</u>

" मान0 न्यायालय में विचाराधीन क्रिमिनल मिस सं0 11/07 के अन्तर्गत धारा 446 द0 प्र0सं0 थाना सिविल लाइन से सम्बन्धित प्रकरण में जामिनान 1. अब्दुल शरीफ पुत्र अब्दुल रशीद निवासी लाल मस्जिद थाना कोतवाली मुरादाबाद 2. नवाब अली पुत्र अब्दुल रशीद निवासी तम्बाकू स्ट्रीट थाना कोतवाली से जमानत धनराशि वसूल कराकर मान0 न्यायालय में दाखिल करने, बार-बार वसूली अधिपत्र भेजे जाने के उपरान्त थाना प्रभारी द्वारा भ्रामक रिपोर्ट प्रेषित करने सम्बन्धी आरोप अंकित किये गये।"

<u>निष्कर्ष</u>

"सम्पूर्ण जाचं से यह पाया कि मान0 न्यायालय में विचाराधीन क्रिमिनल मिस सं0 11/07 के अन्तर्गत धारा 446 द0प्र0सं0 थाना सिविल लाइन से सम्बन्धित प्रकरण में जामिनान 1. अब्दुल शरीफ पुत्र अब्दुल रशीद निवासी लाल मस्जिद थाना कोतवाली मुरादाबाद 2. नवाब अली पुत्र अब्दुल रशीद निवासी तम्बाकू स्ट्रीट थाना कोतवाली से जमानत धनराशि वसूल कर मान0 न्यायालय में दाखिल करने हेतु दिनांक

25.10.07, 11.01.12, 18.01.13, 05.02.13, 25.02.13, 25.02.13, 29.3.13, 07.06.13, 08.11.13, 16.01.14 को निर्गत किये गये वसूली अधिपत्र के सम्बन्ध में जमानतदारो के पते को थाना कोतवाली द्वारा सत्यापित किया गया था परन्तु बाद में यह आख्या प्रेषित की जाने लगी कि जमानदारों का पता नहीं लग पा रहा है। यह भी उल्लेखनीय है कि प्रभारी निरीक्षक की आख्या दिनांक 30.6.2014 के अनुसार मान0 न्यायालय के निर्देश 11.06.2014 के अनुपालन में उक्त दोनों जमानतदारो की तलाश की गयी तो जामिनान नवाब अली पुत्र अशरफ अली नि0 तम्बाकू स्ट्रीट थाना कोतवाली का, वर्तमान में श्रीमती फूलजहाँ पत्नी इब्राहिम निवासी घोसियान मस्जिद के पास गली नं0 7 चक्कर की मिलक थाना सिविल लाइन में रहना पाया गया।

<u>यदि थाना कोतवाली के कर्मचारियों द्वारा मान० न्यायालय के पूर्व आदेशों को गम्भीरता से लेकर जामिनान की तलाश की जाती तो पूर्व में ही जामिनान के सम्बन्ध में रिपोर्ट मान० न्यायालय प्रेषित की जा सकती थी तथा मान० न्यायालय को इतने अधिपत्र निर्गत करने की आवश्यकता प्रतीत नहीं होती, परन्तु ऐसा प्रतीत होता है कि थाना कोतवाली के उक्त कर्मचारियों द्वारा मान० न्यायालय के आदेशों को गम्भीरता से नहीं लिया जो उनकी स्थिल कार्यप्रणाली एवं लापरवाही का परिचायक है जिसके लिए मो0 आरिफ खान उ0नि0 हाल तैनाती थाना कटघर, श्री बी0एल0 यादव उ0नि0 थाना कोतवाली, श्री अख्तर अली हे0का0 पी0 थाना कोतवाली, आरक्षी रिंकू कुमार एवं आरक्षी गिरिराज सिंह थाना कोतवाली दोषी है।"</u> (रेखांकन न्यायालय द्वारा किया गया है)

जाँच आख्या में यह भी बताया गया कि याची को उसके बयान दर्ज कराने के लिए कई बार मौखिक व लिखित रुप से बुलाया गया था, परन्तु याची ने अपना ब्यान दर्ज नहीं कराया।

३. उक्त जाँच आख्या के आधार पर, वरिष्ठ पुलिस अधीक्षक, जनपद मुरादाबाद ने याची को 'कारण बताओ नोटिस', दिनांक ५.१०.२०१५, को निर्गत किया, जिसमें याची पर निम्न कृत में लापरवाही, उदासीनता एवं अकर्मण्यता का आरोप लगाया गया।

" वर्ष 2014 में जब आप जनपद मुरादाबाद में थाना कोतवाली पर नियुक्त थे तब मा0 न्यायालय में विचाराधीन क्रिमिनल मिस सं0 11/07 के अन्तर्गत धारा 446 द0प्र0सं0 थाना सिविल लाइन से सम्बन्धित प्रकरण में जामिनान 1. अब्दुल शरीफ पुत्र अब्दुल रशीद, निवासी लाल मस्जिद थाना कोतवाली, मुरादाबाद, 2. नवाब अली पुत्र अशरफ अली, निवासी तम्बाकू स्ट्रीट थाना कोतवाली से जमीन धनराशि वसूल कर मा0 न्यायालय में दाखिल करने हेतू लगातार वसूली अधिपत्र निर्गत किये जा रहे थे और इन वसूली अधिपत्रों पर जमानतदारों के पते थाना कोतवाली द्वारा सत्यापित किये गये थे, परन्तु बाद में आपके समय में निर्गत वसूली अधिपत्रों पर यह भ्रामक आख्या प्रेषित की जाने लगी कि जमानतदारों का पता नहीं लग पा रहा है। जबकि प्रभारी निरीक्षक कोतवाली की आख्या दिनांकित

30.6.2014 के अनुसार जामिनान नवाब अली पुत्र अशरफ अली, निवासी उपरोक्त वर्तमान में श्रीमती फूल जहाँ पत्नी इब्राहीम,

निवासी घोसियान मस्जिद के पास, गली नं0 7 चक्कर की मिलक थाना सिविल लाइन में रहना पाया गया। यदि आपके द्वारा मा0 न्यायालय के पूर्व के आदेशों को गम्भीरता से लेकर जामिनान की तलाश की जाती तो पूर्व में ही जामिनान के सम्बन्ध में रिपोर्ट मा0 न्यायालय प्रेषित की जा सकती थी। भ्रामक आख्या प्रेषित किये जाने पर मा0 न्यायालय द्वारा कड़ी आपत्ति प्रकट करने पर प्रकरण में सम्पादित कराई गई प्रारम्भिक जाँचख्या में आपकी शिथिल कार्यप्रणाली एवं लापरवाही परिलक्षित हुई है। <u>अतः मा0 न्यायालय से निर्गत अधिपत्रों पर बिना छानबीन किये लापरवाही से रिपोर्ट लगाकर मा0 न्या0 को वापस कर देना आपके अपने कर्तव्यपालन के प्रति घोर लापरवाही, उदासीनता एवं अकर्मण्यता का परिचायक है।</u>

अतः आपको यह कारण बताओ नोटिस इस निर्देश के साथ निर्गत किया जा रहा है कि आप इस नोटिस की प्राप्ति के 15 दिवस के अन्दर अपना लिखित स्पष्टीकरण इस कार्यलय में अधिकारियों की (दण्ड एवं अपील) नियमावली-1991 के नियम-14(2) के अन्तर्गत 10 दिवस के वेतन के समतुल्य अर्थदण्ड से दण्डित कर दिया जाये। यदि आपका लिखित स्पष्टीकरण निर्धारित अवधि में इस कार्यालय में प्राप्तहो जाता है तो उस पर पूर्ण सहानुभूतिपूर्वक विचार करते हुए अन्तिम आदेश पारित किये जायेंगे। यदि आपका लिखित स्पष्टीकरण निर्धारित अवधि में इस कार्यालय में प्राप्त नहीं होता है तो पत्रावली पर उपलब्ध अभिलेखों एवं गुण-दोष के आधार पर निर्णय लेते हुए एक पक्षीय अन्तिम आदेश पारित कर दिये जायेंगे। यदि आप पत्रावली का अवलोकन करना चाहते है तो निर्धारित अवधि में किसी भी कार्य दिवस में पत्रावली का अवलोकन कर सकते हैं।"

(रेखांकन न्यायालय द्वारा किया गया है।)

४. उक्त वर्णित 'कारण बताओ नोटिस' का स्पष्टीकरण याची ने दिया तथा नोटिस वापस लेने की प्रार्थना की। याची ने कहा कि प्रकरण के सम्बन्धित बीट क्षेत्र जो तम्बाकू स्ट्रीट व लाल मस्जिद क्षेत्र में था वो याची को आवंटित नहीं था। वरन् अन्य आरक्षी को आवंटित था। स्पष्टीकरण का मुख्य अंश निम्न है -

"2. श्रीमान जी सम्मान स्पष्टीकरणदाता स्पष्टीकरण के माध्यम से उपरोक्त आरोप के सम्बंध में अवगत कराना चाहता है स्पष्टीकरण दाता की नियुक्ति थाना कोतवाली पर बीट नई बस्ती फीलखाना क्षेत्र आवंटित थे, जो कि बीट क्षेत्र आवंटित का थाना कोतवाली नई बस्ती चौकी क्षेत्र का आवंटित नक्सा संलग्न स्पष्टीकरण है जो कि निर्दोश साबित होने का अभिलेखीय साक्ष्य है कारण बताओ नोटिस में उक्त प्रकरण से सम्बन्धित बीट क्षेत्र तम्बाकू स्ट्रीट व लाल मस्जिद क्षेत्र अंकित है, हो अन्य आरक्षियों को आवंटित है इस सम्बन्ध में प्रारम्भिक जांच अधिकारी महोदय ने कोई जांच नहीं की है, प्रारम्भिक जांच अधिकारी महोदय को चाहिए था कि स्पष्टीकरणदाता के कथन अंकित करते आवंटित बीट क्षेत्र के सम्बनध में जानकारी अंकित करते तथा सम्बन्धित बीट क्षेत्र वाले आरक्षियों के भी कथन अंकित करके प्रश्नोत्तर करते तथा बीट क्षेत्र नक्से का अवलोकन करते तब आरोप अंकित करने चाहिए थे, प्रारम्भिक जांच अधिकारी महोदय ने ऐसा नहीं किया अपने मनमाने तरीके से बिना बचाव का अवसर प्रदान किये आरोप अंकित कर दिया जिसका पुष्टि का कारक साक्ष्य पत्रावली पर उपलब्ध नहीं है। इस परिपेक्ष में भी स्पष्टीकरण दाता को प्राप्त कारण

बताओ नोटिस का स्पष्टीकरण स्वीकार करने का पर्याप्त आधार है।"

५. वरिष्ठ पुलिस अधीक्षक, जनपद मुरादाबाद, ने याची द्वारा दिये गये स्पष्टीकरण व पत्रावली पर उपलब्ध अभिलेखों के परिशीलन के उपरान्त स्पष्टीकरण को असंतोषजनक पाया तथा याची को १० दिवस के वेतन के समतुल्य अर्थदण्ड से दण्डित किये जाने का आदेश दिनांक १३.०५.१६ को पारित किया। इस आदेश में वरिष्ठ पुलिस अधीक्षक ने स्पष्ट रुप से कहा किः-

"क्योंकि आरोपित आरक्षी द्वारा यदि जामिनान अब्दुल शरीफ पुत्र अब्दुल रशीद निवासी लाल मस्जिद थाना कोतवाली एवं नवाब अली पुत्र अब्दुल रशीद निवासी तम्बाकू स्ट्रीट से जमानत धनराशि वसूल कर माननीय न्यायायल में दाखिल किये जाने हेतु निर्गत किये गये वसूली अधिपत्र के संबंध में <u>मा0 न्यायालय के पूर्व आदेशों को गम्भीरता से लेकर जामिनान की तलाश की जाती तो पूर्व में जामिनान के संबंध में रिपोर्ट माननीय न्यायालय के आदेशनुसार हो जाती तो माननीय न्यायालय को विभिन्न तिथियों में इतने अधिपत्र निर्गत करने की आवश्यकता नहीं होती तथा आरोपी आरक्षी को अन्य बीट आरक्षी के भी प्रकरण की गम्भीरता को देखते हुए जानकारी करनी चाहिए थी, किन्तु आरोपी द्वारा ऐसा नहीं किया गया।"</u>(रेखांकन न्यायालय द्वारा किया है।)

६. उपरोक्त आदेश के विरुद्ध, याची ने उ0 प्र0 पुलिस अधीनस्थ श्रेणी के पुलिस अधिकारियों की दण्ड एवं अपील नियमावली १९९१, के नियम २० के अन्तर्गत अपील, पुलिस उपमहानिरिक्षक, मुरादाबाद परिक्षेत्र, के समक्ष पेश की जिसमें मुख्य रुप से कथन किया :-

"श्रीमान जी सम्मान सहित प्रार्थी/अपीलार्थी अपील के माध्यम से उपरोक्त आरोप के सम्बन्ध में अवगत कराना चाहता है कि प्रार्थी/अपीलार्थी स्पष्ट करना चाहता है कि श्रीमान प्रा0 जांच अधिकारी महोदय ने प्रा0 जांच के दौरान न ही तो थाना प्रभारी निरीक्षक के कथन अंकित किये है और न ही सम्बन्धित बीट आरक्षियों के कथन अंकित किये है, न ही किसी स्वतन्त्र साक्षी से यह जानने का प्रयास किया की जामीनान अब्दुल शरीफ निवासी लाल मस्जिद व नबाव अली तम्बाकू स्ट्रीट कोतवाली क्षेत्र में रहते है या नहीं रहते है, यह भी जानने का प्रयास नहीं किया जांच का मतलब होता है मौके पर जाकर के जानकारी हासिल करना लगाये गये आरोपों की पुष्टि करना प्रा0 जांच अधिकारी महोदय ने न तो मौके पर जाकर जांच की है और लगाये गये आरोपों के सम्बन्ध में पुष्टि कारक साक्ष्य पत्रावली में शामिल नहीं किया है, निर्दोष साबित होने का चौकी क्षेत्र से सम्बन्धित बीट आवंटित नक्सा की छाया प्रति संलग्न है,जो कि निर्दोष साबित होने का अभिलेखीय साक्ष्य पत्राली पर उपलब्ध है, इस परिपेक्ष्य में भी प्रार्थी/अपीलार्थी की अपील स्वीकार किये जाने का पर्याप्त आधार है।"

७. उपरोक्त अपील को पुलिस उप महानिरिक्षक, मुरादाबाद परिक्षेत्र मुरादाबाद, ने अपने आदेश दिनांक ३.११.२०१६ द्वारा अस्वीकार कर दी। इस आदेश में याची के तर्क कि वर्तमान प्रकरण बीट क्षेत्र तम्बाकू स्ट्रीट का था, जो अन्य आरक्षियों को आवंटित था, पर विचार किया गया

तथा उक्त तर्क को अमान्य,निम्न शब्दों में किया:-

"याची आरक्षी का यह तर्क कि तम्बाकू स्ट्रीट क्षेत्र अन्य भी आरक्षियों को आवंटित था, बलहीन होने के कारण मान्य नहीं है। याची आरक्षी को प्रकरण की प्ररंभिक जांच के मध्य जांचकर्ता अधिकारी के समक्ष यह तर्क प्रस्तुत करने चाहिए थे ताकि जांच से इस सम्बन्ध में स्थिति स्पष्ट हो पाती परन्तु प्रारंभिक जांच अधिकारी द्वारा निर्देशित किये जाने के बाद भी याची आरक्षी द्वारा जांच के मध्य अपने कथन अंकित नहीं कराये गये। याची आरक्षी द्वारा अपनी अपील के साथ भी ऐसा कोई साक्ष्य/अभिलेख प्रस्तुत नहीं किया गया है जिससे की बीट क्षेत्र तम्बाकू स्ट्रीट अन्य आरक्षियों को आवंटित होने सम्बन्धी उसके तर्क की पुष्टि हो सके। " (रेखांकन न्यायालय द्वारा किया गया है)

८. याची ने उक्त आदेश के विरुद्ध पुनरिक्षण याचिका, पुलिस महानिरिक्षक, बरेली क्षेत्र, बरेली, के समक्ष पेश की, जो दिनांक ३१.१.२०१७ को निरस्त कर दी गयी। आदेश में प्रमुख रुप से कहा गया कि-

" पुनरीक्षणकर्ता का तर्क मान्य नहीं है। प्रस्तुत पत्रावली पर उपलब्ध अभिल्खों के परिशीलन से यह पाया गया कि मा0 न्यायालय में विचाराधीन क्रिमिनल मिस सं0 11/07 के अन्तर्गत धारा 146 द0 प्र0सं0 थाना सिविल लाइन से सम्बन्धित प्रकरण में जामिनान 1. अब्दुल शरीफ पुत्र अब्दुल रशीद, निवासी लाल मस्जिद थाना कोतवाली, मुरादाबाद 2. नवाब अली पुत्र अशरफ अली, निवासी तम्बाकू स्ट्रीट थाना कोतवाली से जमानत धनराशी वसूल कर मा0 न्यायालय में दाखिल करने हेतु लगातार वसूली अधिपत्र निर्गत किये जा रहे थे और इन वसूली अधिपत्रों पर जमानतदारों के पता थाना कोतवाली द्वारा सत्यापित किये गये थे, परन्तु बाद में इनके समय में निर्गत वसूली अधिपत्रों पर यह भ्रामक आख्या प्रेषित की जाने लगी कि जमानतदारों का पता नहीं लग पा रहा है, जबकि प्रभारी निरीक्षक, कोतवाली की आख्या दिनांकित 30.6.2014 के अनुसार जामिनान नवाब अली पुत्र अशरफ अली निवासी उपरोक्त वर्तमान में श्री फूजहाँ पत्नी इब्राहीम, निवासी घोसियान मस्जिद के पास गली नं0 7 चक्कर की मिलक थाना सिविल लाईन्स में रहना पाया गया। यदि पुनरीक्षणकर्ता द्वारा मा0 न्यायालय के पूर्व के आदेशों को गम्भीरता से लिया जाता, तो पूर्व में ही जामिनान के सम्बन्ध में सही रिपोर्ट मा0 न्यायालय प्रेषित की जा सकती थी। भ्रामक आख्या प्रेषित किये जाने पर मा0 न्यायालय द्वारा कड़ी आपत्ति प्रकट की गयी। इस प्रकार पुनरीक्षणकर्ता द्वारा बरती गयी लापरवाही की पुष्टि होती है, अतः पुनरीक्षणकर्ता का तर्क मात्र बचाव ध्येय से प्रेरित है।" (रेखांकन न्यायालय द्वारा किया गया है)

९. उपरोक्त आदेश दिनांक १३.५.२०१६, ३.११.२०१६ व ३१.१.२०१६ से क्षुब्ध होने के कारण याची ने वर्तमान याचिका इस न्यायालय में दायर की है। प्रतिशपथ पत्र व प्रत्युत्तर शपथ पत्र दाखिल किये जा चुके है।

१०. याची के विद्वान अधिवक्ता श्री मोहम्मद उमर खाँ ने कथन किया कि याची के विरुद्ध समस्त कार्यवाही नैसर्गिक न्याय के

सिद्धान्तों के विरुद्ध की गई है। याची को बीट नई बस्ती फीलखाना क्षेत्र आवंटित था जब कि प्रकरण से सम्बन्धित बीट क्षेत्र तम्बाकू स्ट्रीट से था। जो अन्य आरक्षियों को आवंटित था। याची के विद्वान अधिवक्ता अपने कथन के समर्थन में ड्यूटी तालिका का अवलोकन भी कराया जो प्रस्तुत याचिका के साथ संलग्न की गई है। जिसमें फीलखाना में आवंटित अपराधियों के नाम उल्लेखित है। परन्तु तम्बाकू स्ट्रीट के आवंटित अपराधियों की सूची उपरोक्त तालिका में नहीं दर्शायी गई है। अन्त में अधिवक्ता ने कथन किया कि याची की नौकरी साफ छवि वाली रही है व उसकी टिप्पणी उत्कृष्ठ एवं उत्तम रही है।

११. याची के तर्कों का विरोध करते हुए सरकार के स्थाई अधिवक्ता ने कथन किया कि याची के विरुद्ध ३ आदेश है जो तथ्यों व विधि पर समवत्ती है। आक्षेपित आदेशों में याची के समस्त तर्कों पर विचार किया गया है। याची का कृत्य, कर्तव्य पालन के प्रति घोर लापरवाही वाला, उदासीनता व अकर्मण्यता वाला रहा है। प्रस्तुत प्रकरण में उच्च न्यायालय द्वारा अनुच्छेद २२६ के अंतर्गत हस्तक्षेप करने का अधिकार क्षेत्र बहुत सीमित है। याची को अपना ब्यान दर्ज कराने के लिए कई बार बुलाया गया था परन्तु याची नहीं आया। अतः प्राकृतिक न्याय के सिद्धान्तों का पालन न होने का तर्क अमान्य है।

१२. याची व प्रत्यार्थी के विद्वान अधिवक्ता को सुना व याचिका प्रतिशपथ पत्र,प्रत्युत्तर शपथ पत्र व अन्य दस्तावेजों का परिशीलन गहनतापूर्वक किया।

१३. सर्व प्रथम यह विचार करना है कि उच्च न्यायालय, अनुच्छेद २२६ के अधिकार क्षेत्र के अन्तर्गत विभागीय जांच के प्रकरणों में कब और किस सीमा तक हस्तक्षेप कर सकता है। इस विषय पर उच्चतम न्यायालय के कुछ निर्णय उल्लेखनीय है।

i. **संजय कुमार सिंह बनाम भारत सरकार व अन्य 2011 (14) एस सी सी 692** में उच्चतम न्यायालय ने प्रतिपादित किया कि, विभागीय जाँच के प्रकरणों में न्यायालय की भूमिका सीमित है एवं विभागीय प्राधिकारियों द्वारा सभी पक्षों को सुनकर व पत्रावली पर विचार के उपरान्त दिये गये मत के स्थान पर न्यायालय अपना मत प्रतिस्थापित नहीं कर सकता है। **(कण्डिका २२)**

ii. **ललित पोपली बनाम केनरा बैंकः 2003 (3) एस सी सी 583** में उच्चतम न्यायालय ने यह प्रतिपादित किया कि, उच्च न्यायालय अनुच्छेद २२६ की अधिकार क्षेत्र का प्रयोग करते हुए अपीलीय प्राधिकरण की तरह कार्य नहीं कर सकता है। न्यायिक पुनः निरिक्षण क्षेत्राधिकार का, अपीलीय प्राधिकरण की तरह उपयोग नहीं किया जा सकता है। **(कण्डिका १७)**

14. वर्तमान प्रकरण में विभागीय जाँच आख्या, अपीलीय अधिकारी व पुनर्निरिक्षण अधिकारी ने समस्त पत्रावली व याची द्वारा प्रस्तुत किये गये सभी तर्को पर विचार करके ही याची के विरूद्ध आरोप को सत्य पाया व उसको सजा दी गयी। याची के विद्वान अधिवक्ता ने पुरजोर कथन किया है कि याची के अधिकार क्षेत्र में वो वीट क्षेत्र नहीं था जिसमें अभियुक्त का निवास था। अतः वो उस क्षेत्र में नहीं जा सकता था। इसलिए उसने कोई गलत कृत नहीं किया। याची के इस बचाव को अपीलीय अधिकारी ने विचार किया है और स्पष्ट रूप से कहा है कि -*"परन्तु प्रारंभिक जांच अधिकारी द्वारा निर्देशित किये जाने के बाद भी याची आरक्षी द्वारा जांच के मध्य अपने कथन अंकित नहीं कराये गये।*

याची आरक्षी द्वारा अपनी अपील के साथ भी ऐसा कोई साक्ष्य/अभिलेख प्रस्तुत नहीं किया गया है जिससे की बीट क्षेत्र तम्बाकू स्ट्रीट अन्य आरक्षियों को आवंटित होने सम्बन्धी उसके तर्क की पुष्टि हो सके। " अतः यह तर्क बलहीन होने के कारण अस्वीकार किया जाता है।

१५. याची को बार बार अपना उत्तर देने के लिए बुलाया गया था, परन्तु याची ने सूचना होने के बाद भी जबाव दाखिल नहीं किया अतः नैसर्गिक न्याय के सिद्धान्तों का परिपालन न होने का तर्क, दस्तावेज पर उपस्थित साक्ष्य के विपरित है। अतः यह तर्क भी अमान्य किया जाता है।

१६. याची ने न्यायालय द्वारा निर्गत अधिपत्र को अभियुक्त को प्रेषित करने की कोशिश नहीं की। याचिका पर उपस्थित दस्तावेजों के अनुसार याची ने अधिपत्र को प्रेषित करने के लिए उचित कदम नहीं उठाये तथा न्यायालय के समक्ष भ्रामक आख्या पेश करी। यह समस्त कृत याची द्वारा स्थिल कार्यवाही व लापरवाही के परिचायक है। वर्तमान प्रकरण में याची को दिया गया दण्ड भी असंगत नहीं कहा जा सकता है।

१७. संवैधानिक न्यायालय अपने न्यायिक पुनरिक्षण अधिकार क्षेत्र के अन्तर्गत, अनुशासनात्मक कार्यवाही में हस्तक्षेप तब ही कर सकता है, जब उक्त कार्यवाही का निष्कर्ष विकृत या आधारहीन हो। परन्तु वर्तमान प्रकरण में याची यह साबित करने में असमर्थ रहा कि उसके विरुद्ध की गयी अनुशासनात्मक कार्यवाही का निष्कर्ष विकृत या आधारहीन था। अतः वर्तमान प्रकरण में यह न्यायालय अनुच्छेद २२६ के अंतर्गत याची को कोई राहत नहीं दे सकता है।

१८. याची ऐसा कोई तथ्य इस न्यायालय के सामने लाने में असमर्थ रहा है, जिससे अनुच्छेद २२६ की शक्तियों का उपयोग किया जा सके। अतः वर्तमान याचिका बलहीन होने के कारण अस्वीकार की जाती है। व्यय पर कोई आदेश पारित नहीं किया जा रहा है।

(2020)08ILR A117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 50151 of 2003

Phool Chandra(Since Deceased and represented by LRs.) ...Petitioner
Versus
F.C.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh, Sri Prakhar Tandon, Sri P.K. Misra, Sri Vinay Singh, Sri Vijay Singh.

Counsel for the Respondents:
C.S.C., Sri A.K. Singh, Sri A. Singh, Sri Amit Kumar, Sri Raj Kumar Singh, S.C., Sri Satish Chaturvedi, Sri Satya Prakash

A. Service Law - Food Corporation of India Act, 1964 U.P. Panchayat Raj Act, 1947 - Section 5-A(c) - Industrial Employment (Standing orders) Act, 1946 - Clauses 14, 15(2), (5), (7), 16(2)

Departmental/Disciplinary Proceedings - the proceedings were conducted for alleged misconduct under Clause 15(7) and 16(2) but the punishment order dated 26.05.2004 shows that petitioner was held guilty of misconduct under Clause 15(2), (5) and (7) of the S.O., 1946. Since the charges of misconduct under Clause 15(2) and (7) were not levelled upon petitioner, the same could not have been taken into consideration to hold him guilty of such misconduct as the order then would travel

beyond charge-sheet which will vitiate the order of punishment. (Para 27)

In the case of unauthorized absence, it is not the mere absence but absence must be without any lawful or valid reason. In present case, petitioner has categorically stated that he sought leave on medical ground and his request for such leave was not found to be ingenuine, fictitious or imaginary. (Para 37 & 39)

The Petitioner was engaged as Ancillary Labour meanwhile he contested election for Village Pradhan. The breach of Section 5-A(c) of U.P. Act, 1947 would not be come into play as the provision is applicable in respect of eligibility for contesting election on the post of Gram Pradhan and has nothing to do with employment under FCI. If petitioner was not eligible, his election as Gram Pradhan may 5. Rasiklal Vaghajibhai Patel Vs Ahmedabad Municipal Corporation & anr. (1985) 2 SCC 35

6. Santosh Kumar Shukla Vs Syndicate Bank 2014 (5) ADJ 370

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

1. Heard Sri V.K.Singh, Senior Advocate, assisted by Sri Prakhar Tandon, learned counsel for petitioner, Sri Raj Kumar Singh, learned counsel for respondents and perused the record.

2. The sole petitioner Phool Chandra (died during pendency of petition and has been substituted by Legal Heirs) filed this writ petition under Article 226 of Constitution of India, being aggrieved by order dated 28.06.2003 (Annexure 9 to the writ petition) passed by District Manager, Food Corporation of India, Allahabad *(hereinafter referred to as "Disciplinary Authority")* placing him under suspension with effect from 28.6.2003; order dated 26.05.2004 (Annexure 12 to the writ petition) passed by Disciplinary Authority have been bad but that will not vitiate his employment in FCI. (Para 40)

The Law is well settled that if an act or omission is not described to be a misconduct, it cannot be an act or omission inviting disciplinary proceedings. (Para 46)

Writ Petition allowed. (E-10)

List of cases cited:-

1. Krushnakant B. Parmar Vs U.O.i. & anr. (2012) 3 SCC 178

2. St. of Pun. Vs Dr. P.L. Singla (2008) 8 SCC 469

3. A.L. Kalra Vs Project and Equipment Corporation of India Ltd. (1984) 3 SCC 316

4. Glaxo Laboratories (I.) Ltd Vs Presiding Officer Labour Court, Meerut AIR 1984 SC 505 imposing punishment of dismissal; and order dated 15.12.2012/05.01.2013 (Annexure 16 to the writ petition) passed by General Manager, Food Corporation of India Regional Office Lucknow *(hereinafter referred to as "Appellate Authority")* dismissing appeal of petitioner against order of punishment of dismissal. Petitioner has also prayed for consequential benefits.

3. Facts in brief, giving rise to present writ petition, are that, Food Corporation of India *(hereinafter referred to as "F.C.I.")* is a statutory body constituted under Food Corporation of India Act, 1964 *(hereafter referred to as "Act, 1964')* and is an instrumentality of Central Government hence "State' within the meaning of Article 12 of Constitution of India. Petitioner was engaged as Ancillary Labour on 16.06.1973. In 2000, petitioner contested election of Village Pradhan in his Village Gotawan, Tehsil Phoolpur, District Allahabad and elected as such. Despite having been

elected as Pradhan, he continued to discharge duties as Ancillary Labour with F.C.I. On 08.12.2001, petitioner fell ill and proceeded on casual leave for one day sending leave application dated 08.12.2001. The condition of petitioner did not improve and he was detected of suffering "Infectious Hepatitis". He applied for extension of leave and after recovery submitted joining on 27.03.2002.

4. During period of absence, petitioner was given Assembly Election Ticket from Apna Dal Party from Handia Constituency in which due to ailment, he could not canvass and his canvassing was done by his supporters. Petitioner's application for joining was forwarded by Assistant Manager (Industrial Relation Labour) F.C.I., Allahabad to Disciplinary Authority vide letter dated 15.04.2002 for necessary guidance. Disciplinary Authority forwarded the matter to Joint Manager (Industrial Relation) F.C.I., Lucknow vide letter dated 03.05.2002. Ultimately, Senior Regional Manager vide letter dated 21.05.2002 directed Disciplinary Authority to enquire into cause of absence of petitioner and submit detailed report.

5. A charge-sheet dated 20.11.2002 was served upon petitioner containing three charges as under :

"अ. जैसा कि आप बिना किसी अनुमति के, बिना किसी अवकाश की स्वीकृति के दिनांक 8.12.2001 से अनुपस्थित चल रहे हैं चार महीने बाद आप दिनांक 7.12.01 से 26.3.2002 चिकित्सा प्रमाण पत्र के साथ दिनांक 27.3.2002 को नैनी डिपों में उपस्थित हुए यह सूचित करते हुए कि वह बीमारी के कारण ड्यूटी पर उपस्थित नहीं हो सका, इस संदर्भ में ***बिना अनुमति के गायब होने के लिए आपसे स्पष्टीकरण प्रस्तुत करने को कहा गया फिर उसी दिन दिनांक 27.3.02 को बिना किसी सूचना अनुमति के गायब (अनुपस्थित) हो गये, और अभी भी गायब चल रहे हैं।*** *फिर आपने सूचित किया, दिनांक 27.4.02 को कि वह 8.12.2001 से अस्वस्थ चल रहा है और उसी अवधि में अपने नजदीकी लोगों के दबाव में आकर उत्तर प्रदेश विधान सभा चुनाव लडा है।*

ब. जैसा कि जांच (इन्क्वायरी) ***रिपोर्ट में स्पष्ट हो गया कि आपने चुनाव लडा जोकि अति गम्भीर व अनुशासनहीनता का द्योतक है, और प्रशासनिक दृष्टि से विभागीय अनुशासन के विरूद्ध है।***

स. जैसा कि 17 जुलाई को इलाहाबाद के जिलाधिकारी श्री देवेश चतुर्वेदी द्वारा एक पत्र नैनी डिपों अधिकारी को भेजा गया जिसके द्वारा यह अवगत कराया गया कि श्री फूलचन्द्र जो नैनी डिपों में कार्यरत है ***वह वर्तमान समय में ग्राम प्रधान गोतावा विकास खण्ड बहादुरपुर (इलाहाबाद) के प्रधान हैं जो कि एक गम्भीर मामला प्रकाश में आया है जिसके संदर्भ में आपने विभाग को कभी कोई सूचना न दी और न ही कोई अनुमति ली*** *और न हीं विभाग को त्याग पत्र दिया, आपने विभाग से असलियत को छिपाया।"*

"A. That you have been absent since 8.12.2001 without getting leave sanctioned and after four months on 27.3.2002 you presented yourself at Naini Depot with a medical certificate for leaves from 7.12.2001 to 26.03.2002 thereby informing that due to illness you could not report for duty. In this respect, ***you wee asked to submit explanation regarding your absence without any permission but on the same day i.e. 27.03.2002 you again disappeared (absent) without any information and are still absent.*** *Thereafter, on 27.4.2002 you informed that you have been ill since 8.12.2001 but in the same period you contested U.P. Assembly Election out of pressure exerted by your near ones.*

B. As evident in the Inquiry report, ***the fact that you contested election is very serious and reflective of***

indiscipline and is against the departmental discipline from the administrative point of view.

C. That a letter was sent to the Depot Officer, Naini by the District Magistrate, Allahabad Sri Devesh Chaturvedi whereby it was informed that a serious case related to Sri Phool Chandra, working in Naini Depot, ***presently being Pradhan of Village Gatava, Block Bahadurpur (Allahabad) has come into light. With regard to the aforesaid, you neither give any information to the department nor abstained any permission nor submitted resignation to the department,*** *thus concealed reality from your department.*
(English Translation by Court)
(Emphasis added)

6. Petitioner submitted reply dated 10.01.2003 stating that there was no provision in Standing Order restraining employee from contesting election and his absence was also for valid reasons since he suffered Infectious Hepatitis. The matter of giving leave remained pending with authorities for which petitioner is not at fault. In the meantime petitioner also applied vide letter dated 20.04.2003 for sanction of leave from 08.12.2001 to 26.03.2002. He requested for grant of leave as medical as well as earned leave.

7. Thereafter, petitioner was placed under suspension vide order dated 28.06.2003. As per order of suspension, petitioner was guilty of misconduct under Clauses 14, 15(5), (7) and 16(2) of Standing Orders applicable to departmental workers working in North, East and North-East Zone, certified by Competent Authority under Industrial Employment (Standing Orders) Act, 1946 *(hereinafter referred to "S.O., 1946").*

8. Petitioner's election as Gram Pradhan was set aside by District Magistrate vide order dated 06.01.2003 on the ground that he was holding an office of profit. This order of District Magistrate was challenged in Writ Petition No.5323 of 2003, which was allowed by a learned Single Judge (Hon'ble Sunil Ambwani, J.) vide judgment dated 19.02.2003. Thereagainst, complainant Smt. Chandrawati Devi filed Special Appeal no.183 of 2003 but the same was dismissed by a Division Bench vide judgment dated 19.08.2004.

9. Challenging order of suspension, present writ petition was filed that petitioner has not committed any "misconduct' under Clauses 14, 15(5), (7) and 16(2) of S.O., 1946. In the matter of charge sheet issued to petitioner, inquiry report dated 05.03.2004 was submitted by Assistant Manager, F.C.I., Allahabad holding following charges proved:

"1. ***आरोप*** *1– श्री फूलचन्द्र स. श्रमिक टो. नं. 11 (निलंबित) भा.खा.नि. नैनी* ***बिना किसी अनुमति को विधान सभा, ग्राम प्रधान का चुनाव लड़ा जो नियोक्ता के प्रति हेरा फेरी, बेईमानी और एक गम्भीर अपराध है।***

2. वह विभाग, से ***बिना किसी अनुमति एवं स्वीकृत के 15 दिनों से अधिक अनुपस्थित रहे*** *जो* ***अनुशासनहीनता एक कदाचार की परिधि में आता है।"***

"Charge 1*: Shri Phoolchandra, Assistant Workman, To. No. 11 (under suspension), Food Corporation of India, Naini,* ***without any permission, contested elections to the Legislative Assembly and for Gram***

Pradhan, which is a mischief, dishonest act and serious offence against the employer.

He, ***without permission and sanction of the department, remained absent from work for more than 15 days, which comes under the ambit of indiscipline and misconduct."***

(English Translation by Court)
(Emphasis added)

10. Inquiry Officer held both the charges proved. Copy of inquiry report was forwarded to petitioner vide Disciplinary Authority's letter dated 25.03.2004. Petitioner submitted reply whereafter punishment order dated 26.5.2004 was passed by Disciplinary Authority imposing punishment of dismissal upon petitioner holding him guilty of committing misconduct under Clauses 15(2), 15(5) and 15(7) of S.O., 1946 and Section 5-A(c) of U.P. Panchayat Raj Act, 1947 *(hereinafter referred to as "U.P. Act, 1947").* Disciplinary Authority has also held that petitioner has committed an act subversive of discipline of good behaviour in F.C.I. Petitioner preferred an appeal vide memo of appeal dated 15.10.2012, which has been dismissed vide order dated 15.12.2012/05.01.2013.

11. Sri V.K.Singh, learned Senior Counsel appearing for petitioner has challenged impugned order of punishment as well as appellate order on the ground that, *firstly*, Disciplinary Authority has taken into consideration allegations of misconduct, which were not part of charge sheet at any point of time and therefore has punished petitioner on charges, which were never leveled upon him, and, *Secondly*, under Standing Orders, petitioner has not committed any misconduct whatsoever.

12. Respondents have filed counter affidavit stating that petitioner was a regular departmental labour and enjoyed all the benefits under relevant rules. He was paid wages as per wage structure applicable to departmental labour in F.C.I. Petitioner concealed the fact that he contested election of Gram Pradhan and this fact came to knowledge of FCI when letter dated 17.7.2002 was received from District Magistrate making certain inquiry whether petitioner was a temporary or permanent workman or not. FCI submitted reply to District Magistrate vide letter dated 20.07.2002 informing that petitioner is a Permanent Labour Assistant since 16.06.1973 but absent from 08.12.2001. Petitioner infact was not ill but on the pretext of illness, he was actually contesting election and therefore played fraud upon Employer. His theory of deterioration of health condition due to serious illness was also false. In fact, he himself moved an application dated 15.01.2002 seeking permission to contest election. Copy of this letter has been filed as Annexure C.A.4. He contested election without any prior permission from employer. He was not ill but submitted application on 27.03.2002 for extension of leave with medical certificate. His initial application dated 07.12.2001 was for 3 days leave and thereafter he never submitted any application except application dated 27.3.2002. On 28.3.2002, (Annexure CA-5 to the counter affidavit), petitioner submitted an application stating that he is present for duty and in future he will not commit such mistake. Contents of letter dated 28.3.2002 sent by petitioner, read as under :

"आपके स्मृति पत्र दिनांक 27.3.02 के सन्दर्भ में मुझे कहना है कि प्रार्थी दिनांक 8.12.2001 को आकस्मिक अवकाश लेकर गया था ***परन्तु बीमार हो जाने के कारण कार्यस्थल पर उपस्थित नहीं हो सका जिसकी सूचना दिनांक 8.12.2001 को आपको भिजवा दिया था। इसके बाद मैं लगातार बीमार चल रहा था। स्वस्थ्य होने पर दिनांक 27.03.2002 को पुनः अपनी ड्यूटी पर उपस्थित हूँ।*** *भविष्य में अब ऐसी गलती नहीं होगी। कृपया मुझे डियूटी करने की अनुमति प्रदान करने की कृपा करें।"*

"With respect to your reminder dated 27.03.2002, I have to say that the applicant availed casual leave on 08.12.2001; ***but as he fell sick, he could not report back to the work place, the information of which was sent to you on 08.12.2001. Thereafter, I continuously remained sick. On recuperation, I am again reporting to duty on 27.03.2002.*** *In future, there will be no such mistake. Kindly, permit me to resume my duties."*

(English Translation by Court)

(Emphasis added)

13. Assistant Manager forwarded his application but Disciplinary Authority vide letter dated 28.03.2002/03.04.2002 directed Assistant Manager to submit relevant documents in support of his recommendation. Assistant Manager thereafter sent letter dated 15.04.2002.

14. In view of contradictory statement of petitioner, Disciplinary Authority vide letter dated 23.4.2002 directed Assistant Manager to submit his report after obtaining explanation from petitioner. Assistant Manager then sought explanation from petitioner vide letter dated 27.4.2002. Petitioner in reply dated 27.4.2002, admitted that he has contested election and sought permission also from employer. Contents of letter dated 27.4.2002 read as under :

"आपके कार्यालय स्मृति पत्र दिनांक 27.4.02 के संबंध में निवेदन के साथ यह अवगत कराना है कि प्रार्थी दिनांक 8.12.2001 से अस्वस्थ चल रहा था और उसी अवधि में अपने नजदीकी लोगों के दबाव में उत्तर प्रदेश विधान सभा चुनाव लड़ने के लिए तैयार होना पड़ा। इसी संबंध में ***मैने अपने आवेदन पत्र दिनांक 25.1.2002 द्वारा विभाग से चुनाव लड़ने की अनुमति मांगा था*** *तत्पश्चात मैं पूर्ण स्वस्थ होने पर दिनांक 27.3.2002 को डाक्टर के चिकित्सा प्रमाण पत्र के साथ डियूटी पर उपस्थित होकर डियूटी करने की अनुमति मांगा।*

अतः श्रीमान् जी से करबद्ध ***प्रार्थना है कि प्रार्थी को डियूटी करने की अनुमति प्रदान करने की महान कृपा करें।"***

"In connection with your office's reminder dated 27.04.2002, it is, with due respect, to inform you that the applicant had been sick since 08.12.2001; and in the meantime, he had to get ready to contest the Uttar Pradesh Legislative Assembly Election under pressure of his near ones. In this very context, ***I had, through my application dated 25.01.2002, sought permission to contest the election;*** *thereafter, after attaining fitness, I had, on 27.03.2002, sought permission to join duties by reporting to office in person with a medical certificate issued by a doctor to this effect.*

Hence, I pray to you, sir, with folded hands, to accord permission to me, the applicant, to join duties. It will be very grateful of your good-self."

(English Translation by Court)

(Emphasis added)

15. Thereafter, Assistant Manager submitted report dated 30.04.2002. Petitioner did not submit any reply to the

charge sheet. Thereupon, letters dated 07.01.2003 and 12.02.2003 were written and then reply was submitted on 22.02.2003. Petitioner has committed misconduct under Standing Order applicable to departmental labour hence has been punished in accordance with law.

16. Learned counsel for F.C.I. sought to support punishment and appellate order on the basis of pleadings, as noticed above.

17. Punishment order dated 26.05.2004 shows that petitioner was held guilty of misconduct under Clauses 15(2), 15(5) and 15(7) of S.O., 1946. In the charge sheet, relevant provisions of S.O., 1946 referred to are Clauses 15(7) and 16(2) and in suspension order, "misconduct' under Clauses 14 and 15(5) of S.O., 1946 are referred to.

18. For the purpose of considering whether an employee has committed misconduct or not, it is the allegations contained in charge-sheet, which are relevant. However, I find it appropriate to refer/reproduce Clauses 14, 15(2), 15(5), 15(7) and 16 (2) of S.O., 1946, as under :

"CLAUSE NO. 14 : LOSS OF LIEN ON UNAUTHORISED ABSENCE :

If a workman remains absent for 15 days beyond the period of leave originally granted or subsequently extended ***he shall be given 15 days notice*** *(by registered post with acknowledgement due at his leave address)* ***to explain the cause for his absence.*** *In case his explanation is received to the satisfaction of the leave sanctioning authority or officer specified in this behalf by the employer, he will not lose his lien on his job.* ***In case no explanation is received or if received, it is not considered satisfactory and workman returns to duty, he will be give a fresh appointment.*** *He shall be entitled to make a representation to the Sr. Regional Manager for regularization of the absence for continuity of service will all consequential benefits, who shall decide the issue on the basis of the principles of natural justice. The decision of the Sr. Regional Manager shall be final.*

CLAUSE NO. 15 : MISCONDUCT :

The following acts and omission shall be treated as misconduct :-

x x x x

(2) theft, fraud or dishonesty in connection with the employer's business or property.

x x x x

(5) habitual absence without leave or absence without leave for more than 15 days.

x x x x x

(7) breach of any law applicable to the establishment."

CLAUSE NO.16 : DISCIPLINARY ACTION FOR MISCONDUCT

16(1)a) Where a disciplinary proceedings against worker is contemplated or is pending and the employer is satisfied that it is necessary or desirable to place the workman under suspension, he may, by order in writing, suspend him with effect from such date as may be specified in the order. A statement setting out in detail the reasons for such suspension shall be supplied to the workman within a week the date of suspension.

16(1)b) A workman who is placed under suspension under clause (a) shall during the period of such suspension be paid a subsistence allowance as per the provisions of the Section 10 A of the Industrial Employment (Standing Orders) Act, 1946.

16(2)a) ***Any act of indiscipline or misconduct committed by workman may be reported in writing to the Disciplinary Authority.***

16(2)b) On receipt of the written report to the disciplinary authority under sub clause (a) that a worker has committed an act of indiscipline or misconduct, ***Disciplinary Authority may make or cause to be made such further investigation, as he may deem fit,*** *and thereafter* ***subject to the provisions under clause (c) below take any of the following steps that is to say he may impose any of the following penalties.***

i) Give him a warning in writing.

ii) Suspend him for a period not exceeding 4 days without pay at a time.

iii) Stoppage of annual increment without or with commutative effect.

iv) Terminate his services after giving 30 (thirty) days notice and

v) dismiss him.

16(2)(c)(i) Before any action is taken for imposition of penalty specified under sub clause (b) above, the worker concerned shall be given an opportunity of not less than 15 days by the Disciplinary Authority, to show cause why the proposed action should not be taken against him, and also no order imposing any penalty shall be made except after departmental inquiry held in conformity with the principles of natural justice. ***For that purpose interalia a charge sheet may be issued therein specifying charges on account of which disciplinary action is proposed to be taken alongwith statement of imputation against each charge*** *and lists of witnesses and documents relied upon shall be intimated to the worker concerned. Such charge sheet shall be given by the Disciplinary Authority in English or Hindi or the language of the state.* ***His explanation and such other written or oral evidence as he may like to produce in his defence and report of the Inquiry Officer within 30 days shall be taken into account in arriving at a final conclusion about the penalty, if any, to be imposed on him.*** *A copy of the final order shall also be communicated to the worker concerned in English or Hindi, or the language of the State alongwith certified copy of the enquiry report. A copy of enquiry report shall be made available to the charge-sheeted workman to enable him to make representation if any, against the finding of enquiry.*

16(2)(c)(ii) If on the conclusion of the inquiry workman been found guilty of the charges framed against him and it is considered, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order or dismissal of suspension or stoppage of annual increment would meet the ends of justice, the employer shall pass an order accordingly.

16(2)(c)(iii) The proceedings of the inquiry shall be recorded in Hindi or in English or the language of the state.

16(2)(c)(iv) The proceedings of the inquiry shall be completed within a period of three months.

16)(2)(d) A worker shall be allowed to defend himself or an official of the Union or an official of the corporation at the time of departmental inquiry. The corporation shall pay the

travelling allowance to such persons who shall defend the workers at the rates admissible as per FCI TA Rules in case of official of corporation and as admissible to Class-I Officer of the FCI in case of T.U. Official.

16(2)(e) An appeal shall lie against an order passed by the Disciplinary Authority under sub-clause (c) to the appellate authority. Any such appeal to the appellate authority shall be in writing and shall be preferred within 60 days of the receipt of the order appealed against and order passed on such appeal shall be final, provided that the appellate authority may, for reasons to be recorded, consider an appeal preferred after the expiry of 60 days but within three months.

16(2)(f) An order of dismissal shall be effective from the date of such order and subsistence allowance paid during the period of suspension shall not be recovered.

16(2)(g) Provided that where the period between the date on which the workman was suspended from duty pending the inquiry or investigation and the date on which an order of suspension was passed under this clause exceeds four days, the workman shall be deemed to have been suspended only for four days or for such shorter period as specified in the said order of suspension and for the remaining period he shall be treated as on duty and be entitled to the same wages and all benefits as he would have received if he had not been placed under suspension, after deducting the subsistence allowance paid to him for such period.

16(2)(h) Provided also that where an order imposing stoppage of annual increment is passed under this clause, the workman shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension after deducting the subsistence allowance paid to him for such period.

16(2)(i) If on the conclusion of the inquiry, the workman has been found to be not guilty of any of the charges framed against him he shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension after deducting the subsistence allowance paid to him for such period.

16(2)(j) In awarding punishment under this standing orders, the disciplinary authority imposing the punishment, shall take into account the gravity of misconduct, the previous record, if any, of the workers and any other extenuating or agravating circumstances, that may exist. A copy of the order passed by the authority imposing the punishment shall be supplied to the worker concerned." (Emphasis added)

19. The first aspect, which has to be considered in this case is, "whether petitioner has been punished in respect of alleged misconduct for which charges were framed against him or in the order of punishment some other misconduct has been added, which was not made part of charge sheet and therefore order of punishment is founded on a charge which was never levelled against petitioner and for this reason, order of punishment travelling beyond charge sheet is bad in law?"

20. Copy of charge-sheet is Annexure 6 to writ petition and shows

that after referring to charges (A), (B) and (C), it alleges that petitioner has committed misconduct under Clause 15(7) of S.O., 1946. The relevant extract of charge sheet reads as under :

"उसने ऐसा कार्य किया है, जो अशोभनीय है एवं सेवा आचरण नियमों का उल्लंघन है, क्यों न उनके विरूद्ध भारतीय खाद्य निगम के औद्योगिक प्रतिष्ठान के प्रमाणित स्थायी आदेश 1999 के तहत कदाचार (Misconduct) धारा 15(7) कदाचार अनुशासनात्मक के अनुच्छेद संख्या 16(2) के तहत विभागीय कानून भंग करने के आरोप में दोषी हैं।"

21. A copy of inquiry report, which is Annexure 11 to writ petition, shows that Inquiry Officer held that petitioner remained absent without sanction of leave; held office of profit and still contested election of Gram Pradhan, which is in contravention of Section 5-A(c) of Act, 1947 and has violated Clause 7 of S.O., 1946, which provides that an employee of FCI shall not undertake any other employment while he is an employee of FCI and therefore has committed misconduct and all the charges are proved.

22. Punishment order, Annexure 12 to the writ petition, starts by alleging that inquiry was initiated against petitioner for committing misconduct defined under Articles 15(2), 15(5) and 15(7) and holding him guilty of misconduct under the aforesaid provisions and also for contravention of Section 5-A(c) of Act, 1947, he has been held guilty and punishment of dismissal was imposed upon him.

23. Para 1 of Appellate order shows that enquiry was held against petitioner for committing misconduct under Clause 15(7) and 16(2) of S.O., 1946 and he was found guilty of committing misconduct and it is mentioned in para 5 that he was found guilty for committing misconduct under Clauses 15(2), 15(5) and 15(7) of S.O., 1946.

24. In fact, charge-sheet refers to a misconduct under Clause 15(7) and 16(2) of S.O., 1946 only though in the order of suspension, which is Annexure 9 to the writ petition, it is alleged that petitioner has committed misconduct under Clauses 14 and 15(5) of S.O., 1946 and has been suspended.

25. Learned counsel for respondent did not dispute that inquiry proceedings is said to have been initiated with the service of charge sheet. Therefore it is the charge sheet, which has to be looked into to ascertain, what charges have been levelled against a delinquent employee.

26. In the present case, petitioner was alleged to have committed misconduct by violating Clause 15(7) as per allegations contained in charge sheet. Inquiry Officer interestingly, in the inquiry report, has referred to only Clause 7 of S.O., 1946 though Clause 7 has no application and if it is to be read as 15(7) then also it is evident that Inquiry Officer refers to misconduct under Clause 15(7) of S.O., 1946 only and not 15(2) and 15(5). In these circumstances, disciplinary authority misread the entire proceedings and in particular inquiry report and failed to apply its mind when it held that inquiry proceedings were initiated against petitioner for committing misconduct as per Article 15(2), 15(5) and 15(7) though in the charge-sheet, only Article 15(7) was referred.

27. Appellate Authority in para 1 of impugned appellate order has rightly observed that proceedings were conducted for alleged misconduct under Clause 15(7) and 16(2) but thereafter in para 5 has failed to consider that when charges of misconduct under Clause 15(2) and 15(7) were not levelled upon petitioner, the same could not have been taken into consideration to hold him guilty of such misconduct as the order then would travel beyond charge-sheet which will vitiate the order of punishment.

28. Therefore, I have no hesitation in holding that punishment and appellate orders both, travel beyond the charges levelled against petitioner and hence are bad in law.

29. The second issue, which has to be considered is, whether misconduct under Clause 15(2), 15(5), 15(7) and 16(2) are at all attracted in the case in hand?

30. I have already quoted aforesaid provisions. Clause 15(2) talks of 'theft', 'fraud' or 'dishonesty in connection with the employer's business or property'. Neither there is any allegation of theft nor fraud levelled against petitioner and when questioned, learned counsel appearing for respondent could not dispute this fact. Hence these two contingencies are not attracted.

31. Then the only thing remains is "dishonesty in connection with employer's business or property". Here also learned counsel for FCI could not show from charge sheet as to how allegations contained in charge sheet would attract the phrase 'dishonesty' in connection with employer's business or property. The entire charges levelled against petitioner basically are that he remained absent unauthorizedly, contested election and got elected as Gram Pradhan though he was holding an office of profit and therefore violated eligibility condition for contesting election of Gram Pradhan contained in Section 5-A(c) of U.P. Act, 1947.

32. The misconduct, "dishonesty in connection with employer's business or property" is neither attracted on the charge of absence without permission or on the aspect of contesting election. After some argument, learned counsel for FCI could not dispute that Clause 15(2) of S.O., 1946 is not at all attracted to the allegations contained in charge-sheet and therefore it cannot be said that petitioner has committed any misconduct provided in Clause 15(2) of S.O., 1946.

33. Now I come to Clause 15(5) of S.O., 1946, which contain two kinds of misconduct, (i) habitual absence without leave, and; (ii) absence without leave for more than 15 days. The charge levelled against petitioner is that he absented from duty from 08.12.2001 to 26.03.2002. It is a continuous period of absence. Clause 15(5) talks of not a single instance of absence, the period whereof is irrelevant but it talks of habitual absence, which contemplates that violation is for more than once. When an employee from time to time frequently remain absent unauthorisedly only then Clause 15(5), which is talking of habitual absence without leave, would be attracted hence charge of absence in the case in hand cannot said to be a 'habitual absence'. When I confronted learned counsel for FCI to the above position and to the charge levelled against petitioner, after some argument he ultimately could not

dispute that charge of absence levelled in case in hand cannot be said to be covered by phrase 'habitual absence without leave'. Therefore, this part is not attracted in this case.

34. Now I come to sub clause (ii) of Clause 15(5) i.e. absence without leave for more than 15 days. Admittedly charge levelled against petitioner alleges that he was absent for a period of more than three and a half months i.e. from 08.12.2001 to 26.03.2002. The total actual days of absence come to 109. Therefore, petitioner's absence was for more than 15 days. The question is "whether this absence was without any leave or not" so as to constitute a misconduct under Clause 15(5) of S.O. 1946?

35. It has come on record and also mentioned by inquiry officer in inquiry report that when petitioner remained absent for more than 15 days why no immediate action was taken, could not be explained by Employer. Inquiry report also shows that petitioner submitted a leave application dated 07.12.2001 requesting for three days' leave from 8th to 10th December, 2001 but the same was not sanctioned as no casual leave was due. Whether any such decision was communicated to petitioner or not, neither any such document has been placed before inquiry officer in inquiry proceedings nor it has been said anywhere in appellate order nor anything has been placed before this Court to show that petitioner's casual leave request was rejected and he was communicated of this rejection also.

36. Law relating to leave in general is that leave is not a matter of right but so long as any leave is due to employee, the requisite kind of leave, prayed by Employee, if not due, may not be accepted but any other kind of leave, if due, may be accepted. If casual leave was not due and earned leave and any other kind of leave was due, it is open to Employer to sanction such leave. Whether this aspect was considered or not is also not on record. The application dated 07.12.2001 seeking three days casual leave was not rejected on the ground that leave could not have been granted and petitioner's presence was necessary but only reason for rejection is that casual leave was not due. If that be so, other kinds of leave, whether due and could have been granted, ought to have been considered, which has not been done. In these circumstances, it cannot be said that petitioner's application seeking leave of three days was considered by competent authority in accordance with law and any decision thereon was communicated to him.

37. That being so, charge of absence for more than 15 days without leave cannot be said proved against petitioner. In the case of unauthorised absence, it is not the mere absence but absence must be without any lawful or valid reason.

38. This question has been answered in **Krushnakant B. Parmar Vs. Union of India and another (2012) 3 SCC 178** and in para 18 and 19 of the judgment Court has held as under:

"18. In a departmental proceeding, ***if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is***

willful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the inquiry officer on appreciation of evidence ***though held that the appellant was unauthorisedly absent from duty but failed to hold that the absence was willful;*** *the disciplinary authority as also the appellate authority, failed to* ***appreciate the same and wrongly held the appellant guilty."*** (Emphasis added)

39. In the present case, petitioner has categorically stated that he sought leave on medical ground and his request for such leave was not found to be ingenuine, fictitious or imaginary. That being so, it cannot be said that petitioner was unauthorisedly absent.

40. Now comes the question of applicability of Clause 15(7) of S.O., 1946, which was admittedly part of charge-sheet and has been held to be violated by petitioner. It talks of "breach of any law applicable to the establishment". Here the law which is said to have been violated by petitioner is Section 5-A(c) of U.P. Act, 1947. It could not be shown as to how aforesaid provision was applicable to respondent's establishment i.e. FCI. The provision is applicable in respect of eligibility for contesting election on the post of Gram Pradhan and has nothing to do with employment under FCI. If petitioner was not eligible, his election as Gram Pradhan may have been bad but that will not vitiate his employment in FCI. Moreover, this aspect was already considered by this Court wherein petitioner's election as Gram Pradhan was set aside by District Magistrate and he challenged the same in Writ Petition No.5323 of 2003 and learned Single Judge, vide judgment dated 19.02.2003, held, that employment in FCI is not holding an office of profit and therefore Section 5-A(c) of U.P. Act, 1947 was not attracted at all. It has also come on record that aforesaid judgment of learned Single Judge has been confirmed by a Division Bench of this Court vide judgement dated 19.08.2004 by dismissing Special Appeal No.183 of 2003. Both the judgments are on record as Annexures 13 and 14 to the writ petition. Therefore inquiry officer, disciplinary and appellate authorities apparently committed manifest error in holding that petitioner had violated Section 5-A(c) of U.P. Act, 1947 since this Court had already held that employment of petitioner cannot be construed as holding office of profit hence Section 5-A(c) of U.P. Act, 1947 was also neither attracted nor violated by petitioner.

41. I find myself fortified in taking above view by referring to authority of Supreme Court in **State of Punjab vs. Dr. P.L. Singla (2008) 8 SCC 469** wherein Court said that an employee who remains unauthorisedly absent for some period, on reporting back to duty, may apply for condonation of absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If employer is satisfied that there was sufficient cause or justification for unauthorized absence, employer may condone act of indiscipline and sanction leave post facto. Court further said :

"If leave ***is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to***

thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline." (emphasis added)

42. In the present case also it is evident from inquiry report that petitioner has submitted joining and sought to regularize his period of absence by grant of leave and this application was forwarded to higher authorities. As per inquiry report, no decision was taken thereon and so long as the said application for regularization of period of absence is not rejected, in view of above law laid down by Supreme Court, period of absence could not have been treated to be a misconduct justifying any disciplinary action. Enquiry Officer has also noticed this fact that no decision was taken on the said application but unfortunately has failed to take into consideration consequence thereof on disciplinary proceedings. Disciplinary as well as Appellate Authorities have totally failed to look into this aspect.

43. Learned counsel for respondents could not show any other provision which can be said to have been violated or contravened by petitoner so as to attract misconduct under Clause 15(7) of S.O., 1946 therefore Clause 15(7) is also not attracted.

44. So far as Clause 16 (2) is concerned, I find that it provides procedure for taking disciplinary action when employee has been found to have committed misconduct under Standing Order. By itself, it does not define or create any rules of conduct or misconduct. Having gone through Clause 16(2) of S.O., 1946, counsel for respondent 2 during argument could not dispute this aspect. Therefore, it cannot be said that Clause 16(2) of S.O., 1946 lays down any rules of conduct/misconduct, which may attract by itself any punishment. In these circumstances I have no option but to hold that petitioner cannot be said to have been guilty of committing any misconduct under aforesaid clause and therefore punishment in question is wholly illegal.

45. The next question is, whether alleged misconduct of petitioner of contesting election of Gram Pradhan can be said to be a misconduct though no such act or omission is described as a 'misconduct' under Standing Orders applicable to the parties?

46. Learned counsel for FCI when questioned could not dispute that Standing Order did not contain any provision that an employee of FCI while in employment would not be entitled to contest any election of Gram Pradhan etc. and if he has done so, it would be a misconduct inviting punishment under Standing Orders. In such circumstances, law is well settled that if an act or omission is not described to be a misconduct, it cannot be an act or omission inviting disciplinary proceedings. This aspect has been considered by a three Judges Bench of Supreme Court in **A.L. Kalra vs. Project and Equipment Corporation of India Ltd. (1984) 3 SCC 316** wherein Court said that an administrative authority who purports to act by its regulation must be held bound by regulation. Even if these regulations have no force of law employment under these corporations is public employment, and therefore an

employee would get a status which would enable him to obtain a declaration for continuance in service, if he was dismissed or discharged contrary to the regulations. Court said that what is misconduct must be specifically provided in the rules and terms and conditions of service. Any vague or general words cannot be imported to impose punishment upon an employee holding him guilty of misconduct which is not specified as such under the rules prescribed in misconduct.

47. Again in **Glaxo Laboratories (I.) Ltd. vs. Presiding Officer, Labour Court, Meerut, AIR 1984 SC 505,** Court has held : -

"everything which is required to be prescribed has to be prescribed with precision and, no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly failing within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty." (para 23)

48. In **Rasiklal Vaghajibhai Patel vs. Ahmedabad Municipal Corporation and Anr. (1985)2 SCC 35,** Court said :

"It is thus well-settled that ***unless either in the Certified Standing Order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and punish the workman*** *even though the alleged misconduct would not be comprehended in any of the enumerated misconduct. "*
(Emphasis added)

49. Above decision has been followed by a learned Single Judge in **Santosh Kumar Shukla vs. Syndicate Bank 2014(5) ADJ 370** where, in para 24 of judgment Court has said:

"Supreme Court in Rasiklal Vaghajibhai Patel case (supra) held that it is necessary for the employer to prescribe what would be a misconduct so that the workman/employee knows the pit falls, he should guard against. ***The misconduct has to be defined and enumerated. "*** (Emphasis added)

50. In view of above discussion, punishment and appellate orders cannot be sustained.

51. Writ petition is allowed. Order of punishment dated 26.5.2004 and Appellate order dated 15.12.2012/05.01.2013 (Annexures 12 and 16 to the writ petition respectively) are set aside. Petitioner shall be entitled to all consequential benefit and also cost, which I quantify to Rs.25,000/-.

(2020)08ILR A131
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2020
BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Wrti A No. 56660 of 2011

Ramesh Chandra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shashindra Tripathi, Sri Dharm Vir Singh, Sri Shekhar Srivastava, Sri V.D. Dubey

Counsel for the Respondents:
C.S.C., Sri Sathis Mandhyan, Sri Suresh C. Dwivedi, Sri M.C. Chaturvedi

A. Service Law - U.P. Agricultural Produce Market Commodities (Centralized Service) Regulations, 1984 - Regulation 4 - Pay Parity - Equal Pay for Equal Work - - Equal Pay for Equal Work is not an abstract doctrine but has been applied only when all relevant factors and considerations in comparative posts are same. (Para 25)

The Petitioners being the Secretaries in various Krishi Utpadan Mandi Samities are seeking parity in condition of employment in particular pay scale of Secretaries irrespective of size, quantum of transaction and other business carried out in such Samities. (Para 3)

A perusal of Rules and Regulations makes it clear that the Rule framing authority contemplated a specific hierarchy of Secretaries at different levels and for recruitment thereto different qualifications, eligibility conditions etc. have been provided. The appointment and posting of Secretaries belong to different cadres depends upon various factors. Thus it is always open to rule framing authority to provide different pay scales and hierarchy of their employees taking into account relevant factors justifying such creation of hierarchy and different pay scales and grade. In view of this, ex-facie, the scheme can neither be said to be irrationalnor it violates any right enshrined under Article 14 and 16 of the Constitution. (Para 24)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. Randhir Singh Vs U.O.I. & ors. (1982) 1 SCC 618

2. R.D. Gupta & ors. Vs Lt. Governor, Delhi Administration & ors. (1987) 3 SCC 505

3. Federation of All India Customs & Central excise Stenographers & ors. Vs U.O.I. & ors. (1988) 3 SCC 91

4. Jaipal & ors. Vs St. of Hary. & ors. (1988) 3 SCC 354

5. St. of U.P. & ors. Vs J.P. Chaurasia & ors. (1989) 1 SCC 121

6. Grih Kalyan Kendra Workers' Union Vs U.O.I. & ors. JT 1991 (1) SC 60

7. Jaghnath Vs U.O.I. AIR 1992 SC 126

8. Secretary, Finance Department & ors. Vs West Bengal Registration Service Association & ors. AIR 1992 SC 1203

9. St. of M.P. & anr. Vs Pramod Bhartiya & ors. (1993) 1 SCC 539

10. Shyam Babu Verma & ors. Vs U.O.I. & ors. (1994) 2 SCC 521

11. Sher Singh & ors. Vs U.O.I. & ors. (1995) 6 SCC 515

12. U.O.I. and ors. Vs Delhi Judicial Service Assn. & anr. JT 1995 (2) SC 578

13. Sita Devi & ors. Vs St. of Hary. & ors. JT 1996 (7) SC 438

14. The St. of Mysore & anr. Vs P. Narasinga Rao AIR 1968 SC 349

15. St. of J.& K. Vs Triloki Nath Khosa AIR 1974 SC 1

16. P. Murugesan & ors. Vs St. of T.N. 1993 (2) SCC 340

17. St. of Hary. Vs Jasmer Singh & ors. AIR 1997 SC 1788: 1997 (1) AWC2.145 (SC) (NOC)

18. Garhwal Jal Sansthan Karamchari Union & anr. Vs St. of U.P. & ors. (1997) SCC 24

19. St. of Raj. Vs Kunji Raman AIR 1997 SC 693

20. U.O.I. & ors. Vs Pradip Kumar Dey (2000) 8 SCC 580: 2001 (1) AWC 176 (SC)

21. St. of Orissa & ors. Vs Balaram Sahu & ors. (2003) 1 SCC 250: 2003 (1) AWC 273 (SC)

22. State of Hayana & anr. Vs Haryaa Civil Secretariat Personal Staff Assoc. (2002) 6 SCC 72: 2002 (3) AWC 2477 (SC)

23. S.B.I. & anr. Vs M.R. Ganesh Babu and ors. (2002) 4 SCC 556

24. S.B.I. & ors. Vs Gurdeep Kumar Uppal & ors. AIR 2001 SC 2691

25. St. of Pun. & ors. Vs Ishar Singh & ors. AIR 2002 SC 2422

26. Punjab State Electricity Board & ors. Vs Jagjiwan Ram & ors. JT 2009 (3) SC 400

27. U.O.I. & anr. Vs Mahajabeen Akhtar AIR 2008 SC 435

28. Haryana State Electricity & anr. Vs Gulshan Lal & ors. JT 2009 (9) SC 95

29. State of Hary. & ors. Vs Charanjit Singh & ors. AIR 2006 SC 161

30. U.O.I. & ors. Vs Dineshan K. K. AIR 2008 SC 1026

31. Harayana State Minor Irrigation Tubewells Corporation & ors. Vs G.S. Uppal and ors. AIR 2008 SC 2152

32. F.C.I. & ors Vs Ashish Kumar ganguli & ors. 2009 (8) SCALE 218

33. St. of Punj. & anr. Vs Surjit Singh & ors. (2009) 9 SCC 514

34. St. of M.P. & ors. Vs Ramesh Chandra Bajpai (2009) 13 SCC 635

35. A.K. Behra Vs U.O.I. & anr. JT 2010 (5) SC 290

36. St. of Raj. & ors. Vs Daya Lal & ors. (2011) 2 SCC 429

37. Union Territory Administration, Chandigarh & ors. Vs Mrs. Manju Mathur & anr. JT 2011 (3) SC 179

38. Hukum Chand Gupta Vs Director General, I.C.A.R. & ors. AIR 2013 SC 547

39. S. H. Baig & ors. Vs St. of M.P. & ors. (2018) 10 SCC 621

40. General Manager, Electrical Rengali Hydro Electric Project, Orissa & ors. Vs Giridhari Sahu & ors. (2019) 10 SCC 674

41. SAIL. & ors. Vs Jaggu & ors. (2019) 7 SCC 658

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

1. Heard Sri Dharm Vir Singh, learned counsel for petitioners and Sri M.C. Chaturvedi, learned Senior Advocate assisted by Sri Surech Chand Dwivedi, Advocate for Respondents-2 to 4.

2. This is an old writ petition of 2011 and despite repeated request learned counsel for petitioners did not advance any argument and in these circumstances we ourselves have gone through the writ petition.

3. Petitioners are all Secretaries in various Krishi Utpadan Mandi Samities in State of U.P. A writ of mandamus has been prayed by petitioners to seek parity in condition of employment, in particular pay scale of Secretaries of all Mandi Samities working under U.P. Krishi Utpadan Mandi Parishad, irrespective of size, quantum of transaction and other business carried out in such Samities. It is stated that various Krishi Utpadan Mandi Samities established in State of U.P. have been categorised in four categories, i.e., A Class Mandi Samities, B

Class Mandi Samities, C Class Mandi Samities and D Class Mandi Samities. Secretaries posted in said Mandi Samities have been categorized according to aforesaid categories of Mandi Samities, i.e., Secretaries Grade-I, II, III and IV. Secretaries Grade IV are liable to be posted in D Class Mandi Samities, Secretaries Grade III are liable to be posted in Grade C Mandi Samities and so on.

4. The basic contention of petitioners is that duties, responsibilities and work performed by said Secretaries are similar, therefore, they are entitled to be treated at par and should be given a common and same pay scale applying the principle of "equal pay for equal work" and on the basis of categorization of Mandis no further classification should be made in respect of categories of Secretaries and there should be no difference in pay scales.

5. Petitioners have also challenged validity of Regulation 4 of U.P. Agricultural Produce Market Committees (Centralized Service) Regulations, 1984 *(hereinafter referred to "Regulations, 1984")* as ultra vires and violative of Articles 14 and 16 and doctrine of "equal pay for equal work".

6. The record shows that earlier one, Shahzade, came to this Court in Writ Petition No. 2742 of 2000 claiming that he was entitled for highest pay scale admissible to the post of Secretary on the principle of "equal pay for equal work" and prayed for a mandamus to respondents to grant the same. Vide judgment dated 27.02.2000 writ petition was decided requiring Chairman, U.P. Rajya Krishi Utpadan Mandi Parishad *(hereinafter referred to as "Chairman, UPRKUMP")* to decide his representation. Representation was rejected by Chairman vide order dated 22.05.2001. Same was challenged by Sri Shahzade, a Secretary in Mandi Samiti, in Writ Petition No. 30319 of 2001 which was decided vide judgment dated 23.04.2002. It was allowed. On behalf of U.P. Rajya Krishi Utpadan Mandi Parishad *(hereinafter referred to as "UPRKUMP")* a review petition was filed but the same was also dismissed vide judgment dated 23.05.2003. UPRKUMP brought the matter to Supreme Court in Civil Appeal No. 5289-5290 of 2004 (Chairman, Rajay Krishi Utpadan Nandi Parishad and others vs. Shahjade) which were allowed vide judgment dated 03.05.2011 and judgment of this Court was set aside. The judgment of Supreme Court dated 03.05.2011 reads as under:

"These appeals are directed against orders dated 23.04.2002 and 23.05.2003 passed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 30319 of 2001 and Civil Miscellaneous Review Petition No. 104056 of 2002 whereby the High Court directed the appellants to fix the pay of the respondent in the scale of Rs. 2000-3000 with effect from 1.1.1986 with consequential benefits and dismissed the review petition filed by the appellants.

Respondent No. 3, who was then holding the post of Secretary Krishi Utpadan Mandi Samit, Baberu (Banda) filed Writ Petition No. 2742/2000 for issue of a direction to the functionaries of Rajya Krishi Utpadan Mandi Parishad, Uttar Pradesh (for short, "the Parshad") to fix his pay in the higher scale of pay.

The same was disposed of by the Division Bench of the Allahabad High Court with a direction that the concerned authority shall decide the representation.

In compliance of the direction given by the High Court, Director of the Prishad passed detained order dated 22.5.2001 and rejected the respondent's claim for fixation of his pay in the scale of Rs. 3,000-4,500.

The respondent challenged the aforesaid order in Writ Petition No. 30319/2001, which was allowed by the Division Bench of the High Court in the manner indicated hereinabove. The appellants sought review of order dated 23.04.2002 but could not persuade the High Court to entertain the same.

We have heard Smt. Shobha Dikshit, learned senior counsel appearing for the appellants and Shri S.R. Singh, learned senior counsel appearing for the respondent.

If is not in dispute that the conditions of service of the persons holding the posts of Secretaries are governed by the Uttar Pradesh Agricultural Produce Market Committees (Centralised) Service Regulations, 1984 (for short, "the Regulations").

Regulation 4 thereof, insofar as it relevant for deciding these appeals reads as under:

"4. Creation of Centralized Service-With effect from the commencement of these regulations there shall be a centralized service for the market Committes consisting of the cadres and posts given below:

1. Secretaries-

(a) Secretaries, Class-I

(b) Secretaries, Class-II

(c) Secretaries, Class III, Grade-I

(d) Secretaries, Class III, Grade-II

(e) Secretaries, Class III, Grade-III."

A glance at the above reproduced Regulation makes it clear that there are different classes and grades of Secretaries of the Market Committees. The High Court did not strike down classification of the cadre of Secretaries and yet directed the appellants to fix the respondent's pay in the higher scale. This, in our considered view, was legally impermissible.

Learned counsel for the respondent fairly states that without striking down Regulation 4, the High Court could not have ordained fixing of his client's pay in the higher scale.

In view of the above, the appeals are allowed, *the impugned orders are set aside and the matter is remitted to the High Court for fresh disposal of the writ petition.*

It will be open to the respondent to seek amendment of the writ petition for the purpose of challenging the vires of Regulation 4 and other related provisions. If such an application is filed, the High Court shall decide the same after giving notice to the appellants."

(emphasis added)

7. We are informed by learned counsel for respondents that above Writ Petition No. 30319 of 2001 has ultimately been decided by this Court by a detailed judgment dated 22.01.2014. This Court has repelled challenge to vires of Regulation 4 of Regulations, 1984.

8. It appears that petitioners of this writ petition, also came to this Court earlier in Writ Petition No. 3369 of 2004

wherein present petitioners were arrayed as Petitioners-2, 4, 7, 8, 11, 12, 15, 16, 17, 18 and 19. They also challenged validity of Regulation 4 of Regulations, 1984 as violative of Articles 14 and 16 of the Constitution on the ground of equal pay for equal work. A Division Bench of this Court vide judgment dated 24.05.2006 considered the matter in detail and dismissed writ petition vide judgment dated 24.05.2006. These very petitioners filed appeal in Supreme Court, i.e., Special Leave to Appeal (Civil) No. 18674 of 2006 which also appears to have been heard by Supreme Court on 03.05.2011 alongwith Civil Appeal No. 5289-5290 of 2004 and appeal of present petitioners was allowed to be withdrawn but with further observing that petitioners may file a fresh writ petition and the same shall be decided without being influenced by the reasons incorporated in the judgment impugned in appeal before Supreme Court, i.e., judgment dated 24.05.2006 passed in Writ Petition No. 3369 of 2004.

9. We have, therefore, considered the matter independently and proceed to decide the same on the basis of record and relevant statutes.

10. Petitioners are working as Secretaries in different grades in various Mandi Samities. The matter is governed by U.P. Krishi Utpadan Mandi Adhiniyam, 1964 *(hereinafter referred to as "Act, 1964")*. Aforesaid Act was enacted by State Legislature providing for the regulation of sale and purchase of agricultural produce and for the establishment, superintendence and control of markets in the State of U.P. The legislature by its experience found that Farmers and Agricultural Producers were being exploited in Agricultural Produce Markets in different ways causing not only undue exactions but also lesser share of agricultural produce to the Owners. In the matter of dispute, the Producers used to suffer due to disadvantageous position lacking bargaining power. They also suffer due to user of defective weights and scales in the market. The Producers used to be denied lion's share of their produce. The situation was causing lot of dissatisfaction amongst the Farmers citizen of State attracting Government to consider the matter and take care by providing suitable legislation. Even Planning Commission recommended for a legislation in respect of regulation of market in pursuant whereto many other States enacted such laws. Ultimately U.P. Legislature enacted Act, 1964. The broad outlines and objective as mentioned in statement of object and reasons were as under:-

(i) to reduce the multiple trade chares, levies and exactions charged at present from the producer-sellers;

(ii) to provide for the verification of accurate weights and scales and see that the producer-seller is not denied his legitimate due;

(iii) to establish market committees in which the agricultural producer will have his due representation;

(iv) to ensure that the agricultural producer has his say in the utilization of market funds for the improvement of the market as a whole;

(v) to provide for fair settlement of disputes relating to the sale of agricultural produce;

(vi) to provide amenities to the producer-seller in the market;

(vii) to arrange for better storage facilities;

(viii) to stop inequitable and unauthorized charges and levies from the producer-seller; and

(ix) to make adequate arrangements for market intelligence with a view to posting the agricultural producer with the latest position in respect of the markets dealing with his produce."

11. Section 12 of Act, 1964 provides for establishment and incorporation of Mandi Samiti of a Market Area declared under Sections 5 and 6 of Act. Section 13 of Act provides for constitution of Committee and Section 23 provides for appointment of officers and servants of Mandi Samiti, which includes Secretaries of Committee. It provides that every committee shall have a Secretary and such other officers as may be considered necessary by Board for efficient discharge of functions of Committee, appointed by Board on such terms and conditions as being provided in Regulations, made by it.

12. It was amended vide U.P. Act No. 10 of 1991, w.e.f. 01.09.1990 and Section 23 (2), thereafter, read as under:-

Section 23 *(2)- Every Committee shall have* ***such number of secretaries*** *and such other officers as may be considered necessary by the Board for the efficient discharge of the functions of the Committee, appointed by the Board on such terms and conditions as may be provided for in the regulations made by it.*

13. Section 23-A was inserted by U.P. Act No. 13 of 1973 and re-enacted by U.P. Act No. 30 of 1974 providing Constitution of Centralized service and transfer of employees. The said Section is reproduced herein as under-

"Section 23-A. Constitution of Centralized service and transfer of employees:-*(1) Notwithstanding anything contained in any other provision of this Act, the Board may constitute cadres of secretaries and such other officers common to all Committees as it may deem fit to appoint under sub-section (2) of Section 23.*

(2) Subject to the provisions of sub-section (2-B)-

(a) every person, other than a government servant, serving in any Committee on deputation, who holds a post comprised in the cadre referred to in sub-section (1), and

(b) every Government servant, serving in any Committee on deputation on a post in the said cadre, who is not found to be unsuitable, suitability being determined in such manner as may be laid down in regulations,

shall on and from the date of the constitution of the said cadre (hereinafter in this section to be referred to as the said date) become member of the cadre on the terms and conditions mentioned in sub-section (2-A).

14. Section 24 provides for functions, powers and duties of the 'Secretary'. Section 24 as amended vide U.P. Act 10 of 1991 is reproduced as under:-

"24. Functions, powers and duties of the Secretary-*(1) The secretary of a committee shall be its chief executive officer, and shall, subject to the provisions of this Act, perform such*

functions exercise such powers and discharge such duties, as may be prescribed, or provided for in the bye-laws or as the Board or the Director may, by order in writing direct:

Provided that ***when more than one secretaries are posted in a Committee,*** *the* ***Director shall nominate one of the Secretaries to be its chief executive officer and shall determine the functions to be performed, powers to be exercised and duties to be discharged by each of them.***

(2) Without prejudice to the generality of the foregoing provisions, but subject to the provisions of this Act and the rules and bye-laws made thereunder, the Secretary shall.

(a) -exercise all powers of superintendence and control over-

(i) all officers and servants of the Committee so as to ensure less proper and efficient discharge of the duties assigned to them less by or under this Act; and

(ii) the affairs of the Committee;

(b) report cases of neglect, misconduct or dereliction of duty by an employee of the Committee to the appointing authority for necessary action, and where so empowered, take disciplinary action against any of the employees of the Committee;

(c) ensure proper execution of all orders issued by the Board, the Chairman or the Committee;

(d) ensure proper maintenance of-

(i) accounts of all money received and of all moneys expended for and on behalf of the Committee;

(ii) records of disputes coming up for decision under this Act or the rules or bye-laws framed thereunder; and

(iii) a record of the disputes settled by him in such form as may be prescribed.

(3) All licenses under this Act shall be issued under his signatures."

15. Section 25-A provides for prescription of terms and conditions of employment of officers and servants of Committees by Regulations. Section 40 confers powers upon State Government to frame Rules.

16. Exercising Rule framing power, State Government has enacted U.P. Krishi Utpadan Mandi Niyamavali 1965 (hereinafter referred to as "Rules, 1965"). Chapter V of Rules, 1965 deals with the officers and servants of the Committee. Prior to 30.6.1984, Rule 59 reads as under:-

"59- Secretary of the Market Committee-(Section 23)--*(1) Persons who are approved by the public Service Commission U.P. for a post in U.P. Subordinate Agriculture Service and possess at least two years experience in Agricultural Marketing and have successfully completed one years Training course in Agricultural Marketing or the training course of market Secretary organized by the Directorate of Marketing and Inspection, Government of India, shall be eligible for appointment s Secretary of the market committee.*

(2) The ***cadre of Secretary shall have the following three grades namely;***

(a) ***Grade I-****For* ***A Class*** *Markets.*

(b) ***Grade II****-For* ***B Class*** *Markets.*

(c) ***Grade III****-For* ***C Class*** *Markets.*

(3) The scale of pay of the market Secretary in each grade shall be such as may be approved by the State Government and shall carry the usual allowances as may be admissible to Government Servants of the State in corresponding scales of pay from time to time.

(4) The Seniority of the incumbents in each grade of the cadre of market secretary shall be reckoned from the date of the order of their first appointment as secretary in that grade, but in case the date of appointment of two or more incumbents as secretary in any grade is same, their seniority shall be in accordance with the order of their appointment.

(5) The secretary shall be liable to be transferred from one market committee to another in any part of the state by the appointing authority and his transfer traveling allowances shall be borne by the committee to which he is transferred.

(6) The secretary shall be entitled to raveling allowance as admissible to the Government servants of the state in the corresponding scales of pay.

(7) The secretary of every committee shall be governed by such rules and regulations as are applicable to Government Servants on foreign services as laid down in Fundamental Rules 110 to 127 of Financial Handbook volume II Part-II"

17. Vide notification dated 30.06.1984, the entire Rule 59 was substituted as under-

"59- Secretary of the Market Committee (Section 23)-- *That qualifications, method of recruitment and* ***other conditions of service of the secretaries*** *and other officers and employees of centralized service constituted under section 23-A* ***shall be such as may be laid down by Regulations."*** (emphasis added)

18. Rule 60 provides qualifications, designations, grades, salaries and allowance of the posts of officers and servants whose appointing authority is Committee and to be approved by Director.

19. Rule 63 provides functions, powers and duties of Secretary, which is reproduced herein as under-

"63. Functions, powers and duties of the Secretary (section 24)*-(1) The* ***Secretary shall be the Chief Executive Officer of the Market Committee and shall carry into effect the resolutions of the Market Committee.***

(2) All other officers and servants of the Committee shall be subject to his control. He shall also be responsible for directing their work in such manner as to ensure proper and efficient working of the Market committee.

(3) It shall be ***the duty of the Secretary to supervise the work of the officers and servants of the committee*** *and to take necessary disciplinary action against any of the officers and servants of the committee for their neglect, misconduct, dereliction of duty etc. subject to the approval of the Chairman of the Committee.*

(4) The ***secretary shall be responsible for the proper execution of all orders issued by the Chairman or the Committee.*** *He shall take or cause action to be taken against any of the officers and servants of the Committee in accordance with the directions given by the Chairman of the Committee.*

(5) Subject to the control of the Chairman, or in his absence of the vice-Chairman of the Market Committee, the secretary shall be responsible for maintaining proper accounts of money received and/or expended for or on behalf of the Committee.

(6) The ***Secretary shall conduct all routine correspondence and attend to other office work*** *and all correspondence with the Director or Officers subordinate to the Director shall be conducted through the Chairman or with the previous approval of the Chairman.*

(7) The ***Secretary shall be responsible for maintaining complete records of all the disputes,*** *which come up for decision before the Disputes Sub-Committee in such manner as may be specified in the bye-laws of the Committee.*

(8) The ***Secretary shall maintain a record of the disputes settled by him in the form*** *and manner as may be specified in the bye-laws of the Committee.*

(9) ***On receipt of a complaint*** *either written or oral regarding any matter concerning sale or purchase of specified agricultural produce in the Market Area, the* ***Secretary shall conduct an enquiry and shall make a report of he same to the Chairman for taking such action as he may think*** *necessary in accordance with the provisions of the Act, these rules and the bye-laws.*

(10) It shall be the ***duty of the Secretary to ensue that proper payments to sellers in the Market Yards are made and no irregularities in making weighment of the specified*** *agricultural produce in the Market Yards* ***are committed.***

(11) The ***secretary shall advise the Committee and its Chairman in all matters elating to the regulation of the sale and purchase of agricultural produce in the light of the provisions of the Act,*** *these rules and the bye-laws framed thereunder and his opinion shall be recorded in the proceedings of the Committee.*

(12) The ***Secretary shall grant casual leave to the officers*** *and servants of the Committee. For other kinds of leave the Secretary shall recommended he same to the Chairman who shall take action to sanction such leave in accordance with the leave rules applicable to officers and servants of the Committee.*

(13) The Secretary shall ***submit to the Chairman by thirtieth April each year his annual confidential remarks*** *in respect of the work and worth of the officers and servants appointed by the Committee.*

(14) The ***Secretary shall submit to the Chairman his recommendations in respect of the annual increments of the officers and servants*** *appointed by the Committee within thirty days from the date any such increment falls due.*

(15) The ***Secretary shall, on the orders or with the prior approval of the Chairman or on the orders of Director call meetings o****f the Market Committee* ***and shall have right to attend, speak at,*** *and otherwise take part in the meetings of the Committee;*

*Provided that the **secretary shall not have the right to vote in the meetings of the committee."** (emphasis added)*

20. In exercise of power under Section 25-A read with 26-X of Act, 1964, Board has framed Regulations, 1984. Regulation 4 of Regulations, 1984 provides for creation of Centralized Services of Secretaries and others and prior to 05.03.1991, it reads as under-

*"**Regulation-4:** with effect from the commencement of these regulations there shall be a centralized service for the market committees consisting of the cadres and post given below-*

(i) Secretaries:

*(a)Secretaries, **Grade-I,** for "A' Class Markets,*

*(b)Secretaries, **Grade-II**, For "B' Class Markets,*

*(c)Secretaries, **Grade-III,** for "C' Class Markets,*

*(d)Secretaries, **Grade-IV,** for "D' Class Market,*

(ii) Market Staff

(a)Mandi Paryavekshak

(b)Amin/Auctioneers

(iii) Accounts Staff:

(a)Accountant

(b)Accounts Clerk

(c)Cashier-cum-clerk,

(iv) General Staff:

(a)Head Clerk

(b)Clerk-cum-Typist."

21. The aforesaid Regulation 4 was amended on 05.03.1991 and in respect of Secretaries it was substituted as under-

1. Secretaries.

*(a) Secretaries **Grade -I***

*(b) Secretaries **Grade -II***

*(c) Secretaries **Grade -III** Class I*

*(d) Secretaries **Grade -III** Class II*

*(e) Secretaries **Grade -III** Class III*

22. However after amendment of 1991 in Regulation 4, it appears that corresponding amendment in regulation 13 has not been made and it continue to read as under:-

*"**13 Quota**.-Subject to the provisions of sub-rule (2) recruitment to various categories of posts in the cadres of the service shall be made from the source and in the proportion indicated below:*

S.No	*Name of post*	*Source and method of Recruitment*	*Percentage*
1.	*Secretary, Grade IV*	*Direct recruitment*	*100*
2.	*Secretary, Grade III*	*By promotion of secretary grade IV, who has put in at least 5 years continuous service as such (Not being service on ad hoc basis) as on the first day of year of recruitment.* *By promotion of Mndi*	*75* *25*

		Paryveksh ak who has put in at least 5 years continuous service as such of year of recruitmen t	
3.	*Secret ary, Grade II*	*By promotion of secretary Grade III, who has put in at least 5 years continuous service as such (not being service on ad hoc basis) as on the first day of year of recruitmen t.*	*100*
4.	*Secret ary, Grade I*	*By direct recruitmen t.* *By promotion secretary grade II, who has put in at least 5 years continuous service as such (not being service on ad hoc basis) as on the first day of the year of recruitmen t.*	*50*

23. Regulation 23 provides that seniority of persons in any category or grade of any post shall be determined from the date of the order of substantive appointment. It is further stated that after 1991 and 1995 amendment of the Regulations, 1984, there are four grades of Secretaries which are as follows:-

i.	*Secret ary Class I*	*3000-4500*
ii	*Secret ary Class II*	*2200-4000*
iii	*Secret ary Class III Grade I Grade II Grade III*	*2000-3500* *1400-2600 merged with scale 1350-2200 of 1640-2900 1640-2900 w.e.f 1.10.95*

24. A perusal of Rules and Regulations aforesaid makes it clear that Rule framing authority contemplated a specified hierarchy of Secretaries at different levels and for recruitment thereto different qualifications, eligibility conditions etc. have been provided. The appointment and posting of Secretaries belong to different cadres depends upon various factors, namely Mandi Samiti of highest class having highest quantum of transaction and business shall be maintained by the Secretaries working in highest grade or there may be more than one secretary in such Mandis of same grade or different grades and the Secretaries of lower grade may be posted in smaller Mandi Samitis. It is worth of notice that prior to amendment of this Act, each Mandi Samiti had to have one Secretary and therefore, classification of Mandi Samitis was also relevant and hierarchy of Secretary would have its application accordingly. However, vide

1991 amendment while omitting the provision pertaining to classification of Mandi Samitis, simultaneously it has been provided under Section 23 read with Section 24 of the Act that there can be more than one secretary in a Mandi Samiti and in such case Director shall have the authority to nominate one Secretary as Chief Executive Officer of a Mandi Samit. Obviously, pursuant to the existing provision, more than one Secretaries may be posted in a Mandi Samiti considering its size, quantum of business etc. Further, Director while nominating Chief Executive Officer is bound to take into account the qualifications, hierarchy of Secretaries, grade and seniority etc. working in the Mandi Samitis. In view of the aforesaid, ex-facie, the aforesaid scheme can neither be said to be irrational nor it violates any right enshrined under Articles 14 and 16 of the Constitution. It is always open to the Rule framing authority to provide different pay scales and hierarchy of their employees taking into account relevant factors justifying such creation of hierarchy and different pay scale and grade.

25. The principle of equal pay for equal work is not an abstract doctrine but has been applied on the facts and circumstances when it is found in all respects that two sets of employees are equally placed. Time and again what circumstances would be necessary to attract doctrine of equal pay for equal work has been examined by Supreme Court in catena of decisions and instead of referring to all aforesaid authorities, we find appropriate to refer that a Division Bench judgment dated 22.01.2014 passed in Writ Petition No. 30319 of 2001 (Shahjade vs. Chairman, Rajay Krishi Utpadan Mandi Parishad) where it has held as under:

"So far as the challenge on the bifurcation of the cadre of Secretary under Regulation-4 on the ground that it violates Article 14 of the Constitution of India is concerned , we may only record that under Regulations of 1984 an hierarchy of post of Secretary's has been created. *A right for being considered for promotion from lower class/grade to higher within the category of Secretaries has been provided under Regulation-10 read with Regulation-13. For a Secretary of Class-3 Grade-II to be promoted as Secretary Class-3 Grade I five years continuous service as on the first date of the year of recruitment has been provided for. The post of Secretary Class-3 Grade-I are to be filled up by way of promotion 100%.*

As already noticed above, the power to lay down the strength and the pay-scale to each category of posts has been conferred under Regulation -6 upon the Board and such pay-scales have to be the one as recommended from time to time and approved by the State Government.

So far as the plea of violation of Article 14 is concerned, suffice it to refer the judgment of the Apex Court in the case of State of Haryana & Ors. Vs. Jasmer Singh & Ors.,(1996) 11 SCC 77, the Hon'ble Supreme Court considered the provisions of Article 39 (d), 14 and 16 of the Constitution and held that the principle of 'equal pay for equal work' is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations, or even in the same organisation. there may be differences in educational or technical

qualifications, which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify difference in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that the good performance can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a bearing on efficient performance in a job. The evaluation of such jobs for the purposes of pay scale must be left to expert bodies and, unless there are any malafides, its evaluation should be accepted.

In view of the aforesaid, the challenge to the classification o the ground it violates the principles of equal pay for equal work appears to be wholly misconceived. The Regulation provides hierarchy qua the different categories of post of Secretaries and merely because the Secretaries belonging to as of the categories can be posted in any Mandi Samiti because of the deletion of the categories of the modes will make no difference in the matter of salary admissible to the possible classification under Regulation-4. The order absorbing the petitioner as senior Grade III Class II dated 2.7.1996 was accepted by the petitioner by open eyes and has not been questioned even in the petition.

In the totality and circumstances of the record, we do not find any substance and plea raised by the learned counsel for the petitioner with regard to the challenge to the vires of Regulation-4.

In view of the aforesaid facts and the reasons recorded, we repel the challenge to the vires of Regulation-4 of the The Uttar Pradesh Agricultural Produce Market Committees (Centralised) Services Regulations, 1984.

Since, the challenge to Regulation-4 fails, the question of higher pay-scale being granted to the petitioner fails. No relief can be granted.

The writ petition is dismissed."

(emphasis added)

26. We do not find any reason to have a different view than what has been taken in aforesaid judgment.

27. Even otherwise, we find that principle of "equal pay for equal work" is not attracted in the case in hand. Doctrine of "equal pay for equal work" is not an abstract doctrine but it has to be applied only when all relevant factors and considerations in comparative posts are same.

28. In **Randhir Singh v. Union of India and Ors., (1982) 1 SCC 618**, Court considering principle of equal pay for equal work held that it is not an abstract doctrine but one of substance. Construing Articles 14 and 16 in the light of Preamble and Article 39(d) of the Constitution, Court held that principle of equal pay for equal work is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing different scales of pay do identical work under the same employer. However it was also held -

"It is well known that there can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher

grade often being a promotional, avenue for officers of the lower grade. ***The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay.*** *The principle of 'equal pay for equal work' would be an abstract doctrine not attracting Article 14 if sought to be applied to them..." (emphasis added)*

29. In **R.D. Gupta and Ors. v. Lt. Governor, Delhi Administration and Ors. (1987) 3 SCC 505,** Court applying principle of equal pay for equal work, in para 20 of the judgment, considered correctness of defence taken by employer justifying non application of said principle, and held -

"the ***ministerial staff in the NDMC constitute a unified cadre. The recruitment policy for the selection of the ministerial staff is a common one and the recruitment is also done by a common agency. They are governed by a common seniority list.*** *The ministerial posts in the three wings of the BDNC viz, the general wing, the electricity wing and the waterworks wing are interchangeable posts and the postings an made from the common pool according to administrative convenience and exigencies of service and not on the basis of any distinct policy or special qualifications.* ***Therefore, it would be futile to say that merely because a member of the ministerial staff had been given a posting in the electricity wing, either due to force of circumstances or due to voluntary preferment, he stands on a better or higher footing or in a more advantageous position than his counterparts in the general wing. It is not the case of the respondents that the ministerial staff in the electricity wing perform more onerous or more exacting duties than the ministerial staff in the general wing.*** *It therefore follows that all sections of the ministerial staff should be treated alike and all of them held entitled to the same scales of pay for the work of equal nature done by them." (para 20) (emphasis added)*

30. In **Federation of All India Customs and Central excise Stenographers and Ors. v. Union of India and Ors., (1988) 3 SCC 91**, it was held :

"there may be qualitative difference as regards reliability and responsibility justifying different pay scale. Functions may be the same but the responsibilities make a difference. *One cannot deny that* ***often the difference is a mater of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service.*** *So long as such value judgment is made bonafide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination"* (Para 7) (emphasis added)

31. It was further observed that-

"the same ***amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less,*** *it varies from nature and culture of employment,"* (para 11)

(emphasis added)

32. In **Jaipal and Ors. v. State of Haryana and Ors., (1988) 3 SCC 354**, Court held :

*"The doctrine of **equal work equal pay would apply on the premise of similar work, but it does not mean that there should be complete identity in all respects. If the two classes of persons do same work under the same employer, with similar responsibility, under similar working conditions the doctrine of 'equal work equal pay would apply** and It would not be open to the State to discriminate one class with the other in paying salary. The State is under a constitutional obligation to ensure that equal pay is paid for equal work."* (para 6) (emphasis added)

33. In State of U.P. and Ors. v. J.P. Chaurasia and Ors. (1989)1 SCC 121, Court while considering justification of two pay scales of Bench Secretaries of High Court, observed :

"Entitlement to the pay scale similar would not depend upon either the nature of work or volume of work done by Bench Secretaries. Primarily it requires among others, evaluation of duties and responsibilities of the respective posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The quantity of work may be the same, but quality may be different that cannot be determined by relying upon averments in affidavits of Interested parties. *The equation of posts or equation of pay must be left to the executive Government. It must be determined by expert bodies like Pay commission. They would be the best judge to evaluate the nature of duties and responsibilities of posts. If there is any such determination by a Commission or Committee, the court should normally accept it. The Court should not try to linker with such equivalence unless it is shown that it was made with extraneous consideration"* (para 18) (emphasis added)

34. In **Grih Kalyan Kendra Workers' Union v. Union of India and Ors. JT 1991 (1) SC 60**, it was observed :

*"the **question of parity in pay scale cannot be determined by applying mathematical** formula. It **depends upon several factors namely nature of work, performance of duties, qualifications, the quality of work performed by them.** It is also permissible to have classification in services based on **hierarchy of posts, pay scale, value of work and responsibility and experience.** The classification must, however, have a reasonable relation to the object sought to be achieved."* (para 7) (emphasis added)

35. In **Jaghnath v. Union of India and Anr., AIR 1992 SC 126,** Court, following its earlier judgments, observed:

"classification of officers into two grades with different, scales of pay based either on academic qualification or experience, or length of service is sustainable. Apart from that, higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is very common in career service. There is selection grade for District Judges. There is senior time scute in Indian Administrative Service. There is suppertime scale in other like services. The entitlement to these higher

pay scales depends upon seniority-cum-merit or merit-cum-seniority. The differentiation so made in the same cadre will not amount to discrimination. ***The classification based on experience is a reasonable classification. It has a rational nexus with the object thereof.*** *To hold otherwise, it would be detrimental to the Interest of the service itself."* (para 7)

36. In **Secretary, Finance Department and others Vs. West Bengal Registration Service Association and others, AIR 1992 SC 1203** Court held that equation of posts and determination of pay scales is the primary function of Executive and not the Judiciary. Therefore, ordinarily Courts will not enter upon the task of job evaluation which is generally left to expert bodies like the Pay Commissions, etc. It does not mean that Court has no jurisdiction and the aggrieved employees have no remedy if they are unjustly treated by arbitrary State action or inaction. Courts must, however, realise that job evaluation is both a difficult and time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake, sometimes on account of want of relevant data and scales for evaluating performance of different groups of employees. This would call for a constant study of the external comparisons and internal relativities on account of the changing nature of job requirements. Some of the factors which have to be kept in view for job evaluation may include (i) the work programme of his department, (ii) the nature of contribution expected of him (iii) the extent of his responsibility and accountability in the discharge of his diverse duties and functions, (iv) the extent and nature of freedoms/limitations available or imposed on him in the discharge of his duties, (v) the extent of powers vested in him, (vi) the extent of his dependence on superiors for the exercise of his powers,, (vii) the need to coordinate with other departments, etc.

37. Court further said that a pay structure is evolved normally keeping in mind several factors, like, (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. The list is not exhaustive but illustrative.

38. In **State of Madhya Pradesh and Anr. v. Pramod Bhartiya and Ors. (1993) 1 SCC 539,** Court held:

"It would he evident from this definition that the ***stress is upon the similarity of skill, effort and responsibility when performed under similar conditions.*** *Further, as pointed out by Mukharji, J. (as he then was) in Federation of All India Customs and Excise Stenographers the* ***quality of work may vary from post to post.*** *It may vary from institution to institution We cannot ignore or overlook this reality.* ***It is not a matter of assumption but one of proof.*** *The respondents (original petitioners) have failed to establish that their duties, responsibilities and functions are similar to those of the non-technical lecturers in Technical Colleges. They have also failed to establish that the distinction between their*

scale of pay and that of non technical lecturers working in Technical Schools is either irrational and that it has no basis, or that it is vitiated by mala fides, either in law or in fact (see the approach adopted in Federation case). ***It must be remembered that since the plea of equal pay for equal work has to be examined with reference to Article 14. The burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be This burden the original petitioners (respondents herein) have failed to discharge."*** (para 13) (emphasis added)

39. In **Shyam Babu Verma and Ors. v. Union of India and Ors. (1994) 2 SCC 521**, Court observed :

"the principle of equal pay for equal work should not be applied in a mechanical or casual manner. Inequality of the men in different groups excludes applicability of the principle of equal pay for equal work to them. Unless it is established that there is no reasonable basis to treat them separately in matters of payment of wages or salary, the Court should not Interfere holding different pay scale as discriminatory"(para 9)

40. In **Sher Singh and Ors. v. Union of India and Ors. (1995)6 SCC 515**, Court rejected the claim of Library staff of Delhi University and its Constituent Colleges regarding parity in pay with the teaching staff on the ground that the nature of duties, work load, experience and responsibilities of the two sets of employees in question are totally different from each other.

41. In **Union of India and Ors. v. Delhi Judicial Service Assn. and Anr. JT 1995 (2) SC 578,** Court, reversing the judgment of High Court, which allowed same scale of pay to all officers of Higher Judicial Services, held :

"We think that the ***high Court was not right in giving selection grade scale of pay to all the officers on the principle of equal pay for equal work. If that be so the Dist. Munsif (Junior civil Judge, Junior subordinate Judge) etc. lowest officer in judicial hierarchy is entitled to the pay of the Senior most super-time scale district Judge as all of them are discharging judicial duty.*** *The marginal difference principle also is equally inappropriate. Similarly of posts or scale of pay in different services are not relevant. The nature of the duty, nature of the responsibility and degree of accountability etc. are relevant and germane considerations Grant of selection grade, suppertime scale etc. would be akin to a promotion. The result of the impugned direction would wipe out the distinction between the time Scale and Selection grade officers. The learned Counsel for the Union of India, pursuant to our order, has placed before us the service conditions prevailing in the Higher Judicial Services in other States in the country. Except Gujrat which had wiped out the distinction after the judgment in all India Judges Association's case, all other States maintained the distinction between the Grade I and tirade II Higher Judicial offices or Time Scale and Selection Grade or Suppertime scales etc. In fact this distinction is absolutely necessary to inculcate hard work, to maintain character, to improve efficiency, to encourage honesty and integrity among the officers and accountability. Such distinctions would not only be necessary in the Higher Judicial Service but also,*

indeed in all services under the State and at every stage." (para 5)

(emphasis added)

42. In **Sita Devi and Ors. v. State of Haryana and Ors. JT 1996 (7 SC 438**, Court upheld different pay scales on the basis of qualification, relying on its earlier judgments in **The State of Mysore and Anr. v. P. Narasinga Rao, AIR 1968 SC 349; State of Jammu and Kashmir v. Triloki Nath Khosa, AIR 1974 SC 1 and P. Murugesan and Ors. v. State of Tamil Nadu, 1993 (2) SCC 340.**

43. In **State of Haryana v. Jasmer Singh and Ors. AIR 1997 SC 1788:1997 (1) AWC2.145 (SC)(NOC),** Court justified different pay scales, on various factors, observing as under:

*"It is therefore, clear that the quality of work performed by different sets of persons holding different Jobs will have to be evaluated There may be differences in educational or technical qualifications which may have a bearing on the stills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify differences in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that good performance can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a hearing on efficient performance in a job. This Court has repeatedly observed that evaluation of such jobs for the purposes of pay scale must be lef*t to expert bodies and, unless there are any mala fides, its evaluation should be accepted." (para 8)

44. In **Garhwal Jal Sansthan Karmachari Union and Anr. v. State of U.P. and Ors. (1997) SCC 24,** Court, in para 8 of the Judgment, rejected claim of pay parity, between employees of Jal Nigam and Jal Sansthan, on the ground of qualitative difference in the duties, function and responsibilities in the two organizations.

45. Considering difference in mode of recruitment and different service rules, in **State of Rajasthan v. Kunji Raman, AIR 1997 SC 693**, the Court upheld different pay scale for work charged employees and those employed in regular establishment.

46. In **Union of India and Ors. v. Pradip Kumar Dey (2000) 8 SCC 580 : 2001 (1) AWC 176(SC),** question of parity of pay scale of Naik, Radio Operator in CRPF and employees working as Radio Operator in Directorate of Coordination Police Wireless came up for consideration on the principle of equal pay for equal work and the Court negated parity, observing that different pay scale prescribed taking into account hierarchy in service and other relevant factors, cannot be interfered, as it would disturb entire chain of hierarchy.

47. In **State of Orissa and Ors. v. Balaram Sahu and Ors. (2003) 1 SCC 250 : 2003 (1) AWC 273 (SC),** Court observed as under:

"Though "equal pay for equal work" is considered to be a concomitant of Article 14 as much as "equal pay for unequal work" will also be a negation of

that right, equal pay would depend upon not only the nature or the volume of work, tint also on the qualitative difference as regards reliability and responsibility as well and though the functions may be the same, but the responsibilities do make a real and substantial difference." (para 11)

48. In **State of Haryana and Anr. v. Haryana Civil Secretariat Personal Staff Association, (2002) 6 SCC 72 : 2002 (3) AWC 2477 (SC),** Court held, in para 10, as under:-

"It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. ***Fixation of pay and determination of parity in duties and responsibilities is a complex matter*** *which is for the executive to discharge, While taking a decision in the matter, several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to hear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the Slate Government is also a relevant factor for consideration by the State Government. In the* ***context of the complex nature of issues involved, the far-reaching consequences of a decision in the matter and its impact on the administration of the State Government, courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity.*** *That is not to say that the matter is not Justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter..."* (Para 10) (emphasis added)

49. In **State Bank of India and Anr. v. M.R. Ganesh Babu and Ors. (2002) 4 SCC 556,** Court observed in para 16 as under:

"The principle of equal pay for equal work has been considered and applied in may reported decisions of this Court. The principle has been adequately explained and crystallized and sufficiently reiterated in a catena of decisions of this Court. ***It is well settled that equal pay must depend upon the nature of work done. It cannot he judged by the mere volume of work; there may be qualitative difference as regards reliability and responsibility Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service.*** *So long as value judgment is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. The principle is not always easy to apply as there are inherent difficulties in comparing and evaluating the work done by different persons in different organizations, or even in the same organization.* ***Differentiation in pay***

scales of persons holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. *The judgment of administrative authorities concerning the responsibilities which attach to the post, and the degree of reliability expected of an incumbent, would be a value judgment of the authorities concerned which, if arrived at bona fide, reasonably and rationally, was not open to interference by the court."* (emphasis added)

50. The difference in pay scale and wages for work charge employees and those engaged in regular establishment has been upheld in State of **Punjab and others Vs. Gurdeep Kumar Uppal and others, AIR 2001 SC 2691, State of Punjab and others Vs. Ishar Singh and others, AIR 2002 SC 2422** and **Punjab State Electricity Board and others Vs. Jagjiwan Ram and others, JT 2009 (3) SC 400.**

51. In **Deb Narayan Shyam and others Vs. State of West Bengal and others, 2005(2) SCC 286,** the Court summarized as to when doctrine of equal pay for equal work would apply in the light of exposition of law laid down in catena of its earlier decisions and said:

*"Large number of decisions have been cited before us with regard to the principle of 'equal pay for equal work' by both sides. We need not deal with the said decisions to overburden this judgment. Suffice it to say that the principle is settled t****hat if the two categories of posts perform the same duties and function and carry the same qualification, then there should not be any distinction in pay scale between the two categories of posts similarly situated. But when they are different and perform different duties and qualifications for recruitment being different, then they cannot be said to be equated so as to qualify for equal pay for equal work."*** (emphasis added)

52. The above dictum has been followed in **Union of India and Another Vs. Mahajabeen Akhtar, AIR 2008 SC 435.**

53. In **Haryana State Electricity Board and another Vs. Gulshan Lal and others, JT 2009(9) SC 95,** Court observed that same or similar nature of work, by itself, does not entitle an employee to invoke doctrine of equal pay for equal work. Qualification, experience and other factors would be relevant for the said purpose.

54. A three Judge Bench of Supreme Court in **State of Haryana and others Vs. Charanjit Singh and others, AIR 2006 SC 161** said that the principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course the qualities and characteristics must have a reasonable relation to the object sought to be achieved. In service matters merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay

differentiation. The very fact that a person has not gone through the process of recruitment in certain cases make a difference. If the the educational qualifications are different then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justify a difference in pay scales. The earlier nomenclature designating a person as a carpenter or a craftsman is not enough to come to the conclusion that he was doing the same work as another carpenter or craftsmen in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by mere volume of work. There may be qualitative difference as regards reliability and responsibility.

55. The above view has been followed in **Union of India and others Vs. Dineshan K. K., AIR 2008 SC 1026, Haryana State Minor Irrigation Tubewells Corporation and others Vs. G.S. Uppal and others, AIR 2008 SC 2152** and **Food Corporation of India and others Vs. Ashish Kumar Ganguli and others, 2009(8) SCALE 218.**

56. Recently in **State of Punjab and another Vs. Surjit Singh and others, 2009(9) SCC 514,** after referring to its earlier judgments, the Court has summarized dictum, in the following manner:

"In our opinion fixing pay scales by courts by applying the principle of equal pay for equal work upsets the high constitutional principle of separation of powers between the three organs of the State. Realising this, ***this Court has in recent years avoided applying the principle of equal pay for equal work, unless there is complete and wholesale identity between the two groups*** *(and there too the matter should be sent for examination by an Expert Committee appointed by the government instead of the court itself granting higher pay)." (emphasis added)*

57. It further says that grant of benefit of doctrine of "equal pay for equal work" depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity. The Apex Court in **Surjit Singh (supra)** also stressed upon that the principle has undergone a sea change and the matter should be examined strictly on the basis of the pleadings and proof available before the Court to find out whether the distinction between two based on any relevant factor or not. The onus to prove lie on the person who alleges discrimination and claims enforcement of the doctrine of equal pay for equal work.

58. In **State of Punjab Vs. Surjit Singh (supra),** the Court said that Article 14 permits reasonable classification

based on qualities or characteristics of persons recruited and grouped together, as against those, who are left out, of course, qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay. A mere nomenclature designating a person say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of 'equal pay for equal work' requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. A party who claims equal pay for equal work has to make necessary averments and prove that all things are equal.

59. In **State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009(13) SCC 635** the Court said that it is well settled that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated. Similarity in designation or nature or equation of work is not determinative for equality in the matter of pay scales. The Court has to consider the factors like the source and mode of recruitment/appointment, qualifications, nature of work, the value thereof, responsibility, reliability, experience, confidentiality, functional need, etc. In other words the equality clause can be invoked in the matter of pay scale only when there is a whole sale identity between the two posts.

60. In **A.K.Behra Vs. Union of India & Anr., JT 2010 (5) SC 290,** the Court, in paras 84 and 85, said:

"84. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.

85. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive."

61. In **State of Rajasthan & Ors. Vs. Daya Lal & Ors., 2011 (2) SCC 429**, the Court culled down following principles:

"Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must

arise under a contract or under a statute."

62. This decision has been followed in **Union Territory Administration, Chandigarh and Ors. v. Mrs. Manju Mathur and Anr., JT 2011 (3) SC 179.**

63. In **Hukam Chand Gupta vs. Director General, I.C.A.R. and Ors. AIR 2013 SC 547,** the Court observed that in order to attract doctrine of "equal pay for equal work", assessment of the nature and quality of duties performed and responsibilities shouldered by the incumbents is necessary. Even if, the two persons are working on two posts having same nomenclature, it would not lead to the necessary inference that the posts are identical in every manner.

64. Recently also the above principles, discussed in detail, have been reiterated and followed in **S. H. Baig and Ors. vs. The State of Madhya Pradesh and Ors., (2018)10SCC621; General Manager, Electrical Rengali Hydro Electric Project, Orissa and Ors. vs. Giridhari Sahu and Ors., (2019)10SCC674;** and**, Steel Authority of India Ltd. and Ors. vs. Jaggu and Ors., (2019)7SCC658.**

65. Applying above principles to the facts of present case, it is not in dispute that size of different Mandi Samities in different areas are different having different quantity of transactions dealing different strength of people, quantum of revenue is largely differs and, therefore, degree and responsibility also differs based on size and structure of Mandi Samiti. Therefore, categorization of Mandi Samities, per se, if not initially bad, the offers posted looking to size of Mandi Samiti concerned and for that purpose categorizing in different ways per se cannot be said to be illegal, arbitrary, unreasonable or irrational.

66. When the question of parity in work, performance and responsibility of are seen in the light of above exposition of law, atleast we have no hesitation in holding that there cannot be any parity in the matter of pay scale as all the four posts cannot be equated and atleast nothing has been brought on record to show that the same are similar in all respect. 67. In view of above, relief prayed by petitioners based on principle of equal pay for equal work to claim parity in the matter of pay scale cannot be granted.

67. In the result, the writ petition lacks merit. Dismissed. Interim order, if any, stands vacated.

(2020)08ILR A154
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No. 1745 of 2020

Rajiv Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh, Sri Arvind Kumar

Counsel for the Respondents:
C.S.C., Sri R.K. Ojha, Sri Krishna Pahal, Sri Rahul Chaudhary, Sri Tejasvi Mishra

A. Civil Law - U.P. State Universities Act, 1973 – Section 2(13) – Statutes of Meerut

University – Clause 13.05 – Affiliation of the Colleges – Prior Permission of Vice-Chancellor – Observance of Clause 13.05 would be necessary or else the application for affiliation to the University itself would not be considered – Every college has necessarily to ensure its compliance – Neither sub-clauses (a) to (d) specified in Clause 13.05 can be altered even with the permission of the Vice Chancellor in view of use of the expression 'shall' occurring in Clause 13.05 nor the Vice Chancellor can be denuded of any jurisdiction in the matter relating to change in the constitution of management of an affiliated college (Para 14 and 19)

Held –

23. In light of discussions and deliberations made above, it is held that obtaining of prior permission from the Vice Chancellor before affecting any change in constitution of management of an affiliated college would be impermissible in law. Consequently, the amendment made in the constitution of management on 11.11.2016 is not liable to be sustained and is quashed.

B. Interpretation of Statute – Expression 'Shall' used in statute – Meaning – Directory or Mandatory – Clause 13.05 of First Statutes provides that constitution of management of every college shall provide for matters specified in sub clauses (a) to (d) – As is clear from language of Clause 13.05 of Statutes constitution of every college shall incorporate the conditions as are enumerated under sub clauses (a) (b) (c) (cc) & (d) and since the word 'shall' has been used, therefore, it is mandatory and not directory – These conditions are to be there in the constitution of the management and they obviously cannot be amended or deleted. (Para 16 and 18)

Writ Petition allowed (E-1)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Short question that requires consideration in this case is as to whether the expression "the said constitution' occurring in Clause 13.05 (e) of First Statutes of Meerut University requires prior permission of Vice-Chancellor before incorporating any change in the constitution of management of every college or is it restricted to Clause 13.05 (a) to (d) alone? Learned Senior Counsels for the rival parties submit that above being a pure question of law can be decided by this Court without formally calling of counter affidavit.

2. Kisan Degree College, Simbhaoli, (hereinafter referred to as the "College') is college affiliated to Chaudhary Charan Singh University, Meerut (hereinafter referred to as the "University). The University is regulated by the provisions of Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as the "Act of 1973'). Section 2(13) of the Act of 1973 defines management in following terms:-

"2(13) *'management'* in relation to an affiliated or associated college, means the managing committee or other body charged with managing the affairs of that college and recognised as such by the University :

[Provided that in relation to any such college maintained by a Municipal Board or a Nagar Mahapalika, the expression *'management'* means the education committee of such Board or Mahapalika as the case may be and the expression 'Head of the *Management'* means the Chairman of such committee;]"

3. Management of College is regulated by "Bye-laws of Kisan Degree College, Simbhaoli' (hereinafter referred to as the "bye-laws'). Clause 4 of the bye-

laws defines committee of management in following terms:-

"Committee of Management: The authority to manage and conduct the affairs of the college shall vest in the Managing Committee in accordance with the provisions of the bye-law of this college and the statutes and regulations of the Agra University Hand Book for affiliated colleges."

4. Clause 5 of the bye-laws provides for constitution of committee of management. As per bye-laws, committee of management shall have fifteen members in all including the office-bearers, ex-officio and ordinary members, who are all defined in the bye-laws. Clause 6(2)(a) of the bye laws would be relevant for the present purposes and is extracted hereinafter:-

"Seven members to be elected by the delegates of seven constituencies as defined by the Cane Development Union, Simbhaoli Ltd."

5. The bye-laws as it originally stood are alleged to have been amended on 11.11.2016, and Clause 6(2)(a) stands substituted with a new clause providing for "eleven members to be elected by the general body from its members'. Sub-Clause (5) is also added in Clause 5(b) of the bye-laws, thereby including a category of life members who deposit Rs. 1000/- with the college, and duly received by Principal and Secretary of managing committee. These changes, apart from others in bye-laws of college are the bone of contention between parties.

6. According to petitioner, who claims to be a delegate from Co-operative Cane Development Union Simbhaoli and thereby a member of General Body of College, the amendment is invalid as procedure contemplated in Clause 25 of bye-laws read with other clauses, that specifies procedure for any modification therein, have not been followed. It is also urged that aforesaid amendment in bye-laws is also invalid as Vice-Chancellor has not granted prior permission before making such changes in the constitution of management of college concerned. Reliance is placed upon Clause 13.05 of Statutes of University, which is reproduced hereinafter:-

"13.05. The constitution of the Management of every college shall provide that -

(a) the Principal of the College shall be ex-officio member of the Management;

(b) twenty five per centum of the members of the Management, are teachers (including the Principal);

(c) the teachers (excluding the Principal) referred to in clause (b) are such members for a period of one year by rotation in order of seniority;

(cc) one member of the Management shall be from the non-teaching class III employees of the College selected for a period of one year by rotation in order of seniority;

(d) subject to the provisions of clause (c) no two members of the Management shall be related to each other within the meaning of the Explanation to Section 20;

(e) no change in the said constitution shall be made except with

the prior permission of the Vice-Chancellor;

(f) if any question arises whether any person has been duly chose, as, or is entitled to be a member or office-bearer of the Management or whether the Management is legally constituted, the decision of the Vice-Chancellor shall be final;

7. (g) the college is prepared to place before any person or persons authorised by the Vice-Chancellor or before the Panel of Inspectors appointed by the University all original documents pertaining to income and expenditure of the college including the accounts of the Society. Trust, Board or Parent body under which may be operating.

(h) the income from the Endowment Funds referred to in Statute 13.06 shall be available for the maintenance of the College."

8. The amendment in bye-laws appear to have been acknowledged by the Deputy Registrar, Firms, Societies & Chits, Meerut. These amended bye-laws also appear to have been followed in the last elections conducted to constitute committee of management of the college. Petitioner has approached this Court for issuing necessary directions to authorities to act as per Statutes and has also challenged the amendments made in the bye-laws as same are alleged to have been made without following the procedure contemplated under Clause 13.05 (e) of the First Statutes of University.

9. I have heard Sri G.K. Singh, learned Senior Counsel assisted by Sri Arvind Kumar for petitioner, Sri R.K. Ojha, learned Senior Counsel assisted by Sri Rahul Chaudhary for respondent nos. 4 & 5. Sri Tejasvi Mishra holding brief of Sri Krishan Pahal has been heard for the University while Standing Counsel has been heard for State authorities. With the consent of learned counsel for parties and also as per the provisions of Rule of Court, this writ petition is being disposed of at admission stage itself.

10. Sri Tejasvi Mishra holding brief of Sri Krishan Pahal on behalf of the University contends that expression 'the said constitution' occurring in clause 13.05 of First Statutes of Meerut University refers to the constitution of the management of college and is not restricted to sub - clauses (a) to (d) thereof. It is submitted that Vice-Chancellor being the Principal Executive and Academic Officer of the University exercises general supervision and control over affairs of the University and a narrow interpretation is not required to be given to the expression "the said constitution" for the purposes of obtaining prior permission of the Vice-Chancellor. Sri Mishra further refers to sub clause (f) of Statute 13.05 to submit that power of the Vice Chancellor under said statute includes power to decide as to whether any person has been duly chosen as, or is entitled to be a member or office-bearer of the management or whether the Management is legally constituted. The Act of 1973 read with First Statues clearly contemplates vesting of authority in the Vice-Chancellor over its affiliated/constituent colleges and a narrow construction suggested by the private respondents would go against the statutory scheme, itself.

11. Sri R.K. Ojha appearing for private respondents however submits that Clause 13.05(e) has to be given a literal interpretation and the concern of Vice-Chancellor must be restricted to the

stipulations made in sub clauses (a) to (d) of Statute 13.05. Learned Senior Counsel with reference to dictionary meaning of term 'said' states that it refers to past tense and past participle of 'say' and would be synonymous to the expression 'aforesaid'. It is thus contended that Statute 13.05 (e) specifically refers to sub clauses (a) to (d) and a composite reading of the Statute makes it amply clear that requirement of prior permission from Vice Chancellor is restricted to sub clauses (a) to (d) only.

12. It is in the backdrop of above submissions that matter needs to be examined by this Court. Before proceeding further it would be worth noticing that import of Clause 13.05 of First Statutes of Meerut University fell for consideration before this Court in a bunch of Special Appeals with leading Special Appeal No. 237 of 2015, decided on 24.11.2016. The Division Bench noticed the issue, but refused to answer it and left it open to be decided in an appropriate case. The issue is, therefore, now required to be examined by this Court.

13. It is undisputed that no prior permission of the Vice Chancellor has been obtained before incorporating the disputed amendment in the bye-laws of college. Learned Senior Counsel for petitioner points out that Educational Society, Simbhaoli, Meerut had initially established two educational institutions namely Raghubir Singh Degree College affiliated to University and Raghubir Singh Kisan Inter College recognized under U.P. Intermediate Education Act, 1921. With passage of time and on account of various developments Raghubir Singh Degree College was renamed as Kisan Degree College, Simbhaoli i.e. the College.

14. Sub clause (e) of Statute 13.05 provides that no change in "the said constitution' shall be made except with prior permission of Vice Chancellor. Before that, Statute 13.04 provides that before an application for affiliation is placed before Executive Council the Vice Chancellor must be satisfied that provisions of Statute 13.05, 13.06 and 13.07 have been complied with. From the scheme contained in the Statute it is clearly discernible that observance of Clause 13.05 would be necessary or else the application for affiliation to the University itself would not be considered. The observance of the conditions laid down in Statute 13.05 are mandatory and every college has necessarily to ensure its compliance.

15. By virtue of Section 2(13) of Act 1973, read with First Statutes it is mandatory for every College desiring affiliation with the University to have a management for governance of the College. The College, once affiliated to University is virtually an extension of the University itself inasmuch as students of affiliated college are given degrees by the University itself. The University, therefore, is vitally interested in governance of the College as per Act 1973 and the Statutes and Ordinances framed thereunder. It is for this reason that Vice Chancellor is conferred with the authority under the Act to recognise management of affiliated colleges. The manner in which management of an affiliated college shall be run is also of relevance for the University. It is for these reasons that composition of management has to be clearly provided for. Clause 13.05 of the First Statutes of the University accordingly refers to the constitution of management.

16. Clause 13.05 of First Statutes provides that constitution of management of every college shall provide for matters specified in sub clauses (a) to (d). The use of expression "shall" clearly indicates that stipulations referred to in sub clauses (a) to (d) must exist and ordinarily any change therein would not be permissible so long as the Statutes are itself not amended.

17. The constitution of management, however, is not specified in the Statutes. The constitution of management of an affiliated college will have to have various other clauses/conditions for making the management of affiliated college functional in addition to sub-clauses (a) to (d). So far as other clauses/stipulations in the constitution of management are concerned the college will have freedom in its formulation. It is in this context that Clause 13.05 (e) will have to be examined.

18. As is clear from language of Clause 13.05 of Statutes constitution of every college shall incorporate the conditions as are enumerated under sub clauses (a) (b) (c) (cc) & (d) and since the word shall has been used, therefore, it is mandatory and not directory. These conditions are to be there in the constitution of the management and they obviously cannot be amended or deleted.

19. Sub-clause (e) of Statute 13.05 stipulates that no change in constitution of management shall be made except with prior permission of the Vice Chancellor. In case argument of Sri Ojha is accepted that aforesaid statute refers to sub-clauses (a) to (d) only then it would mean that sub-clauses (a) to (d) can also be changed with the prior permission of the Vice Chancellor and, the Vice Chancellor will have no role to play in change of other clauses contained in the constitution of management. Both the premises would go contrary to the scheme and stipulations under Act of 1973 and the statutes framed thereunder. Neither sub-clauses (a) to (d) specified in Clause 13.05 can be altered even with the permission of the Vice Chancellor in view of use of the expression "shall" occurring in Clause 13.05 nor the Vice Chancellor can be denuded of any jurisdiction in the matter relating to change in the constitution of management of an affiliated college, being the Principal Executive Officer of the University the jurisdiction of Vice Chancellor to have a say in the change of constitution of management cannot be doubted.

20. Once it is found that the constitution of management is not restricted to the stipulations contained in sub-clauses (a) to (d) of Statute 13.05 then, the requirement of obtaining permission before making amendment in the constitution of management will have to be interpreted as referring to any clause in the constitution of management and not refer to sub clauses (a) to (d) of Statute 13.05.

21. It further transpires that in 1993 also an attempt was made to change constitution of managing committee and the Vice Chancellor vide his order dated 30th March, 2017 found the amendment to be bad for the reason that no prior permission was obtained from the Vice Chancellor. It is contended that this order has attained finality with dismissal of the writ petition filed against it in default.

22. It further appears that the Vice Chancellor initially stayed the elections, but without ensuring compliance to Statute 13.05(e) has withdrawn his earlier orders restricting the holding of elections. The Vice Chancellor does not appear to have examined the implication of non observance of clause 13.05(e) while passing the subsequent order.

23. In light of discussions and deliberations made above, it is held that obtaining of prior permission from the Vice Chancellor before affecting any change in constitution of management of an affiliated college would be impermissible in law. Consequently, the amendment made in the constitution of management on 11.11.2016 is not liable to be sustained and is quashed. The Vice Chancellor, therefore, shall pass necessary consequential orders as may be warranted in law within a period of two months from the date of presentation of certified copy of this order.

24. Writ petition is allowed. No order is passed as to costs.

(2020)08ILR A160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ-C No. 24484 of 2019
Connected with
Writ -C No. 26050 of 2019 and other cases

Ansar Ali ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhitab Kumar Tiwari

Counsel for the Respondents:
A.S.G.I., Sri Ishan Shishu, Sri Vikas Budhwar

A. Constitution of India – Article 14 – Natural Justice – Non-speaking and cryptic order – Legality – In order to secure fairness and to prevent miscarriage of justice, the authorities discharging function should follow very accurate and proceedings conforming to the norms of natural justice – An order without well founded reason is like skeleton which is neither identifiable for want of a body cover nor, enforceable for want of character it must have in it essentially – Held, the orders passed by the authorities are not only non-speaking unreasoned and cryptic one but also cannot otherwise pass test of Article 14 of the Constitution. (Para 28, 29 and 33)

Writ Petition allowed (E-1)

Cases relied on :-

1. Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs Jagdish Sharan Varshney & ors.(2009) 4 SCC 240

2. Punjab State Electricity Board & ors. Vs Jit Singh (2009) 13 SCC 118

3. Dharampal Satyapal Ltd. Vs. Deputy commissioner of Central Excise, Gauhati & ors.(2015) 8 SCC 519

4. Rashmi Metaliks Limited & anr. Vs Kolkata Metropolitan Development Authority & ors., (2013) 10 SCC 95

5. T.P.Senkumar. IPS Vs UOI 7& ors., (2017) 6 SCC 801

6. Mangalam Organics Ltd. Vs U.O.I. (2017) 7 SCC 221

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

1. Heard Sri Ravi Kant, learned Senior Advocate assisted by Sri Tarun Agarwal, learned Advocate, Sri A.K.Tiwari, Sri Santosh Dwivedi, Sri S.K.Sharma, Sri Dharmendra Singh and Sri Ashish Malhotra, learned counsels for the petitioners and Sri Vikas Budhwar, learned Advocate for the respondent Corporation and learned counsel appearing on behalf of the Union of India.

2. All these petitions since raise common question of law, have been clubbed together and are being heard and decided by this common judgment and order.

3. All the petitioners in their respective petitions have raised grievance against the order passed by the authority of Petroleum Corporation holding their candidature to be ineligible after field verification of the land and placing their candidature in category/ Group-3 which according to the guidelines are to be considered subject to condition that the other competing candidates do not qualify in first two categories called Group 1 and Group 2.

4. The basic grievance raised by the petitioners is that the order impugned by which their candidature has come to be rejected in the first two categories holding them ineligible, is absolutely non- speaking and cryptic order as ground assigned is Land Evaluation Committee visited the site and found the same not meet the required norms.

5. According to learned Advocates appearing on behalf of the petitioners passing of such an order having adverse consequences upon the interest and rights of the petitioners as competing contender, is arbitrary and hit by Article 14 of the Constitution. It is also argued that even within the legitimate sphere of authority taking administrative decision, the decision must reflect consideration of claims on merits. In a nutshell, the action of the respondent is sought to be judicially reviewed on the ground of lack of just and fair play at the end of the authorities while evaluating the candidature of the petitioners in connection with respective advertisements for allotment of retail outlet dealership by oil companies.

6. Before we proceed to examine the legality of the action assailed in this bunch of writ petitions, it is necessary to refer to the facts of the case in order to appreciate the controversy on facts. Since in all the writ petitions, more or less facts are identical, for convenience we are referring to the facts as detailed out in Writ Petition No. 24484 of 2019 filed by one Ansar Ali. We have further reasons to refer to the facts of this case because learned counsel for the respondents Sri Budhwar has placed instructions obtained by him in respect of this case only.

7. Respondent Hindustan Petroleum Corporation Ltd. (for short "Petroleum Corporation") issued an advertisement on 25.11.2018 inviting online applications for retail outlet dealership at a site between Kilometer Stone 26 and 29 at Meerut-Shamli Raod , National Highway 709A (Old SH-82) in district Meerut in the open category. Last date for submission of form was 24th December, 2018.

8. Out of three locations for which applications were invited under the above advertisement, the petitioner made an application for the site at serial no. 1538

of the advertisement for which selection was to be done by way of draw of lots and the total area of the land required was 1575 square meters with a frontage of 35 metres wide and depth of 45 meters. While petitioner applied online by way of online submission of application, the petitioner offered plot no. 1117 situate at village Baparasi, Pargana, Tehsil and District Meerut with area of 1575 square meters and with 35 meters and with a 35 meters wide frontage and 45 meters in depth as the said land fell on the location for which advertisement was made.

9. The land offered by the petitioner was obtained by him on the basis of a registered lease deed for a period of 20 years executed by original tenure holder, Kartar Singh on 24.12.2018 itself, copy whereof has been filed as Annexure 3 to the writ petition.

10. In the draw of lots that was held as per scheduled on 11th February,, 2019, the petitioner came to be selected and the Corporation intimated selection vide letter dated 16th February, 2019 and the respondent Corporation called it out to be preliminary intimation of the selection for retail outlet dealership. The letter is reproduced hereunder.

"Ref: 15457034924695
Date: 16-Feb-2019
To,
Mr. ANSAR ALI
Address: VILLAGE KALCHHINA,
TEHSIL MODINAGAR,
U.P.
District :GHAZIABAD
State:UTTAR PRADESH
Pin Code: 245304

Dear Sir,

SUBJECT: RESULT OF DRAW OF LOTS (FOR RETAIL OUTLET DEALERSHIP)

***Name of Location** : BETWEEN KM STONE 26 TO 20 ON MEERUT SHAMLI ROAD NH 709A (OLD SH-82), Category OPEN*

Name of District: MEERUT, State UTTAR PRADESH

We are pleased to inform you that based on DRAW OF LOTS for selection of Retail Outlet dealership for the above location held on 11-Feb-2019 at the venue BROADWAY INN, 1/9, GARH ROADH, MEERUT (UP) 250 004 (CONTACT NO. 0121-4200300 at 09:30 AM you have been declared as selected.

This is only a preliminary intimation towards your selection for Retail Outlet dealership. However, the award of the dealership is subject to compliance of terms and conditions of the Corporation in this regard.

Thanking you.
Yours faithfully
For Hindustan Petroleum Corporation Ltd.
SANJAY NAGPAL
Heard of Regional Office
Meerut Retail Regional Office,
Hindustan Petroleum Corporation Limited,
495/1/2Nd Floor,
Rpg Tower,
University Road,
Mangal Pandey Nagar,
Meerut-250004
0121-3323915,9412221541, 941222544"

11. Yet another letter issued in the same date further required to the petitioner to remit an amount of Rs. 50,000/- towards initial security and to

supply his documents within 10 days at the address mentioned in the letter. The main document regarding which controversy has arisen relates to item no. 4,5 and 6, however, for convenience we are reproducing the entire letter dated 16th February, 2019.

Ref:15457034924695
Date: 16th Feb-2019
To,
Mr. ANSAR ALI
Address:VILLAGE KALCHHINA,
TEHSIL MODINAGAR,
DISTRICT GHAZIABAD,
U.P.
District: GHAZIABAD
State:UTTAR PRADESH
Pin Code: 245304

Subject: Application for award of RO dealership at BETWEEN KM STONE 26 TO 29 ON MEERUT-SHAMLI ROAD NH709A (OLD SH-82)District MEERUT Under OPEN category Advertised on 25-Nov-2018

Dear Sir,

Please refer to your online application reference number 15457034924695 submitted for award of the subject RO dealership.

Please also refer to the Brochure on Retail Outlet dealer selection application for the subject location and available on the portal https://www. Petrolpumdealerchayan.in/.

We are pleased to inform you that you have been declared as successful candidate in the DRAW OF LOTS conducted on 11-Feb-2019 for selection of RO dealership at the subject location.

You are requested to remit online Rs. 50000.00, towards initial Security Deposit (To pay click here or login to https://www. Petrolpumdealerchayan.in/.) and submit the set of documents as specified below within 10 days at the address mentioned below for processing your application for award of Retail Outlet dealership at the above location.

Documents applicable for all category:

1. Notarized Affidavit by the applicant as per Appendix-X A/ X B (standard Affidavit), as applicable

2. Proof of age (date of birth) i.e.- Self Attested copy of 10th Std. Board Certificate / Secondary School Leaving Certificate / Birth Certificate / Passport/ Identity card issued by Election Commission/Affidavait for age (Original).

3. Prrof of education qualification i.e. -Self Attested Copy of Certificate of passing 10th Std. Issued by a Board / School conducting the examination or equivalent.

4. Appendix-III B (Advocate's letter) along with Appendix-III A (for offer of land) if applicable.

5. Copy of land documents in support of ownership/lease rights.

6. Sketch of the offered land with dimension.

7. Proof of SKO allocation & copy of dealership agreement in case you are an existing unviable SKO Dealer.

Verification of all attested photo copies shall be done with the original documents during the Field Verification of Credentials (FVC).

It is expected that you are in possession of original documents wherever photo copies of documents are submitted.

Please note that your candidature is liable to be canclled in case initial Security Deposit is not remitted or the documents listed above

are not submitted within 10 days from the date of this intimation.

Your candidature is liable to be rejected if you are not able to present the original documents at the time of FVC on the designated date and time or during the FVC if it is found that the information submitted by you in your online application is false/ incorrect/misrepresented affecting your eleigibility.

Note: Documents can be submitted at the below mentioned address of the Regional Office between 10 am to 5 pm on any working day. In case the last date for submission of documents happens to be a Holiday for the Regional Office, Documents can be submitted on the next working day.

Thanking you
Yours faithfully
For Hindustan petroleum corporation Ltd.
SANJAY NAGPAL
Heard of Regional Office
Meerut Retail Regional Office,
Hindustan Petroleum Corporation Limited,
495/1
2Nd Floor,
RPG Tower,
University Road,
Mangal Pandey Nagar,
Meerut-250004
0121-3323915, 9412221541, 941222544"

(Emphasis added)

12. The petitioner deposited the amount of security as required under the letter above and submitted all the documents within time before respondent no. 3. The petitioner then was intimated vide letter dated 24th May, 2009 that Field Verification of Credentials (for short "FVC") will be done on 3rd April, 2019 on the site of land and the petitioner was required to be present with documents relating to the land. Field verification was done regarding credentials and also spot verification of the land in presence of the petitioners and then thereafter no communication was made with petitioner by Corporation for more than three months and while petitioner was expecting good news, he was surprised by the Corporation by issuing a letter dated 21st June, 2019 informing that his candidature has not been found eligible as Land Evaluation Committee after visiting the site on the scheduled date, did not find the land to be meeting the required norms.

13. For better appreciation of the order and the legal arguments as we have quoted in the initial part of the judgment, we reproduced the order impugned dated 21st June, 2019 passed by respondent Petroleum Corporation.

"Ref: 15457034924695
Date: 21-Jun-2019
To,
Mr. Ansar Ali
Address:VILLAGE KALCHHINA,
TEHSIL MODINAGAR,
DISTRICT GHAZIBAD,
U.P.
District: GHAZIBAD
State:UTTAR PRADESH
Pin Code: 245304
Subject: Application for award of RO dealership at BETWEEN KM STAONE 26 TO 29 ON MEERUT SHAMLI ROAD NH709A (OLD SH-82) DISTRICT MEERUT under OPEN category Advertised on 25 Nov, 2018

Dear Sir,

1. Please refer to your application received by us application form No. 15457034924695 on the subject and our letter dated 24-Mar-2019 informing you about the visit of Land Evaluation committee of evaluation of your offered land.

2. This is to inform you that the Land Evaluation Committee visited the site offered by you on 03-Apr-2019 and found the same to be not meeting the required norms.

3. In view of above, we regret to inform you that your candidature has been found ineligible. However, your candidature may get considered for selection along with Group 3 applicants as per guidelines.

Thanking you

Yours faithfully,

For Hindustan Petroleum Corporation Ltd.

Sanjay Nagpal

Head of Regional Office

Meerut Retail Regional Office,

Hindustan Petroleum Corporation Limited,

495/1,

2Nd Floor,

Rpg Tower

University Road,

Mangal Pandey nagar,

Meerut-250004

9412221544"

(Emphasis added)

14. At the stage, we also find it necessary to refer the guidelines issued by Petroleum Corporation for selection of retail outlet dealership relating to the land required by the Corporation for setting up retail outlet petrol pump. The relevant extract of the guidelines is reproduced hereunder:

"(V) भूमि (सभी श्रेणियों को लागू):

आवेदन फार्म में आवेदको द्वारा प्रस्तावित भूमि अथवा अप्रस्तावित भूमि के आधार पर आवेदकों को 3 समूहों में निम्नानुसार वर्गीकृत किया जाएगा:–

ग्रुप 1: आवेदकों के पास विज्ञापित लोकेशन/एरिया में मालिकाना हक में/न्यूनतम 19 वर्ष 11 माह की अवधि के लिए दीर्घ अवधि लीज पर भूमि का उपयुक्त टुकड़ा हो या तेल विपणन कंपनी द्वारा दिये गए विज्ञापन के अनुसार हो।

ग्रुप 2: आवेदकों के पास उपयुक्त भूमि खरीदने के लिए या न्यूनतम 19 वर्ष 11 माह की अवधि के लिए दीर्घ अवधि लीज का पक्का प्रस्ताव हो या तेल विपणन कंपनी द्वारा दिये गये विज्ञापन के अनुसार हो।

ग्रुप 3: जिन आवेदकों ने अपने आवेदन में भूमि प्रस्तावित नहीं की है।

ग्रुप 3 के तहत आवेदन तभी प्रोसैस किए जाएंगे/भूमि का प्रस्ताव देने को कहा जाएगा जब कोई पात्र आवेदक नहीं पाया जाता है या ग्रुप 1 और 2 के तहत किसी आवेदक का चयन नहीं होता है।

यदि ग्रुप 1 और ग्रुप 2 के अंतर्गत आने वाले सभी आवेदकों की प्रस्तावित भूमि उपयुक्त नहीं पायी जाती है या अपेक्षाओं को पूरा नहीं करती है तब इन ग्रुप 1 और ग्रुप 2 के आवेदकों के साथ–साथ ग्रुप 3 के आवेदकों (जिन्होंने आवेदन के साथ भूमि प्रस्तावित नहीं की है) को तेल विपणन कंपनियों द्वारा एसएमएस/ईमेल के माध्यम से सूचना पत्र जारी होने की तारीख से 3 माह के अंदर विज्ञापित स्थानों/दायरे में उपयुक्त भूमि का प्रस्ताव देने को कहा जाएगा। यदि आवेदक निर्धारित अवधि में उपयुक्त भूमि उपलब्ध करने में विफल रहता है या उपलब्ध कराये जाने वाली भूमि निर्धारित मानदंडो को पूरा नहीं करती है तो आवेदन निरस्त कर दिया जाएगा।

प्रस्तावित भूमि के लिए अन्य शर्तें निम्नानुसार है:–

(क) आवेदन की तारीख को आवेदक के पास भूमि उपलब्ध होनी चाहिए और विज्ञापन की तारीख को या उसके बाद की तारीख में (परंतु आवेदन की तारीख के बाद नही) 19 वर्ष

11 माह के न्यूनतम लीज (जैसा की संबंधित तेल कंपनी द्वारा विज्ञापन किया गया हो) पर होनी चाहिए।

(ख) यदि प्रस्तावित भूमि दीर्घ अवधि लीज पर है तो कॉर्पस फंड योजना, अन्य कॉपरिशन के स्वामित्व के स्थलों (''ए''/''सीसी'' स्थल) के अन्तर्गत विज्ञापित लोकेशनों के लिए लीज करार में उप–लीज का प्रावधान होना चाहिए।"

(Emphasis added)

15. Before we proceed further to examine the guidelines and test the order passed by the respondent Corporation for rejecting the candidature of the petitioner, we would also like to refer to the instructions placed before this Court by Sri Vikash Budhwar, learned counsel appearing on behalf of respondent Corporation in the form a piece of paper. This piece of paper is nothing but field verification report regarding lay out of land offered by petitioner in respect of the retail outlet dealership at serial no. 1538. The report carries as we peruse, three details as far as spot inspection is concerned: **firstly** the address of the site condition land; **Secondly** marked details of the site i.e. distance from the nearest kilometer stone or any other permanent land mark; and **thirdly** a hand sketched lay out of the land.

16. After these three collumns the recital in the report is in the form of undertaking by the applicant. Undertaking is typed one in the report which is on a printed format and bears signatures of the petitioner and three members of the Land Evaluation Committee except for the hand sketched map. The entire narrative of the report dated 25th March, 2019 is reproduced hereunder for its better appreciation:

Layout sketch of land offered by the appellant

Location

District: Meerut

Sr. No. 1538

State: U.P

Category: Open

Land Details: Khasra No. 1117, village Baparasi, Tehsil Sardana, District Meerut

Name of Applicant: Ansar Ali

Site Address (As mentioned in the application form): Khasra No. 1117, Villlage Baparsi, Tehsil Sardhana, District Meerut.

Landmark details (distance from nearest Km stone or any other permanent landmark/ structure nearest to the starting point of the site)

Layout Sketch of land offered by the candidate with approximate dimensions (All dimensions to be mentioned in Meters.) (Hand Sketched lay out)

I hereby confirm that the above mentioned details of the plot offered by me are correct and site has been inspected by the Company Officials as mentioned below. Further I also confirm that:

1. Offered land is of required dimension and abutting the Road boundary, after leaving Right of Way (ROW) line of the road.

II. The offered land is also not notified for acquisition.

III. Land owner is in possession of the land from the beginning/ edge of ROW line.

I also understand that in case any of the details mentioned above are found incorrect or the site is found unsuitable by the Corporation for any

reason whatsoever then I would have no claim on the dealership of this location.

Name & Signature of the applicant/Representative of applicant

Date: 25/03/2019 Member 1 Member 2 Member 3

(In case of NH)

17. From the perusal of the above report as quoted above, it transpires that the site of the land was visited on 25th March, 2019 and not on 3rd April, 2019 as stated in letter dated 24th March, 2019 annexure 5 to the writ petition. From the above facts as instruction have been paced before this Court one thing at least comes out very clear that no spot inspection was carried out on 3rd April, 2019 as claimed by the respondents, it was in fact conducted on 25th March, 2019 which bears signatures of the present petitioner, Ansar Ali and endorsement of the date is 25th March, 2019. Since petitioner has not questioned the spot inspection conducted on 25th March, 2019 and has not taken stand that no spot inspection was conducted on 3rd April, 2019 and since the documents to spot inspection bears signature of petitioner we presume that it is on 25th March, 2019 with the consent of the petitioner that spot inspection was done by the Land Evaluation Committee and proceed to decide the case on the said basis.

18. From the perusal of the guidelines as quoted hereinabove in this judgment, we find that so far as offer of land is concerned three categories have been provided for; Category One is called Group 1 in which land offered must be claimed by the applicant with minimum lease of 19 years and 11 months of the land or piece of land on the site advertised by the Corporation; category two called as Group 2 where applicant has firm proposal of lease to be executed in his favour for a minimum period of 19 years and 11 months; and category three is called as Group-3 is in respect of the candidates who have not made any offer of land. It is further provided under the guidelines that applications under Group 3 shall be processed and will be assigned to give offer of land when no candidate is found eligible and not selected in Group 1 and Group 2 category. Since petitioner in the present case had registered lease in his favour of the land in question for period of 20 years at annual premium of Rs. 6,000/- as rent executed on 24.12.2018 and document thereof was submitted by the petitioner as offer of land, it amounted a firm offer of land in Group 1 category. In draw of lots, the petitioner was selected and was directed to submit documents which petitioner submitted within the prescribed time. The Land Evaluation Committee thereafter proceeded to evaluate credentials of the petitioner as well as the land situation on the spot so as to get the first hand assessment as to whether land of which offer has been made by candidate is an ideal site to set a petrol pump or not.

19. From the bare reading of the report of spot inspection which has been placed before the Court and quoted hereinabove in this order, we find that the address of the land offered and the land mark of Kilometer stone between 27 to 28 is same as is required under the advertisement and in the lay out sketched map is of the land offered by the present applicant with proximate dimension has been shown. The report does not disclose

as to how the measurement has been carried out of the spot, nor it disclose as to what scale was applied to measure the land to justify particularly the dimensions in respect of frontage and depth as opening area and the depth area of the land in question at the located site on a piece of A-4 size paper.

20. From bare perusal of the report, we find that opening of the plot offered by the petitioner is 35 meters on front on national highway no. 709-A and the depth is shown as 45 meters. What further we find that the distance between crossing of 101 meters. If we compare this report with that of the details as contained in advertisement for serial no. 1358 land site in question, we find that minimum dimension required is in respect of frontage, depth and total area in column no. 8. There is no other depth or area or distance required, so according to us as far as dimension part is concerned vide column 8, requirement of measurement is same as has come to be reported in the report in hand sketched map. The report is signed by three members of the committee but we do not know who at the three members was expert with technical skills to conduct measurement and who prepared the hand sketched map in the report, but we noticed that the report is in fact in the form of format in column nos. 1,2 and 3 encircled by a rectangle, a blank space required to be filled in only and rest of the contents are in an already typed format including the undertaking on which applicant has to sign. Four conditions which are part of the undertaking are: that offered land as per required dimension must be abutting the road boundary with the offered land after leaving right of way line of the road; the offered land is not under any notification for acquisition; the applicant/land owner is in possession of the land; and there is other land including Government land between the land offered and the right of way. If any of the details as noted above is found to be incorrect, the site was to be held unsuitable by the Corporation and the applicant would not have any claim for the dealership on such location.

21. In the present case, we do not find in the report that any of the four conditions were violated nor, we do find any remarks coming in the report that land was not suitable for a/b/c on d reason but according to the learned counsel for the respondent this report has formed the basis of the cancellation of the candidature of the petitioner as ineligible one.

22. The above being factual position emerging out in the present case we proceed to test the order impugned and the legal arguments advanced by learned counsel for the petitioners.

23. From the better perusal of the order that has been passed holding the petitioner not to be eligible as far as his candidature is concerned, the retail outlet dealership, it is clear that the Land Evaluation Committee vested on 3rd April, 2019 and found the same not meeting required norms. We have not been apprised of any report dated 3rd April, 2019 by learned counsel for the respondent though he was given time to have instructions in the matter and the instruction that has been placed before us is report dated 25th March, 2019 as we have quoted above and have also discussed hereinabove. This report does no record any recital in the form of

opinion of expert regarding situation of and and its suitability is nothing but contains details of land and a hand sketched map prepared on the spot with the details of dimensions and measurement.

24. The ground of attack is that the order is absolutely non speaking as to what is the report of the Land Evaluation Committee or what is the opinion of Land Evaluation Committee in its assessment, that has rendered site offered not meeting the required norms, have not been disclosed in the order impugned. It is alleged that the order has been passed on the basis of same report of the Land Evaluation Committee so therefore it was incumbent upon the respondent authority to have discussed the report in this order to make it not only speaking order but reasoned order as well.

25. As we have noticed that it is the Land Evaluation Committee's report dated 25th March, 2019 that has been placed before us and there is no instruction regarding any report dated 3rd April, 2019, we can safely conclude that there was no such report at all and the report, before Corporation, was dated 25th March, 2019 only. From the report dated 25th March, 2019, we do not find any lacking of requirement in terms of the dimensions and measurement of the land in question while comparing it with required dimensions and the measurement provided vide column 8 of the located site at serial no. 1538 of the advertisement the required opening of the plot 35 meter wide is there in the report and depth of 45 meter which is also there in the report. There was requirement of total measurement of the land in terms of area as 1575 of plot of and the area of land offered is not disputed in the report. The distance of situation where plot is required to situate is also not disputed in the report. The area and the plot is totally identifiable as per the report. We further find that all four conditions mentioned in the report in the form of undertaking by the petitioner are also met and there is nothing in the report adverse to the same. The offered land is not under any notice of compulsory acquisition; the possession of the land holder is not disputed and there is no other land between land offered and the right of way (ROW). Thus if said report was placed before the authority, we fail to understand why the said report was not considered and if any further report was obtained as has come to be mentioned in the order dated 3rd April, 2019, both the reports should have been discussed, evaluated and compared as a rule of procedure by the respondents before rejecting the candidature of the petitioner holding him ineligible on the basis of the report of the Land Evaluation Committee subsequently obtained on 3rd April, 2019 if any.

26. In our considered opinion, justice and fair play required this procedure to be mandatory one. Even otherwise, we are in the rule of law society and public sector undertakings, or Corporations are more under bounden duty to discharge function in just and fair manner. Every subject in a welfare state is looking for equality in terms of equal treatment if identically placed. If petrol pump dealership is being offered by public sector undertakings from open markets inviting applications from the people and the candidates come to be selected in the draw of lots, the cancellation of candidature of such candidates should be preceded by a

thorough examination of documents, proper evaluation and proper spot inspection of the land and due verification of the credentials placed before Corporation in respect the land site offered by such candidates. We may further hold that in such matters where on a printed format undertaking is taken and that too in a language with which locals may not be well conversant as being not highly qualified as in the present case language was in English, it was an obligation cast upon authority of a public sector undertaking to have apprised at least petitioners of the grounds and thus in that process the petitioners should have been supplied with the report so as to apprise them of the details and the reasons assigned by the Land Evaluation Committee for holding that site offered was not suitable for the reasons a/b/c or d. However, all this we find lacking in the orders impugned in all these writ petitions.

27. It has been held in case of Chairman, **Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharan Varshney and Others (2009) 4 SCC 240** that *unless reasons are disclosed how can the person know whether authority has applied its mind or not ? Giving all reasons minimize the chances of arbitrariness.* Again in the case of **Punjab State Electricity Board and Others v. Jit Singh (2009) 13 SCC 118**, the Apex Court while testing the order passed by the State Electricity Board which was assailed on the ground of arbitrary one as being sans reasons, observed that *fair play requires recording precise and cogent reasons when an order affects rights of the citizen* and again in the case of **Dharampal Satyapal Limited v. Deputy commissioner of Central Excise, Gauhati and Others (2015) 8 SCC 519** the Apex Court held that *the principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias, i.e. nemo debet esse iudex in causa sua; and (ii) opportunity of being heard to the party concerned, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'.*

28. The Court further proceeded to hold that in order to secure fairness and to prevent miscarriage of justice, the authorities discharging function should follow very accurate and proceedings conforming to the norms of natural justice and the Court observed that primarily these basics of dispensation of justice though were mandatory for discharge for judicial and quasi judicial functions but later have come to be extended even to those who are involved in administrative decision making and may not necessarily discharging judicial or quasi judicial functions. The Court observed that these principles *are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.*

29. An order without well founded reason is like skeleton which is neither identifiable for want of a body cover nor, enforceable for want of character it must

have in it essentially. In order to infuse life in an order to make it legally enforceable it must have the characteristic of being taken as a reasoned and speaking one to pass the test of Article 14 of the Constitution, one of the most acclaimed and cherished of the fundamental rights recognized under the Indian Constitution. What is, therefore, fundamental for an order or an action to make it sustainable is to ensure it to be devoid of any arbitrariness.

30. 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.*

31. 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.*

32. 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.*

33. In view of above settled legal position as have come to be emerged and applying the same to the present set of facts involved in the case in hand and in the connected matters, we find that the orders passed by the authorities in respective petitions are not only non speaking unreasoned and cryptic one but also cannot otherwise pass test of Article 14 of the Constitution.

34. In our considered opinion while rule of personal hearing may not be a compulsory rule in every case but rule of assigning reason while passing an order on the basis of some adverse report is mandatory for the authority to make the order legally enforceable.

35. Accordingly, we are setting aside the orders impugned canceling the candidature of the petitioners in respective writ petitions for retail outlet dealership.

36. We are accordingly further directing the authorities to revisit the matter and reconsider the reports after supplying copy thereof to the respective petitioners and inviting their objections upon the same. Necessary requisite document as have been directed hereinabove shall be supplied to the petitioner within period of two weeks from the date of production of certified copy of this order and the petitioners shall be at liberty to file their objection within further period of two weeks and after receiving objection of the respective petitioners, respondent shall proceed to decide the matter within further period of four weeks by means of reasoned and speaking order.

37. However, we may hasten to add that in all these writ petitions the only ground taken for passing the order is that the offer of land made by the respective petitioners did not meet the requirement as per brochure and, therefore, it will be open for the respondent to revisit the matter from that angle only and, if otherwise, after due evaluation and meeting objection of the petitioners, they are found suitable, their candidature on other norms shall not be cancelled on any fresh ground.

38. With the aforesaid observations and directions, writ petitions are allowed, with no order as to cost.

(2020)08ILR A172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 29010 of 2008

The Manager Birju Yadav, Inarman Yadav Purva Madhyamik Vidyalay, Chakaundhi, Mau ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Naveen Srivastava

Counsel for the Respondents:
C.S.C.

A. Civil Law - MPLAD Fund – Disbursement for the Construction of School – Misrepresentation or Fraud – Merely because certain part of the land has fallen in the adjoining village, it will not amount to mis-representation or fraud on the part of the petitioner – No whisper anywhere that any enquiry was made from the then Member of Parliament as to under what circumstances the recommendation was made – Held, It was not open for the Collector to take into account irrelevant considerations to record a finding of fraud and misrepresentation – The findings is completely misplaced and ill-founded. (Para 7 and 9)

B. Civil Law - MPLAD Fund – Recommendation of Member of Parliament – Jurisdiction of Administrative Authority – A Member of Parliament in our representative form of Government holds a very sacrosanct position – His recommendation cannot be a matter of administrative enquiry unless he himself complains of being misrepresented/ mislead. (Para 8)

Held –

8. …We may, therefore, hold that no recommendation *qua* MPLAD if made by a member of parliament for his constituency is subject to enquiry by administrative authorities unless the Member of Parliament himself asks for the same, however monitoring and enquiry regarding consumption of fund released under MPLAD is always subject to administrative enquiry in the event of complaint. This is however, not the case in hand.

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

1. Heard Sri Naveen Srivastava, learned counsel for the petitioner and Sri A.K. Roy, learned Additional Chief Standing Counsel appearing for the State-respondents. Perused the record.

2. By means of this petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 10.5.2008 directing the petitioner to pay Rs.5 lacs which was advanced from the fund of Member of Parliament for local development in a district (For

short MPLAD) to which the concerned Member represents, failing which it is directed that coercive measures shall be taken against the petitioner taking recourse to the provisions prescribed for recovery of the amount as arrears of land revenue.

3. Briefly stated facts of the case are that on the basis of the proposal forwarded by the then Members of Parliament representing district Mau a parliamentary constituency, vide letter dated 2.1.2006 for disbursement of amount of Rs.10 lacs for construction of the school, to the petitioner society which runs Harijan Primary Pathshala situate at Chakaudi Sultani. It appears that after preliminary enquiry/investigation was conducted in the matter and the revenue records were submitted by the petitioner the disbursement of first installment of Rs.5 lacs i.e. 50 per cent of the total amount was made on 31.2.2006. Although, the first disbursement had taken place after the preliminary enquiry got conducted relating to the matter as to the eligibility of the petitioner in getting aid for the purposes of the construction of the building of the school from MPLAD fund, some further enquiry was conducted and a letter was forwarded by the Magistrate, Mohammadabad, Mau on 6.12.2006 requiring the petitioner to submit the computerized copy of Revenue Extract/Annual Register relating the land in question as there appeared to be difference in the computerized record and manually prepared record. It was admitted that the school was situate on Plot No.192 however, certain part of the land that belonged to the school to the extent of 25 *kadis* fell in village Utpal, an adjoining village and thus a conclusion was drawn by the District Magistrate to the effect that the petitioner got the disbursement of fund by misrepresentation and fraud in getting the document prepared and submitted, which if had come to the knowledge of the authorities the disbursement of the land could not have been made. Consequently, an FIR was also lodged against the petitioner for committing such alleged fraud under Sections 420, 467, 468 and 471 IPC as Case Crime No.182A/2008 on 25.2.2008. However, in the meanwhile, the impugned order was also got passed on the basis of some directives issued by the Chief Development Officer, Mau dated 23.2.2008 to get the amount of first installment, disbursed to the petitioner, recovered. It is in this light that the impugned order has been passed directing the petitioner to pay back the amount failing which coercive measures shall be adopted for recovery of the same.

4. The argument advanced by learned counsel for the petitioner assailing the order is that the school infact is situate over Plot No.192 which is recorded in the name of the society that runs the Institution and which falls in the village within the territorial limits of district Mau represented by the then Member of Parliament, Sri Daroga Prasad Saroj. He submits that merely because certain small piece of land falls in an adjoining village falling in an adjoining district as two revenue villages are bordering each other, it cannot be said that the petitioner committed any mis-representation or fraud in getting the amount disbursed from the MPLAD fund. He has drawn our attention to the computerized *khatauni* which is produced as Annexure No.3 in the writ

petition in which Plot No.192 besides Plot No.194 and 193 was originally recorded in the name of Ram Awadh son of Narman, the person in whose name the society exists and the land has subsequently stood transferred in the name of the institution. The khatauni clearly demonstrates that the land of Plot No.192 in the fasli year of 1409 exists in revenue village, Chakaudi. Year 2002 corresponds to the said fasli year and so khatauni shows record of land, prior to the year of disbursement of the fund and corroborates the fact that the land very well stood in the revenue village Chakaudi of district Mau. It is pointed out by learned counsel for the petitioner that this fact that the plot in question falls in revenue village Chakaudi of district Mau has not been disputed and hence, it has been vehemently urged that the order has been passed completely mis-interpreting the revenue records of the land in question, at least, the finding of mis-representation of fraud is completely misplaced and ill founded and thus according to him, the order cannot be sustained in law.

5. Learned Additional Chief Standing Counsel has submitted that the very act of major portion of the school and the land which fell in the revenue village of district Mau which was represented by the then Member of Parliament, Sri Daroga Prasad and on whose recommendation the fund was disbursed for the construction of the school over Plot No. 192 merely because certain part of the land measured as 25 *kadis* in the order impugned has fallen in the adjoining village, it will not amount to mis-representation or fraud on the part of the petitioner. We further find though an enquiry has been made in the matter but the petitioner of offering a land in exchange as has come up from a document filed alongwith supplementary affidavit demonstrates that the petitioner was well aware of the fact that certain part of the land stood fell in adjoining village which is within the territorial limits of district Azamgarh and, therefore, a fund meant for MPLAD could not have been utilized for a building to be constructed over the land, part of which fell in an adjoining district. He further submits that the objection has been raised regarding the exchange and, therefore, to that extent building have been constructed over the land which fell in an adjoining district, the order cannot be faulted with.

6. However, we find that while the writ petition was entertained initially an order was passed in which time was granted to the learned Standing Counsel representing the State-respondents on his request to file counter affidavit and yet no counter affidavit has been filed till date and the State has virtually failed to defend the order impugned in the present writ petition.

7. Apart from the above fact we are of the considered opinion that if the

there is no whisper anywhere that any enquiry was made from the then Member of Parliament as to under what circumstances the recommendation was made. We are of the opinion that once a Member of Parliament has made recommendation for disbursement of the fund meant for the construction and development purposes in the village concerned which fell in the territorial limits of the district which he was representing some sanctity has to be attached to such letter and it was not open for the Collector to take into

account irrelevant considerations to record a finding of fraud and misrepresentation.

8. A Member of Parliament in our representative form of Government holds a very sacrosanct position and his recommendation cannot be a matter of administrative enquiry unless he himself complains of being mis-represented/mislead. One who holds a responsible position after being elected by people to parliament, is the best judge of development activities in his parliamentary constituency and if civil servants and government officials are permitted to question their recommendations in respect of development activity in their parliamentary constituencies, it will erode faith of people in our parliamentary system of democracy. We may, therefore, hold that no recommendation *qua* MPLAD if made by a member of parliament for his constituency is subject to enquiry by administrative authorities unless the Member of Parliament himself asks for the same, however monitoring and enquiry regarding consumption of fund released under MPLAD is always subject to administrative enquiry in the event of complaint. This is however, not the case in hand.

9. The findings in our considered opinion is completely misplaced and ill-founded as has been rightly argued by learned counsel for the petitioner.

10. The writ petition, therefore, deserves to be allowed.

11. Accordingly, the order dated 10.5.2008 is hereby quashed and the present petition stands allowed.

(2020)08ILR A175
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-C No. 29169 of 2019
connected with
Writ-C No. 31170, 25319, 26335 of 2019

Yashraj College of Professional Studies, Kanpur Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya, Rajan Upadhyay

Counsel for the Respondents:
C.S.C., Sri Rohit Pandey

A. Civil Law - U.P. State Universities Act, 1973 – Section 37 – Grant of Affiliation on temporary basis – Nature and Effect – Power to grant affiliation vested in the Executive Council of the University concerned with the previous sanction of the Chancellor – University once admits a college to the privileges of affiliation as per Section 37 of the Act of 1973, after introduction of amendment vide U.P. Act No. 14 of 2014, it has to be treated as continuing and would not be restricted to a limited period, unless such privileges are withdrawn in accordance with Section 37(8) and (9) of the Act of 1973. (Para 30)

Held –

30. ... Clauses 10(3) and 11(2) of the Government Order dated 27.9.2002 would not be a relevant consideration for the purposes of grant of affiliation to a college after 18.7.2014 when Section 37 was amended vide U.P. Act No. 14 of 2014. Exercise of power by the Executive Council, for the purposes of imposing conditions for grant of affiliation would have to be restricted

to the conditions specified in the Statutes of the University.

B. Civil Law - U.P. State Universities Act, 1973 – Section 2(14) of Act of 1973- Interpretation of Statute – Word 'Prescribe' – defines 'prescribe' to mean as prescribe by the Statutes – The conditions as are required to be possessed by colleges for grant of affiliation has to be such as is prescribed in the Statutes – When a Statute requires an act to be done in a particular manner, it has to be done in that manner alone and all other modes are prohibited. (Para 26)

Writ Petition disposed of (E-1)

Cases relied on :-

1. Taylor Vs Taylor: (1875) LR (1) CH-D-426

2. Nazir Ahmad Vs King Emperor: AIR 1936 PC 253

3. Bal Krishna Agarwal Vs St. of U.P. & ors., (1995) 1 SCC 614

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Heard Sri Ramesh Upadhyay, learned Senior Counsel assisted by Sri Rajan Upadhyay for the petitioners, Sri Rohit Pandey for the University and Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Sudhakar Upadhyay for the State Authorities.

2. These four writ petitions have been filed by the colleges, which have been admitted to privileges of affiliation by Chhatrapati Sahu Ji Maharaj University, Kanpur, questioning the temporary grant of affiliation to them. In the leading Writ Petition No.29169 of 2019 the petitioner has challenged the conditions incorporated in the affiliation order passed by the respondent University, dated 30.5.2018, in that regard. In connected cases the petitioners have challenged denial of privileges on account of grant of temporary affiliation. It is sought to be urged that in the existing statutory scheme the grant of affiliation ought to be permanent but the authorities are illegally granting temporary affiliation, notwithstanding the fact that the colleges fulfill all conditions of affiliation specified in law/statutes of the University. The petitioners have also questioned the enforcement of Government Order dated 27.9.2002 insofar as it mandates that 60% students enrolled in the affiliated college must pass before temporary affiliation is extended to the college concerned. It is contended that the Government Order, to that extent, is beyond jurisdiction and is otherwise inconsistent with the statutory scheme.

3. In order to appreciate the controversy raised in this bunch of petitions, it would be necessary to refer to the relevant Legislation operating in the field and also notice successive amendments made, from time to time, regarding grant of privileges of affiliation to a college by the University concerned.

4. The State Legislature enacted the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as "Act of 1973') after obtaining presidential assent on 2.9.1973 (vide President's Act No.10 of 1973). Its object was to amend and consolidate the laws relating to certain Universities. The Act of 1973 has been amended and re-enacted by U.P. Act No.29 of 1974. It (Act of 1973) authorizes the University to admit a degree college, which fulfills the prescribed conditions, to the

privileges of its affiliation. Affiliated college is defined in Section 2(2) to mean an institution affiliated to the University in accordance with the provisions of the Act of 1973 and Statutes of that University. Chapter VII of Act of 1973 regulates grant of such affiliation. Section 37 of the Act of 1973, falling in Chapter VII at the time of its inception, read as under:-

"**37. Affiliated Colleges.** - (1) This section shall apply to the Universities of Agra, Gorakhpur, Kanpur, and Meerut and such other Universities (not being the Universities of Lucknow and Allahabad) as the State Government may, by notification in the Gazette, specify.

(2) The Executive Council may, with the previous sanction of the Chancellor, admit any college which fulfils such conditions of affiliation, as may be prescribed, to the privileges of affiliation or enlarge the privileges of any college already affiliated or subject to the provisions of sub-section (8), withdraw or curtail any such privilege:

Provided that previous sanction of the Chancellor shall not be required for the grant of an application of an affiliated college for permission to start instruction in a subject, being a subject in which instruction is not already given in that college, for a bachelor's degree in respect of which the college is already affiliated.

(3) It shall be lawful for an affiliated college to make arrangement with any other affiliated college situated in the same local area, or with the University, for co-operation in the work of teaching or research.

(4) Except as provided by this Act, the management of an affiliated college shall be free to manage and control the affairs of the college and be responsible for its maintenance and upkeep, and its Principal shall be responsible for the discipline of its students and for the superintendence and control over its staff.

(5) Every affiliated college shall furnish such reports, returns and other particulars as the Executive Council or the Vice-Chancellor may call for.

(6) The Executive Council shall cause every affiliated college to be inspected from time to time at intervals not exceeding five years by one or more persons authorised by it in that behalf, and a report of the inspection shall be made to the Executive Council.

(7) The Executive Council may direct an affiliated college so inspected to take such action as may appear to it to be necessary within such period as may be specified.

(8) The privileges of affiliation of a college which fails to comply with any direction of the Executive Council under sub-section (7) or to fulfil the conditions of affiliation may, after obtaining a report from the Management of the college and with the previous sanction of the Chancellor, be withdrawn or curtailed by the Executive Council in accordance with the provisions of the Statutes."

5. Proviso to sub-section (2) of Section 37, quoted above, was omitted by U.P. Act No.21 of 1975, and a sub-section (9) was inserted by U.P. Act No.5 of 1977, after sub-section (8) in Section 37, which read as under:-

"(9) Notwithstanding anything contained in sub-sections (2) and (8), if the Management of an affiliated college

has failed to fulfil the conditions of affiliation, the Chancellor may, after obtaining a report from the Management and the Vice-Chancellor, withdraw or curtail the privileges of affiliation."

6. As per the scheme initially envisaged in the Act of 1973 the power to grant affiliation vested in the Executive Council of the University concerned with the previous sanction of the Chancellor. The degree colleges were, however, being admitted to the privileges of affiliation largely on temporary basis and only in some cases the affiliation was allowed on permanent basis. An issue was raised before this Court questioning grant of privileges of affiliation to a college by the University established under the Act of 1973, on temporary basis. This Court in Writ Petition No.5881 (MB)/2002, Committee of Management, Paramhans Degree College, Baharaich Vs. Chancellor and others, examined the relevant provisions and held that the term "affiliation' used in Section 37 means permanent affiliation and not temporary affiliation. It was held that the concern authority may, before granting affiliation to a degree college enquire into such matters, as they deem fit, but the affiliation should be permanent. It was also observed that the authority, at the time of inspection of degree college, by virtue of affiliation, may withdraw the privileges of affiliation on account of non-fulfillment of conditions of affiliation by virtue of Sub-sections (2), (8) and (9) of Section 37 of the Act of 1973 but the affiliation itself had to be nevertheless permanent and not temporary.

7. The State Legislature, in view of the judgment delivered by this Court in Committee of Management, Paramhans Degree College, Baharaich (supra) found it appropriate to amend the Act of 1973 vide The Uttar Pradesh State Universities (Amendment) Act, 2003 (U.P. Act No.1 of 2004). Section 37 was amended vide Section 5 of the U.P. Act No.1 of 2004, which is reproduced hereinafter:-

"5. Amendment of Section 37.- In Section 37 of the principal Act,-

(a) In sub-section (2) the following provisos shall be inserted at the end, namely:-

"Provided that if in the opinion of the Chancellor, a college substantially fulfils the conditions of affiliation, the Chancellor may sanction grant of affiliation to that college or enlarge the privileges thereof in specific subjects for one term of a course of study on such terms and conditions as he may deem fit:

Provided further that unless all the prescribed conditions of affiliation are fulfilled by a college, it shall not admit any student in the first year of the course of study for which affiliation is granted under the foregoing proviso after one year from the date of commencement of such affiliation."

(b) after sub-section (9) the following sub-section shall be inserted, namely:-

"(10) Notwithstanding anything to the contrary contained in any other provisions of this Act, a college, which has already been given affiliation to a University before the commencement of the Uttar Pradesh State Universities (Amendment) Act, 2003 in specific subjects for a specified period, shall be entitled to continue the course of study for which admissions have already taken place but it shall not admit any student in the first year of such course of study

without obtaining affiliation under sub-section (2)."

8. The proviso added vide U.P. Act No.1 of 2004 permitted grant of affiliation for one term of a course of study to a college (temporary affiliation) if in the opinion of the Chancellor a college substantially fulfills the conditions of affiliation. The proviso also clarified that unless all the prescribed conditions of affiliation are fulfilled by a college it shall not admit any student in the first year of the course of study after one year from the date of commencement of such affiliation. The Legislative intent in introducing the amendment is explicit i.e. it permitted grant of temporary recognition even before all conditions of affiliation were fulfilled with the rider that conditions of affiliation are substantially fulfilled and the remaining conditions are fulfilled within a period of one year or else the college was precluded from admitting any students in the first year of the course of study after expiry of one year.

9. Act of 1973 was again amended in the year 2007 vide U.P. Act No.12 of 2007. Section 2 of the amending Act is relevant for our purposes and is reproduced hereinafter:-

"Amendment of Section 37 and 38 of President's Act No.10 of 1973 as amended and re-enacted by the U.P. Act No.29 of 1974.- In the Uttar Pradesh State Universities Act, 1973 in Section 37 and 38, for the word "Chancellor" wherever occurring, the words "State Government" shall be substituted."

10. The scheme for admitting a college to the privileges of affiliation vide U.P. Act No.1 of 2004 continued even after introduction of U.P. Act No.12 of 2007, with the only change that power of "Chancellor' stood assigned to the "State Government'. The position in law was therefore clear that privileges of affiliation could be extended to a college, by the Executive Council of the University, with the previous approval of the Chancellor/State Government, if the college fulfilled conditions of affiliation, as may be prescribed. Conditions of affiliation was therefore required to be specified in the Statutes of the University. The only exigency in which affiliation could be granted for one term of course (temporary affiliation) was when the college did not fulfill conditions of affiliation in its entirety yet fulfilled it substantially. The considerations for grant of permanent affiliation vis-a-vis temporary affiliation, therefore, stood clearly outlined in the Act of 1973. This position in law prevailed after introduction of amending Act No.1 of 2004 and continued after U.P. Act No.12 of 2007 with the modification that previous approval of Chancellor stood substituted by previous approval of the State Government.

11. Section 37 of Act of 1973 came to be amended yet again by State Legislature in the year 2014 vide U.P. Act No.14 of 2014. The statement of object and reasons contained in U.P. Act No.14 of 2014 clearly indicates legislative intent to omit the requirement of previous sanction by the State Government for grant of affiliation. Section 3 of the Amending Act, 2014 whereby Section 37 came to be amended is reproduced hereinafter:-

"3. Amendment of Section 37.- In Section 37 of the principal Act,-

(a) for sub-section (2) the following sub-section shall be substituted, namely-

"(2) The Executive Council may, admit any college which fulfils such conditions of affiliation as may be prescribed, to the privileges of affiliation or enlarge the privileges of any college already affiliated or subject to the provisions of sub-section (8), withdraw or curtail any such privilege."

(b) for sub-section (8) the following sub-section shall be substituted, namely-

"(8) The privileges of affiliation of a college which fails to comply with any direction of the Executive Council under sub-section (7) or to fulfil the conditions of affiliation may, after obtaining a report from the management of the college be withdrawn or curtailed by the Executive Council in accordance with the provisions of the Statutes."

(c) after sub-section (10) the following sub-section shall be inserted, namely-

"(11) Any institution whose application is rejected by the University may prefer an appeal to the State Government within 30 days from the receipt of the order of rejection, which may either allow the appeal or reject it. The State Government shall also have power to review the matter of application of a college in cases where the complaints received by it with respect to the irregularities committed by the college.""

12. The consequence of amendment made in Section 37 of the Act of 1973 is essentially three fold. Firstly, the power to grant affiliation now stands vested in the Executive Council of the University concerned and the requirement of prior approval of Chancellor/State Government stood dispensed with. Secondly, the privilege of affiliation can now be extended to a college only when it fulfills conditions of affiliation, as may be prescribed. Thirdly, the proviso which permitted grant of temporary affiliation even if conditions of affiliation were not fulfilled entirely but only substantially stood deleted. No further amendment is made in the Act after the year 2014. The Executive Council is thus empowered in the Act now to grant privileges of affiliation only if the college fulfills all conditions of affiliation as are specified in the Statutes of the University. The object for which temporary affiliation was made permissible i.e. to secure fulfillment of all conditions of affiliation while granting affiliation even if conditions of affiliation are only substantially fulfilled and not in its entirety ceased to exist.

13. The exercise of power by the Executive Council of University in the matter relating to grant of affiliation or its withdrawal remains subject to the appellate jurisdiction of the State Government. The Executive Council could, thus, no longer grant privilege of affiliation temporarily.

14. Admission of college to the privileges of University, consequent upon its affiliation, however, continues to remain subject to the college fulfilling such conditions as are prescribed by the statutes and is otherwise subject to the directions which may be issued by Executive Council under sub-section (7) of Section 37. The continuance of privilege of affiliation are also subject to the exercise of power under sub-section

(8) and (9) of Section 37, and the decision in that regard remains subject to the appellate power of the State under sub-section (11).

15. Before proceeding further it would be worth noticing that the conditions of affiliation as per Section 37 of the Act of 1973 is required to be prescribed. Term "prescribed' is defined in the Act of 1973 to mean as is prescribed by the Statute. The First Statutes of the Universities established under the Act of 1973 were framed on similar lines and contained Chapter XIII regulating grant of privileges of affiliation to a college and also provided the conditions to be fulfilled by a college for the grant of affiliation. Clause 13.01 to 13.04 of the Statutes is reproduced hereinafter:-

"13.01. The list of college affiliated to the University as on the date of the publication of these Statutes is given in Appendix "E'. [Section 37].

13.01-A. The provisions of the Statutes relating to the affiliated College shall not apply to the Har Court Butler Technological Institutes, Kanpur in so far as they are inconsistent with its Memorandum of Association Rules, Regulation and bye-laws.

13.02. Every application for affiliation of a College shall be made so as to reach the Registrar not less than 12 months before the commencement of the session in respect of which the affiliation is sought. [Sections 37 and 49 (m)].

Provided that the Chancellor may, in special circumstances reduce the said period in the interest of higher education to such extent as he may deem necessary.

13.03. Every application for affiliation of a college shall be accompanied by a Bank Draft payable to the University, for a sum of Rs.2,000 which will be non-refundable. [Sections 37 and 49 (m)].

13.04. Before an application for affiliation is placed before the Executive Council, the Vice-Chancellor must be satisfied with regard to the following particulars, namely-[Section 37 and 49 (m)]-

(a) that the provisions of Statutes 13.05, 13.06 and 13.07 have been complied with;

(b) that the institution satisfies the demand for higher education in the locality;

(c) that the Management concerned has provided or has adequate financial resources to provide for-

(i) suitable and sufficient building;

(ii) adequate library, furniture, stationery, equipment and laboratory facilities;

(iii) two hectares of land (excluding covered area);

(iv) facilities for health and recreation of the students;

(v) payment of salary and other allowances to the employees of the college for at least three years."

16. The statutes of the University, insofar as it relates to grant of privileges of affiliation is concerned, appears to have been framed with reference to the provisions of the Act of 1973, as it was originally enacted. The Court has not been apprised of any amendment in the Statutes of the University, insofar as it provides the conditions for grant of affiliation to a new college.

17. The above noted provisions in the Statutes of the University are specific, inasmuch as relevant factors for establishment and efficient running of college have been incorporated therein. The conditions includes availability of (i) suitable and sufficient building; (ii) adequate library, furniture, stationery, equipment and laboratory facilities; (iii) two hectares of land (excluding covered area); (iv) facilities for health and recreation of the students; and (v) payment of salary and other allowances to the employees of the college for at least three years. In case the college can demonstrate that it fulfills the aforesaid conditions its application for grant of affiliation is required to be considered by the Executive Council. In case the Executive Council denies the privileges of affiliation to the college concerned its decision would be subject to exercise of appellate power by State Government. Once the State Government is vested with the appellate authority in the matter relating to grant of affiliation to the college concerned, the question of grant of temporary affiliation with the permission of State Government or the extension of its term, as was contained in Section 37 prior to introduction of U.P. Act No.14 of 2014 had to be necessarily omitted and has rightly been done so by the State Government while introducing U.P. Act No.14 of 2014. The involvement or association of State Government, at the first instance, regarding grant of affiliation or the question of enlarging the privileges of affiliation for one term of a course of study now ceases to exist. The University nevertheless would have jurisdiction to ensure that affiliated college function under its supervision and control in the manner provided for in Section 37 of the Act of 1973. Every affiliated college shall have to furnish such reports, returns and other particulars as the Executive Council or the Vice-Chancellor may call for. The Executive Council will also have jurisdiction to cause every affiliated college to be inspected, from time to time, at intervals not exceeding five years by one or more persons authorised by it in that behalf and the report of inspection shall be made to Executive Council. Executive Council is empowered by the Act of 1973 to direct an affiliated college so inspected to take such action as may appear to it to be necessary within such period as may be specified. Sub-section 8 thereof contemplates that where an affiliated college fails to comply with any direction of the Executive Council issued under sub-section (7) or fails to fulfill the conditions of affiliation then after obtaining a report from Management of the college the affiliation granted can be withdrawn or curtailed by Executive Council in accordance with the provisions of Statutes.

18. It is in the above context that the grievance raised by the petitioners require consideration. Learned counsel for the petitioner states that the University has not been able to comprehend the true purpose specified by the legislature for grant of temporary recognition i.e. fulfillment of conditions of affiliation. Submission is that even after the amendment incorporated vide U.P. Act No.14 of 2014 in section 37 of the Act of 1973 the University continues to grant temporary recognition even though all conditions for affiliation specified in the Statutes of the University are fulfilled and no justification exists to deny grant of permanent affiliation. It is further urged that new colleges are compelled to run after the University and its authorities for

extension of term of affiliation for no obvious reason. According to petitioners this practice results in limited resources of new colleges being diverted to unproductive activities and impedes quality of education.

19. Per contra, on behalf of the respondents it is urged that the power to grant permanent affiliation includes the power to grant temporary affiliation also. Contention is that the University is in a better position to regularly monitor the affairs of the college, and therefore, the petitioners are not entitled to any relief.

20. It has already been noticed that this Court in Committee of Management Paramhans Degree College, Bahraich (supra) has held that affiliation contemplated in section 37, per se, denotes permanent affiliation. It was for such reasons that the Act was amended vide U.P. Act No.1 of 2004 and a proviso was added to sub-section (2) of section 37 permitting grant of temporary affiliation even before all conditions of affiliation are met by the college. However, after the proviso to sub-section (2) of section 37 came to be deleted vide U.P. Act No.14 of 2014 the enabling provision for issuing temporary affiliation ceases to exist. Moreover, the Act now requires all conditions of affiliation to be met before the Executive Council could admit college to the privilege of affiliation, and therefore, no justification otherwise exists for grant of temporary affiliation to a college seeking affiliation.

21. It appears that on account of amendments introduced in Section 37, from time to time, a state of uncertainty/confusion has prevailed regarding grant of privileges of affiliation by the University. The import of amending Act No.14 of 2014 has not been correctly understood. The University appears to be continuing under the statutory scheme which existed prior to introduction of amendming Act No.14 of 2014.

22. Additional conditions regarding grant of affiliation are being introduced from time to time, vide different Government Orders, on account of which a state of uncertainty has been created in the affiliated colleges and they are forced to run after the authorities of the Universities upon expiry of each term. The grant of affiliation temporarily or for a limited term, therefore, is not found to be in consonance with the legislative mandate and is otherwise opposed to the cause of education, inasmuch as the institutions are all the time concerned about grant of extension of term of affiliation, which is often resulting in uncalled for litigation also before this Court. Such unwarranted stage of uncertainty has already been remedied by the legislature vide amending Act No.14 of 2014 and it is high time that the universities established under the Act of 1973 take note of it and obviate the menace.

23. It is at this juncture that the Court would like to refer to the Government Order issued by the State Government on 27th September, 2002. This Government Order lays down the norms to be made applicable for opening of new colleges for graduate/postgraduate level or for introducing new subject in the college concerned. Clause 1 of the Government Order lays down general procedure to be

adopted for opening of colleges by getting the society registered under the provisions of the Societies Registration Act, 1860. Various conditions with regard to existence of land and other teaching facilities etc. have also been specified. Clause 2 deals with justification for opening of a new college, inasmuch as it would have to be ascertained as to how many colleges are already in existence within a radius of 15 Kms. from such college. Clause 3 lays down the amount of security to be deposited by the college concerned. The existence of library and requisite furniture have also been specified. Both in respect of colleges upto graduate and postgraduate levels, Clause 9 lays down the criteria for sanctioning additional seats in the college concerned. Clause 10 lays down the norms for extension of affiliation to a college concerned. Clause 10 and 11 of this Government Order separately deals with norms for grant of temporary affiliation and also in respect of permanent affiliation. Clause 10 and 11 of the Government Order dated 27.9.2002, which are relevant for the controversy at hand are reproduced herein under:-

"**(10) सम्बद्धता विस्तारण हेतु मानक**

(1) महाविद्यालय की स्थापना से सम्बन्धित अवस्थापना सम्बन्धी मानक तथा पूर्व में निर्गत सम्बद्धता प्रदान करने सम्बन्धी आदेश में उल्लिखित बातें पूर्ण कर ली गयी है।

(2) शिक्षकों की नियुक्ति यू0जी0सी0/शासन द्वारा निर्धारित अर्हताओं के अनुरूप की गई हो।

(3) विगत वर्षो (अधिकतम तीन वर्ष) का परीक्षाफल 60 प्रतिशत से कम न रहा हो।

(4) संस्था का पंजीकरण अद्यावधिक विधि मान्य हो।

(5) महाविद्यालय द्वारा शासन एवं विश्वविद्यालय के निर्देशों का पालन किया जा रहा हो।

(6) विश्वविद्यालय की परीक्षाओं की अवधि में सामूहिक नकल का आरोप न हो।

(7) सम्बद्धता विस्तारण का प्रस्ताव विश्वविद्यालय की संस्तुति सहित सम्बद्धता समाप्त होने की अवधि से तीन माह पूर्व शासन तथा महामहिम कुलधिपति कार्यालय को प्राप्त होना चाहिए।

(11) स्थायी सम्बद्धता हेतु मानक

(1) महाविद्यालय की स्थापना से सम्बन्धित समस्त अवस्थापना एवं शैक्षिक मानकों की पूर्ति कर लेने का समुचित प्रमाण हो।

(2) विगत तीन वर्षो का परीक्षाफल 60 प्रतिशत से न्यून न रहा हो।

(3) निर्धारित योग्यता धारक प्राचार्य तथा समस्त शिक्षकों की नियुक्ति निर्धारित प्रक्रिया के अनुसार कर दी गई हो तथा यथा आवश्यक नियुक्ति पर कुलपति का अनुमोदन प्राप्त कर लिया गया हो।

(4) अध्यापकों को नियमित रूप से वेतन भुगतान किया जा रहा हो।

(5) स्थायी सम्बद्धता का प्रस्ताव विश्वविद्यालय के माध्यम से निरीक्षण मण्डल की आख्या एवं संस्तुति सहित अस्थायी सम्बद्धता समाप्त होने की अवधि के तीन माह पूर्व शासन/कुलाधिपति को प्राप्त हो जाये।

(6) संस्था का पंजीकरण अद्यावधिक विधि मान्य हो।

(7) प्रबन्ध तंत्र में किसी प्रकार का विवाद न हो तथा प्रबंधतंत्र के विश्वविद्यालय से अनुमोदित होने का प्रमाण हो।

(8) सामूहिक नकल का कोई आरोप न हो।"

24. Clause 10(3) contains a specific requirement that the result of the affiliated college has to be above 60% during the last three years for extending the term of affiliation. Similarly, clause 11(2) of the Govt. Order contemplates that the result for the last three years has

to be above 60% for the grant of permanent affiliation.

25. The aforesaid Government Order appears to have been issued when the power to grant affiliation was to be exercised with the approval of the State Government and included the power to grant affiliation for a limited term. It was in that context that conditions were imposed for grant of temporary recognition or for grant of permanent recognition to a college already admitted to the privileges of affiliation on temporary basis. This Government Order has completely lost its relevance in the existing statutory scheme where temporary recognition itself is not envisaged. Prior approval of the State Government for grant of affiliation is also dispensed with. In the Act of 1973 or the Statutes of the University concerned there exists no condition of the like nature as are contained in clause 10(2) and 11(3) of the Government Order dated 27.9.2002, for grant of affiliation. This Government Order, therefore, has lost its efficacy and cannot be relied upon for denying grant of affiliation.

26. At this juncture it would be worth referring to Section 2(14) of Act of 1973, which defines "prescribe' to mean as prescribe by the Statutes. The conditions as are required to be possessed by colleges for grant of affiliation has to be such as is prescribed in the Statutes. Law is otherwise settled that when a Statute requires an act to be done in a particular manner, it has to be done in that manner alone and all other modes are prohibited (see:- Taylor vs. Taylor: (1875) LR (1) CH-D-426, and Nazir Ahmad vs. King Emperor: AIR 1936 PC 253).

27. The exercise of power by the Executive Council for grant of recognition by virtue of Section 37(2) and the conditions to be imposed in that regard has therefore to be with reference to the Statutes alone and a condition, which has not been specified in the Statutes, ordinarily cannot be introduced by the Executive Council. This Court finds support in its view from the observation of the Apex Court in Bal Krishna Agarwal Vs. State of U.P. and others, (1995) 1 SCC 614. The Supreme Court while examining a claim of personal promotion interpreted the term "prescribed' in para 13 of the aforesaid judgment, which is reproduced hereinafter:-

"13. Shri Sanyal, the learned Senior Counsel appearing for Respondent 5, has, however, urged that since the validity of appointment of Respondents 4 and 5 with effect from 9-11- 1984 has not been assailed by the appellant, he should not be permitted to raise this question at this stage. It is no doubt true that the validity of promotion of Respondents 4 and 5 has not been assailed by the appellant but all that he is pointing out is that in view of the provisions contained in Section 31-A of the Act the promotion of Respondents 4 and 5 under the Personal Promotion Scheme could be made only after the length of service and qualifications were prescribed by the Statutes and provisions in this regard were made in the Statutes only on 21-2-1985. In other words, what the appellant is saying is that the promotion of Respondents 4 and 5 to the grade of Professor can be regarded to have been made legally only with effect from 21- 2-1985. This does not involve a challenge to the validity of their promotion but only raises the question about the date from

which it can be given effect to in law. We are of the opinion that in view of the provisions contained in Section 3 1 -A and Section 2(14) of the Act there is no escape from the conclusion that Respondents 4 and 5 could not be given promotion under the Personal Promotion Scheme till the necessary provisions prescribing the length of service and the qualifications for such promotion were made in the Statutes and since this was done by Notification dated 21-2-1985, promotion under the Personal Promotion Scheme could not be made prior to 21-2-1985. The Executive Council in its Resolution No. 198 dated 8-11-1984 had accepted the recommendations of the Selection Committee for promotion of Respondents 4 and 5 on the basis of Government Orders dated 12-12-1983 and 25-2-1984. At that time Section 31 of the Act provided for appointment of teachers by direct recruitment and did not envisage promotion from a lower teaching post to a higher teaching post. The orders of the Government aforementioned could not be given effect till necessary amendment was made in the Act making provision for personal promotion. This was done by introducing Section 3 1 -A by U.P. Act No. 9 of 1985 with effect from 10- 10- 1984. But Section 3 1 -A could be given effect only after the necessary provision was made in the Statutes prescribing the length of service and the qualifications for personal promotion. This was done by the notification dated 21-2- 1985. The promotion of Respondents 4 and 5 to the grade of Professor under the Personal Promotion Scheme could, therefore, not be made prior to 21-2-1985 and it has to be treated to have been made with effect from 21-2-1985. The inter se seniority of the appellant and Respondents 4 and 5 has to be determined on that basis."

28. Respondents, for justifying the issuance of Government Order have also referred to Section 66-A of the Act of 1973, which reads as under:-

"**66A**. The State Government may issue such directions from time to time to a University on policy matters, not inconsistent with the provisions of this Act as it may deem necessary such direction shall be complied with by the University."

29. The abovenoted provision is an enabling provision which permits the State Government to issue such directions, from time to time, to a University on policy matter, which are not inconsistent with the provisions of the Act and is otherwise deemed necessary. Such directions are required to be complied with by the University. The power to issue direction by the State Government has to be on matters of policy which are otherwise not inconsistent with the provisions of the Act. In the matter of grant of affiliation to a college concerned the Act of 1973 specifically provides for the course to be followed in Section 37. Affiliation has to be granted by the Executive Council of the University to a college which fulfills such conditions of affiliation, as may be prescribed in the Statutes. In such circumstances, the Executive Council is required to exercise its jurisdiction in the matter of grant of affiliation as per the conditions prescribed in the Statutes and not otherwise. Even otherwise, once it is held that the power to grant affiliation is not for a limited term and would continue so long as the affiliation is not withdrawn

by exercising power in the manner as contemplated under Section 37 of Act of 1973, clauses 10(3) and 11(2) of Government Order dated 27.9.2002 would have no application. These clauses otherwise have no role to play in the current statutory scheme, as already discussed above.

30. From the deliberations and discussions aforesaid, this Court is of the considered view that the University established under the Act of 1973 once admits a college to the privileges of affiliation as per Section 37 of the Act of 1973, after introduction of amendment vide U.P. Act No.14 of 2014, it has to be treated as continuing and would not be restricted to a limited period, unless such privileges are withdrawn in accordance with Section 37(8) and (9) of the Act of 1973. This would be the position in respect of all cases of grant of affiliation after the introduction of U.P. Act No.14 of 2014. It is further held that Clauses 10(3) and 11(2) of the Government Order dated 27.9.2002 would not be a relevant consideration for the purposes of grant of affiliation to a college after 18.7.2014 when Section 37 was amended vide U.P. Act No.14 of 2014. Exercise of power by the Executive Council, for the purposes of imposing conditions for grant of affiliation would have to be restricted to the conditions specified in the Statutes of the University. Since the privileges of affiliation to the petitioners have been held to be continuing as such the benefits denied to them only on the ground that their affiliation is limited/temporary and not permanent cannot be sustained. All the writ petitions are disposed of with the direction that University would pass needful orders in light of the aforesaid observation, expeditiously, preferably within a period of one month from the date of presentation of certified copy of this order. No order is passed as to costs.

(2020)08ILR A187
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 30608 of 2018

Sursati ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Singh
Counsel for the Respondents:
C.S.C., Sri Devendra Kumar, Sri Pramod Kumar Pandey

A. Civil Law - National Highways Act, 1956 – Section 3-C, 3-D, 3-E (1) – Land Acquisition Act, 1894 – Sections 4, 5A, 6, 9, 11 and 17 – Subsequent Purchaser – Right of Compensation – The right of the subsequent purchaser to receive compensation on the strength of his vendor's title has been judicially recognized – Right of a subsequent purchaser, appears to be still substituting under the National Highways Act, 1956, even if the sale is made after publication of declaration under Section 3D(1) – The sale shall be void against the Government as it was earlier. But the same shall not deprive subsequent purchaser from receiving compensation of the acquired land on the strength of vendor's title. (Para 24 and 36)

B. Civil Law - National Highways Laws Amendment Act, 1997 – Scope and Objects – The object was to reduce delay and make speedy implementation of highway projects – In order to expedite the process of land acquisition, it was proposed, once the Central Government declares

that the land is required for public purposes for development of a highway, that land will vest in the Government and only the amount by way of compensation is to be paid and any dispute relating to the compensation will be subject to adjudication through process of arbitration – The object of the Amendment Act 1997 was not to deprive the subsequent purchaser, after the notification of declaration under Section 3D (1), of his right to receive compensation of the acquired land on the strength of his vendor's title. (Para 33 and 35)

C. Procedure of Court – Judicial Discipline – Conflicting judgments on the point in issue – On the one hand there is judgment in Surendra Nath Singh Yadav and on the other the judgments in the cases of Asha Devi, Vipin Agrawal and Smt. Gyanti Singh – Former case held that the subsequent purchaser has a right to receive compensation but the later case took a contrary view – Judicial discipline requires that if two Division Benches of the same High Court take different views, the matter should be referred to a larger bench – Case referred to the Full Bench. (Para 38, 39 and 42)

Petition referred to Full Bench (E-1)

Cases relied on :-

1. Surendra Nath Singh Yadav Vs UOI; 2018 (2) ADJ 768

2. Writ C No. 9874 of 2018; Asha Devi VsNHAL & 4 ors. decided on 16.3.2018

3. Writ C No. 12158 of 2018; Smt. Gyanti Singh Vs St. of U.P. & ors. decided on 3.5.2018

4. Writ C No. 10958 of 2018; Vipin Agrawal Vs U.O.I decided on 27.3.2018

5. V. Chandrashekharan Vs Administrative Officer; (2012) 12 SCC 133

6. Government (NCT) of Delhi Vs Manav Dharm Trust; (2017) 6 SCC 751

7. U.P. Jal Nigam Vs Kalara Properties (P) Ltd.; (1996) 3 SCC 124

8. Sneh Prabha (Smt.) Vs St.of U.P. & anr, (1996) 7 SCC 426

9. Rajasthan Housing Board Vs New Pink City Nirman Sahkari Samiti; (2015) 7 SCC 601

10. M. Venktesh & ors. Vs Commissioner, Bangalore Development Authority; (2015) 17 SCC 1

11. Shiv Kumar & ors. Vs U.O.I. & ors.; (2019) 10 SCC 229

12. Union of India Vs Tarsem Singh; AIR 2019 SC 4689

13. Usha Kumar Vs St. of Bihar; (1998) 2SCC 44

14. Rajasthan Public Commission & ors.Vs Hari; (2003) 5 SCC 480

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Ajay Kumar Singh, learned counsel for the petitioner, learned Standing Counsel for Respondent Nos. 1 to 5 and Sri Devendra Kumar, learned Counsel for National Highways Authority of India, Respondent No.6.

2. The petitioner has filed this petition for the following main reliefs:-

"(A) Issue an appropriate writ order or direction in the nature of mandamus commanding the respondents and directing them (specially respondent No.3 and 5) to decide the claim of the petitioner regarding to ensure the payment of compensation with respect of Arazi No. 535 area 0.0580 hectare which is acquisition the land of the petitioner.

(B) Issue an appropriate writ order or direction in the nature of mandamus commanding the respondents and directing them to decide the representation of the petitioner within stipulated period, which is pending

before the respondent No.3 and 5 since 24th February, 2018."

3. Facts of the case are that one Smt. Ram Dulari widow of late Pataru son of Sugriv executed a sale deed dated 21.1.2016 in favour of petitioner for an area of 0.430 hectare out of 0.05804 hectare of gata No. 535 situated in Mauja Pirthipur, Pargana Pachotar, District Ghazipur. On the basis of the said sale deed the petitioner's name was recorded as Bhumidhar in the revenue records on 11.3.2016. Later on, the petitioner acquired knowledge that the land of gata No. 535, purchased by her had already been acquired vide notification under Section 3D of the National Highways Act, 1956. In the notification annexed as Annexure No.3 the name of the original land holder was mentioned in Column 34. The petitioner filed many applications for correction of her name in place of the name of transferor and for payment of compensation for the acquired land to the petitioner in view of the sale deed but the payment has yet not been made.

4. The Repondent Nos. 1 to 5 have set up the case that the Government of India issued two notifications dated 1.12.2014 and 27.11.2015 under Section 3A and 3D of the National Highways Act, 1956, for widening of National Highway No. 29, by which the aforesaid land was also acquired. The petitioner purchased the land in question on 22.1.2016 after publication of the notification and as such the sale deed being void ab initio, the petitioner has no right to claim compensation, hence, the representation of the petitioner is of no consequence.

5. The Project Director National Highways district Gorakhpur has taken a stand that the role of the National Highways Authority of India in respect of land acquisition is limited to the depositing of the awarded amount of compensation with the competent authority. It has also taken a stand that the petitioner's sale deed dated 21.1.2016 is illegal and it is for the competent authority to act according to law.

6. Smt. Ram Dulari, the petitioner's transferor Respondent No.7, having died during pendency of the writ petition, was substituted by her grand son Respondent No. 7/1 who has stated in the counter affidavit that the petitioner is entitled for payment of compensation of the acquired land which was transferred to the petitioner and for payment of such compensation to the petitioner he has no objection.

7. Learned counsel for the petitioner has argued that the petitioner having purchased the land from its tenure holder, may be after the notification under Section 3D of the Act 1956, is entitled for payment of compensation which is being denied illegally by Respondent Nos.1 to 5. He has submitted that the subsequent purchaser has also a right to receive compensation of the acquired land on the strength of the vendor's title. He has placed reliance on the judgment passed by a coordinate Bench of this Court in the case of **Surendra Nath Singh Yadav Vs. Union of India decided on 16.1.2018 reported in 2018 (2) ADJ 768.**

8. Per contra, learned Standing Counsel for respondent Nos. 1 to 5 and Sri Devendra Kumar learned counsel for Respondent No. 6 have submitted that

the subsequent purchaser of the land acquired under the National Highways Act 1956, has no right to claim or receive compensation on the strength of the sale deed after declaration under Section 3-D(2), which is void ab initio. They have placed reliance on the judgment of this Court by other coordinate Benchs in the case of **Asha Devi Vs. National Highways Authority of India and four others Writ C No. 9874 of 2018 (DB) decided on 16.3.2018; the case of Smt. Gyanti Singh Vs. State of U.P. and others Writ C No. 12158 of 2018 (DB) decided on 3.5.2018 and the case of Vipin Agrawal Vs. Union of India Writ C No. 10958 of 2018 (DB) decided on 27.3.2018.**

9. We have heard the submissions advanced by the learned counsel for the parties and have thoroughly considered the judgments cited from both the sides.

10. The short question involved in the present writ petition is "whether the petitioner who is a subsequent purchaser vide sale deed dated 21.1.2016 after the date of notification for acquisition of land under Section 3-D (1) of the National Highways Act, 1956, has a right to claim and receive compensation of the acquired land from the State?

11. It is relevant to reproduce Sections 4, 5A, 6, 9, 11 and 17 of the Land Acquisition Act, 1894 as under:

"4. Publication of preliminary notification and powers of officers thereupon:

(1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification.

(2) Thereupon it shall be lawful for any officer, either, generally or specially authorised by such Government in this behalf, and for his servants and workmen, to enter upon and survey and take levels of any land in such locality; to dig or bore in the sub-soil; to do all other acts necessary to ascertain whether the land is adapted for such purpose; to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; to mark such levels, boundaries and line by placing marks and cutting trenches; and, where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

***5A. Hearing of objections.** (1) Any person interested in any land which has been notified under section 4, sub-section (1) as being needed or likely to be needed for a public purpose or for a Company may, within thirty days from*

the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land, which has been notified under section 4, sub-section (1) or make different reports in respect of different parcels of such land, to the Government containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

6. Declaration that land is required for a public purpose.

(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (1), irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2)]:

[Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1).

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967) but before the commencement of the Land Acquisition (Amendment) Act, 1984 shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:]

[Provided further that] no suh declaration nshall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

[Explanation 1. In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.]

Explanation 2- Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.

(2) [Every declaration] shall be published in the Official Gazette, [and in two daily newspapers circulating in the locality in which the situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the date of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the declaration), and such declaration shall state] the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the [appropriate Government] may acquire the land in manner hereinafter appearing.

9 Notice to persons interested:

(1) The Collector shall then cause public notice to be given at convenient places o or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.

(2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

(4) In case any person so interested resides elsewhere, and has no such agent the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business and registered under sections 28 and 29 of the Indian Post Office Act, 1898 (6 of 1898)].

11. Enquiry and award by Collector

[(1)] On the day so fixed, or any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any person interested has stated pursuant to a notice given under Section 9 to the measurements made under Section 8, and into the value of the land at the date of the publication of the notification under Section 4, sub-section (1)], and into the respective interests of the persons claiming the compensation, and shall make an award under his hand of-

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him:

[Provided that no award shall be made by the Collector under this sub-section without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorise in this behalf.

Provided further that it shall be competent for the appropriate Government to direct that the Collector may make such award without such approval in such class of cases as the appropriate Government may specify in this behalf.]

[(2)] Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement.

(3) the determination of compensation for any land under sub-section (2) shall not, in any way affect the determination of compensation in respect of other lands in the same locality or elsewhere in accordance with the other provisions of this Act.

(4) Notwithstanding anything contained in the Registration Act, 1908 (16 of 1908), no agreement made under sub-section (2) shall be liable to registration under that Act.]

17. Special powers in cases of urgency-

(1) In cases of urgency, whenever the [appropriate Government], so directs, the collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), [take possession of any land needed for a public purpose]. Such land shall thereupon [vest absolutely in the [Government], free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel or any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to anquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, [or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity,] the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the [appropriate Government], enter upon and take possession of such land, which shall thereupon [vest absolutely in the [Government] free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty eight hours notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his

movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested, compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

[(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the collector shall, without prejudice to the provisions of sub-section (3),

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in section 31, sub-section (2),

and where the Collector is so prevented, the provisions of section 31, sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3B). the amount paid or deposited under sub-section (3A), shall be taken into account for determining the amount of compensation required to be tendered under section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under section 11, the excess may, unless refunded within three months from the date of the Collector's award, be recovered as an arrear of land revenue.]

[(4)] In the case of any land to which, in the opinion of the [appropriate Government], the provisions of sub-section (1) or sub-section (2) are applicable, the [appropriate Government] may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time [after the date of the publication of the notification] under section 4, sub-section (1)].

12. Thus under the Land Acquisition Act vesting of acquired land takes place on possession being taken under section 16 or section 17 of the Act, 1894.

13. So far as the National Highways Act, 1956 is concerned, Section 3A confers the power on the Central Government to acquire land etc. on being satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, by notification in the official Gazette, declaring its intention to acquire such land. Section 3-C provides for opportunity of hearing of objections to the person interested in the land and the order to be passed by the competent authority on those objections. Section 3-D provides for declaration of acquisition. Under Sub-Section (1) where no objection under Section 3-C(1) has been made to the competent authority within the specified period or where the competent authority has disallowed the objection under section 3-C (2), the competent authority shall as soon as may be submit a report to the Central Government and on receipt of such report, the Central Government shall declare by notification in the Official

Gazette, that the land should be acquired for purpose or purposes mentioned in sub-section (1) of Section 3-A. Sub-section (2) of Section 3-D provides that on the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

14. It it is relevant to reproduce Section 3-D of National Highways Act, 1956, as under:-

"3-D. Declaration of acquisition-

(1) Where no objection under sub-section (1) of section 3-C has been made to the compentent authority within the period specified therein or where the competent authority has disallowed the objection under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of section 3A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Wherein respect of any land, a notification has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect.

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 3A is stayed by an order of a court, shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

It it also relevant to reproduce Section 3E of the National Highways Act, 1956 as follows:

3-E. Power to take possession-

(1) Where any land has vested in the Central Government under sub-section (2) of section 3-D, and the amount determined by the competent authority under section 3-G with respect to such land has been deposited under sub-section (1) of section 3-H, with the competent authority by the Central by the Central Government, the competent authority may by notice in writing direct the owner as well as any other person who may be in possession of such land to surrender or deliver possession thereof to the competent authority or any person duly authorised by it in this behalf within sixty days of the service of notice.

(2) If any person refuses or fails to comply with any direction made under sub-section (1), the competent authority shall apply-

(a) in the case of any land situated in any area falling within the metropolitian area, to the Commissioner of Police;

(b) in case of any land situated in any area other than the area referred to in clause (a), to the Collector of a District, and such Commissioner or Collector, as the case may be, enforce the surrender of the land, to the competent authority or to the person duly authorised by it."

15. Thus, under the National Highways Act, on the publication of the

declaration under sub-section (1) of Section 3-D the land vests absolutely in the Central Government, free from all encumbrances. It is not dependent upon taking of possession.

16. In the case of **Surendra Nath Singh Yadav** *(supra)* the notification under Section 3A of The National Highways Act, 1956 was published on 1.12.2014 and the notification under Section 3-D (1) of the Act, 1956 was published on 24.9.2015. The petitioner therein had purchased the land from its earstwhile owner, vide registered sale deed dated 22.7.2016, after the notification under Section 3A and 3-D (1) of the Act, 1956. The Division Bench of this Court, after considering the judgments of the Hon'ble Apex Court in **V. Chandrashekharan Vs. Administrative Officer reported in (2012) 12 SCC 133;** and **Government (NCT) of Delhi Vs. Manav Dharm Trust reported in 2017 (6) SCC 751,** held that the subsequent purchaser, is a person interested only to the extent of claiming compensation of the land, subject matter of acquisition, and, as such, right of compensation being claimed by the petitioner therein was worthy of consideration. This Court directed the Land Acquisition Officer/Additional District Magistrate, (Finance and Revenue), Gandhipur to consider the representation of the petitioner therein (the subsequent purchaser) for making payment of compensation to him.

It is relevant to reproduce paragraphs 4 to 8 of the case of **Surendra Nath Singh Yadav** *(supra)*, as under:

"(4) It is well settled proposition of law by judicial pronouncement of the Apex Court that purchaser of the land subsequent to initiation of the acquisition proceedings has no locus standi to challenge the acquisition proceedings but certainly he is a person interested in the compensation.

(5) Reference may be made to the decision of the apex Court in the case of Vs. Chandrasekaran v. Administrative Officer, (2012) 12 SCC 133 wherein it has been held as under:

(6) The same view has been reiterated in a recent decision of the apex Court in the case of Government (NCT of Delhi) v. Manav Dharm Trust and another, (2017) 6 SCC 751.

(7) In view of the settled law on the subject, subsequent purchaser is a person interested only to the extent of making a claim of compensation of the land, subject matter of acquisition.

(8) In view of above, right of compensation being claimed by the petitioner is worthy of being considered. However, since the issue involves adjudication into a question of fact, we feel appropriate that the fact finding authority may consider the claim of the petitioner at the initial stage."

17. In the case of **Asha Devi** *(supra)* the Division Bench of this Court held that the sale deed executed in favour of a person, subsequent to the publication of the declaration under Section 3-D (I) of the Act, 1956, is void *ab initio* and does not confer any right upon such person to claim compensation. It is relevant to reproduce relevant portion of the judgment of Asha Devi *(supra)* as under:-

"Section 3-D(2) of the Act provides that on publication of the

declaration under Section 3-D(1), the land shall vests absolutely in the Central Government free from all encumbrances. In the present case, the declaration under Section 3(D) was published on 27 November 2015. The person from whom the petitioner purchased the land, therefore, did not have any title on 11 February, 2016 to sell the land to the petitioner. The sale deed executed in favour of the petitioner is, therefore, void ab initio and does not confer any right upon the petitioner to claim compensation. At best the petitioner can, if so advised, file a Suit against the vendor for recovery of the amount and for consequential reliefs"

18. In **Asha Devi** Case *(supra)* the judgment of the co-ordinate bench in Surendra Nath Singh Yadav *(supra)* does not find mention and appears not to have been brought to the notice of this Court.

19. In the case of **Vipin Agrawal** *(supra)* it has been held that on publication of the declaration in the official gazette under Section 3-D(1) of the National Highways Act, 1956, the land vests absolutely in the Central Government free from all encumbrances and thereafter the erstwhile owner is left with no title to such land and any sale deed executed thereafter would be void *ab initio* and would not confer any right on the subsequent purchaser to receive compensation.

20. In **Vipin Agrawal** case *(supra)* this Court considered the case of **Surendra Nath Singh Yadav** *(supra)* and held that the case of **Government of (NCT of Delhi) Vs. Manav Dharm Trust 2017 (6) SCC 751**, and relied upon in Surendra Nath Singh Yadav *(supra)*, was under the provisions of the Land Acqusition Act, 1894, and as such it was not applicable to the acquisitions made under the National Highways Act, 1956, in as much as under the Land Acquisition Act, the property vests in the Government free from all encumbrances either under section 16 or under Section 17 on possession being taken and not on the publication of declaration under Section 6; whereas under the National Highways Act, 1956, the land vests in the Government free from all encumbrances on publication of the declaration under Section 3D (1). It is relevant to reproduce portion of Vipin Agrawal case *(supra)* as follows:

"It is, therefore, clear that on receipt of the report, the Central Government declares by notification in the official gazette that the land should be acquired for the purpose mentioned in sub-section (1) of Section 3A. Sub-section (2) of Section 3 provides that on the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances. Thus, on publication of the declaration in the official gazette on 7 August 2012, the land stood vested in the Central Government free from all encumbrances and the erst while owner did not have any right to execute the sale deed in favour of the petitioner. The sale deed was executed by the petitioner is void ab initio and does not confer any right upon the petitioner to receive compensation.

Learned counsel for the petitioner has placed reliance upon a Division Bench of this Court in Surendra Nath Singh Yadav v. Union of India and Others reported in 2018 (2) ADJ 760. This decision relies upon the decision of the Supreme Court in the case of

Government (NCT) of Delhi) v. Manav Dharam Trust and Another reported in (2017) 6 SCC 751 which is in connection with the acquisition under the provisions of the National Highways Act, 1956. Unlike the provisions of sub-Section 3D(2) of the Act under the Land Acquisition Act, the property vests in the State Government free from all encumbrances either under Section 16 or under Section 17, on possession being taken and not on the publication of the declaration under Section 6 of the Act.

Thus, the decision in the case of Surender Nath, does not help the petitioners. The petitioners can initiate appropriate proceedings against the erst while owner."

21. In the case of **Smt. Gyanti Singh** *(supra)* it was held that in the light of the law laid down in the case of Vipin Agrawal *(supra)* the sale deed executed after declaration, as per Section 3D (2) of National Highways Act, 1956, was void ab initio and did not confer any right on the vendee/ transferee to claim compensation. Relevant portion of Gyanti Singh Case *(supra)* is as under:

"Suffice to mention, in the instant matter the declaration as per Section 3-D of the National Highways Act, 1956 was made on 27 November, 2015 and the sale deed was executed on 7 April, 2017. In this factual background and in the light of the law laid down in the case of ***Vipin Agarwal,*** *the sale deed is void ab initio and that does not create any right of the petitioner to claim compensation."*

22. Thus, in **Surendra Nath Singh Yadav** *(supra)* the subsequent purchaser has been held entitled to receive compensation of the land acquired under the National Highways Act, 1956 although the sale took place after the notification under Section 3-D (1); whereas in Asha Devi *(Supra)*, Vipin Agarwal *(supra)* and Gyanti Singh *(supra)*, the coordinate Benches have held that the subsequent purchaser has no right to receive compensation. Surendra Nath Singh case *(supra)* has been distinguished on the ground that the Judgment of the Supreme Court in Manav Dharm Trust Case *(supra)* was under the Land Acquisition Act, 1894, and not under the National Highways Act, 1956.

23. The basic distinction as pointed out in the case of **Vipin Agarwal** *(supra)* is that under the Land Acquisition Act, 1894, vesting takes place after taking of possession in pursuance of the notification under Sections 4 and 6, either under Section 16 or Section 17, but under the National Highways Act, 1956, vesting takes place on declaration under Section 3D(1) and as such any sale deed executed thereafter i.e. after vesting of the land in the Government, by the erstwhile owner, is void ab initio.

24. The right of the subsequent purchaser to receive compensation on the strength of his vendor's title has been judicially recognised.

25. In **U.P. Jal Nigam Vs.** Kalara Properties (P) Ltd. Reported in 1996 (3) SCC 124, M/s Kalara Properties had purchased the land after the notification under Section 4 (1) of the Land Acquisition Act was published. It was held that the sale was void against the State and M/s Kalara Properties acquired no right, title or interest in the land. It

could not challenge the validity of the notification or the irregularity in taking possession of land before publication of the declaration under Section 6. Any encumbrance created by the owner after Section 4(1) notification is published does not bind the Government and such a purchaser does not acquire any title on the property. The purchaser is a person interested in the compensation, since he steps into the shoes of earstwhile owner, and is entitled to claim compensation. Relevant part of Paragraph 3 and 4 of the U.P. Jal Nigam *(supra)* is being reproduced as under:

"3.....It is settled law that after the notification Under Section 4(1) is published in the Gazette any encumbrance created by the owner does not bind the Government and the purchaser does not acquire any title to the property.

In this case notification Under Section 4(1) was published on March 24, 1973, possession of the land admittedly was taken on July 5, 1973 and pumping station house was constructed. No doubt, declaration Under Section 6 was published later on July 8, 1973. Admittedly power Under Section 17(4) was exercised dispensing with the enquiry Under Section 5A and on service of the notice Under Section 9 possession was taken, since urgency was acute, viz., pumping station house was to be constructed to drain out flood water. Consequently, the land stood vested in the State Under Section 17(2) free from all encumbrances. It is further settled law that once possession is taken, by operation of Section 17(2), the land vests in the State free from all encumbrances unless a notification Under Section 48(1) is published in the Gazette withdrawing from the acquisition. Section 11A, as amended by Act 68 of 1984, therefore, does not apply and the acquisition does not lapse. The notification Under Section 4(1) and the declaration Under Section 6, therefore, remain valid. There is no other provision under the Act to have the acquired land divested, unless, as stated earlier, notification Under Section 48(1) was published and the possession are surrendered pursuant thereto.

That apart, since M/s. Kalra Properties, respondent had purchased the land after the notification Under Section 4(1) was published, its sale is void against the State and it acquired no right, title or interest in the land. Consequently, it is settled law that it cannot challenge the validity of the notification or the regularity in taking possession of the land before publication of the declaration Under Section 6 was published."

26. In **Sneh Prabha (Smt.) Vs. State of U.P. and another (1996) 7 SCC 426** the Hon'ble Supreme Court reiterated that any alienation of land after publication of the notification under section 4 (1) of the 1894 Act did not bind the Government or the beneficiary under the acquisition. It was also held that if any subsequent purchaser acquires land, his/her only right would be subject to the provisions of the Act and/or to receive compensation for the land. Paragraph 5 of the judgment in the case Sneh Prabha (supra) is being reproduced as under:

"5. Though at first blush, we were inclined to agree with the appellant but on deeper probe, we find that the appellant is not entitled to the benefit of the Land Policy. It is settled law that any person who purchases land after publication of the notification under Section 4(1), does so at his/her own peril. The object of publication of the

notification under Section 4(1) is notice to everyone that the land is needed or is likely to be needed for public purpose and the acquisition proceedings point out an impediment to anyone to encumber the land acquired thereunder. It authorises the designated officer to enter upon the land to do preliminaries etc. Therefore, any alienation of land after the publication of the notification under Section 4(1) does not bind the Government or the beneficiary under the acquisition. On taking possession of the land, all rights, titles and interests in land stand vested in the State, under Section 16 of the Act, free from all encumbrances and thereby absolute title in the land is acquired thereunder. If any subsequent purchaser acquires land, his/her only right would be subject to the provisions of the Act and/or to receive compensation for the land. In a recent judgment, this Court in ***Union of India V. Shivkumar Bhargava*** *considered the controversy and held that a person who purchases land subsequent to the notification is not entitled to alternative site. It is seen that the Land Policy expressly conferred that right only on that person whose land was acquired. In other words, the person must be the owner of the land on the date on which notification under Section 4(1) was published. By necessary implication, the subsequent purchase was elbowed out from the policy and became disentitled to the benefit of the Land Policy."*

27. In **V. Chandrasekaran and another Vs. Administrative Officer and others (2012) 12 SCC 133** it has been reiterated that at the most, the subsequent purchaser can claim compensation on the basis of his vendor's title. Paragraph 18 of the judgment is being reproduced as under:

"In view of the above, the law on the issue can be summarised to the effect that a person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour dos not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title.

28. To the same effect are the decisions of Hon'ble Supreme Court in **Rajasthan Housing Board Vs. New Pink City Nirman Sahkari Samiti (2015) 7 SCC 601** and **M. Venktesh and others Vs. Commissioner, Bangalore Development Authority (2015) 17 SCC 1,** wherein it has been held that the legal position about the validity of any sale, post issuance of a preliminary notification is fairly well settled by long line of decisions. The sale in such cases is void and non east in the eye of the law giving to the vendee the limited right to claim compensation and no more.

29. In **Government (NCT of Delhi) Vs. Manav Dharm Trust and another (2017) 6 SCC 751,** the Hon'ble Supreme Court held that the subsequent purchaser, the assignee, the successor in interest, the power of attorney holder etc. are all persons who are interested in compensation/landowners/ affected persons in terms of the 2013 Act and such persons are entitled to file a case for a declaration that the land acquisition proceedings have lapsed by virtue of operation of Section 24(2) of the Act,

2013. It is a declaration qua the land wherein indisputably they have an interest and they are affected by such acquisition. For such a declaration, it cannot be said that the respondent-writ petitioners do not have any locus standi.

30. In **Shiv Kumar and others Vs. Union of India (UOI) and others reported in (2019) 10 SCC 229** the Hon'ble Supreme Court held that Manav Dharm Trust case does not lay down the law correctly. It was held that when a purchase is void, then no declaration can be sought on the ground that the land acquisition under the Act of 2013 has lapsed due to illegality/irregularity of taking possession under the Act 1894.

31. In **Manav Dharm Trust** *(supra)* as well as in **Shiv Kumar** *(supra)* the Hon'ble Supreme Court referred to its earlier judgments which recognized that the subsequent purchaser has right to receive compensation on the basis of his vendor's title, although the purchase made after section 4 notification was held to be void against the State.

32. So far as acquisition of the land for national highways is concerned, it was earlier made under the Land Acquisition Act, 1894. The National Highways Act, 1956 as originally enacted did not provide for acquisition of land. The National Highways Act, 1956 was amended by the National Highways Laws (amending) Act, 1997 and Sections 3A to 3J were added. After such amendment, the acquisition of land for the national highways was made and is being made under the National Highways Act, itself.

33. The object of amendment of 1997, was, interalia, to reduce delay and make speedy implementation of highway projects. In order to expedite the process of land acquisition, it was proposed, once the Central Government declares that the land is required for public purposes for development of a highway, that land will vest in the Government and only the amount by way of compensation is to be paid and any dispute relating to the compensation will be subject to adjudication through process of arbitration.

34. In the case of **Union of India Vs. Tarsem Singh reported in AIR 2019 SC 4689,** vires of Section 3J of the National Highways Act, 1956, was under challenge, as being violative of Article 14 of the Constitution of India, to the extent of non grant of solatium and interest to lands acquired under the National Highways Act; which was available if the lands were acquired under the Land Acquisition Act. The Hon'ble Supreme Court considered the object of the Amendment Act, 1997, in the National Highways Act, 1956 by which Section 3A to 3J were introduced. It is relevant to reproduce paragraphs 6,7,9 and 18 of the judgment in **Tarsem Singh** *(supra)* as under:-

6. Having heard the learned Counsel on both sides, it is necessary to first mention that the National Highways Act, 1956, as originally enacted, did not provide for acquisition of land. Thus, till the National Highways Laws (Amendment) Act, 1997, all acquisitions for the purpose of National Highways were made under the Land Acquisition Act, and the owners were given, in addition to market value, solatium as

well as interest under the provisions of that Act.

7. Coming to the Amendment Act of 1997, it is important to set out the Objects and Reasons that led to the aforesaid amendment. They are:

1. In order to create an environment to promote private investment in national highways, to speed up construction of highways and to remove bottlenecks in their proper management, it was considered necessary to amend the National Highways Act, 1956 and the National Highways Authority of India Act, 1988.

2. One of the impediments in the speedy implementation of highways projects has been inordinate delay in the acquisition of land. In order to expedite the process of land acquisition, it is proposed that once the Central Government declares that the land is required for public purposes for development of a highway, that land will vest in the Government and only the amount by way of compensation is to be paid and any dispute relating to compensation will be subject to adjudication through the process of arbitration.

3. It was also felt necessary to ensure continuity of the status of bypasses built through private investment. To achieve this, it is proposed to amend the National Highways Act, 1956 so as to include the highway stretches situated within any municipal area as a part of National Highway. Further, as the National Highways Act, 1956 permits participation of the private sector in the development of the National Highways, it became imperative to amend the National Highways Authority of India Act, 1988 so as to provide that the National Highway Authority of India may seek the participation of the private sector in respect of the highways vested in the Authority.

4. With a view to provide adequate capital and loans to the National Highways Authority of India by the Central Government, it is proposed to make amendment in the National Highways Authority of India Act, 1988.

5. With a view to achieve the above objectives and also as both Houses of Parliament were not in session and the President was satisfied that circumstances existed which rendered it necessary for him to take immediate action, the National Highways Laws (Amendment) Ordinance, 1997 was promulgated by the President on the 24th day of January, 1997.

6. The Bill seeks to replace the aforesaid Ordinance.

9. Keeping in view the object of reducing delay and speedy implementation of highway projects, the amended National Highways Act does away with any "award" by way of an offer to the landowner. Post the notification Under Section 3A, objections are to be heard by the competent authority, whose order is then made final. The moment the authority disallows the objections, a report is submitted to the Central Government, and on receipt of such report, the Central Government, by a declaration, states that the land should be acquired for the purpose mentioned in Section 3A. The important innovation made by the Amendment Act is that vesting is not postponed to after an award is made by the Competent Authority. Vesting takes place as soon as the Section 3D declaration is made. One other important difference between the Amendment Act and the Land Acquisition Act is that determination of

compensation is to be made by the competent authority under the Amendment Act which, if not accepted by either party, is then to be determined by an Arbitrator to be appointed by the Central Government. Such arbitrator's Award is then subject to challenge under the Arbitration and Conciliation Act, 1996. Thus, delays in references made to District Judges and appeals therefrom to the High Court and Supreme Court have been obviated. Section 3G(7) does not provide for grant of solatium, and Section 3H(5) awards interest at the rate of 9% on the excess amount determined by the arbitrator over what is determined by the competent authority without the period of one year contained in the proviso to Section 28 of the Land Acquisition Act, after which interest is only awardable at the rate of 15% per annum, if such payment is made beyond one year.

18. When we examine the Objects and Reasons which led to the 1997 amendment of the National Highways Act, we do not find mentioned therein any object relating to distribution of the material resources of the community. The object of the Amendment Act has no relationship whatsoever to the Directive Principle contained in Article 39(b), inasmuch as its limited object is to expedite the process of land acquisition by avoiding inordinate delays therein. The object of the Amendment Act was not to acquire land for the purpose of national highways as, pre-amendment, the Land Acquisition Act provided for this. The object of the Amendment Act was fulfilled by providing a scheme different from that contained in the Land Acquisition Act, making it clear that the stage of offer of an amount by way of compensation is removed altogether; vesting takes place as soon as the Section 3D notification is issued; and most importantly, the tardy Court process is replaced by arbitration. Obviously, these objects have no direct and rational nexus with the Directive Principle contained in Article 39(b). Article 31-C is, therefore, out of harm's way. Even otherwise, on the assumption that Article 31-C is attracted to the facts of this case, yet, as was held by Bhagwati, J. in Minerva Mills Ltd. v. Union of India.

...it is not every provision of a statute, which has been enacted with the dominant object of giving effect to a directive principle, that it entitled to protection, but only those provisions of the statute which are basically and essentially necessary for giving effect to the directive principle are protected under the amended Article 31-C (at page 338-339)

This passage was specifically referred to in Tinsukhia Electric Supply Co. Ltd. v. State of Assam MANU/SC/0027/1990 : (1989) 3 SCC 709 at 735. Also, in Maharashtra State Electricity Board v. Thana Electric Supply Co.

43. The idea of nationalisation of a material resource of the community cannot be divorced from the idea of distribution of that resource in the community in a manner which advances common good. The cognate and sequential question would be whether the provisions of the Amending Act, 1976, had a reasonable and direct nexus with the objects of Article 39(b). It is true, the protection of Article 31-C is accorded only to those provisions which are basically and essentially necessary for giving effect to the objects of Article 39(b). The High Court from the trend of its reasoning in the judgment, appears to

take the view that while the provision for the takeover in the principal Act might amount to a power to acquire, however, the objects of the Amending Act of 1976, which merely sought to beat down the price could not be said to be part of that power and was, therefore, incapable of establishing any nexus with Article 39(b). There is, we say so with respect, a fallacy in this reasoning.

The test of Article 31-C's protection being accorded only to those provisions which are basically and essentially necessary for giving effect to the objects of Article 39(b) is lifted from Akadasi Padhan v. State of Orissa MANU/SC/0089/1962 : 1963 Supp. (2) SCR 691, where this Court held, with reference to Article 19(6), that qua laws passed creating a State monopoly, it is only those essential and basic provisions which are protected by the latter part of Article 19(6). This Court stated the test thus:

17. In dealing with the question about the precise denotation of the Clause "a law relating to", it is necessary to bear in mind that this Clause occurs in Article 19(6) which is, in a sense, an exception to the main provision of Article 19(1)(g). Laws protected by Article 19(6) are regarded as valid even though they impinge upon the fundamental right guaranteed Under Article 19(1)(g). That is the effect of the scheme contained in Article 19(1) read with Clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant Clause an unduly wide and liberal construction. "A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6). In other words, the effect of the amendment made in Article 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6). (at page 707)

Even if the Amendment Act, 1997 be regarded as an Act to carry out the purposes of Article 39(b), the object of the Amendment Act is not served by removing solatium and interest from compensation to be awarded. It is obvious, therefore, that the grant of compensation without solatium and interest is not basically and essentially necessary to carry out the object of the Amendment Act, 1997, even if it is to be considered as an acquisition Act pure and simple, for the object of the said Amendment Act as we have seen is to obviate delays in the acquisition process of acquiring land for National Highways. On application of this test as well, it is clear that the grant of compensation without solatium and interest, not being basically and

essentially necessary to carry out the object of the Amendment Act, would not receive the protective umbrella of Article 31-C and, therefore, any infraction of Article 14 can be inquired into by the Court."

35. The object of the Amendment Act 1997, as seen above, was not to deprive the subsequent purchaser, after the notification of declaration under Section 3D (1), of his right to receive compensation of the acquired land on the strength of his vendor's title. The object of the 1997 Amendment was to speed up the process of acquiring lands for National Highways, to be achieved in the manner of Sections 3A to 3H.

36. Under the Land Acquisition Act, 1894, sale executed after the publication of notification under section 4(1) was void and not binding on the State but inspite thereof the right of the subsequent purchaser to receive compensation was a judicially recognized right. Such right of a subsequent purchaser, appears to us to be still substituting under the National Highways Act, 1956, even if the sale is made after publication of declaration under Section 3D(1). The sale shall be void against the Government as it was earlier. But the same shall not deprive subsequent purchaser from receiving compensation of the acquired land on the strength of vendor's title.

37. The Government has to make payment of compensation. Its payment to the tenure holder whose land is acquired or to the subsequent purchaser has nothing to do with achieving the object of the amendment Act 1997 i.e. speedy acquisition of land for National Highways nor it comes in the way of achieving that object.

38. We are thus faced with a situation where there are conflicting judgments of co-ordinate Benches on the point in issue. On the one hand there is judgment in **Surendra Nath Singh Yadav** *(supra)* and on the other the judgments in the cases of Asha Devi, Vipin Agrawal and Smt. Gyanti Singh *(supra)*. Both the judgments in Surendra Nath Yadav as well as in Vipin Agrawal considered the judgment of the Hon'ble Supreme Court in the case of Manav Dharm Trust *(supra)*; the former case holding that the subsequent purchaser has a right to receive compensation but the later case taking a contrary view distinguishing Manav Dharm Trust Case as being under the Land Acquisition Act and not under the National Highways Act.

39. In the case of **Usha Kumar Vs. State of Bihar (1998) 2SCC 44,** the Hon'ble Supreme court has held that judicial discipline requires that if two Division Benches of the same High Court take different views, the matter should be referred to a larger bench. The Division Bench cannot ignore or refuse to follow the decision of an earlier Division Bench of the same court and proceed to give its decision contrary to the decision given by the earlier Division Bench. It is relevant to reproduce relevant para 3 of Usha Kumar *(supra)* as under:

In the impugned judgment of a Division Bench of the Patna High Court (Hon'ble Aftab Alam and A.N. Trivedi, JJ.) dated 1-5-1995, the Division Bench has taken a view which is different from the view taken by the two earlier Division

Benches of the same High Court. The judgment itself sets out that normally the matter should have been referred to a larger Bench; but this may further delay the matter and hence the Division Bench was proceeding with its judgment. This course which is taken by the Division Bench has created obvious difficulties. Judicial discipline requires that if two Division Benches of the same High Court take different views, the matter should be referred to a larger Bench. One Division Bench cannot ignore or refuse to follow the decision of an earlier Division Bench of the same Court and proceed to give its decision contrary to the decision given by the earlier Division Bench. If it is inclined to take a different view, a request should be made to the Chief Justice to refer the same to a Full Bench. Even the purpose of saving time has not been served in the present case. The decision has merely generated these appeals which are filed in view of the conflicting views taken by two Division Benches. The State has also come in appeal before us. All the parties are agreed that the appropriate course would be to refer the matter to the Full Bench of the Patna High Court. All these appeals are, therefore, remanded to the High Court of Patna. The Chief Justice of that High Court may constitute a Full Bench for deciding all issues which were raised before the Division Bench in the impugned judgment. Although the departure from the earlier decisions of the Division Bench may not be on all issues raised before the Court, since the appeals are being remanded to the High Court, it is desirable that the Full Bench, in considering all these matters, deals with all the issues which were raised and considered by the Division Bench in the impugned judgment.

40. Similarly in the case of **Rajasthan Public Commission and others Vs. Hari reported in 2003 (5) SCC 480** the Hon'ble Supreme Court has reiterated that if the Bench hearing matters subsequently entertains any doubt about the correctness of the earlier decision the only course open to it is to refer the matter to a larger Bench. The Hon'ble Supreme Court quoted its earlier judgment in State of Tripura Vs. Tripura Bar Association and others AIR 1999 SC 1494. It is relevant to reproduce paragraph12, 13 and 14 of the said judgment as under:-

"12. Before parting with the case we would like to point out one disturbing feature which has been brought to our notice. On 13-12-2001 a Division Bench dismissed an application containing identical prayers. Even before the ink was dry on the judgment, by the impugned judgment, another Division Bench took a diametrically opposite view. It is not that the earlier decision was not brought to the notice of the subsequent Division Bench hearing the subsequent applications. In fact, a reference has been made by the submissions made by the Commission where this decision was highlighted. Unfortunately, the Division Bench hearing the subsequent applications did not even refer to the conclusions arrived at by the earlier Division Bench. The earlier decision of the Division Bench is binding on a Bench of coordinate strength. If the Bench hearing matters subsequently entertains any doubt about the correctness of the earlier decision, the only course open to it is to refer the matter to a larger Bench.

13. The position was highlighted by this Court in a three-Judge Bench decision in State of Tripura

v. Tripura Bar Assn. [(1998) 5 SCC 637 : 1998 SCC (L&S) 1426] in the following words: (SCC p. 639, para 4)

"4. We are of the view that the Division Bench of the High Court which has delivered the impugned judgment being a coordinate Bench could not have taken a view different from that taken by the earlier Division Bench of the High Court in the case of Durgadas Purkayastha v. Hon'ble Gauhati High Court[(1988) 1 Gau LR 6] . If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger Bench. We have perused the reasons given by the learned Judges for not referring the matter to a larger Bench. We are not satisfied that the said reasons justified their deciding the matter and not referring it to the larger Bench. In the circumstances, we are unable to uphold the impugned judgment of the High Court insofar as it relates to the matter of inter se seniority of the Judicial Officers impleaded as respondents in the writ petition. The impugned judgment of the High Court insofar as it relates to the matter of seniority of the respondent Judicial Officers is set aside. The appeals are disposed of accordingly. No costs."

14. In the instant case, the position is still worse. The latter Bench did not even indicate as to why it was not following the earlier Bench judgment though brought to its notice. Judicial propriety and decorum warranted such a course indicated above to be adopted."

42. We, therefore, consider it appropriate to refer and we hereby refer the following questions for authoritative pronouncement by Hon'ble the Full Bench:

(i) Whether a subsequent purchaser of the land acquired under the National Highways Act, 1956, after publication of declaration under Section 3D (1), is not entitled to receive compensation on the strength of his vendor's title in view of Section 3D(2)?

(ii) Which of the judgments (i) Surendra Nath Singh Yadav (supra) or (ii) Vipin Kumar Agarwal, Asha Devi and Smt. Gyanti Singh, lay down the law correctly?

43. The Registry is directed to place the papers of this case before Hon'ble the Chief Justice for appropriate orders.

44. List this petition after the reference is answered.

(2020)08ILR A207
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 34529 of 2006

Dr. Chandra Deo Tyagi ...Petitioner
Versus
A.D.J., Court No. 1, Meerut & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Saini, Sri Rahul Dev Garg

Counsel for the Respondents:
Sri A.K. Mehrotra, Sri M.D.S. Shekhar, S.C.

A. Civil Law- Civil Procedure Code (5 of 1908) - O.41 R.27 – Production of Additional evidence in Misc. Appeal under O.43 R. 1 - provision of O. 41 R. 27 applies to appeal from order as well & appellate court has the power to admit additional evidence in appeal from orders as well - applicability of O. 41 R. 27 C.P.C. cannot be restricted to the appeals from decrees only (Para 44, 61)

B. Civil Law - Civil Procedure Code (5 of 1908) - O.41 R.27 - Additional Evidence in appellate court - stage of consideration - should be considered at the time of final hearing of appeal on merits -when after appreciating the evidence on record - court reaches conclusion that additional evidence - has relevance/bearing on the issue involved - and in order to pronounce satisfactory judgment or for any other substantial cause (Para 53)

C. Civil Law - Civil Procedure Code (5 of 1908) - O.41 R.27 - Additional evidence - Consideration - At the stage of O.41 R.27, court had to consider if the proposed documents were relevant or not - Relevancy is required to be considered - court is not to enter into the merits of the proposed documents with respect to the petitioner's case (Para 62)

D. Civil Law - Civil Procedure Code (5 of 1908) - O.41 R.27 - Satisfaction to be recorded - by the court that the proposed additional evidence is required to be taken on record for deciding the appeal in a satisfactory manner by the appellate court - satisfaction not manifested in the impugned order - Rejection of application, erroneous (Para 60)

Plaintiff's application for temporary injunction under O.39, R.1, 2 rejected - filed Misc. Appeal under O. 43 R. 1 alongwith application for admission of additional evidence under O. 41 r. 27 - Appellate court took view that in Misc. Appeal under O. 43 R. 1 C.P.C. application for admission of additional evidence under O. 41 R. 27 C.P.C. was not maintainable & that Misc. Appeal should be confined to the impugned order, in the light of the evidence already on record- Rejected application for additional evidence - *Held* - Appellate Court not following principle of law under O. 41, R. 27 - Rejection of application, erroneous

Allowed. (E-5)

List of cases cited:-

1. St. of Raj Vs T.N Shekri & anr. (2001) 10 SCC 619

2. U.O.I. Vs Ibrahim Uddin & anr. (2012) 8 SCC 148

3. Smt. Malti Devi & anr. Vs St. of U.P. Matters under Article 227 No. 4312 of 2018

4. Dr. Pratap Singh Vs Director of Enforcement, Foreign Exchange and Regulation Act (1985) 3 SCC 72

5. Ismail Faruqui Vs U.O.I. (1994) 6 SCC 360

6. Maktool Singh Vs St. of Pun. (1999) 3 SCC 321

7. Regional Provident Fund Commissioner Vs Hooghly Mills Co. Ltd & ors. (2012) 2 SCC 4898.

8. Sangram Singh Vs Election Tribunal Kotah AIR 1955 SCC425

9. Chinnammal & ors. Vs Arumugham (1990) 1 SCC 513

10. Ghanshyam Das Vs U.O.I.(1984) 3 SCC 46

11. Sukhveer Singh Vs Brijpal Singh (1997) 2 SCC 200

12. Salem Advocate Bar Association Vs U.O.I. AIR 2005 SCC 3353

13. Hemareddi (D) Through Lrs. Vs Ramachandra Yallappa Hosmani & ors. (2019) 6 SCC 756

14. Zila Parishad Badaun & anr. Vs Brahma Rishi Sharma AIR 1970 All 376

15. Rajesh Jaiswal & anr. Y.S. Anuj Shah & anr. 2013 (3) ALJ 67

16. Bal Krishna Vs Virendra Kumar Misc. Single .No. 15947 of 2017, decided on 5/7/2019

17. Smt. Malti Devi & anr. Vs St. of U.P. & anr. Matters under Article 227 No. 4312 of 2018, 09.10.2018

18. St. of Raj Vs T. N. Sahani & ors. (2001) 10 SCC 619

19. Corporation of Madras & anr. Vs M Parthasarathy & ors. (2018) 9 SCC 445

20. Union of India Vs K.V. Lakshman & Ors (2016) 13 SCC 124

21. Uttaradi Mutt Vs Raghavendra Swamy Mutt (2018) 10 SCC 484

22. Mahavir Singh & ors. Vs Naresh Chandra & anr. (2001) 92 R.D. 67

23. Rita Rani Vs Tanu Chauhan & ors. (2005) 61 ALR 264

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Shri Rahul Dev Garg, Advocate holding brief of Shri Nipun Saini, learned counsel for the petitioner. The respondent no. 1, is Additional District Judge, Court No. 1, Meerut whose order is under challenge in the petition. No one responded for the respondent nos. 2 to 4, even in the revised list.

2. The matter being old one and as it pertained to the year 2006, the court proceeded to hear the matter on merits, on the basis of material on record and after hearing the learned counsel for the petitioner, the judgment was reserved.

3. By means of this petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 29.03.2006 passed by the learned Additional District Judge, Meerut in Misc. Appeal No. 98 of 2004 (Chandra Deo Tyagi versus Surya Deo Tyagi and another) passed on the petitioner's application for admission of additional evidence under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (in short C.P.C.), whereby the petitioner's said application (14A/1) was rejected. The petitioner has also prayed that a direction may be issued to respondent no. 1 i.e. the Additional District Judge, Court No. 1, Meerut to allow the petitioner's application under Order 41 Rule 27 C.P.C.

4. The facts of the case are that the petitioner is a plaintiff who has instituted the original Suit No. 11 of 2001 (Chandra Deo Tyagi versus Surya Deo Tyagi and another) in the Court of Civil Judge (Junior Division) Sardhana, Meerut, for a decree of declaration that the petitioner is the owner in possession of a tube well/boring, situated over part of Gata No. 333 District-Meerut. The mandatory injunction is also requested to direct the respondent nos. 3 and 4 i.e. the U.P. Power Corporation through its Chairman Vikramaditya Marg and the Executive Engineer Electricity Distribution Division-II, Meerut, to disconnect the electricity connection of the tube well, which was granted in favour of respondent no. 2 Surya Deo Tyagi. The petitioner has also prayed for prohibitory injunction to restrain the respondent no. 2 from interfering in the usage of tube well by the petitioner. In the suit, the petitioner also filed an application for grant of temporary injunction under Order 39 Rules 1 & 2 C.PC.

5. The learned Civil Judge (Junior Division), Shardhana, Meerut rejected

the application for temporary injunction by order dated 27.05.2004. The petitioner filed Misc. Appeal No. 98 of 2004 before the learned District Judge, Meerut, under Order 43 Rule 1 C.P.C. In the said appeal, the petitioner filed an application for admission of additional evidence, as per the list of documents (Annexure no. 3 to the petition) under Order 41 Rule 27 C.P.C. The petitioner's said application was allowed on payment of cost and the respondent no. 2 was granted time to file rebuttal, by order dated 21.02.2005. Against the order dated 21.02.2005, an application for recall was filed by the respondent no. 2 which was rejected on 08.09.2005 and further one month's time was granted to file rebuttal which time was further extended on 10.10.2005 and 07.11.2005 in favour of respondent no. 2.

6. The respondent no. 2, thereafter, filed Writ Petition No. 66932 of 2005 (Surya Deo Tyagi versus Chandra Deo Tyagi and others) before this Court challenging the order dated 21.02.2005. The writ petition was allowed by means of judgment and order dated 09.11.2005. The order dated 21.02.2005 passed by the appellate court was quashed and the matter was remanded, with a direction to the appellate court to decide the petitioner's application under Order 41 Rule 27 C.P.C., after affording opportunity of hearing to the present respondent no. 2, expeditiously, and preferably within a period of six weeks from the date of production of copy of judgment before the appellate court.

7. After remand the appellate court rejected the petitioner's application under Order 41 Rule 27 C.P.C. after hearing both the parties, by order dated 29.03.2006, which is impugned in the present petition.

8. The appellate court has taken the view that, as the parties are at liberty to file documents before the trial court and establish their case in trial, where the dispute is yet to be adjudicated, and as the Misc. Appeal should be confined to the impugned order, in the light of the evidence already available on record, the petitioner's application for admission of additional evidence was liable to be rejected.

9. The appellate court has further taken the view that the Misc. Appeal has been filed against the order, whereby the temporary injunction matter was rejected, and, therefore, the present being a Misc. Appeal under Order 43 Rule 1 C.P.C. the application for admission of additional evidence under Order 41 Rule 27 C.P.C. was not maintainable.

10. The appellate court has further taken the view that the documents proposed to be filed in additional evidence, are not the public documents, except, the certified copies of the statements of Surya Deo Tyagi, Chandra Deo Tyagi and their sister Shashi Prabha. All other documents are private in nature and cannot be read unless those documents are proved.

11. The appellate court has further held that as per the petitioner' case, the issues/dispute between plaintiff/petitioner and defendant/respondent no. 2 were identified by late Shri Ramesh Chandra Verma, the person agreed by the said parties to mediate between them on 03.06.1998; and a memorandum dated 27.08.1998 was prepared by Smt. Shashi Prabha, but the written memorandum, nowhere revealed that the dispute between the parties in respect of Khasra

No. 333, in which the disputed boring existed, was set at rest between the parties. Similarly, copies of the statements proposed to be filed did not disclose that the parties had also compromised in respect of the suit property.

12. Sri Raghav Dev Garg, learned counsel holding brief of Shri Nipun Saini, learned counsel for the petitioner, submitted that an application under Order 41 Rule 27 C.P.C. is maintainable in Misc. Appeal, as well, in view of Order 43 Rule 2 C.P.C., which provides that the rules of Order 41 C.P.C. apply to appeals from order as well, so far as may be.

13. Learned counsel has next submitted that at the stage of deciding the application for admission of additional evidence the appellate court travelled beyond its jurisdiction in considering the proposed documents (written memorandum dated 27.08.1998 and the statements), on merits. He has further submitted that an application for additional evidence is required to be decided along with the appeal, but, in the present case, the application has been decided first, whereas the appeal remained pending.

14. Learned counsel for the petitioner has placed reliance on the judgments of the Hon'ble Supreme Court in the case of ***State of Rajasthan versus T.N Shekri and another reported in (2001) 10 SCC 619 and*** in the case of Union ***of India versus Ibrahim Uddin and another, reported in (2012) 8 SCC 148.*** Learned counsel has further placed reliance on judgment of this Court in the case of ***(Smt. Malti Devi and another versus State of U.P.) Matters under Article 227 No. 4312 of 2018*** decided on 09.10.2018, in support of his another contention that, even if, Order 41 Rule 27 C.P.C. strictly speaking, does not apply to the proceedings of Misc. Appeal, still the court has power and jurisdiction to admit additional evidence/documents/materials in Misc. Appeal in the interest of justice.

15. I have perused the counter affidavit filed by the respondent no. 2. The facts as stated by the learned counsel for the petitioner and mentioned in the petition have not been disputed. It has been stated, in the counter affidavit, that so far as the facts are concerned, the same being material on record, only needs verification from the records. From, verification of the records, the court finds that there is no dispute about the facts of the case, so far as they are relevant for deciding the present controversy, as regards the rejection of the petitioner's application for admission of the additional evidence by the appellate court by the order under challenge.

16. With respect to the arguments of the learned counsel for the petitioner as mentioned in the petition, the contention of the respondent no. 2, in the counter affidavit, is, that the same being argumentative would be replied at the time of hearing, but at this stage no one responded for the respondents to argue the matter, even in the revised call.

17. I have considered the submissions advanced by learned counsel for the petitioner and have perused the material on record.

18. In view of the above submissions, the following points arise

for consideration & determination in the present petition:-

i)the applicability of the provisions of Order 41 Rule 27 C.P.C. for admission of additional evidence/material in Misc. Appeals filed under Section 104 read with Order 43 Rule 1(r) C.P.C. and

ii)if the appellate court has correctly applied the law under Order 41 Rule 27 C.P.C. in rejecting the petitioner's application for admission of additional evidence.

19. Point No. 1. Applicability of the provisions of Order 41 Rule 27 C.P.C. to Misc. Appeals under Order 43 Rule 1 C.P.C.

20. It is appropriate to reproduce Sections 107, 108, 2(16), (18) and Order 43 Rule 1 (r), 2 of C.P.C. as under:-

*"**Section 107.** Powers of appellate Court-(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power-*

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

*"**Section108.** Procedure in appeals from appellate decrees and orders .-The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals-*

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided."

*"**Section 2(16)** "prescribed" means prescribed by rules;"*

*"**Section 2(18)** "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125;"*

*"**Order 43 Rule 1**(r) an order under rule 1, rule 2 [rule 2A], rule 4 or rule 10 of Order XXXIX;*

*"**Order 43 Rule 2.** Procedure. - The rules of Order XLI shall apply, so far as may be, to appeals from orders."*

21. Section 104 C.P.C. provides for filing appeal against the orders of the nature as mentioned under clauses (ff), (ffa), (g), (h), (i) as well as under Order 43 Rule 1 Clause (a) to (w). An appeal against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 is provided by clause (r) of Order 43 Rule 1 C.P.C.

22. Section 107 C.P.C. provides that subject to such conditions and limitations as may be prescribed, an appellate court shall have power, (a) to determine a case finally; (b) to remand a case (c) to frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken. Further, subject to the above, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code of Civil Procedure on courts of original jurisdiction in respect of suits instituted before those courts.

23. As such, Section 107(1) (d) C.P.C. specifically provides that the appellate court shall have power to take additional evidence or to require such evidence to be taken. The power, is, however, subject to such conditions and limitations as may be prescribed.

24. Section 2(16) C.P.C., the definition clause, provides that in this Act, unless there is anything repugnant in the subject or context "Prescribed' means, prescribed by rules, and "Rules' have been defined under Clause (18) of Section 2, which means rules and forms contained in the first schedule or made under Section 122 or Section 125. The first schedule contains the orders and the rules thereunder. Order 41 C.P.C. lays down the procedure with respect to appeals from original decrees. Its Rule 27, provides for production of additional evidence in appellate court, and according to this rule, the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the appellate court; but if the condition as provided by Clause (a), (aa), (b), (c) of Sub rule (1) are satisfied the appellate court may allow such evidence or document to be produced or witness to be examined. Where additional evidence is allowed to be produced, the appellate court shall have to record the reasons for its admission.

25. Section 108 C.P.C. provides for the procedure to be followed in appeals from appellate decrees or orders. As per this Section, the provisions of Part VII relating to appeals from original decrees shall, so far as may be, apply to appeals (a) from appellate decrees; and (b) from order made under the Code or under any special or local law, in which, a different procedure is not provided. Section 107 C.P.C. which provides for the powers of the appellate court falls in part VII.

26. Order 43 Rule 2 C.P.C. also provides that the rules of Order 41 shall apply, so far as may be, to appeals from orders.

27. The Allahabad High Court amendment, inserts "and Order 41-A" in Rule 2 of Order 41 between the words "the rules of order 41" and "shall apply". Order 41-A, inserted by the High Court Amendment, applies to appeals from original decrees in the High Court. The same shall apply to Appeals from Orders filed in the High Court. The present case relates to the appeal before the appellate court, below, and not before the High Court, and as such, Order 41 A is not relevant for the present controversy.

28. From a conjoint and bare reading of Section 108 & Order 43 Rule 2 C.P.C. it is clear that Order 41 shall apply to the appeals before the appellate court arising from orders under Section 104 read with Order 43 Rule 1 C.P.C. or from orders made under any special or local law in which a different procedure is not provided. Here, the court is concerned with appeal from order made under C.P.C. Order 41 shall apply to appeals from orders but "so far as may be,' the expression used in Section 108 & Order 43 Rule 2 C.P.C. This expression "so far as may be' is, therefore, considered to be of utmost importance.

29. In the case of ***Dr. Pratap Singh versus Director of Enforcement, Foreign Exchange and Regulation Act (1985) 3 SCC 72,*** the expression "so far as may be" came for consideration in the context of searches made under Section 37(2) of the Foreign Exchange Regulation Act, 1973. which provided, that the provision of the Code of

Criminal Procedure relating to searches, shall, so far as may be, apply to searches directed under Section 37(1) of the Act, 1973. The Hon'ble Supreme Court held that the expression "so far as may be" has always been construed to mean that those provisions may be generally followed to the extent possible. In order to give full meaning, the expression so far as may be, in sub Section (2) of Section 37 of the Act, 1973, was interpreted to mean that broadly the procedure relating to search as enacted in Section 165 Cr.P.C. shall be followed. But, if a deviation becomes necessary to carry out the purpose of the Act in which Section 37(1) is incorporated, it would be permissible except that when challenged before a court of law, justification will have to be offered for the deviation.

30. Paragraph 12 of the judgment in Pratap Singh case (supra) is being reproduced as under:-

"12. Section 37(2) provides that 'the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under Section 37(1). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in Section 165 has to be generally followed.

The expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible.

The submission that Section 165(1) has been incorporated by pen and ink in Section 37(2) has to be negatived in view of the positive language employed in the section that the provisions relating to searches shall so far as may be apply to searches under Section 37(1). If Section 165(1) was to be incorporated by pen and ink as Sub-section (2) of Section 37, the legislative draftsmanship will leave no room for doubt by providing that the provisions of the CrPC relating to searches shall apply to the searches directed or ordered under Section 37(1) except that the power will be exercised by the Director of Enforcement or other officer exercising his power and he will be substituted in place of the Magistrate. The provisions of Sub-section (2) of Section 37 has not been cast in any such language. It merely provides that the search may be carried out according to the method prescribed in Section 165(1). If the duty to record reasons which furnish grounds for entertaining a reasonable belief were to be recorded in advance, the same could have been incorporated in Section 37(1), otherwise a simple one line section would have been sufficient that all searches as required for the purpose of this Act shall be carried out in the manner prescribed in Section 165 of the Code by the officer to be set out in the section. ***In order to give full meaning to the expression 'so far as may be', Sub-section (2) of Section 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Section 165 shall be followed. But if a deviation becomes necessary to carry out the purposes of the Act in which Section 37(1) is incorporated, it would be permissible except that when challenged before a court of law, justification will have to be offered for the deviation.*** *This view will give full play to the expression 'so far as may be'."*

31. In the case of ***Ismail Faruqui versus Union of India (1994) 6 SCC 360***, the expression "so far as may be', used in Section6(3) of the "Acquisition

of Certain Area at Ayodhya Act, 1993," by which it was provided that the provisions of Sections 4, 5, 7 and 11 shall, so far as may be, apply in relation to such authority or body or trustees, as they apply in relation to the Central Government, was interpreted by the Hon'ble Supreme Court as indicative of the fact that all or any of these provisions may or may not be applicable to the transferee under sub-section (1).

32. It is relevant to quote paragraph 56 of Ismail Faraqui case (supra) as under:-

"56. We would now examine the validity of Section 6. Sub-section (1) of Section 6 empowers the Central Government to direct vesting of the area acquired or any part thereof in another authority or body or trust. This power extends to the entire acquired area or any part thereof. This is notwithstanding anything contained in Sections 3, 4, 5 and 7. Section 3 provides for acquisition of the area and its vesting in the Central Government. It is, therefore, made clear by sub-section (1) of Section 6 that the acquisition of the area and its vesting in the Central Government is not a hindrance to the same being vested thereafter by the Central Government in another authority or body or trust. Section 4 relates to the effect of vesting and Section 5 to the power of the Central Government to secure possession of the area vested, with the corresponding obligation of the person or the State Government in possession thereof to deliver it to the Central Government or the authorised person. Section 4(3) relating to abatement of pending suits and legal proceedings would be considered separately. Section 7 which we have already upheld, relates to management and administration of the property by the Central Government or the authorised person during the interregnum till the exercise of power by the Central Government under Section 6(1). Section 7 has been construed by us as a transitory provision to maintain status quo in the disputed area and for proper management of the entire property acquired during the interregnum. Thus, sub-section (1) of Section 6 read with sub-section (2) of Section 7 is an inbuilt indication in the statute of the intent that acquisition of the disputed area and its vesting in the Central Government is not absolute but for the purpose of its subsequent transfer to the person found entitled to it as a result of adjudication of the dispute for the resolution of which this step was taken, and enactment of the statute is part of that exercise. Making of the Reference under Article 143(1) simultaneously with the issuance of Ordinance, later replaced by the Act, on the same day also is an indication of the legislative intent that the acquisition of the disputed area was not meant to be absolute but limited to holding it as a statutory receiver till resolution of the dispute; and then to transfer it, in accordance with, and in terms of the final determination made in the mechanism adopted for resolution of the dispute. Sub-section (2) of Section (6) indicates consequence of the action taken under sub-section (1) by providing that as a result of the action taken under sub-section (1), any right, title and interest in relation to the area or part thereof would be deemed to have become those of the transferee. ***Sub-section (3) of Section 6 enacts that the provisions of Sections 4, 5, 7 and 11 shall, so far as may be, apply***

in relation to such authority or body or trustees as they apply in relation to the Central Government. The expression "so far as may be" is indicative of the fact that all or any of these provisions may or may not be applicable to the transferee under sub-section (1). *This provides for the situation of transfer being made, if necessary, at any stage and of any part of the property, since Section 7(2) is applicable only to the disputed area. The provision however does not countenance the dispute remaining unresolved or the situation continuing perpetually. The embargo on transfer till adjudication, and in terms thereof, to be read in Section 6(1), relates only to the disputed area, while transfer of any part of the excess area, retention of which till adjudication of the dispute relating to the disputed area may not be necessary, is not inhibited till then, since the acquisition of the excess area is absolute subject to the duty to restore it to the owner if its retention is found, to be unnecessary, as indicated. The meaning of the word "vest' in Sections 3 and 6 has to be so construed differently in relation to the disputed area and the excess area in its vicinity."*

33. In the case of ***Maktool Singh versus State of Punjab (1999) 3 SCC 321,*** Section 36-B of the Narcotic Drugs and Pyschotropic Substances Act, 1985, provided that the High Court may exercise so far as may be applicable all the powers conferred by Chapters 29 and 30 of the Code of Criminal Procedure, 1973, on a High Court as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court. Thus, the provisions of Chapters 29 and 30 of Cr.P.C. were made applicable to the Act, 1985, "so far as may be' The Hon'ble Supreme Court held that Section 36-B clearly indicated that its applicability was subject to the extent of adaptability because of the words employed there in "so far as may be applicable." This means, the High Court can exercise powers under Chapter 29 of the Code, only to the extent such powers are applicable. In other words, if there is an interdict against applicability of any provision, the High Court cannot use such powers albeit, its inclusion in Chapter 29 of the Code and that is the effect of employment of the words "so far as may be applicable," where a statute incorporates the provisions of another statute.

34. Paragraph 6 of the judgment in the case of Maktool Singh (supra) is being reproduced as under:-

"The argument advanced before us is that when Section 36-B of the Act preserved the powers of the High Court under Chapter XXIX of the Code while dealing with an appeal challenging conviction under the Act, it must be deemed to have preserved all the powers mentioned in Section 389 of the Code including the power to suspend the sentence. But we canot give accord to that argument on the following grounds. When Section 36-B of the Act is juxtaposed with Section 32-A, the latter must dominate over the former mainly for two reasons. First is that Section 32-A overrides all the provisions of the Code, by specific terms, through the non obstante limb incorporated therein. ***Second is that Section 36-B has clearly indicated that its applicability is subject to the extent of adaptability because of the words employed therein "so far as may be applicable". This means, the High Court can exercise powers under***

Chapter XXIX of the Code only to the extent such powers are applicable. In other words, if there is an interdict against applicability of any provision, the High Court cannot use such provision, albeit its inclusion in Chapter XXIX of the Code. That is the effect of employment of the words "so far as may be applicable" when a statute incorporates the provision of another statute."

35. In the case of ***Regional Provident Fund Commissioner vs. Hooghly Mills Co. Ltd & Others reported in (2012) 2 SCC 489*** the expression "so far as may be" used in Section 17(1-A) (a) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952" came up for consideration. The High Court, in this case, had taken the view that Sections 6, 7A, 8 & 14-B of the Act could not be applied in their entirety, for the use of the expression "so far as may be" in Section 17(1A)(a) of the Act 1952. The Hon'ble Supreme Court did not accept the interpretation of the High Court, and held that an interpretation of the statute which harmonizes with its avowed object is always to be accepted than the one which dilutes it. The Act 1952, was a social welfare legislation to ensure health and other benefits to the employees; and the employer under the Act was under an obligation to make the deposit. Therefore, for construing Section 14 B & 17(1A)(a), a purposive approach, which promoted the purposes of the Act was adopted. The Hon'ble Supreme Court held that the parameters of interpretation cannot be the same for interpreting a fiscal statute; special statute, and a social welfare legislation.

36. It is relevant to reproduce paragraph nos. 49, 50, 51, 54, 55, 56 of the Hooghly Mills Case (supra) as under:-

"49. Apart from that the High Court's interpretation of the expression "so far as may be" as limiting the ambit and width of Section 17(1A)(a) of the Act, in our judgment, cannot be accepted for two reasons as well.

50. The High Court is guided in the interpretation of the word "so far as may be" on the basis of the principle that statutes does not waste words. The High Court has also relied on the interpretation given to "so far as may be" in the case of Dr. Pratap Singh and another v. Director of Enforcement, Foreign Exchange Regulation Act and others reported in AIR 1985 SC 989. It goes without saying that Foreign Exchange Regulation Act is a fiscal statute dealing with penal provisions whereas the aforesaid expression is to be construed in this Act which is eminently a social welfare legislation. Therefore, the parameters of interpretation cannot be the same.

Even then in Pratap Singh (supra) this Court while construing "so far as may be" held "if a deviation becomes necessary to carry out the purposes of the Act..... it would be permissible". Of course the Court held that if such deviation is challenged before a Court of law it has to be justified.

51. In the instant case, the High Court failed to discern the correct principle of interpretation of a social welfare legislation. In this connection we may profitably refer to what was said by Chief Justice Chagla about interpretation of a social welfare or labour legislation

in Prakash Cotton Mills (P) Ltd. v. State of Bombay reported in (1957) 2 LLJ 490. Justice Chagla unerringly laid down:

"no labour legislation, no social legislation, no economic legislation, can be considered by a court without applying the principles of social justice in interpreting the provisions of these laws. Social justice is an objective which is embodied and enshrined in our Constitution.....it would indeed be startling for anyone to suggest that the court should shut its eyes to social justice and consider and interpret a law as if our country had not pledged itself to bringing about social justice."

54. Unfortunately, the High Court missed this well settled principle of interpretation of social welfare legislation while construing the expression "so far as may be" in interpreting the provision of Section 17 (1A)(a) of the Act and unduly restricted its application to the employer of an exempted establishment.

55. The interpretation of the expression "so far as may be" by this Court in its Constitution Bench decision in M. Ismail Faruqui (supra) was given in a totally different context. The said judgment on a Presidential Reference was rendered in the context of the well known Ram Janam Bhumi Babri Masjid controversy where a special Act, namely, Acquisition of Certain Area at Ayodhya Act was enacted and sub-section (3) of Section 6 of the said Act provides that the provisions of Sections 4, 5 & 7 shall "so far as may be" apply in relation to such authority or body or trustees as they apply in relation to the Central Government. In that context this Court held that the expression "so far as may be" is indicative of the fact that all or any of these provisions may or may not be applicable to the transferee under sub-section (1). The objects behind the said enactment are totally unique and the same was a special law. Apart from this, this Court did not lay down any general principle of interpretation in the application of the expression "so far as may be". Their being vast conceptual difference in the legal questions in that case, the interpretation of "so far as may be" in M. Ismail Faruqui (supra) cannot be applied to the interpretation of "so fr as may be" in the present case.

56. The High Court's interpretation also was in error for not considering another well settled principle of interpretation. It is not uncommon to find legislature sometime using words by way of abundant caution. To find out whether the words are used by way of abundant caution the entire scheme of the Act is to be considered at the time of interpretation. In this connection we may remember the observation of Lord Reid in I.R. Commissioner v. Dowdall O'Mahoney & Co. reported in (1952) 1 All E.R. 531 at page 537, wherein the learned Law Lord said that it is not uncommon to find that legislature is inserting superfluous provisions under the influence of what may be abundant caution. The same principle has been accepted by this Court in many cases. The High Court by adopting, if we may say so, a rather strait jacket formula in the interpretation of the expression "so far as may be" has in our judgment, misinterpreted the intent and scope and the purpose of the Act."

37. Thus, the Court finds, that the expression "so far as may be' is indicative of the fact that all or any of the provisions, which have been made applicable, may or may not be applicable. This expression has always been

construed to mean that the provisions may be generally followed, to the extent possible. Even if, some deviation becomes necessary to carry out the purpose of the Act such deviation is permissible, for justified reasons. The power and/or the procedure, which has been made applicable by use of expression "so far as may be' shall apply to the extent there is no interdict. This expression has to be given its meaning, considering the nature of the statute in which it exists as well as the nature of the statute to which such provision has been applied. The same parameters cannot be applied in giving interpretation to this expression. In case of Social Welfare Legislation, the applicability of the provisions, cannot be unduly restricted and in case of fiscal or penal statute it cannot be unduly extended.

38. In the present case, the expression "so far as may be' as used in Section 108 & Order 43 Rule 2 of the Code of Civil Procedure is under consideration. As such, the purpose & object of the Code of Civil Procedure, requires consideration.

39. In the case of ***Sangram Singh versus Election Tribunal Kotah AIR 1955 SCC425***, the Hon'ble Supreme Court, has held that the Code of Civil Procedure must be regarded as such. It is "procedure", something designed to facilitate justice and further its end. Not a penal indictment for punishment and penalties. Not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against, provided always that justice is done to both sides lest, the very means designed for furtherance of justice be used to frustrate it. It has also been held that our laws of procedure are grounded on a principle of natural justice. The relevant paragraph nos. 16 and 17 of the case of Sangram Singh (supra) are being reproduced as under:-

"16. Now a code of procedure must be regarded as such. It is "procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to "both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."

"17 Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

40. In **Chinnammal and other versus Arumugham (1990) 1 SCC 513** the Hon'ble Supreme Court has held that the Code of Civil Procedure is body of

procedural laws designed to facilitate justice and it should not be treated as enactment providing for punishment and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. Paragraph nos. 16 and 17 of the aforesaid judgment are being reproduced as under:-

"16.This is also the principle underlying Section 144 of the CPC. It is the duty of all the Courts as observed by the Privy Council "as aggregate of those tribunals" to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the Court. The above passage was quoted in the majority judgment of this Court in A.R. Amtulay v. R.S. Nayak and Ors.,
MANU/SC/0002/1988MANU/SC/0002/1988 : 1988CriLJ1661 . Mukherjee, J., as he then was, after referring to the said observation of Lord Cairns, said (at 672):

No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied.

17. It is well to remember that the CPC is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. It is in our opinion, not unreasonable to demand restitution from a person who has purchased the property in court auction being aware of the pending appeal against the decree."

41. In the case of ***Ghanshyam Das versus Union of India (1984) 3 SCC 46,*** the Hon'ble Supreme Court has held that our laws of procedure are based on the principle that as far as possible no proceedings in a court of law should be allowed to be defeated on their technicalities. In the case of ***Sukhveer Singh versus Brijpal Singh (1997) 2 SCC 200*** it was held that procedure is the handmaid to substantial rights.

42. In the case of ***Salem Advocate Bar Association versus Union of India reported in AIR 2005 SCC 3353,*** the Hon'ble Supreme Court has held that the rule and procedure are handmaid of justice and not its mistress. It is relevant to reproduce Paragraph 21 of the report as under:-

"21. The use of the word "shall' in Order VII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are

hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

43. In ***Hemareddi (D) Through Lrs. vs Ramachandra Yallappa Hosmani & other (2019) 6 SCC 756*** *the Hon'ble Supreme Court, highlighted the need to apply laws of procedure in a manner so that substantial justice is facilitated.*

44. Thus, it is settled in law that the procedure is something designed to facilitate justice. The procedural laws are not treated as an enactment providing for punishments or penalties. They are the handmaid of justice and are to be construed in a way to promote justice and not to frustrate it. Any strict interpretation which defeats justice is to be avoided in the light of this object. The applicability of Order 41 Rule 27 to appeals from orders is to be considered to advance justice and the expression "so far as may be' is to be construed liberally, keeping in view, the object of Rule 27 which is to enable the appellate court to pronounce a satisfactory judgment, if in its judicial discretion the proposed additional evidence is required for pronouncing a satisfactory judgment. The applicability of Order 41 Rule 27 C.P.C. cannot be restricted to the appeals from decrees. The appellate court has to pronounce satisfactory judgment in appeal from orders as well. If it requires the additional evidence to enable it to pronounce a satisfactory judgment it has power & jurisdiction to take additional evidence in appeal from order as well, and particularly when there is no interdict in C.P.C. This Court therefore, holds that Order 41 Rule 27 C.P.C. applies to the Appeal filed under Section 108 r/w Order 43 Rule 1 (r) C.P.C.

45. In the case of ***Zila Parishad Badaun and another versus Brahma Rishi Sharma reported in AIR 1970 Allahabad page 376*** facts were that against the order of ad-interim injunction under Order 39 C.P.C., First Appeal From Order was filed before this Court and finding apparent conflict between two Division Bench decisions in L.D. Meston School Society versus Kashi Government Mishra AIR 1951 Allahabad 558 and Raja Deo Singh versus Kumar Shambu Krishna Narayan 1960 A.L.J. 124, two questions were referred to the larger Bench. The second question, relevant for the present case, was if the order is appealable can the appellant rely on fresh evidence which was not before the trial court ?" The Hon'ble Full Bench held that ordinarily an appellant is confined to the evidence already on record prepared by the lower court. It is open to him to request the appellate court to admit fresh evidence under Order 41 Rule 27 C.P.C. Where permission is granted and fresh evidence is admitted under the aforesaid provision, the appellant can rely on that evidence as well. The Hon'ble Full Bench answered the second question that the appellant as a matter of right cannot rely on fresh evidence in appeal which was not before the trial court until it is admitted by the appellate court under Order 41 Rule 27 C.P.C. Paragraph nos. 22 and 23 of the case of Zila Parishad (supra) are being reproduced as under:-

"22. Re. Question 2: Ordinarily an appellant is confined to the evidence already on record prepared by the lower Court. It is open to him to request the appellate Court to admit fresh evidence under Order 41, Rule 27, C. P. C. Where permission is granted and fresh evidence is admitted under the aforesaid provision,

the appellant can rely on that evidence as well. Learned counsel for the appellants has not been able to cite any authority to show that an appellant as of right, can rely on fresh or additional evidence in appeal from an ex parte order passed under Order 39, Rule 1 or 2, C.P.C."

"23. In view of the above discussion our answer to the first question formulated in First Appeal from Order No. 152 of 1967 is in the 'affirmative'. Our answer to question No. 2 is as follows:--

"The appellant as a matter of right cannot rely on fresh evidence in appeal which was not before the trial Court until it is admitted by the appellate Court under Order 41, Rule 27, C.P.C."

46. In the case of ***Rajesh Jaiswal and another Y.S. Anuj Shah and another*** reported in ***2013 (3) ALJ 67***, which was also a case arising out of the matter of grant of temporary injunction and an application for additional evidence filed in the Misc. Appeal was rejected, this Court held that Order 43 Rule 2 C.P.C. provides that Order 41 C.P.C. shall apply to appeals from orders also which means appeals preferred against orders as specified under Section 104 read with Order 43 Rule 1. It means that Order 41 Rule 27 C.P.C. can be applied to Misc. Appeals as well and there is no bar in taking new material on record at the appellate stage in the appeal arising out of orders. The appellate court has full authority to accept affidavits/documents in addition to those filed in the court below if necessary for the purposes of deciding the injunction matter subject to certain limitations. Paragraph nos. 5 and 6 of Rajesh Jaiswal case (supra) are being reproduced hereunder:-

"5. Order XLIII. Rule 2. C.P.C. provides that rules of Order XLI, C.P.C. shall apply to appeals from orders also which means appeals preferred against orders as specified under Section 104 read with Order XLIII, Rule 1 including one arising from grant or refusal of interim injunction. It means Order XLI, Rule 27, C.P.C. can be applied to miscellaneous appeals as well and there is no bar in taking new material on record at the appellate stage in appeals arising out of orders. Therefore, also the appellate Court has full authority to accept affidavits/documents in addition to those filed in the Court below, if necessary for the purposes of deciding the injunction matter subject to certain limitations."

"6. In the above legal scenario the appellate Court below is not right in refusing to accept the documents in appeal and erred in refusing them on the ground that the provisions of Order XLI, Rule 27, C.P.C. are not applicable. In view of the above, the impugned order dated 24.9.2012 is unsustainable and is hereby quashed and the Court below is directed to consider the application 15C afresh and to decide the appeal itself in accordance with law, as expeditiously as possible, preferably within a period of four months from the date of production of a certified copy of this order."

47. In the case of ***Bal Krishna versus Virendra Kumar Misc. Single No. 15947 of 2017,*** decided on 5/7/2019 this Court considered the Full Bench Judgment in the case of Zila Parishad (supra) and in the case of Rajesh Jaiswal (supra) and held that the additional evidence is permissible to be filed in Misc. Appeal.

48. In the case of ***(Smt. Malti Devi & another versus State of U.P. & another)*** Matters under Article 227 No. 4312 of 2018 decided on 09.10.2018, relied upon by the learned counsel for the petitioner, this Court has held that the appellate court can consider the additional evidence by giving other party an opportunity to rebut it and further can decide the injunction matter after making necessary enquiry within the scope of Order 39 Rules 1 & 2 C.P.C.

49. Point No. 2: If the appellate court has correctly applied the law under Order 41 Rule 27 C.P.C. in rejecting the petitioner's application for admission of additional evidence.

50. Now it is appropriate to reproduce Order 41 Rule 27 C.P.C., 1908 and to consider the law on the subject Order 41 Rule 27 read as under:-

"Order 41 Rule 27. Production of additional evidence in Appellate Court.--(1) The parties to an appeal shall not be

entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if --

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which

ought to have been admitted, or the party seeking to produce additional evidence, establishes that notwithstanding the

exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of

due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to

enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall

record the reason for its admission."

51. In the case of ***Union of India versus Ibrahim Uddin and another (2012) 8 SCC 148*** the Hon'ble Supreme Court held that the appellate court has the power to allow the document to be produced and a witness to be examined but the requirement of law is that if the court finds it necessary to obtain such evidence to enable it to pronounce a judgment. The provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal. It has also been held that the words "for other substantial cause', must be read with the word "required' in the beginning of the sentence, so, it is only where for substantial cause the appellate court requires additional evidence then this rule will apply.

52. Paragraph nos. 36 to 48 of the judgment in the case of Ibraham Uddin (supra) are being reproduced as under:-

"36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co. [(1978) 2 SCC 493 : AIR 1978 SC 798])

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham [AIR 1965 SC 1008] .)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101] .)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not

constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.

42. Whenever the appellate court admits additional evidence it should record its reasons for doing so (sub-rule (2)). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the court of further appeal to see, if the discretion under this Rule has been properly exercised by the court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the Rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable, particularly when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision-making. The person who is adversely affected must know why his application has been rejected. (Vide State of Orissa v. Dhaniram Luhar [(2004) 5 SCC 568 : (2008) 2 SCC (Cri) 49 : AIR 2004 SC 1794] , State of Uttaranchal v. Sunil Kumar Singh Negi [(2008) 11 SCC 205 : (2008) 2 SCC (L&S) 1093] , Victoria Memorial Hall v.

Howrah Ganatantrik Nagrik Samity [(2010) 3 SCC 732 : AIR 2010 SC 1285] and Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd. [(2010) 13 SCC 336 : (2010) 4 SCC (Civ) 904])

45. In City Improvement Trust Board v. H. Narayanaiah [(1976) 4 SCC 9 : AIR 1976 SC 2403] , while dealing with the issue, a three-Judge Bench of this Court held as under: (SCC p. 20, para 28)

"28. ... We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it, an opportunity should have been given to the appellant to rebut any inference arising from its existence by leading other evidence."

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad [(2008) 3 SCC 120] .

46. A Constitution Bench of this Court in K. Venkataramiah [AIR 1963 SC 1526] , while dealing with the same issue held: (AIR p. 1529, para 13)

"13. It is very much to be desired that the courts of appeal should not overlook the provisions of clause (2) of the Rule and should record their reasons for admitting additional evidence. ... The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."(emphasis added)

In the said case, the Court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."

53. In the case of Ibraham Uddin (supra) the Hon'ble Supreme Court has also laid down the stage of consideration of application under Order 41 Rule 27

C.P.C. and as per this judgment an application under Order 41 Rule 27 C.P.C. is to be considered at the time of hearing of appeal on merits, so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issue involved. It has been clearly held that an application for taking additional evidence on record at an appellate stage, even if filed during pendency of the appeal, is to be heard at the time of the final hearing of the appeal, at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence is required to be taken on record in order to pronounce the judgment or for any other substantial cause. If the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total non application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is allowed to be ignored. It is relevant to reproduce paragraph nos. 49 to 52 of the judgment in the case of Ibrahim Uddin (supra) as under:-

"49.An application under Order 41 Rule 27 C.P.C. is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court. (Vide Arjan Singh v. Kartar Singh and Natha Singh v. Financial Commr. Taxation.)

50. In Parsotim Thakur v. Lal Mohar Thakur it was held: (LW pp. 86-87)

".....The provisions of Section 107, Civil Procedure Code, as elucidated by Order 41 Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal.

..... Under Rule 27, clause (1) (b), it is only where the appellate court "requires' it (i.e. find it needful)... The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent'.

.....It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing and under Rule 29

must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.. the power so conferred upon the court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case."

51. In Arjan Singh v. Kartar Singh this Court held: (AIR pp. 195-96 paras 7-8)

"7.... If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non existent.....

8....The order allowing the appellant to call the additional evidence is dated 17-8-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing its judgment."

52. Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."

54. In the case of ***State of Rajasthan versus T. N. Sahani and others (2001) 10 SCC 619,*** the Hon'ble Supreme Court has held that the application under Order 41 Rule 27 should have been decided along with appeal. If the court finds the document necessary to pronounce the judgment in the appeal in more satisfactory manner, it would have allowed the same, if not, the same would have been dismissed at that stage, but taking a view on the application before hearing of the appeal would be inappropriate and for the said reason the dismissal of the said application under Order 41 Rule 27 C.P.C. at the stage prior to the stage of deciding the appeal was held untenable. Paragraph no. 4 of the T.N. Sahani Case (supra) is being reproduced as under:-

"4. It may be pointed out that this Court as long back as in 1963 in K Venkataramiah v. Seetharama Reddy pointed out the scope of unamended provision of Order 41 Rule 27(c) that though there might well be cases where even though the court, found that it was able to pronounce the judgment on the state of the record as it was, and so, additional evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it

could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27(b) CPC can be invoked. So the application under Order 41 Rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law."

55. As regards the procedure to be followed after admission of the additional evidence, it has been held in the case of ***Corporation of Madras and another versus M Parthasarathy and others*** reported in ***(2018) 9 SCC 44***5 that if the additional evidence is allowed, the respondents must be given opportunity to file rebuttal evidence to counter the additional evidence and if the said procedure is not adopted the court commits error of procedure involving the question of jurisdiction.

56. In the case of ***Union of India versus K.V. Lakshman and others*** reported in ***(2016) 13 SCC 124*** the Hon'ble Supreme Court has held that Order 41 Rule 27 of C.P.C. is a provision which enables the party to file additional evidence at the first and second appellate stage. If the party to appeal is able to satisfy the appellate court that there is justifiable reasons for not filing such evidence at the trial stage and that the additional evidence is relevant and material for deciding the rights of the parties which are the subject matter of the lis, the court should allow the party to file such additional evidence. After all, the court has to do substantial justice to the parties. Merely because the court allow one party to file additional evidence in appeal, would not by itself mean that the court has also decided the entire case in his favour and accepted such evidence. Indeed *once the additional evidence is allowed to be taken on record the appellate court is under obligation to give opportunity to other side to file additional evidence by way of rebuttal. In the case of* ***Akhilesh Singh @ Akhileshwar Singh vs. Lal Babu and others reported in (2018) 4 SCC 659,*** it has been held that though Order 41 Rule 27 is silent as to the procedure to be adopted by the High Court after admission of additional evidence, but in view of the provisions of Order 41 Rule 2 C.P.C. the appellate court after admission of additional evidence has to follow the procedure as per the rules of natural justice and fair play. The contesting party should be given an opportunity to file evidence in rebuttal against the additional evidence to counter it. In the case of ***Uttaradi Mutt versus Raghavendra Swamy Mutt (2018) 10 SCC*** the same principle has

been reiterated that the other party shall be afforded opportunity to lead evidence in rebuttal.

57. In the case of ***Uttaradi Mutt versus Raghavendra Swamy Mutt (2018) 10 SCC 484,*** the Hon'ble Supreme Court made it clear that by allowing the application filed under Order 41 Rule 27 C.P.C. it would not follow that the additional document/additional evidence can be straightaway exhibited, rather, the respondent/applicant would have to not only prove the existence, authenticity and genuineness of those documents, but also the contents thereof in accordance with law. Mere admission of the additional evidence by the appellate court does not amount to those documents being straightaway exhibited. Such documents have to be proved in accordance with law. Paragraph No. 12 of the case of Uttaradi Mutt (supra) is being reproduced as under:-

"12. That takes us to the second contention raised by the appellant that even if there was sufficient ground for allowing the stated applications filed by the respondent-defendant for production of additional evidence, the genuineness and the contents of the additional documents would have to be proved by the party placing reliance thereon. As regards this plea, we find that the High Court has made it amply clear that the fact that the applications are allowed per se is not to give any direction to straightaway exhibit the additional documents, but that it could be exhibited subject to proof. The High Court has unambiguously observed that the documents will have to be proved in accordance with law. We make it amply clear that by allowing the three applications filed by the respondent-defendant under Order 41 Rule 27 C.P.C. it would not follow that the additional documents/additional evidence can be straightaway exhibited rather, the respondent would have to not only prove the existence, authenticity and genuineness of the said documents but also the contents thereof, as may be required by law."

58. The following propositions of law as laid down in the aforesaid judgments on the scope of Order 41 Rule 27 may be summarised:-

1. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal.

2. The appellate court , as an exception to the above general principle may permit additional evidence only if the conditions laid down in Rule 27 are found to exist.

3. If the appellate court requires additional evidence to enable it to pronounce a satisfactory judgment, it can permit additional evidence.

4. If the appellate court, on the basis of evidence already on record can pronounce a satisfactory judgment this provision does not entitle it to let in fresh evidence only for filing lacuna in the evidence and to pronounce judgment in a particular way.

5.The matter is entirely in the direction of the appellate court and is to be used sparingly and judiciously, circumscribed by the limitations in the rule itself.

6.The application under Order 41 Rule 27 should be heard and decided at the time of final hearing of the appeal and if it is decided before hearing of

appeal, the order would be a product of total non application of mind, as to whether such evidence was required to be taken on record to pronounce the judgment or not and would remain inconsequential, inexecutable and liable to be ignored.

7. The parties are not entitled as of right to the admission of the additional evidence.

8. Where the additional evidence is admitted the appellate court shall record reasons for such admission.

9. If the application for additional evidence is allowed, the additional evidence/documents will have to be proved regarding their existence, authencity, genuineness and also their contents. Mere admission of the documents in additional evidence does not amount to those documents being straightway exhibited.

10. On admission of additional evidence, the other side is to be given opportunity to file evidence in rebuttal.

59. Now coming to the impugned order, this Court finds that the same cannot be legally sustained as the appellate court has not followed the principle of law under Order 41 Rule 27 C.P.C. and the grounds on which the impugned order has been passed are wholly untenable.

60. The impugned order suffers from non application of judicial mind to the legal requirements for consideration. The stage of consideration, as per the settled law, is at the time of consideration of the appeal on merits but in the present case, the application has been decided at a stage prior to consideration of the appeal on merits and as such the relevant consideration of appreciating the evidence on record to reach the conclusion that the additional evidence was required to be taken on record to pronounce satisfactory judgment in appeal is lacking in the impugned order. Any such satisfaction that the proposed additional evidence was required for deciding the appeal in a satisfactory manner by the appellate court is not manifested in the impugned order.

61. The impugned order also suffers from illegality as the appellate court rejected the application on misconception of law that it has to confine itself to the material on record of the trial court and in Misc. Appeal no additional evidence/material could be admitted, whereas the provision of Order 41 Rule 27 applies to appeal from order as well, and the appellate court has the power to admit additional evidence subject to conditions under Order 41 Rule 27 itself.

62. The other ground of rejection that the proposed documents i.e. the written memorandum dated 27.08.1998 and the copies of the statements of the petitioner, the respondent no. 2 and their sister Smt. Shashi Prabha did not disclose that the parties have also compromised in respect of suit property, is also not sustainable, as this is entering into the merits of the documents with respect to the petitioner's case, whereas at this stage the court had to consider if those documents were relevant or not. The relevancy was required to be considered. Admissibility in evidence of the proposed documents was a matter for consideration, if those documents were admitted in evidence. In the case of Uttaradi Mutt (supra) the Hon'ble Supreme Court has held that by allowing the application under Order 41 Rule 27

C.P.C. it would not follow that the additional evidence has been straightaway exhibited. Such additional evidence/documents have to be proved in accordance with law.

63. I have also considered the judgments reported in ***(2001) 92 R.D. 67 Mahavir Singh and others versus Naresh Chandra and another*** of Hon'ble the Supreme Court and in the case of ***Rita Rani versus Tanu Chauhan and others*** reported in ***(2005) 61 ALR 264*** which were cited before the appellate court below from the side of the present respondent no. 2.

64. The judgment in the case of ***Mahavir Singh and others versus Naresh Chandra and another*** laid down the principle on the scope of Order 41 Rule 27 C.P.C. which has already been discussed in this judgment. In the said judgment it has been held that Section 107(d) C.P.C. is an exception to the general rule and the additional evidence can be taken only when the condition and limitation laid down in the said rule are found to exist. When the appellate court finds itself unable to pronounce judgment, owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of Court delivering it. The principle of law as laid down in the case of Mahavir Singh (supra), would apply to the facts of the present case and the impugned order, as it does not record its satisfaction on the point if the appellate court was able to pronounce judgment on the basis of evidence/material available on the record of the trial court and if the additional evidence was required for pronouncing a satisfactory judgment the impugned order cannot be sustained.

65. So far as the case Reeta Rani (supra) is concerned the same was rendered in the circumstance of that case as is evident from paragraph 6 of the report.

66. This Court is of the considered view that the impugned order cannot be sustained and deserves to be set aside. The matter deserves to be remitted to the appellate court below to decide the petitioner's application under Order 41 Rule 27 C.P.C. in accordance with law, afresh, after providing opportunity of hearing to the parties without being influenced from the impugned order dated 29.03.2006. 67. Thus, considered, the petition is allowed. The impugned order dated 29.03.2006 is set aside. The matter is remitted to the learned appellate court for fresh decision on the petitioner's application for additional evidence, as per law, discussed above, expeditiously and preferably within a period of six months from the date of production of certified copy of this judgment before the appellate court. No order as to costs.

(2020)08ILR A232
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ C No. 38789 of 2016

C/M Sankatha Prasad Inter College, Fatehpur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vijay Kumar Singh, Sri Jai Singh Yadav

Counsel for the Respondents:
C.S.C., Sri Nanhe Lal Tripathi, Sri Prabhakar Awasthi

Civil Law - Societies Registration Act (21 of 1860) – Section 4 - Regional Level Committee (R.L.C.) and the Assistant Registrar (A.R.) operate & perform their functions in different fields under two different legislations - If the C/m of the Society & College (run by the society) are one and same - then whenever a dispute with regard to the correctness of the list of the General Body of Society is raised then A.R. alone could decide such dispute u/s 4-B of the Societies Registration Act, - On the other hand R.L.C. could look into a dispute pertaining to the C/m of Intermediate College governed by the provisions of the Intermediate Education Act, 1921 read with G.O. dated 19.12.2000 - R.L.C. could not sit in appeal over the order of the A.R. - If there is any dispute with regard to the management of Society then A.R. to refer the same to the Prescribed Authority u/s 25 of the Societies Registration Act.

Vide impugned order R.L.C. directed A.R. to review his order whereby the A.R. had found that only 14 members were the actual members of the General Body - *Held* - When writ court directed R.L.C. to look into the grievance of parties - *in accordance with law* - then the Court had not bestowed R.L.C. the jurisdiction to sit in appeal over the order passed by the A.R. - R.L.C. in the first instance had to see if it had any jurisdiction to look into the controversy as was placed before it (Para 11)

Allowed. (E-5)

List of cases cited:-

1. T.P. Singh (En. No. 2473), Senior Advocate Vs Registrar/Assistant Registrar, Firms Societies & Chits, Teliyarganj & ors. 2018 (11) ADJ 586

2. C/m of Hindu Inter College, Kosi Kalan Vs Regional Deputy Director of Education, 11 Agra Region, Agra & Ors 1988 UPLBEC 732

3. Udit Narain Kshetriya High School Padrauna Deoria Vs D.M., Deoria 1993 ACJ 1293

4. Harshad Chiman Lal Modi Vs DLF Universal Ltd. & anr. (2005) 7 SCC 791

5. C/M, Sarvodaya Post Graduate College Vs St. of U.P. & ors. 2011 (29) LCD 272

6. C/m, Public Inter College, Mandaripur, Bijnor Vs St. of U.P. & anr. 2014 (4) ESC 2341

(Delivered by Hon'ble Siddhartha Varma, J.)

1. In this writ petition, the order dated 25.7.2016 passed by the Regional Level Committee, Allahabad, has been challenged. The events which fall within a narrow compass culminating in the impugned order would be essential for the adjudication of this case.

2. There is a registered society by the name of Sankatha Prasad Shiksha Sadan Prabandh Samiti Mawai Ganeshpur, Fatehpur. The society also runs an Intermediate College which is recognized under the Intermediate Education Act, 1921. As per law, the society has its bye-laws and the Intermediate College has its Scheme Of Administration. A perusal of the bye-laws and the Scheme of Administration shows that enrolment of members is done only for the general body of the society and those very members are the members of the general body of the Intermediate College. The general body of the society elects its members for its Committee of Management and, thereafter, the latter functions for the society as also the Intermediate College.

3. On 5.12.2010, when an election was held one Sri Jai Bahadur Singh was elected as president and Sri Shattrughan Lal Vishwakarma was elected as the Manager. The elected body which was elected by the Election dated 5.12.2010, on 27.12.2011 claimed that on the enrolment of 9 life members and 11 Ordinary members vide resolution of the general body dated 5.12.2010, the General Body of the Society now had 28 members. The Committee which was elected on 5.12.2010 also came up with an election dated 1.12.2013 on the basis of those 28 members. This election was approved by the Assistant Registrar on 19.12.2013 on the basis of which, the list of office bearers was registered by the Assistant Registrar under Section 4 of the Societies Registration Act on 2.3.2015.

4. However, when knowledge dawned on the other members regarding the addition of members to the general body, they filed their complaints before the Assistant Registrar and when the Assistant Registrar on 2.3.2015 had ultimately registered the list of office bearers, the Petitioners filed a writ petition being Writ Petition No. 20789 of 2015 which was allowed on 28.4.2015. The order dated 2.3.2015 passed by the Assistant Registrar was set aside and the Assistant Registrar, by the High Court's order, was directed to finalize the list of the General Body of the Society in accordance with law and after affording an opportunity of hearing to all the stake holders.

5. The Assistant Registrar, thereafter, on 14.8.2015 passed an order holding that the election dated 1.12.2013 was invalid and finalized a list of 14 members who according to him were there in the General Body of the Society. However, the Assistant Registrar was of the view that Election was to be held under Section 25 (2) of the Societies Registration Act, 1860. Thereafter, the District Inspector of Schools, upon the resolution of the dispute regarding membership, granted permission dated 26.8.2015 to the institution to hold the election of the Committee of management. However, the president of the society on the very next day i.e. 27.8.2015 requested the District Inspector of Schools to get the Election of the Society also held. Thereupon on 28.8.2015, the District Inspector of Schools appointed one Sri Ramendra Singh, the member of the Government Kanya Uchchattar Madhyamik vidyalaya Chakki, Fatehpur as the Election Officer. The Election Officer, thereafter, finalized the Election programme and published the same in two newspapers, namely, Dainik Jagran and Amar Ujala. Observers etc. were appointed and the election of the committee of management of the Society as also of the college was held on 12.9.2015. On 14.9.2015, the observer submitted his report to the District Inspector of Schools and on 16.9.2015, the District Inspector of Schools approved the Election and also attested the signature of the petitioner no. 2 as the manager.

6. Aggrieved by the order of the Assistant Registrar dated 14.8.2015, the respondent no. 5 filed a writ petition being Writ Petition No. 50262 of 2015. This writ petition, however, came to be dismissed on 8.9.2015 as the Election was already notified for 12.9.2015. A Special Appeal being Special Appeal No. 742 of 2015 was filed against the order of the High Court dated 8.9.2015 which was

also disposed of on 30.10.2015. However, upon the Election results being declared, the respondent no. 5 again filed a writ petition being Writ Petition No. 68194 of 2015 whereby four orders were challenged.

I. The order dated 14.8.2015 passed by the Assistant Registrar finalizing the Electoral Roll of 14 members.

II. The Election dated 12.9.2015 of the Committee of Management of the Society.

III. The Election dated 12.9.2015 of the Committee of Management of the Institution.

IV. The order dated 16.9.2015 of the District Inspector of Schools which had approved the Election dated 12.9.2012.

7. On 14.1.2016, the High Court did not enter into the merits of the impugned orders. However,it granted liberty to the petitioners of the Writ Petition No. 68194 of 2015 to approach the Regional Level Committee. The operative portion of the order dated 4.1.2016 is being reproduced here as under:-

"Accordingly, without going into the merits of the impugned orders as well as the election proceedings, this writ petition is disposed of with liberty to the petitioners to approach the Regional Level Committee and in which event, the Regional Level Committee shall decide the objections preferred by the petitioners, in **accordance with law (emphasis added),** after due notice and opportunity of hearing to all affected parties. The aforesaid exercise be carried out by the Regional Level Committee, expeditiously and preferably within a period of next six months from the date the objection were preferred before it. The impugned order dated 16.9.2015 as well as the election proceedings shall abide by the decision taken by the Regional Level Committee."

8. When the Regional Level Committee passed an order on 25.7.2016 (order impugned in the writ petition), the instant writ petition was filed. The order impugned was to the following effect:-

i. The Election of the Committee of Management held on 12.9.2015 was held to be invalid.

ii. A direction was given to the Assistant Registrar Firms, Societies and Chits, Allahabad, to review his order dated 14.8.2015 whereby he had found that only 14 members were the actual members of the General Body. This exercise had to be completed by the Assistant Registrar within a period of three months of the passing of the impugned order dated 25.7.2016.

iii. A direction was also given to the District Inspector of Schools to get the Election of the Committee of Management of the Institution held on the basis of the list of members which was to be finalized by the Assistant Registrar.

iv. The accounts of the institution were in the mean time to be operated by the District Basic Siksha Adhikari, Fatehpur, singly.

9. Learned counsel for the petitioner while assailing the order dated 25.7.2016 passed by the Regional Level Committee has made the following submissions:-

(i)The Joint Director of Education/ the Regional Level Committee and the Assistant Registrar Firms, Societies and Chits, Allahabad perform their functions in their own spheres. The two Acts which govern their functioning are two different legislations. The Joint Director of Education/ Regional Level Committee draw their powers from the U.P. Intermediate Education Act, 1921, read with the Government Order dated 19.12.2000. The Joint Director of Education was required to decide a dispute in regard to a Committee of Management of an Intermediate College governed by the provisions of the Intermediate Education Act. By means of the Government Order dated 19.12.2000 it was provided that the dispute pertaining to the Committee of Management of an Intermediate College would be decided by the Regional Level Committee. In effect, therefore, he submitted that the Regional Level Committee was required to decide a dispute pertaining to a Committee of Management of an Institution governed by the Intermediate Education Act, 1921. While deciding the question of election of Committee of Management, however, the Regional Level Committee incidentally could have gone into the validity of the Electoral Roll which was used for holding the Election. However, he submits that if by virtue of the bye-laws of the society and the Scheme of Administration of an Intermediate College, the Committee of Management of the Society and the Intermediate College (run by the society) are one and the same then the Assistant Registrar who exercises his powers under the Societies Registration Act, 1860, alone could deal with the list of the General Body of the Society under Section 4-B of the Societies Registration Act. He submits that whenever a dispute with regard to the list of the General Body of a society is raised then under Section 4-B of the Societies Registration Act, 1860, the dispute pertaining to the said list was required to be decided by the Assistant Registrar under the provisions of the Section 4-B of the Societies Registration Act, 1860. Learned counsel to bolster his submission has relied upon **2018 (11) ADJ 586 (T.P. Singh (En. No. 2473), Senior Advocate vs. Registrar/Assistant Registrar, Firms Societies & Chits, Teliyarganj and others).**

Learned counsel further submitted that a dispute under Section 4-B of the Societies Registration Act could not be appealed against. However, if the Prescribed Authority under Section 25 of the Societies Registration Act had to decide any dispute then he could also have incidentally looked into the electoral roll also.

Therefore, the learned counsel for the petitioner submits that the Regional Level Committee which functioned as per the Government Order dated 19.12.2000 could not have looked into the order passed by the Registrar dated 14.8.2015 and also could not have directed the Registrar to review his order. Since the learned counsel for the petitioner relied upon the provisions of the Government Order dated 19.12.2000, the same is being reproduced here as under:-

"शासन स्तर पर निरन्तर यह शिकायतें प्राप्त हो रहीं है कि माध्यमिक शिक्षा अधिनियम, 1921 एवं वेतन वितरण अधिनियम, 1971 द्वारा प्राप्त अधिकारों का कतिपय अधिकारियों द्वारा दुरूपयोग किया जा रहा है, इसलिए मण्डलीय संयुक्त शिक्षा निदेशक की अध्यक्षता में एक समिति का गठन किया जाता है जिसमें मण्डलीय उप शिक्षा निदेशक तथा

सम्बन्धित जनपद के जिला विद्यालय निरीक्षक सदस्य होंगे। यह समिति निम्नलिखित प्रकरणों पर विचार करेगी।

1. प्रबन्धकों के हस्ताक्षर प्रमाणित करना।

2. वेतन वितरण अधिनियम के अन्तर्गत साधिकार नियंत्रक की नियुक्ति।

3. समस्त प्रकार के प्रबन्धकीय विवाद।

4. शिक्षकों के वरिष्ठता सम्बन्धी विवाद।

5. वेतन अनुमन्यता से सम्बन्धित समस्त प्रकरण न्यायालयी प्रकरणों को छोड़कर।

यह समिति उक्त प्रकणों का परीक्षण करने के उपरान्त अपनी संस्तुति उस अधिकार को प्रस्तुत करेंगी, जो अधिनियमों के अन्तर्गत इन कार्यों को करने के लिए अधिकृत है। इस समिति की माह में दो बार नियमित रूप से बैठकें आयोजित होंगी। न्यायालयी प्रकरणों पर उक्त समिति अपनी संस्तुति शिक्षा निदेशक को प्रेषित करेंगी, जिनकी आख्या एवं संस्तुति प्राप्त होने पर शासन द्वारा कार्यवाही हेतु निर्देश दिया जाएगा। "

(ii) Learned counsel for the petitioner further submitted that the Regional Level Committee could not have sat in appeal over the order of the Assistant Registrar. He submitted that the order of the Assistant Registrar, having not been challenged, had attained finality and the Regional Level Committee could not have directed that Assistant Registrar to review his order dated 14.8.2015. In this regard, learned counsel for the petitioner relied upon a judgement of this Court reported in 1988 **UPLBEC 732 (Committee of Management of Hindu Inter College, Kosi Kalan vs. Regional Deputy Director of Education, Agra Region, Agra and Others.**

(iii) Learned counsel for the petitioner further submitted that simply because the Court had directed the parties to approach the Regional Level Committee it did not mean that it had bestowed the Regional Level Committee with the power to arrogate to itself a jurisdiction which it did not have. In this regard, learned counsel for the petitioner relied upon **1993 ACJ 1293 (Udit Narain Kshetriya High School Padrauna Deoria through its Secy. Sri Ram Pratap Narain Singh and Other v. District Magistrate, Deoria and 2005 (7) SCC 791 (Harshad Chiman Lal Modi v. DLF Universal Ltd. And another)**. He submitted that the Regional Level Committee had to decide the matter in accordance with law and if the law did not permit it to decide the issue as was raised before it then it ought to have kept its hands away.

(iv) Learned counsel for the petitioner further submitted that the High Court had by its order only directed the Regional Level Committee to decide the dispute in accordance with law. It had not bestowed any jurisdiction on the Regional Level Committee.

(v) Learned counsel for the petitioner further submitted that even on merits the order of the Assistant Registrar dated 14.8.2015 could not be interfered with as it had interpreted resolution dated 5.12.2010 by which resolution no members had been enrolled but a resolution was there that in future they would be enroled. He submitted that after the enrolment of the new members there was also no fresh resolution accepting the fresh members as regular members. In this regard, learned counsel for the petitioner relied upon **2011 (29) LCD 272 (C/M, Sarvodaya Post Graduate College vs. State of U.P. And Others).**

(vi) Learned counsel had also submitted that when the Election of the

Society alone had to be looked into then it mattered little that it was the District Inspector of Schools who monitored the Elections.

10. The counsel for the respondent no. 5, however, in reply, made the following submission. He had also submitted his written arguments:-

(I) The order dated 14.8.2015 could have been looked into by the Regional Level Committee as the order dated 4.1.2016 passed by this Court was passed on the basis of consent and, therefore, a jurisdiction vested in the Regional Level Committee to look into the order dated 14.8.2015 which was passed by the Assistant Registrar. This was the order which was challenged in the writ petition being Writ Petition No. 68194 of 2015. When once the order of the Assistant Registrar Firms, Societies and Chits, Allahabad had come into existence and had not been interfered with by the Court and in fact when the Court had relegated the parties to approach the Regional Level Committee then the Regional Level Committee alone could have looked into the orders which were impugned in Writ Petition No. 68194 of 2015. The respondent no. 5 relied upon **2014 (4) ESC 2341 (Committee of Management, Public Inter College, Mandaripur, Bijnor vs. State of U.P. And Others)** to support his case.

(ii)Learned counsel for the respondent no. 5 further submitted that in view of the order passed on 30.10.2015 in Special Appeal No. 742 of 2015 and in view of the order dated 4.1.2016 passed in Writ Petition No. 68194 of 2015 the order passed by the Regional Level Committee on 25.7.2016 could not be interfered with.

(iii) The respondent no. 5 had drawn the attention of the Court to the Resolution dated 5.12.2010 and had submitted that the Resolution dated 5.12.2010 very clearly had resolved to enrol fresh members. Learned counsel for the respondents read out the Resolution No. 3(2) dated 5.12.2010 and, therefore, the same is being reproduced here as under:-

"2. श्री शिव राम द्विवेदी ने प्रस्ताव रखा कि हमारी समिति में अधिकांश वयोवृद्ध एवं मात्र साक्षर सदस्य है इसलिए भविष्य में नव युवक शिक्षित एवं निर्विवादित सदस्य रखे जाने चाहिए सदर में प्रस्ताव का स्वागत करने हुए भविष्य में प्रस्ताव के अनुसार ही सदस्य बनाये जाने का निर्णय जिया।

अन्य कोई प्रस्ताव न जाने के कारण अध्यक्ष महोदय ने आज ही कार्यवाही के समापन की घोषणा की। "

(iii) He submits that "*भविष्य में प्रस्ताव के अनुसार ही सदस्य बनाये जाने का निर्णय लिया*" was such a statement in the Resolution which gave the General Body a power to enrol members then and there. Learned counsel for the respondent also drew the attention of the Court with regard to the method in which earlier members were enrolled and, therefore, submitted that the writ petition be dismissed.

11. Having heard the learned counsel for the petitioner and learned counsel for the respondent no. 5, this Court is of the view that the order dated 25.7.2016 cannot be sustained in the eyes of law. The Joint Director of Education/Regional Level Committee and the Assistant Registrar operated in different fields and under different enactments. The Regional Level Committee could have looked into a dispute, had it arisen between the Committee of Management of an Intermediate College governed by the

provisions of the Intermediate Education. However, the Assistant Registrar could not have done so. The Assistant Registrar could have only looked into the register of members under Section 4B of the Societies Registration Act, 1860. If there was any dispute with regard to the management, then he could have referred the same to the Prescribed Authority under Section 25 of the Societies Registration Act. Furthermore, when the order dated 14.8.2015 was not challenged and, when by the order dated 4.1.2016 passed in Writ Petition No. 68194 of 2015 the Regional Level Committee was asked to look into the grievance of the petitioner of that writ petition in accordance with law then the Court had not bestowed the Regional Level Committee the jurisdiction to sit in appeal over the order dated 14.8.2015 passed by the Assistant Registrar. The High Court had also not bestowed powers on the Regional Level Committee to the extent that it could have directed the Registrar to to review his order dated 14.8.2015. When the writ petition did not adjudicate upon the order 14.8.2015 then the only irresistible conclusion was that the order dated 14.8.2015 had attained finality. Further, this Court is of the view that when the High Court by its order dated 14.1.2016 directed the parties to approach the Regional Level Committee then it had not bestowed any power on it and when the Regional Level Committee was adjudicating the matter it had to, in the first instance, see if it had any jurisdiction to look into the controversy as was placed before it. The Regional Level Committee had to decide the matter in accordance with law.

12. Further, on merit, I find that the Resolution dated 5.12.2010 was only to enroll members in the future. Still further, I am of the view that as per the bye-laws if any new member had to be enrolled the General Body was required to pass a resolution accepting those members. Since no meeting had taken place as per the resolution dated 5.12.2010 it has to be presumed that the members enrolled on 5.12.2010 were not in fact members under any resolution.

13. In view of what has been observed above, the order 25.7.2016 passed by the Regional Level Committee Allahabad cannot be sustained and is set aside.

14. The writ petition is allowed.

(2020)08ILR A239
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 51337 of 2012

M/s Triveni Eng. & Indus. Ltd. Sugar Unit, Muzaffar Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh, Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Sri Anoop Trivedi, Sri Bushra Maryam

Services of respondent no.3 (Cane Inspector) dispensed with simply because of the institution of the criminal case - order of termination stated that on account of nature of offence - not possible to conduct any domestic inquiry against the respondent no.3 - respondent no. 3 subsequently acquitted by

Criminal Court - *Held* - when the trial had resulted in an acquittal then no fault in the Labour Tribunal award whereby termination order set aside & respondent no. 3 was given 50% of his back wages - Court found no force in submission that there was loss of confidence - directed petitioner to adjust R-3 in the organization (Para 10)

Dismissed. (E-5)

List of Cases cited:-

1. Divisional Controller, Karnataka St. Rd. Trans. Corp. Vs M.G. Vittal Rao (2012) 1 SCC 442

2. Bharat Heavy Electricals Ltd. Vs M. Chandrashekhar Reddy & ors. (2005) 2 SCC 481

3. DCM Sri Ram Industries Ltd. Meerut Vs St. of U.P. & ors. (2003) 99 FLR 24

4. M.L. Singla Vs P.N.B. (2018) 18 SCC 21

5. Amrit Vanaspati Co. Ltd. Vs Khem Chand & anr. (2006) 6 SCC 325

6. Kurukshetra University Vs Prithvi Singh (2018) 4 SCC 483

7. Neeta Kaplish Vs P.O., Labour Court (1999) 1 SCC 517

8. U.P. S.R.T.C. Vs Rajendra Singh & anr. 2012 (4) ADJ 473

9. Deputy Inspector General of Police & anr. Vs S. Samuthiram (2013) 1 SCC 598

10. Union Territory, Chandigarh Administration & ors. Vs Pradeep Kumar & anr. (2018) 1 SCC 797

11. D.K. Yadav Vs M/s. J.M.A. Industries Ltd. 1993 (67) FLR 111

12. U.O.I. Vs Naman Singh Shekhawat 2008 (118) FLR 1121

13. Amar Chakravarti & ors. Vs M/s. Maruti Suzuki India Ltd. 2008 (118) FLR 1121

14. Bharat Singh & ors. Vs St. of Hary. & ors. (1988) 4 SCC 534

15. L. Michael Vs Jhonson Pumps Ltd. 1975 (30) FLR 140

(Delivered by Hon'ble Siddhartha Varma, J.)

1. When on 27.1.2000 the services of the respondent no.3 were done away with, a dispute was raised by the respondent no.3-Pramod Kumar which was referred to the Labour Tribunal at Meerut with the following reference :

"क्या सेवायोजकों द्वारा अपने विवादित श्रमिक श्री प्रमोद कुमार पुत्र हरपाल सिंह की सेवाएं दिनांक 27.1.2000 से समाप्त किया जाना उचित एवं वैधानिक है ? यदि नहीं तो सम्बंधित श्रमिक किस हितलाभ/अनुतोषको पाने का अधिकारी है एवं अन्य किस विवरण सहित ?"

2. When the reference was decided in favour of respondent no.3 on 13.4.2012 whereby the order dated 27.1.2000 was set-aside and the respondent no.3 was given 50% of his back-wages, the present writ petition was filed.

3. The facts of the case are that on 29.12.1999, one Sri Subhash Chandra Jaggi, Vice-President and the Head of the Establishment run by the petitioner was shot dead inside the factory premises. Thereupon a Fact Finding Committee was constituted to identify the culprits who might have been involved in the murder of the Vice-President, Sri Subhash Chandra Jaggi. Sri Ajay Sharma, the person appointed for conducting the Fact Finding Inquiry, submitted his report on 21.1.2000 by which he had held the respondent no.3-Pramod Kumar along with one Ajay Kumar guilty of the murder of Subhash

Chandra Jaggi. On 27.1.2000, an order terminating the services of respondent no.3 was passed. Aggrieved thereof, the respondent no.3 had raised an industrial dispute which was referred by the State Government on 20.12.2002 for a decision to the Industrial Tribunal (V), Meerut. In the interregnum, after the murder of Subhash Chandra Jaggi on 29.12.1999, the police had also, upon a First Information Report being lodged, submitted a charge-sheet on 29.2.2000 and a Sessions Trial being Sessions Trial No.647 of 2000 was initiated. The respondent no.3 was released on bail on 16.5.2000 and after a full-fledged trial, the respondent no.3 was finally acquitted in the Sessions Trial on 28.5.2002.

4. Learned counsel for the petitioner and the learned counsel appearing for respondent no.3 had filed their Written Submissions, which are made part of the record.

5. The contentions of the learned counsel for the petitioner were as follows :

(i) The petitioner could not have retained the respondent no.3 in its establishment as, because of his doings, they had no confidence in respondent no.3 at all and, therefore, because of the loss of confidence in respondent no.3, the petitioner could not reinstate him. Learned counsel for the petitioner contended that after the murder had taken place on 29.12.1999, a Fact Finding Inquiry in absolutely unambiguous terms had held that the respondent no.3 was definitely involved in the murder and he submitted that the mere fact that the respondent no.3 had been acquitted by a Criminal Court would not mean that he could be taken back by the petitioner. Learned counsel submitted that the very fact that the respondent no.3 had absconded after the commission of the murder spoke volumes about the fact that the respondent no.3 was guilty. Still further, learned counsel for the petitioner submitted that the respondent no.3 had been out of service for the past 21 years and now he could not be taken back and adjusted in the establishment of the petitioner. Learned counsel for the petitioner to support his arguments relied upon **(2012) 1 SCC 442 : Divisional Controller, Karnataka State Road Transport Corportation vs. M.G. Vittal Rao; (2005) 2 SCC 481 : Bharat Heavy Electricals Ltd. vs. M. Chandrashekhar Reddy & Ors. and (2003) 99 FLR 24 : DCM Sri Ram Industries Ltd. Meerut vs. State of U.P. & Ors..**

(ii) The further contention of the learned counsel for the petitioner is that acquittal of the respondent no.3 was not an honourable acquittal but was one which was based on a benefit of doubt. Learned counsel for the petitioner relying upon various decisions of the Apex Court submitted that a departmental inquiry and a criminal trial were held in two different spheres. When a departmental inquiry was held, it was always the intention of the department to see as to whether the establishment would be brought to any harm if the delinquent official is retained in service. He submitted that a domestic inquiry was based on the doctrine of "preponderance of probabilities" whereas a criminal trial is based on different considerations altogether. He submitted that in a criminal trial if there was even a single doubt, the trial resulted in an acquittal and it could always be presumed that the guilty had been discharged of the stigma of being a

criminal. However, he submitted that when it was found in the departmental inquiry that the respondent no.3 was involved in the criminal case, then he could not have been retained by the establishment i.e. by the petitioner.

(iii) Learned counsel for the petitioner submitted that the Tribunal in the award had not found any error in the fact finding report.

(iv) Learned counsel for the petitioner further submitted that if the inquiry which was conducted was erroneous then the petitioner which had made a specific prayer for a fresh inquiry in the written statement filed before the Tribunal, should have been allowed an opportunity to lead further evidence whereby charges against the respondent no.3 could have been looked into. In this regard, learned counsel for the petitioner relied upon **(2018) 18 SCC 21 : M.L. Singla vs. Punjab National Bank; (2006) 6 SCC 325 : Amrit Vanaspati Co. Ltd. vs. Khem Chand & Anr.; (2018) 4 SCC 483 : Kurukshetra University vs. Prithvi Singh; (1999) 1 SCC 517 : Neeta Kaplish vs. Presiding Officer, Labour Court and 2012 (4) ADJ 473 : U.P. State Road Transport Corporation vs. Rajendra Singh & Anr..** While the petitioner had argued that the standards of departmental inquiry and a criminal trial were based on different parameters, he had taken recourse to the decisions reported in **(2013) 1 SCC 598 : Deputy Inspector General of Police & Anr. vs. S. Samuthiram and (2018) 1 SCC 797 : Union Territory, Chandigarh Administration & Ors. vs. Pradeep Kumar & Anr..**

6. Learned counsel appearing for the respondent no.3, however, in reply submitted that in the absence of a full-fledged inquiry, wherein the respondent no.3 was included in the inquiry, it could be presumed that there were no departmental inquiry whatsoever. Learned counsel submitted that the Standing Orders also contemplated for a full-fledged inquiry, even if the delinquent absented himself. She submitted that a full-fledged inquiry ought to have been undergone. Learned counsel submitted that the respondent no.3 was a permanent employee of the petitioner and his services could not have been done-away with without any departmental inquiry. To support her arguments, learned counsel for the respondent no.3 relied upon the decisions reported in **1993 (67) FLR 111 : D.K. Yadav vs. M/s. J.M.A. Industries Ltd.; 2008 (118) FLR 1121 : Union of India vs. Naman Singh Shekhawat and (2010) 10 SCC 471 : Amar Chakravarti & Ors. vs. M/s. Maruti Suzuki India Limited..**

7. The further contention of the learned counsel for respondent no.3 was that whether the petitioner had lost confidence in respondent no.3 was never pleaded or argued before the Tribunal and, therefore, in the High Court while the award was being challenged, it could not be argued that the award was bad on account of the fact that it had not considered that there was loss of confidence in respondent no.3. In this regard, learned counsel relied upon the decision reported in **(1988) 4 SCC 534 : Bharat Singh & Ors. vs. State of Haryana & Ors..**

8. Further more, learned counsel for respondent no.3 submitted that the petitioner could not have also taken a

case of loss of confidence in respondent no.3 as the respondent no.3 was not working on any post where, if he was reinstated, he would divulge some secret etc. which would be detrimental to the employer and, therefore, it could not be argued by the petitioner that they had lost confidence in the respondent no.3. In this regard, learned counsel for the respondent no.3 relied upon **1975 (30) FLR 140 : L. Michael vs. Jhonson Pumps Limited..**

9. Learned counsel for the respondent no.3 also submitted that when the respondent no.3 was being reinstated, he should have been granted the back-wages.

10. Having heard learned counsel for the petitioner and learned counsel appearing for respondent no.3, this Court is of the view that no interference is warranted in this writ petition. After the Vice-President of the petitioner-establishment Sri Subhash Chandra Jaggi was found murdered, services of the respondent no.3 were dispensed with on 27.1.2000 only on account of the fact that a police case had been registered against the respondent no.3 and the respondent no.3 was found involved in that crime. It was also found that because of the trial which was being undergone in the Criminal Court, the services of respondent no.3 were done away with as the involvement in the trial constituted a serious offence under the Standing Orders. The order of termination itself had stated that on account of the nature of the offence, it was not possible to conduct any domestic inquiry against the respondent no.3. The Court, therefore, finds that simply because of the institution of the criminal case, the termination order had been passed. Furthermore, the submission of the learned counsel for the petitioner that the criminal trial had resulted in an acquittal on the basis of "benefit of doubt" and not on the basis of a full-fledged trial which could be called an "honourable acquittal" appears to be absolutely fallacious. A perusal of the judgment and order passed by the Trial Court definitely shows that it was based on a correct assessment of evidence as was led by the prosecution and the defence. The acquittal had not resulted on account of the fact that there was no evidence or that witnesses had been won over by the accused. It is another matter that the acquittal had taken place on account of the fact that the Trial Court had found that the evidence against the accused was doubtful. Furthermore, since the termination order was based on the fact that a Criminal Trial was being undergone and that there was no occasion for the petitioner to pray for a domestic inquiry, I find that the order of termination could not be sustained. The domestic inquiry itself was not undergone by the petitioner when the respondent no.3 was involved and, therefore, when the trial had resulted in an acquittal and that too on the basis of a genuine analysis of evidence brought on record by the prosecution as also by the defence, then no fault can be found with the award. Still further, the Court finds that the submission of the learned counsel for the petitioner that there was loss of confidence, also holds no water. The respondent no.3 was a Cane Inspector and could always be adjusted in the organization of the petitioner which is a huge-one.

11. Under such circumstances, there is no interference warranted in the writ petition. It is, accordingly, dismissed.

(2020)08ILR A244
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.07.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Bail No. 10163 of 2019

Vinay Kumar Mishra ...Applicant
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Ayodhya Prasad Mishra

Counsel for the Opposite Party:
Akhilesh Kumar Awasthi

Criminal Law- Indian Penal Code, 1860- Section 19, 24, 27-A - The Narcotics Drugs And Psychotropic Substances Act, 1985 -Possession of Commercial quantity – Ground for bail – Not unless P.P. has been given opportunity to oppose bail application – In case bail opposed by P.P. - There should be reason to believe that applicant not guilty and not likely to commit offence while on bail – No such ground made out .

The bail is rejected. (E-2)

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

1. The instant pre-trial bail application has been moved by the applicant who has been charged under Sections 8/20/29/60 (3) of the Narcotic Drugs & Substances Act (hereinafter referred to as NDPS Act), P.S. NCB, Lucknow.

2. Heard Sri A.P. Mishra, learned counsel for the applicant and Sri Akhilesh Kumar Awasthi, learned counsel for the Narcotics Control Bureau.

3. The facts giving rise to the instant bail application are that as per the prosecution case, it is alleged that on the basis of information given by the Zonal Director of Narcotics Control Bureau to the complainant that Ganja in huge quantity is being transported hidden in a concealed cavity in Truck No. UP 44 T 1781 and is moving from Chhatisgarh and would be reaching Faizabad via Akbarpur Road between 4:00 PM to 6:00 PM on 17.11.2019.

4. On the basis of the aforesaid information a raiding team was constituted. The information was reduced in writing by the complainant and was placed before the superior officerthereafter the complianant along with other departmental officers proceeded in the departmental vehicles and reached the Devkali Chauraha at Faizabad at around 03:30 PM on 17.01.2019. After reaching the aforesaid Devkali Chauraha, Sri Rajesh Singh, Sub Inspector of the U.P. Police was also informed about the information regarding the transportation of Ganja and his assistance was sought in the search and seizure proceedings, which was accepted and he along with raiding team of the NCB positioned themselves.

5. At around 04:30 PM, the said truck was spotted and was intercepted by the raiding team near the petrol pump on the Akbarpur Faizabad Highway on the Akbarpur side. Upon intercepting the said Truck bearing No. UP 44 T 1781 two person were found traveling therein who identified themselves as Vivek Kumar Mishra (the present applicant) and the other identified himself as Kaleem.

6. It is also the case of the prosecution that both the persons were briefed about the legal provisisions of Sections 50 of the NDPS Act before they were searched. They were informed separately of their rights including the right to be searched before a Magistrate or a Gazetted officer. Upon the request of the applicant and the other co-accused the search was conducted in presence of a Gazetted Officer Sri Mohd. Nawab, Superintendent of NCB, Lucknow and nothing incriminating was found from their possession.

7. However, while the truck was searched, the hidden cavity was discovered and both the applicant and the co-accused Kaleem, informed that the said cavity was closed with nuts and bolts which could be opened from behind the driver's seat. It was accordingly done and from the hidden cavity 15 jute bags were recovered. Upon opening the said jute bags, 167 small packets were found and upon testing the same, it tested positive for Ganja. From the seized 15 bags containing 167 small packets, a total quantity of 349.250 Kgs of Ganja was recovered.

8. During the search and seizure proceedings, samples were taken from the said seized contraband which was sealed and sent for inspection to a laboratory and later as per the report it tested positive for Ganja while the remaining packets were sealed and confiscated. The search cum seizure memo was prepared and thereafter the statements of the applicant and the co-accused Kaleem were recorded under Section 67 of the NDPS Act.

9. As per the statement of the applicant and co-accused Kaleem, it revealed that the seized goods belonged to one Sri Chand Khan, R/o Gonda while the contraband was loaded by one Sri Amaan and the Truck in question belonged to one Sri Sagir Ahmad R/o Gonda. It is in this backdrop that the applicant has been apprehended and has been in Jail since 18.11.2019.

10. The first submission of Sri A.P. Mishra, learned counsel for the applicant, is that there has been a complete violation of Section 42 of the NDPS Act. It has been submitted that in paragraph 17 of the bail application there has been a clear averment that there is non-compliance of Section 42 of the NDPS Act, inasmuch as, the information received and reduced in writing was not done by the officer who received it nor there is any material to indicate that the aforesaid provision has been complied with. It has also been urged that Sub Section 2 of Section 42 of the NDPS Act has also not been complied with. It has been submitted that the information conveyed by the Zonal Director Sri Birendra Kumar, NCB does not speak regarding the source of such information having been received by him and he admittedly did not reduce the said information in writing.

11. The second submission of Sri Mishra is that there is non-compliance of Section 50 of the NDPS Act, inasmuch as, the search was conducted without the rights being informed to the applicant and the other co-accused before conducting the search. He has further submitted that the consent memo does not bear the place and time of its preparation nor does it bear the signatures of other members of the team.

12. The third submission of Sri Mishra is, that there is no material to

indicate that the applicant had the conscious possession over the contraband so recovered and consequently in absence of the conscious possession, the applicant cannot be charged especially when he had already disclosed who the owner of the contraband was rather the said owner has not been charge-sheeted but the applicant who is a poor truck driver and otherwise having no nexus with the alleged crime has been apprehended and has been languishing in Jail since 18.01.2019.

13. Sri Mishra in support of his submission has relied upon the decision of the Apex Court in the case of ***Sarija Bano Vs. State through Inspector of Police*** reported in ***2004 (12) SCC 266.*** Sri Mishra while heavily relying upon the aforesaid decision of Sarija Bano (Supra) has submitted that now it is a well settled that the compliance of Section 42 of the NDPS Act is mandatory and the same is also a relevant consideration for the Court while considering a bail application. Sri Mishra has also relied on the decision of the Apex Court in the case of ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*** reported in ***2000 (2) SCC 513*** and ***State of Rajasthan Vs. Jag Raj Singh*** reported in ***2016 (11) SCC 687*** to buttress his submissions.

14. Sri Akhilesh Awasthi, learned counsel for the NCB while refuting the aforesaid submission has submitted that the record would indicate that there is an adequate legal compliance of Section 42 of the NDPS Act, inasmuch as, the information received was duly reduced in writing and it was also reported to the Senior Officer within the time prescribed under Section 42 (2) of the NDPS Act. It has also been submitted that it is not the case where Section 42 of the NDPS Act has not been complied with, rather the material apparently indicates that there has been a complete compliance of Section 42 of the NDPS Act. Sri Awasthi has further urged that even otherwise the aforesaid plea regarding the compliance of Section 42 of the NDPS Act is a matter which is to be considered during the trial and may not be very relevant at the stage of consideration of the bail application.

15. Sri Awasthi has further urged that similarly the record would indicate that there has been complete compliance of Section 50 of the NDPS Act and even the aforesaid plea is a matter which is to be considered during the trial. Thus, it is urged that there has been complete compliance of both Section 42 and Section 50 of the NDPS Act, however, only hyper-technical plea is being raised by the learned counsel for the applicant which does not merit consideration. Apart from the fact that what is important to be considered by the Court while considering an application for bail is the mandate which has been provided under Section 37 of the NDPS Act.

16. Sri Awasthi has vehemently urged that it would indicate that the applicant was clearly in the knowledge of the presence of the contraband in the Truck which was being transported being hidden in a special cavity. The applicant was also aware that it was loaded by one Sri Amaan and it belonged to Sri Chand Khan resident of Gonda. The Truck also belonged to one Sri Sagir Ahmad and the fact remains that both the applicant and the co-accused Kaleem were found in the truck transporting the aforesaid contraband which was apprehended on the highway.

17. Sri Awasthi has also urged that Section 35 of the NDPS Act permits the presumption of culpable mental state to be drawn, therefore, since the contraband was found from the truck which was being driven by the applicant, hence, it cannot be said that he did not have the conscious possession. Moreover, in view of the presumption so made, it was for the applicant to disclose and rebut by cogent material to indicate that he did not have the conscious possession.

18. Sri Awasthi has also submitted that efforts were made to trace out the other offenders namely Sri Chand Khan, Sri Amaan and Sri Saghir Ahmad, however, they are not traceable and while keeping the option open to proceed against the said offenders, the complaint was filed against the applicant and the co-accused Kaleem. Merely because the other offenders are not parties in the complaint as they were not traceable till the time of filing of the complaint, it cannot be said that they have been left out. Thus, the submissions raised by the learned counsel for the applicant do not warrant any merit and the bail application of the applicant deserves to be rejected.

19. Sri Awasthi in support of his submissions has relied upon the decision of the Apex Court in the case of ***Union of India Vs. Ramsamujh*** reported in ***1999 (9) SCC 429, Union of India Vs. Ratan Malik*** reported in ***2009 (2) SCC 264*** and ***State of Kerala Vs. Rajesh*** reported in ***2020 SCC Online SC 81.***

20. The Court has considered the rival submissions and has also perused the material available on record and the case laws cited by the both parties.

21. The primary submission of Sri A.P. Mishra revolves around the non-compliance of Section 42 and Section 50 of the NDPS Act. While advancing his submissions, Sri Mishra has urged that the record does not indicate that there has been any compliance of Section 42 (1) or 42 (2) of the NDPS Act. It has been submitted that the applicant has taken a specific plea in paragraph 17 of the bail application in respect of non-compliance of Section 42 of the NDPS Act. It has been submitted by Sri Mishra that in paragraph 19 of the counter affidavit a reply to the paragraph 17 of the Bail Application has been given and it has been alleged and stated that the information available with the Officer in-charge was passed to Sri Narendra Kumar, Intelligence Officer empowered under Section 42 (1) of the NDPS Act and who reduced the same in writing and put up the same before the Zonal Director to proceed further, thus, the provision of both Section 41 (1) and 42 (2) of the NDPS Act have been duly complied with, while no document has been annexed indicating the recording of the information and forwarding the same to the superior officer, as required in law.

22. Sri Mishra has further urged that the officer before whom the search had taken place namely Sri Mohd. Nawab was a member of the raiding party, hence, he could not be treated to be an independent person. There is nothing to indicate that there was any difficulty in getting the search of the applicant conducted before a Magistrate or a gazetted officer. It has also been urged that in paragraph 20 of the counter affidavit, while giving a reply to the paragraph 18 of the bail application, the prosecution could not establish the compliance of Section 50 of the NDPS Act, hence, for the aforesaid reasons,

there is non-compliance of the mandatory provisions, hence, the applicant is entitled to be enlarged on bail.

23. In order to test the submissions of Sri Mishra, it will be gainful to consider Section 42 of the NDPS Act which reads as under:-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]"

24. Upon plain reading of the aforesaid Section, it would indicate that Sub section (1) of Section 42 of the

NDPS Act requires an officer not below the rank of a Peon/Sepoy or constable of the Departments as mentioned in the said section therein and where he has reason to believe from person's knowledge or information given by any person, to be taken down in writing that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence is punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or the illegally acquired property or any other documents which is liable for seizure or forfeiture is kept or concealed in any building, conveyance or enclosed place and further Sub section (2) provides that where the officer takes down the information in writing under Sub section (1) or records the grounds for his belief under the proviso mentioned in the sub Section (1) above, he shall within 72 hours, send a copy thereof to his immediate official superior.

25. The compliance of this Section has been disputed by the learned counsel for the applicant. The counter affidavit filed on behalf of the NCB in paragraph 19 states that the information available with the officer in-charge i.e. Sri Birendra Kumar, Zonal Director was passed to Narendra Kumar, the Intelligence Officer who recorded the same in writing and put it before the Zonal Director for further action.

26. The record further indicates that the applicant along with his bail application has annexed a typed copy of the information having been reduced in writing by the complainant as Annexure No. 3. From the perusal of the aforesaid document, the submission of the learned counsel for the NCB gets credence that the information was received from Sri Birendra Kumar, Zonal Director, NCB which was reduced in writing by Sri Narendra Kumar, the Intelligence Officer and the same was also placed before the officer concerned within the prescribed time as provided under Sub Section 2 of Section 42 of the NDPS Act. Sri Mishra could not indicate as to in what manner the aforesaid information was wanting of the requisites mentioned in Section 42 of the NDPS Act.

27. Another aspect to be considered is that apparently the compliance has been made by the NCB in respect of Section 42 and it is for the aforesaid reason that the applicant has also brought on record the typed copy of information reduced in writing as Annexure No. 3 with the bail application. Now, in case if the applicant disputes that the compliance is not in accordance with the strict provisions of the law then that aspect becomes a factual issue which is to be considered during the trial.

28. This Court gainfully relies upon the Constitution Bench decision of the Apex Court in the case of ***Karnail Singh Vs. State of Haryana*** reported in ***2009 (8) SCC 39*** wherein the Apex Court while looking into the mandate of Section 42 of the NDPS Act has observed as under:-

"35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513: 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692: 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2)

need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

29. Thus, it would be seen that the compliance of Section 42 being a question of fact may not be looked into by the Court for considering the bail application though may be relevant and to be considered by the Court during the trial.

30. It would be relevant to notice that the decision of the Apex Court in the case of Sarija Bano (supra) which has been heavily relied upon by the learned counsel for the applicant, upon its perusal

indicates that the Apex Court while making the observations that the compliance of Section 42 is mandatory and is a relevant fact which should have engaged the attention of the Court while considering the bail application is to be read in context with the facts of the case before the Apex Court.

31. In the case of Sarija Bano (supra) it was the specific case that the applicant no. 1 was arrested at 11:15 PM on 10.07.2003 and on the basis of the confessional statement, a search was made in the building at about 01:15 AM on 11.07.2003 where the second applicant was found staying and she was also taken into the custody at 01:15 AM. It was the case that in the aforesaid house the contraband was found and accordingly a case was registered. The redeeming feature of the aforesaid case was that on 10.07.2003 at 01:14 PM a telegram had also been sent to the Home Secretary, to the Governor of State of Tamilnadu, to the Police Commissioner of Chennai as well as to the Police Inspector of Ambunagar, Madurai wherein it was alleged that the applicants have already been detained and their lives were in danger and their whereabouts were not known. The fact that the telegram was sent and received was not disputed.

32. It is in these circumstances where the allegations were ex-facie made that the applicants before the Apex Court were illegally detained for which a telegram had already been sent much prior in time at 01:15 PM whereas the search was made at a subsequent time and the factum regarding the telegram was also not disputed, hence, the Court recorded the observations and further it specifically noted that the decision of Sarija Bano (supra) was rendered in special facts.

33. Thus, the said case is distinguishable from the facts of the instant case, coupled with the mandate as discernable from the constitution bench decision of the Apex Court in the case of Karnail Singh (Supra) and also for the aforesaid reason that prima facie there does not appear to be an *ex-facie* violation of Section 42 of the NDPS Act and even though if some infraction has been made as per the applicant then he is free to raise the said the ground during trial, hence, this Court does not find any merit in the submission of the learned counsel for the applicant regarding non-compliance of Section 42 of the NDPS Act at this stage, while considering the bail application.

34. In so far as the violation of Section 50 of the NDPS Act is concerned, the same also does not find favour with this Court for the reason that the applicant himself has brought on record the copy of the memo issued to the applicant which was duly received by him and also signed by him as Annexure No. 4 clearly indicating the option exercised by the applicant regarding the search.

35. From the perusal of the Annexure No. 4, it would indicate that the applicant was informed that he had an option to be searched before a Magistrate or a gazetted officer. The applicant has mentioned under his signatures that he would like to get himself searched before a gazetted officer and once the applicant exercised his option thereafter his search was conducted in the presence of a Gazetted Officer Sri Mohd. Nawab, the Superintendent of NCB, Lucknow.

36. Again, it will be relevant to mention that the option was given to the

applicant and he exercised the same and accordingly, his search was conducted before a gazetted officer now in case if this fact is disputed by the applicant it also becomes a question of fact which can be adjudicated at the time of trial and may not be looked into by this Court at the time of consideration of the bail application.

37. The other limb of the submission of Sri Mishra, that the gazetted officer Mohd. Nawab was also a member of the raiding team and that he not being an independent officer, hence, the compliance is sham again for the reasons as mentioned above this too is a question of fact which can be seen and considered by the Court during trial.

38. This Court is also strengthened in its view from the decision of the Constitution Bench of the Apex Court in the case of ***Vijay Sinh Chandubha Jadeja Vs. State of Gujrat*** reported in ***2011 (1) SCC 609***. The relevant extract from para 31 of the said report is quoted hereinunder:-

Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

39. The last submission of Sri Mishra regarding the applicant not having the conscious possession of the articles of contraband seized also does not sound convincing.

40. It will be relevant to notice that Section 2 (viii) and Section 2 (viiib), Section 2 (xxiv), Section 2 (xxviii) of the NDPS Act define the words "conveyance', "illicit traffic', "to import inter-State' and "to transport' as under:-

"Section 2 (viii):- *"Conveyance" means a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel;*

Section 2 (viiib):- *" illicit traffic", in relation to narcotic drugs and psychotropic substances, means -*

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transhipment, of narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or

(v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv); other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder, and includes

(1) financing, directly or indirectly, any of the aforementioned activities;

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and

(3) harbouring persons engaged in any of the aforementioned activities;]

Section 2 (xxiv):- *"to import inter-State" means to bring into a State*

or Union territory in India from another State or Union territory in India;"

Section 2 (xviii):- *"to transport" means to take from one place to another within the same State or Union Territory;*

41. Significantly, Section 35 of the NDPS Act provides for presumption of culpable mental state and Section 8 (c) of the NDPS Act prohibits the possession, sale, purchase and transport of any contraband.

42. This Court gainfully refers to the decision of the Apex Court in the case of ***Mohan Lal Vs. State of Rajasthan*** reported in ***2015 (6) SCC 222*** wherein the concept of possession has been explained by the Apex Court and the relevant part thereof reads as under:-

12. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of "possession" given in Black's Law Dictionary is as follows:

"Possession.--Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel [219 Kan 616 : 549 P 2d 568 at p. 569 (1976)] . The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said Dictionary, the term "possess" in the context of narcotic drug laws means:

"Term ''possess', under narcotic drug laws, means actual control, care and management of the drug. Collini v. State [487 SW 2d 132 at p. 135 (Tex Cr App 1972)] . Defendant ''possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises ''dominion or control' over substance. State v. Hornaday [105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)] ."

And again:

"Criminal law.--Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, United States v. Craig [522 F 2d 29 at p. 31 (6th Cir 1975)] ; as well as joint or exclusive, Garvey v. State [176 Ga App 268 : 335 SE 2d 640 at p.

647 (1985)] . The defendants must have had dominion and control over the contraband with knowledge of its presence and character. United States v. Morando-Alvarez [520 F 2d 882 at p. 884 (9th Cir 1975)] .

Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. McConnell v. State [48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)] .

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. United States v. Ellison [469 F 2d 413 at p. 415 (9th Cir 1972)] .

To constitute ''possession' of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. State v. Kelley [12 Or App 496 : 507 P 2d 837 at p. 837 (1973)] ."

13. In Stroud's Dictionary, the term "possession" has been defined as follows:

""Possession' [Drugs (Prevention of Misuse) Act, 1964 (c. 64), Section 1(1)]. A person does not lose ''possession' of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (R. v. Buswell [(1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)]).

14. Dr Harris, in his essay titled "The Concept of Possession in English Law" [Published in Oxford Essays in Jurisprudence (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968).] while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are: (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the person's intention in regard to the thing, that is, "animus possessionis" and "animus domini", (d) possession of land on which the thing is claimed is lying, also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff.

15. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged

physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realise that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a very limited degree of physical control over the object or he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:

"35.Presumption of culpable mental state.--*(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

Explanation.--In this section "culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the

knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others."

43. From the facts available on record, it is the case that the private truck bearing No. UP 44 T 1781 was being driven by the applicant and another person namely Kaleem was riding in the said truck. Both were apprehended and from the hidden cavity of the truck 15 jute boxes containing 167 packets with a total quantity of 249.250 Kgs. of Ganja, which is a prohibited article as provided under Section 2 (iii) (b) of the NDPS Act and also being a commercial quantity, was seized.

44. From the statement which was given by the applicant and the other co-accused indicated that they had taken the truck to Chhatisgarh where one Sri Amaan had loaded the aforesaid bags in the truck and had also informed the applicant that it contained the contraband. The statement also indicates that the applicant was knowing the aforesaid fact that he along with the co-accused were transporting the contraband interstate and were apprehended at the Akbarpur Faizabad Highway in the State of U.P.

45. Hence, the applicant prima facie did have the possession with dominion over the same as explained by the Apex Court in the decision of Mohan Lal (Supra) and there not being any cogent material on the record to rebut the same. Accordingly, at this stage the plea of the learned counsel for the applicant regarding the applicant not having conscious possession does not have force and it is turned down.

46. Now, at this stage, this Court relegates itself to Section 37 of the NDPS Act to ascertain its mandate while considering an application for bail. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29-5-1989 with further amendment by Act 9 of 2001 reads as follows:

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1)

are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

47. Thus, from the perusal of the aforesaid provision, it would be clear that no person who is accused of an offence punishable under Section 19, 24 or 27 A and also for offences involving commercial quantity shall be released on bail or his own bond unless the Public Prosecutor had been given an opportunity to oppose the bail application and where the Public Prosecutor opposes the bail application, the Court is required to satisfy itself that it has reason to believe that the applicant is not guilty of such offence and that he is not likely to commit the offence while on bail.

48. This legislative mandate is required to be considered by the Court while considering an application for bail under the NDPS Act. The aforesaid provision has been the subject matter of interpretation and consideration in large number of cases and is very well settled.

49. In the case of ***Union of India Vs. Ram Samujh and Another reported in 1999 (9) SCC 429,*** the Apex Court in paras 6 to 8 has held as under:-

6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt. (emphasis supplied)

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the

public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.

50. Similarly, The Apex Court in the case of ***Union of India Vs. Shiv Shanker Kesari*** reported in ***2007 (7) SCC 798*** has held as under:- The relevant extract of the said report is quoted hereinunder:-

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

.....

11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is

pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

51. The Apex Court in the case of Union of India Vs. Rattan Malik Alias Habul reported in 2009 (2) SCC 624 in paras 12 to 15 has held as under:-

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to

conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years, and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the NDPS Act."

52. Lately, the Apex Court in the case of State of ***Kerala Vs. Rajesh*** reported in ***2020 SCC OnLine SC 81*** after noticing the earlier decisions on the aforesaid point regarding grant of bail has held as under:-

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

53. In light of the facts of the instant case as well as in view of the legal exposition considered and discussed hereinabove, this court at this stage prima facie for the purpose of this bail application is unable to form the required satisfaction that there are reasonable grounds for believing that the applicant is not guilty of the offence and hence this Court cannot persuade itself to acceed to the prayer of the applicant for being enlarged on bail.

54. Accordingly, the application for bail is rejected. It is clarified that any observation made in this judgment may not be construed as an expression on the merits of case and is solely for the purpose of this bail application and shall not affect the trial. Since the applicant has been in Jail since 18.01.2019, accordingly, the Trial Court is directed to expedite the trial.

(2020)08ILR A261
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.06.2020

BEFORE

THE HON'BLE SURYA PARAKASH KESARWANI, J.

Contempt Application (Civil) No. 1785 of 2020

Pradeep Kumar Srivastava & Ors.
...Applicants
Versus
Vishal Singh, C.E.O., & Ors.
...Opposite Parties

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

Counsel for the Opposite Parties:
Sri Vineet Sankalp, Sri M.C. Chaturvedi (Addl. A.G.).

A. Civil Contempt - Contempt of Courts Act (70 of 1971) - Civil contempt - Section 2(b) - quasi-criminal - *Burden of Proof* - 'he who asserts must prove' - person who asserts deliberate disobedience of the court order must prove beyond reasonable doubt that the alleged contemnor had knowledge of the order - *Standard of Proof* - that of a criminal proceedings - To hold a person guilty of contempt - breach alleged to be established beyond all reasonable doubt - In case of doubt, benefit to go to the person charged (Para 12, 14)
B. Civil Contempt - Contempt of Courts Act, 1971 - Section 2(b), 12 - extraordinary jurisdiction - Power - when to exercise - when law courts satisfied beyond doubt that there is clear case of wilful disobedience of the Court's order - adjudication of the liability to be made on admitted & undisputed facts - Courts must not enter into questions that have not been dealt with or decided in the judgment /order violation of which is alleged (Para 10)

Applicants failed to categorically state on affidavit as to what constructions are contrary to the interim order -no case for wilful disobedience of the writ court order made out - contempt application based on suppression and concealment of material facts , misleading averments, which itself are contemptuous in nature (Para 27)

Dismissed. (E-5)

List of cases cited :-

1. Rosnan Sam Boyce Vs B.R. Cotton Mills Ltd. (1990) 2 SCC 636 (para-9)

2. Kapil Deo Prasad Sah Vs St. of Bihar (1999) 7 SCC 569 (paras-9 & 11)

3. Ashok Paper Kamgar Union Vs Dharam Godha (2003) 11 SCC 1

4. Anil Kumar Shahi Vs Professor Ram Sevak Yadav (2008) 14 SCC 115

5. Jhareswar Prasad Paul Vs Tarak Nath Ganguly (2002) 5 SCC 352

6. Union of India Vs Subedar Devassy PV (2006) 1 SCC 613

7. Bihar Finance Service House Construction Co-operative Society Ltd. Vs Gautam Goswami (2008) 5 SCC 339

8. Chhotu Ram Vs Urvashi Gulati (2001) 7 SCC 530

9. Avishek Raja Vs Sanjay Gupta (2017) 8 SCC 435 (paras-20 to 23)

10. Noor Saba Vs Anoop Mishra & anr. (2013) 10 SCC 248 (para-14)

11. Anil Ratan Sarkar Vs Hirak Ghosh (2002) 4 SCC 21

12. Aligarh Municipal Board Vs Ekka Tonga Mazdoor Union (1970) 3 SCC 98 (para-8)

13. Babu Ram Gupta Vs Sudhir Bhasin (1980) 3 SCC 47

14. Chhotu Ram Vs Urvashi Gulati (2001) 7 SCC 530 (para-2)

15. All India Anna Dravida Munnetra Kazhagam Vs L.K. Tripathi (2009) 5 SCC 417 (para-78 to 81)

16. K.D. Sharma Vs Steel Authority of India & or.s (2008) 12 SCC 481

17. Dnyandeo Sabaji Naik Vs Pradnya Prakash Khadekar (2017) 5 SCC 496

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ajay Kumar Singh, learned counsel for the applicants and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Vineet Sankalp, learned counsel for the opposite parties.

Facts:

2. This contempt application under Section 12 of the Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act, 1971') has been filed by the applicants alleging that the opposite parties have wilfully disobeyed the interim order dated 27.07.2012 passed by the Division Bench in PIL No.31229 of 2005 (Kautilya Society and another vs. State of U.P. and others). The relevant portion of the aforesaid interim order dated 27.07.2012 is reproduced below:-

"As directed above, the Varanasi Development Authority shall ensure that no further constructions within 200 meters from the highest flood level at banks of river Ganga at Varanasi is made and filed a compliance report by the next date fixed."

Submissions:-

3. Learned counsel for the applicants submits as under:-

(i) By the aforesaid interim order dated 27.07.2012, the Division Bench has clearly restrained from raising any construction within 200 meters from the highest flood level at the banks of river Ganga at Varanasi.

(ii) In another PIL No.59698 of 2013 (M/s Prathik Samajik Sewa Samiti and another vs. State of U.P. through Secretary and 6 others), a Division Bench passed **an interim order** dated 08.11.2013 directing that the respondents shall ensure that no pakka constructions are raised within 200 meters of the bank of river Ganga at Varanasi till the next date of listing.

(iii) Despite the aforesaid **interim order** 27.07.2012 in Kautilya Society's case (supra), the **Chief Executive Officer of "Shri Kashi Vishwanath Special Area Development Board" issued a tender notice inviting tenders for certain constructions/ development work in Shri Kashi Vishwanath Temple and surrounding areas,** which fall within 200 meters from the highest flood level of river Ganga at Varanasi. The Chief Executive Officer of "Shri Kashi Vishwanath Special Area Development Board", is the opposite party No.1. Thus, the opposite party No.1 has wilfully disobeyed the interim order dated 27.07.2012 passed by the writ court in Kautilya Society's case (supra).

(iv) In another Writ-C No.14997 of 2018 (Redis Market Vyavasaik Samiti and another vs. Union of India and 2 others), the writ court passed an order dated 30.04.2018 disposing of the writ petition with a direction to decide petitioner's representation in accordance with law on the point whether the plot falls within 200 meters of the holy Ganga river. In the counter affidavit in Writ Petition

No.41249 of 2017 (M/s Knots India Carpets Private Ltd. Vs. State of U.P. and others), the Varanasi Development Authority, Varanasi has itself referred to the interim order dated 27.07.2012 passed by the writ court in Kautilya Society's case (supra), regarding restriction on construction within 200 meters of the bank of river Ganga. The Varanasi Development Authority has itself sought permission for construction of some new ghats which fact is evident from the interim order dated 29.07.2013 passed by the writ court in Kautilya Society's case (supra). Thus, the opposite party No.1 who is also Secretary of Varanasi Development Authority, Varanasi, has knowingly disobeyed the interim order dated 27.07.2012 passed in Kautilya Society's case (supra).

(v) The entire development work by "Shri Kashi Vishwanath Special Area Development Board" is being carried within 200 meters of river Ganga. The restriction with regard to the construction has not been lifted by the writ court. Therefore, the opposite party No.1 has wilfully disobeyed the interim order of the writ court passed in the aforesaid PIL in the Kautilya Society's case (supra).

(vi) The opposite party has not complied with one of the condition of the permission granted by the N.M.C.G. and thus has rendered liable for punishment under Section 12 of the Act, 1971.

Submission on behalf of Opposite Party No.1:-

4. Learned Additional Advocate General has made submissions on behalf of the opposite party No.1 as under:-

(i) The order dated 27.07.2012 in Kautilya Society's case (supra) was in the background that some unauthorised construction was going on at the bank of river Ganga.

(ii) Several orders were passed by the writ court subsequently in Kautilya Society's case (supra). Pursuant to order dated 11.09.2014 and 29.01.2015 in Kautilya Society's case (supra), the National Mission for Clean Ganga, Ministry of Water Resources, River Development and Ganga Rejuvenation Government of India (for short NMCG), has constituted a committee of experts by order dated 17.02.2016. The terms of reference of the Committee are mentioned in the order. The State Legislature has enacted **Shri Kashi Vishwanath Special Area Development Board Varanasi Act, 2018** (U.P. Act 31 of 2018) under which several houses nearby Sri Kashi Vishwanath Temple, were acquired in public interest for development and the authority constituted under the Act, is carrying on the development work including prevention of pollution in river Ganga. The aforesaid authority, i.e. Shri Kashi Vishwanath Special Area Development Board (hereinafter referred to as the Development Board), is carrying on work under the Act and has sought No Objection Certificate/ Permission from all concerned departments including the Committee constituted on 17.02.2016 under the orders of the writ court dated 11.09.2014 and 29.01.2015 in Kautilya Society's case (supra). Thus, the Development Board or the opposite party No.1 have not committed any wilful disobedience of the interim order of the writ court dated 27.07.2012 in Kautilya Society's case (supra).

(iii) The present contempt application is an abuse of process of

court by the applicants who have not even disclosed their credentials. In paragraphs-3, 4 and 5 of the contempt application, the applicants have stated that the applicant No.1 is Ex Chairman of some Kashi Patrakar Sangh and the applicant No.2 is a practising lawyer at District and Sessions Court, Varanasi and is Ex General Secretary, Banaras Bar Association, Varanasi and the applicant No.3 is a practising lawyer at District and Sessions Court, Varanasi, and both are social workers.

(iv) The contempt application has been filed grossly concealing/ suppressing material facts, and making false and misleading averments.

(v) The applicant Nos.2 and 3 despite being advocates as alleged by them and the applicant No.1 despite being a journalist as alleged by him, have filed the present contempt application without there being any wilful disobedience of the order of the writ court by the opposite parties. They have made false and misleading averments in the contempt application and have not even complied with the clear direction of this court dated 03.06.2020 to file a supplementary affidavit categorically stating as to what constructions are being raised contrary to the interim order dated 27.07.2012 granted by the writ court in Kautilya Society's case (supra).

(vi) The alleged supplementary affidavit is nothing but a waste paper and is grossly misleading and amounts to fraud played upon the court inasmuch as the aforesaid alleged supplementary affidavit dated 10.06.2020 does not bear signature of any of the applicants or the alleged deponent Sri Sunil Kumar Gupta (applicant No.3). It also does not bear identification by any advocate and verification of Oath Commissioner. It is also not accompanied by any application signed by the counsel of the applicants. Thus, the aforesaid alleged supplementary affidavit is nothing but a waste piece of paper and therefore, it deserves to be rejected. Since the applicants have not complied with the order of this court dated 03.06.2020, therefore, this contempt application deserves to be dismissed on this ground also.

(vii) This contempt application has no merit and deserves to be dismissed with exemplary cost.

Discussion and Findings:-

5. I have carefully considered the submissions of applicants and the learned Additional Advocate General for the opposite party No.1.

What is Civil Contempt:-

6. The word "Civil Contempt" has been defined in Section 2(b) of the Act, 1971, which reads as under:-

"Civil Contempt means wilful disobedience of any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court."

7. Section 12 of the Act, 1971 provides for punishment for contempt of court. Thus, a person may be punished for civil contempt under Section 12 of the Act, 1971 provided he has wilfully disobeyed any judgment, decree, direction, order, writ or other process of a court or committed wilful breach of an undertaking given to a court. Proceedings in contempt are quasi criminal in nature.

The law of contempt has to be strictly interpreted and the requirement of that law must be strictly complied with before any person can be committed for contempt. This is also the view of Hon'ble Supreme Court in **Rosnan Sam Boyce vs. B.R. Cotton Mills Ltd. (1990) 2 SCC 636 (para-9).** In **Kapil Deo Prasad Sah vs. State of Bihar (1999) 7 SCC 569 (paras-9 and 11),** Hon'ble Supreme Court elaborated commission of civil contempt and held, as under:

"9. For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of the Court. ***Power to punish for contempt is to be resorted to when there is clear violation of the Court's order.*** *Since notice of contempt and punishment for contempt is of far-reaching consequence and these* ***powers should be invoked only when a clear case of wilful disobedience of the court's order has been made out.*** *Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Judicial orders are to be properly understood and complied with. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the Court's orders and its implication.*

....

11. No person can defy the Court's order. Wilful would exclude casual, accidental, bona fide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of Court's order must allege deliberate or contumacious disobedience of the Court's order."

(Emphasis supplied by me)

8. Similar view has been expressed by Hon'ble Supreme Court in **Ashok Paper Kamgar Union vs. Dharam Godha [(2003) 11 SCC 1], Anil Kumar Shahi vs. Professor Ram Sevak Yadav [(2008) 14 SCC 115], Jhareswar Prasad Paul vs. Tarak Nath Ganguly [(2002) 5 SCC 352], Union of India vs. Subedar Devassy PV [(2006) 1 SCC 613], Bihar Finance Service House Construction Co-operative Society Ltd. vs. Gautam Goswami [(2008) 5 SCC 339], Chhotu Ram vs. Urvashi Gulati [(2001) 7 SCC 530] and Avishek Raja vs. Sanjay Gupta [(2017) 8 SCC 435 (paras-20 to 23)].**

9. In the case of **Noor Saba vs Anoop Mishra and another [(2013) 10 SCC 248 (para-14)],** Hon'ble Supreme Court held as under:-

"14. To hold the respondents or anyone of them liable for contempt this Court has to arrive at a conclusion that the respondents have wilfully disobeyed the order of the Court. ***The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the Court is normally made on admitted and undisputed facts.*** *In the present case not only has there been a shift in the stand of the petitioner with regard to the basic facts on which commission of contempt has been alleged even the said new/altered facts do not permit an adjudication in consonance with the established principles of exercise of contempt jurisdiction so as to enable the Court to come to a conclusion that any of*

the respondents have wilfully disobeyed the order of this Court ...."

(Emphasis supplied by me)

10. In **Anil Ratan Sarkar vs. Hirak Ghosh [(2002) 4 SCC 21],** Hon'ble Supreme Court held as under:

"13.....The Contempt of Courts Act, 1971 has been introduced in the statute-book for the purposes of securing a feeling of confidence of the people in general and for due and proper administration of justice in the country - undoubtedly a powerful weapon in the hands of the law courts but that by itself operates as a string of caution and ***unless thus otherwise satisfied beyond doubt, it would neither be fair nor reasonable for the law courts to exercise jurisdiction under the statute."***

(Emphasis supplied by me)

11. Thus to hold a person that he has committed civil contempt, it has to be shown that there has been wilful disobedience of any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. **The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the court is normally made on admitted and undisputed facts.** Power to punish for contempt is to be resorted to when there is clear violation of the court's order and this power should be invoked only when a clear case of wilful disobedience of the court's order has been made out. Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the court's order and its implications. To hold a person guilty of contempt, the standard of proof required would be the same as in a criminal proceeding and **the breach alleged shall has to be established beyond all reasonable doubt.** The power of the court to punish for contempt is a special and rare power available both under the Constitution as well as the Act, 1971. It is a drastic power which, **if misdirected, could even curb** the liberty of the individual charged with commission of contempt and **the public interest.** The very nature of the power under the Act, 1971, casts a sacred duty upon Courts to exercise the same with the greatest of care and caution. Therefore, the Courts must not travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Power of contempt can be invoked only when a clear case of wilful disobedience of the court's order has been made out.

Burden of Proof and Standard of Proof:-

12. In **Aligarh Municipal Board vs. Ekka Tonga Mazdoor Union [(1970) 3 SCC 98 (para-8)]**, Hon'ble Supreme Court held that for charge of contempt of court for disobeying orders of courts, **those who asked that the alleged contemnors had knowledge of the order must prove that fact beyond reasonable doubt. In case of doubt, benefit ought to go to the person charged.** In **Babu Ram Gupta vs.**

Sudhir Bhasin [(1980) 3 SCC 47], Hon'ble Supreme Court held that it is not open to the courts to assume an implied undertaking when there is none on the record. The aforesaid two judgments have been referred by Hon'ble Supreme Court in a subsequent judgment in **Rosnan Sam Boyce (supra). In Chhotu Ram vs. Urvashi Gulati [(2001) 7 SCC 530 (para-2)]**, Hon'ble Supreme Court held, as under:

"2. As regards the burden and standard of proof, the common legal phraseology 'he who asserts must prove' has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the 'standard of proof', be it noted that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of theContempt of Courts Actis quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond all reasonable doubt."

(Emphasis supplied by me)

13. The judgment in the case of **Chhotu Ram** (supra) has been followed by Hon'ble Supreme Court in its judgment in the case of **All India Anna Dravida Munnetra Kazhagam vs. L.K. Tripathi, [(2009) 5 SCC 417 (para-78 to 81)]** after referring to the observations of Lord Denning in **Re. Bramblevale Ltd. [(1969) 3 All ER 1062](CA).**

14. Thus, in matters of contempt, the person **who asserts deliberate disobedience** of the order of the court, **must prove it to constitute an act of contempt**. The jurisdiction of the court under the Act, 1971 is quasi criminal, and as such the **standard of proof required is that of a criminal proceedings and the breach shall have to be established beyond all reasonable doubt.**

15. In the present set of facts, **this court passed an order on 03.06.2020, as under:**

"Counsel for the applicant is granted a weeks time to file a supplementary affidavit categorically stating as to what constructions are being raised contrary to the interim order granted by the writ court in a PIL on 26.07.2012.

Put up as fresh on 10.06.2020."

16. Despite the afore-quoted order, **the applicants have filed some typed papers dated 10.06.2020 alleging it to be a supplementary affidavit** in compliance to the afore-quoted order dated 03.06.2020. Perusal of the aforesaid alleged supplementary affidavit dated 10.06.2020, a copy of which was served upon the opposite party; shows that **it neither bears signature of the alleged deponent/ applicant No.3 i.e. Sri Sunil Kumar Gupta nor it has been signed by the advocate nor by Oath Commissioner.** In paragraph-14 of the aforesaid paper (alleged supplementary affidavit), it is mentioned that due to non-availability of coupon with Oath Commissioner on account of lock-down caused due to COVID-19 Pandemic, present affidavit could not be sworn before the Oath Commissioner. The aforesaid alleged supplementary affidavit does not bear even signature of the deponent on any of the pages, who is

stated to be the applicant No.3. Chapter XXXV-E, Rule 3(3) of the Allahabad High Court Rules, 1952 framed under Section 23 of the Act, 1971, is relevant, which is reproduced below:

"Rule 3(3)(a).- ***A petition for taking contempt of court proceedings shall be supported by an affidavit.*** *In case of criminal contempt three copies of the application and the affidavit shall accompany the application :*

Provided that if there are more than one opposite parties, the petition shall be accompanied by as many extra copies as there are opposite parties.

(b) ***When the petitioner relies upon any document or documents in his possession, he shall file the same along with the petition or a copy thereof as annexure to affidavit.***

(c) A petition made under Section 15 (1) (b) of the Act shall also be accompanied by the consent in writing of the Advocate General and a copy thereof."

17. The alleged supplementary affidavit of the applicant No.3 dated 10.06.2020, which neither bears signature of the alleged deponent on any page nor bears signature of the advocate nor signature and seal of Oath Commissioner; is not an affidavit at all. It is merely a waste paper. Therefore, the matters written in the alleged supplementary affidavit cannot be considered at all. In fact, the applicants have wilfully and deliberately not complied with the order of this court dated 03.06.2020, which has been quoted above and have attempted to mislead this court during arguments that the aforesaid paper is the supplementary affidavit filed in compliance to the order dated 03.06.2020. The applicants have completely failed to prove that the opposite parties have wilfully disobeyed the interim order dated 27.07.2012 passed by the writ court in **Kautilya Society's** case (supra). **Thus, the applicants not only abstained to file supplementary affidavit despite order dated 03.06.2020 but also deliberately not even signed the aforesaid alleged supplementary affidavit so as to escape from the responsibility of matters typed in it.**

Suppression/ Concealment of facts:-

18. Perusal of the present contempt petition filed by the applicants shows that contempt has been alleged for disobedience of the interim order dated 27.07.2012 in Kautilya Society's case (supra). The applicants claimed themselves to be local residents of the Varanasi City. **Applicant No.1 claims himself to be a journalist while the applicant Nos.2 and 3 claimed themselves to be practising advocate of District and Sessions Court, Varanasi and yet they have conveniently suppressed the entire material facts relating to "Sri Kashi Vishwanath Special Area Development Board", constituted under "Sri Kashi Vishwanath Special Area Development Board Act, 2018 (U.P. Act No.31 of 2018)", subsequent orders of the writ court in Kautilya Society's case (supra) dated 11.09.2014, 29.01.2015, 28.04.2016, the office memorandum dated 17.02.2016 regarding constitution of an expert committee by the Ministry of Water Resources pursuant to the orders of the writ court dated 11.09.2014 and 29.01.2015,**

the minutes of the meeting of the committee dated 06.11.2019, No Objection Certificate/ Permission regarding execution of work in question by the Board in terms of the provisions of the Act and the No Objection Certificates/ Permissions dated 05.12.2019 **granted by Indian National Trust for Art and Cultural Heritage (for short 'INTACH'),** dated 08.01.2020 **granted by the Town and Country Planning Organisation Government of India,** dated 09.01.2020 **granted by the Archaeological Survey of India, New Delhi,** dated 15.01.2020 **granted by the Central Ground Water Board, Aliganj Lucknow,** dated 04.12.2019 **granted by the Central Public Works Department, Varanasi,** dated 27.05.2020 **granted by Chief Environmental Officer, U.P. Pollution Control Board and** dated 22.05.2020 **granted by the State Level Environment Impact Assessment Authority, Uttar Pradesh.** The applicants have also very conveniently suppressed the minutes of the meeting of the Expert Committee dated 29.02.2020 which considered all the permissions/ no objection certificates including those mentioned above.

Powers and functions of the Board and Remedy under the Act, 2018:-

19. **Section2(j) of the Act, 2018 defines the words 'Special Development Area'** which undisputedly includes the area where development work is being carried on by the Board. Under Section 3 of the Act, 2018, the Board known as "Shri Kashi Vishwanath Special Area Development Board" has been created to exercise the powers conferred and perform the functions assigned to it under this Act. **The powers and functions of the Board are defined in Section 6 of the Act, 2018, which is reproduced below:**

*"6. **Power and functions of the Board.-** (1) The Chief Executive Officer will be the executive head of the Board who will act and pass orders in accordance with the provisions of this Act or the rules and regulations made under this Act;*

(2)(a) The Board shall, as soon as may be, prepare a plan for the Special Development Area-

(i) The plan shall define various sectors into which such area may for the purposes of development indicate the land in each sector which is proposed to be used and the stages by which any development shall be carried out; serve as a basic pattern of frame-work, within which the development plans for various sectors may be prepared;

(ii) The plan may provide for any other matter necessary for the proper development of such area;

(b) The Board shall prepare a plan to rehabilitate, as may be required, and get it approved by the State Government in order to settle and rehabilitate residents, owners or occupants; who are to be relocated, for implementation of development plan for the Special Development Area;

(c) The Board shall make and execute a long-term plan to conserve the heritage that falls under its jurisdiction and shall ensure that the surrounding are according to the Sajra Bandobast Plan after due approval of the State Government.

(3) (i) Subject to the directions given by the State Government, the Board may acquire any building or land

through mutual negotiations, purchase, donation, transfer, lease, rent or otherwise. It may also acquire any land, buildings in accordance with the provisions of law for the time being in force and shall publish a public notice in the local newspaper/gazette inviting persons who may have any claim or interest in such property, to file their claim;

(4) The State Government may vest any land to the Board, whether under its control or under the control of any local body by such terms and conditions as it may deem fit;

(5) The Board may sell, lease, rent or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Board in the Special Development Area with the prior approval of the State Government in such manner and on such terms and conditions as may be prescribed;

(6) The Board may on payment of such fees and on such conditions grant renew licence for such period as may be prescribed by regulations and renew to carry out any profession or trade in the Special Development Area;

(7) For the purposes of proper planning and development of the Special Development Area, the Board may issue such directions as it may consider necessary, regarding,-

(a) ban on erection or occupation of any building in contravention of regulations;

(b) protection of architectural features of the elevation or frontage of any building;

(c) layout and alignment of buildings on any site;

(d) restrictions and conditions in regard to open spaces to be maintained in and around buildings and height and character of buildings;

(e) number of residential buildings that may be erected on any site;

(f) erections of shops, workshops, warehouses, factories or buildings;

(g) maintenance of height and position of walls, fences, hedges or any other structure or architecture constructions;

(h) maintenance of amenities;

(i) restrictions of use of any site for a purpose other than that for which it has been allocated;

(j) the means to be provided for proper (i) drainage of waste water (ii) disposal of waste, and (iii) disposal of town refuse;

(k) the materials to be used for external and partition walls, roofs, floors and other parts of buildings and their position or location or the method of construction;

(l) the certificates necessary and incidental to the submission of plans, amended plans and completion and/or occupancy certificates."

20. **Section 17 of the Act, 2018 confers revisional power** upon the State Government, which is reproduced below:

"17. ***Power of the State Government to call for records.-*** *The State Government may, at any time either on its own motion or on application made to it in this behalf call for any record and may in case or an order passed by the Board or any officer authorised by it to perform any function under this Act for the purpose of satisfying itself as to the legality or propriety of any order, pass such order or issue such direction in relation thereto as it may think fit:*

Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard."

21. Thus, the work in question is being carried on by "Shri Kashi Vishwanath Special Area Development Board, Varanasi" in terms of the provisions of the Act, 2018 and after requisite no objection certificates/ permissions from the concerned authorities and with the consent of the expert committee constituted by the writ court in terms of the orders passed in Kautilya Society's case (supra).

Subsequent orders of the Writ Court in the Public Interest Litigation Kautilya Society's case which were suppressed by the applicants.

22. By order dated 11.09.2014 in Kautlya Society's case (supra), the writ court while considering the application of the State Government for permission to construct four new ghats at Varanasi has observed as under:-

"At this stage, it appears that the Union of India is also in the process of formulating a perspective plan for the preservation of the intrinsic character and heritage importance of Varanasi. ***Any proposal in that regard must also factor in the needs of millions of devotees who gather on the ghats and for whom even basic amenities are not available at present.***

.....
.....
.....

We request the Amicus Curiae to make available a copy of this order to the Assistant Solicitor General of India in order to enable him to take appropriate instructions from the Union Government and to file an affidavit before the Court. The State Government shall also file an affidavit before the next date of hearing furnishing full particulars along the lines indicated above by the Court and any such further relevant information ***as would be of the assistance to the Court for passing a suitable order which would balance the need for protecting the environment and heritage character of the ghats with the need for providing proper amenities and infrastructure to devotees who use the ghats.*** *These affidavits shall be filed before the Court by 17 October 2014."*

23. On 29.01.2015 in Kautlya Society's case (supra), the writ court observed/ directed as under:

"A detailed order was passed by this Court on 11 September 2014 in which the Court expressed the view that it would be appropriate for both the Union and the State Governments to take a joint and coordinated action in order to apprise the Court of the steps which are being taken to preserve the intrinsic character and heritage importance of Varanasi. The Court had observed that it would be appropriate if a comprehensive analysis and plan is entrusted to a team of experts consisting of eminent persons drawn from diverse branches, including conservation architecture, ecology, hydro-geology, civil engineering and urban planning. Though the order was passed well over three months back, we find that there has been no concrete

action either by the Union Government or by the State Government.

We direct the learned Assistant Solicitor General of India and the learned Chief Standing Counsel to take instructions at the appropriate level of their respective governments so that the Court can be apprised of the views of the Union and the State Governments in the matter by the next date of listing.

An important issue which needs to be considered by the Court at an appropriate stage is the need for framing appropriate guidelines for dealing with cases of repair, restoration and rehabilitation. *Since this issue has been raised during the course of hearing today, we are of the view that it would be appropriate if a comprehensive perspective of the matter is formed having due regard to the Master Development Plan and all other applicable statutory requirements. This aspect may be considered by the Amicus Curiae so as to assist the Court by the next date of listing. Based on this, it would be necessary for the VDA to frame bye-laws and guidelines to cover cases of restoration, repair and rehabilitation which would be consistent with the overall nature and character of the Ghats."*

24. In terms of the aforesaid orders of the writ court dated 11.09.2014 and 29.01.2015, a committee of experts was constituted vide office memorandum dated 17.02.2016 issued by NMCG, Ministry of Water Resources, River Development and Ganga Rejuvenation, Government of India. The terms of reference of the Committee was mentioned in the aforesaid office memorandum, as under:

"2. Terms of Reference of the Committee

"i. To preserve and restore the intrinsic character and heritage importance of Varanasi Ganga Ghats with comprehensive analysis and Plan.

ii. Identification of the historic Ghats, assessment of their heritage value, determining the present condition as well as the need and extent of restoration of existing Ghats and proposal of new Ghats.

iii. Consider and recommend repair of old constructions alongside the banks of River Ganga and the need to monitor the nature of work that may be permitted.

iv. Assess the extent of pollution and recommend mitigative measures arising due to new construction, waste disposal, throwing of pious materials, and river-surface cleanliness along the Ghats.

v. ***Mechanism for monitoring of new construction, if any that may be permitted.***

vi. ***Public utilities and services, sanitation and hygienic condition alongside of the Ghats.***

vii. Addressing the issue of ecological imbalance."

25. In the order dated 28.04.2016 in Kautlya Society's case (supra), the writ court considered various projects including project of "Inland Water Ways Authority of India", repair of Ghats and construction of five new Ghats and observed as under:

"In our view, now that a broad based committee has been constituted by the National Mission for Clean Ganga, consisting both of the representatives of the State Government as well as the Union Government, it would be appropriate and proper if the proposals

for repair of the Ghats are placed before the committee. The terms of reference of the committee include the preservation and restoration of the intrinsic character and heritage importance of the Ghats on the banks of the river at Varanasi. The terms of reference are broad enough to cover proposals for repair and restoration of the Ghats.

Hence, we are of the view that it would be but appropriate and proper that the broad based committee which has been constituted considers the proposals which have been moved before the Court. Upon the receipt of the consent of the committee, the State Government would be at liberty to proceed with the work of repair. In order to facilitate the fulfillment of the urgent need of repairing of the Ghats and to provide amenities to tourists, pilgrims as well as the local residents *who visit the Ghats on a daily basis, we would request the committee initially to meet at least once every fortnight so as to facilitate an early decision on the proposal for repair. Once the requisite consent has been granted, the committee would be at liberty to schedule its meetings in accordance with the exigencies of work. To facilitate the work of repair of the Ghats, we lift the order of restraint. We clarify that subject to the above, the interim order shall not stand in the way of the carrying out of repairs to the Ghats.*

II. Insofar as the ***proposal for the construction of four new Ghats*** *is concerned (the learned Chief Standing Counsel has informed the Court that the initial proposal for four Ghats has now been enhanced to five new Ghats), we propose to issue a direction to the effect that this proposal should also be initially placed before the committee constituted on 17 February 2016 by the office memorandum referred to above. This application which has been submitted before the Court for construction of new Ghats and for the grant of permission by the Court would be taken up after the committee has an opportunity to consider the proposal and to submit a report in regard thereto containing its observations and findings.* ***The committee would be at liberty to consider the matter from all its perspectives and suggest such environmental and other safeguards as may be necessary if the proposal is found to be in order.*** *We would request the committee to finalize its report on these aspects preferably within a period of two months from today. We direct that the representative of INTACH be also associated with the work of the committee."*

Legislation subsequent to the orders in the Public Interest Litigation (Kautilya Society's case) suppressed by the Applicants

26. The Act, 2018 was enacted to create, formulate, implement, regulate and maintain the special area under its jurisdiction for developing and maintaining the culture, spiritual, mythological and archaeological aesthetics in such area to promote tourism in consonance with the rich cultural heritage thereof. The Act 2018 is not in conflict with any of the orders of the writ court. Under the Act, 2018 "Special Development Area" was created which consists of the areas mentioned in Section 2(j). "Shri Kashi Vishwanath Special Area Development Board" has been constituted under Section 3 of the Act, 2018. Work in question is being

carried under the Act, 2018 after due permissions/ NOCs and consent of the expert committee. Facts in this regard have been conveniently suppressed by the applicants which itself is contemptuous in nature.

Whether the Opposite Parties committed contempt:-

27. The applicants have wilfully tried to mislead this court. Despite specific order dated 03.06.2020, they failed to categorically state on affidavit as to what constructions are contrary to the interim order dated 27.07.2012 in Kautilya Society's case (supra). Thus, no case for wilful disobedience of the order of the writ court dated 27.07.2012 passed in Kautilya Society's case (supra), has been made out. Instead this contempt application is based on gross suppression and concealment of material facts and misleading averments, which itself are contemptuous in nature.

28. It is settled law that a person who approaches the court must come with clean hands and put forward all the material facts otherwise he shall be guilty of misleading the court and his application or petition may be dismissed at the threshold. If an applicant makes false statement and suppresses material facts or attempts to mislead the court, the court may dismiss action on that ground alone. The applicant cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose. Suppression of material facts is not an advocacy. **In K.D. Sharma vs. Steel Authority of India and others [(2008) 12 SCC 481 (para-39)],** Hon'ble Supreme Court observed that **suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation. This rule has been evolved in the larger public interest to deter unscrupulous litigant from abusing the process of court by deceiving it.**

29. The submission of learned counsel for the applicants that the opposite parties have not complied with a condition of the permission of N.M.G.C., is absolutely beyond the scope of civil contempt as defined under Section 2(b) of the Act, 1971.

30. All the facts discussed above leave no manner of doubt that the applicants have filed this contempt application concealing material facts and have tried to mislead this court and have also wilfully disobeyed the order dated 03.06.2020. They failed to discharge burden of proof even in prima facie manner. No case for contempt has been made out by the applicants. The contempt application has been filed by the applicants with oblique motive, so as to impede development work being carried by the Board under the Act 2018 in larger public interest, for pious cause and for protection of environment and cleanliness of river Ganga. Under the circumstances, this contempt application deserves to be dismissed with exemplary costs.

Cost:-

31. Courts across the legal system are choked with litigation. More than nine lakh fifty thousand cases are pending in our High Court. In such situation, frivolous and groundless filings

constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Thus, resources which should be deployed in handling of genuine cases are dissipated in attending frivolous and groundless cases like the present one, which has been filed to obstruct public interest. The applicants have abused the process of court.

32. While dealing with frivolous and groundless filing, Hon'ble Supreme Court in the case of **Dnyandeo Sabaji Naik Vs. Pradnya Prakash Khadekar, (2017) 5 SCC 496 (Para-14)**, observed as under:

*"**This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behavior. 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. We commend all courts to deal with frivolous filings in the same manner."***

(Emphasis supplied by me)

33. For all the reasons stated above, this contempt application is dismissed with costs of Rs.5,000/- on each of the applicants, which shall be deposited by them separately within one month from today, with **"Shri Kashi Vishwanath Special Area Development Board".**

CONCLUSION:-

34. The findings and conclusions recorded above are briefly summarised as under:-

I. A person may be punished for civil contempt under Section 12 of the Act, 1971 provided he has wilfully disobeyed any judgment, decree, direction, order, writ or other process of a court or committed wilful breach of an undertaking given to a court.

II. To hold a person that he has committed civil contempt, it has to be shown that there has been wilful disobedience of any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. **The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for**

wilful disobedience of the court is normally made on admitted and undisputed facts. Power to punish for contempt is to be resorted to when there is clear violation of the court's order and this power should be invoked only when a clear case of wilful disobedience of the court's order has been made out. Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the court's order and its implications. To hold a person guilty of contempt, the standard of proof required would be the same as in a criminal proceeding and **the breach alleged shall has to be established beyond all reasonable doubt.** The power of the court to punish for contempt is a special and rare power available both under the Constitution as well as the Act, 1971. It is a drastic power which, **if misdirected, could even curb** the liberty of the individual charged with commission of contempt and **the public interest.** The very nature of the power under the Act, 1971, casts a sacred duty upon Courts to exercise the same with the greatest of care and caution. Therefore, the Courts must not travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Power of contempt can be invoked only when a clear case of wilful disobedience of the court's order has been made out.

III. In matters of contempt, the person **who asserts deliberate disobedience** of the order of the court, **must prove it to constitute an act of contempt.** The jurisdiction of the court under the Act, 1971 is quasi criminal, and as such the standard of proof required is that of a criminal proceedings and **the breach shall have to be established beyond all reasonable doubt.**

IV. The alleged supplementary affidavit of the applicant No.3 dated 10.06.2020, which neither bears signature of the alleged deponent on any page nor bears signature of the advocate nor signature and seal of Oath Commissioner; is not an affidavit at all. It is merely a waste paper. Therefore, the matters written in the alleged supplementary affidavit cannot be considered at all.

V. **Applicant No.1 claims himself to be a journalist while the applicant Nos.2 and 3 claimed themselves to be practising advocate of District and Sessions Court, Varanasi and yet they have conveniently suppressed the entire material facts relating to "Sri Kashi Vishwanath Special Area Development Board", constituted under "Sri Kashi Vishwanath Special Area Development Board Act, 2018 (U.P. Act No.31 of 2018)", subsequent orders of the writ court in Kautilya Society's case (supra) dated 11.09.2014, 29.01.2015, 28.04.2016, the office memorandum dated 17.02.2016 regarding constitution of an expert committee by the Ministry of Water Resources pursuant to the orders of the writ court dated 11.09.2014 and 29.01.2015, the minutes of the meeting of the committee dated 06.11.2019, various No Objection Certificates/ Permissions granted by Authorities/ departments and** the minutes of the meeting of the Expert Committee dated 29.02.2020 which considered all the permissions/ no objection certificates.

VI. The work in question is being carried on by "Shri Kashi Vishwanath Special Area Development Board, Varanasi" in terms of the provisions of the Act, 2018 and after requisite no objection certificates/ permissions from the concerned authorities and with the consent of the expert committee constituted by the writ court in terms of the orders passed in Kautilya Society's case (supra).

VII. The Act, 2018 was enacted to create, formulate, implement, regulate and maintain the special area under its jurisdiction for developing and maintaining the culture, spiritual, mythological and archaeological aesthetics in such area to promote tourism in consonance with the rich cultural heritage thereof. The Act 2018 is not in conflict with any of the orders of the writ court. Under the Act, 2018 "Special Development Area" was created which consists of the areas mentioned in Section 2(j). "Shri Kashi Vishwanath Special Area Development Board" has been constituted under Section 3 of the Act, 2018. Work in question is being carried under the Act, 2018 after due permissions/ NOCs and consent of the expert committee. Facts in this regard have been conveniently suppressed by the applicants which itself is contemptuous in nature.

VIII. **The applicants have wilfully tried to mislead this court. Despite specific order dated 03.06.2020, they failed to categorically state on affidavit as to what constructions are contrary to the interim order dated 27.07.2012 in Kautilya Society's case (supra). Thus, no case for wilful disobedience of the order of the writ court dated 27.07.2012 passed in Kautilya Society's case (supra), has been made out. Instead this contempt application is based on gross suppression and concealment of material facts and misleading averments, which itself are contemptuous in nature.**

IX. A person who approaches the court must come with clean hands and put forward all the material facts otherwise he shall be guilty of misleading the court and his application or petition may be dismissed at the threshold. If an applicant makes false statement and suppresses material facts or attempts to mislead the court, the court may dismiss action on that ground alone. The applicant cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose. Suppression of material facts is not an advocacy. **It is a jugglery, manipulation, maneuvering or misrepresentation. This rule has been evolved in the larger public interest to deter unscrupulous litigant from abusing the process of court by deceiving it.**

X. Courts across the legal system are choked with litigation. More than nine lakh fifty thousand cases are pending in our High Court. In such situation, frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Thus, resources which should be deployed in handling of genuine cases are dissipated in attending frivolous and groundless cases like the present one, which has been filed to obstruct public interest. The applicants have abused the process of court.

XI. The applicants have failed to discharge burden of proof even in prima facie manner. No case for contempt has been made out by the

applicants. The contempt application has been filed by the applicants with oblique motive, so as to impede development work being carried by the Board under the Act 2018 in larger public interest, for pious cause and for protection of environment and cleanliness of the river Ganga.

XII. Contempt application is dismissed with costs of Rs.5,000/- on each of the applicants, which shall be deposited by them separately within one month from today, with **"Shri Kashi Vishwanath Special Area Development Board".**

35. For all the reasons stated above, **this contempt application is dismissed** with costs as above.

(2020)08ILR A278
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.07.2020

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

FAFO No. 581 of 2016

New India Insur.Co. Ltd. ...Appellant
Versus
Dr. Vikas Sethi & Ors. ...Respondents

Counsel for the Appellant:
Bhanu Prakash Dubey, Kartikey Dubey

Counsel for the Respondents:
Brijesh Kumar Singh, Miss Alka Saxena, Pratul Srivastava, Uma Kant Gupta

A. Civil Law - Motor Vehicle Act, 1988 – Section 169 – Motor Vehicle Rules, 1998 – Rule 215 and 220 – Motor Accident Claim Tribunal – Nature of Jurisdiction – Exclusive Jurisdiction – Motor Accident Claims Tribunals are a substitute of civil courts for the redressal of motor accident claims – The nature of jurisdiction exercised by each Tribunal over a specified territory is exclusive – Held, the principle as to the finality of an issue decided by a forum of exclusive jurisdiction for the purpose of binding the parties and disabling them to reagitate the same in the subsequent proceedings is well settled. (Para 20 and 22)

B. Civil Law - Civil Procedure Code - Motor Accident Claim —– Section 11 – Res Judicata – Applicability – It is no more res integra that such forums are the forum of exclusive jurisdiction, therefore, determination of an issue between the same parties must attain finality to subserve the policy of judicial economy, consistency and finality in adversial litigation – An issue once determined and acted upon by the same parties arising out of the same subject matter, therefore, cannot be left open for leading evidence before another forum of equal jurisdiction – Held, The principle of res judicata ought to have been applied while rendering the impugned judgement/award. (Para 23 and 24)

Appeal disposed of. (E-1)

Cases relied on :-

1. Gulabchand Chhotalal Parikh Vs St. of Gujr., AIR 1965 SC 1153

2. Canara Bank V. N.G. Subbaraya Setty & anr., (2018) 16 SCC 228

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Kartikey Dubey, learned counsel for the appellant, Sri Uma Kant Gupta for respondent no. 1, Sri Pratul Srivastava for respondent no. 3/1 and Km. Alka Saxena for respondent no. 4. None for respondent no. 2.

2. This appeal filed under Section 173 of Motor Vehicle Act, 1988 has arisen out of the judgement and award dated 16.2.2016 rendered by Motor Accident Claims Tribunal, Lucknow in Claim Petition No. 275 of 2007 whereby a compensation of Rs. 21,02,221/- alongwith an interest @7% p.a. has been awarded in favour of the claimant who sustained a serious eye injury. The accident involves two vehicles i.e. Truck bearing No. UP63 F 9612 and a Wagon-R No. UP43 D 7120. The truck was insured by the appellant i.e. New India Assurance Co. Ltd. whereas Wagon-R was insured by Oriental Insurance Co. Ltd. i.e. respondent no. 4.

3. The correctness of the judgement/award rendered by Motor Accident Claims Tribunal, Lucknow is essentially questioned on the ground of fixation of entire liability arising out of the award upon the appellant although the case before the Tribunal was that of a composite negligence and according to the appellant, the liability ought to have been apportioned appropriately between the two companies having insured the vehicles.

4. The appellant has not questioned the quantum of compensation except for the application of wrong multiplier.

5. In view of the submissions put forth, the points that arise for consideration are thus confined to the correctness of fixation of liability exclusively upon the appellant and application of wrong multiplier.

6. Coming to the point of fixation of liability exclusively upon the appellant, it is argued that the accident in question which took place on 20.2.2007 gave rise to two claims and that too before the two different Tribunals. The claim arising out of the death of the driver of Wagon-R bearing no. UP43 D 7120 i.e. Claim Petition No. 23/2007 was decided by Motor Accident Claims Tribunal, Gonda vide judgement and award dated 15.1.2009 whereas the subsequent proceeding arising out of an injury sustained by one of the occupants in the above mentioned Wagon-R i.e. Claim Petition No. 275/2007 was decided by Motor Accident Claims Tribunal at Lucknow. The insurance companies of both the vehicles involved in the accident were impleaded as respondents. The judgement and award in the former proceedings instituted before the Motor Accident Claims Tribunal, Gonda was rendered earlier whereby a compensation of Rs. 2,70,000/- was awarded to the dependents of the deceased driver of Wagon-R.

7. Since the accident involved two vehicles, therefore, a plea of contributory/composite negligence was taken by the insurance companies against each other in the respective cases so that the liability may be fixed proportionately looking to the evidence on record. On the issue of negligence the Tribunal at Gonda in the former proceedings initiated by the dependants of the deceased driver of Wagon-R, has recorded that the accident was caused due to negligence on the part of both the vehicles involved in the accident. It is on account of the composite negligence that proportionate liability for payment of compensation was fixed upon both the insurance companies equally.

8. The judgement rendered by Motor Accident Claims Tribunal, Gonda

has been complied with by both the insurance companies and has undisputedly attained finality.

9. Since the judgement rendered by Motor Accident Claims Tribunal, Gonda had attained finality, therefore, a plea of finallity on the aspect of proportionate liability was taken by the present appellant in the subsequent proceedings instituted before the Motor Accident Claims Tribunal at Lucknow. The copy of the judgement/award rendered by the Tribunal at Gonda was also placed on record alongwith the written statement filed by the appellant.

10. It was further submitted that the judgement and award rendered in the earlier proceedings arising out of the same accident was acted upon by both the insurance companies, therefore, such an issue was liable to be decided in the manner in which it had already stood settled between the parties.

11. Learned counsel for respondent no. 4 has submitted that the issue of composite negligence was framed by the Tribunal in the subsequent proceeding as well and the same was open to be decided on the basis of evidence available on record. It is further submitted that a Tribunal having exclusive jurisdiction and not bound by the provisions of Section 11 CPC, has thus not committed any error of law by not attaching a finality to the issue decided by another Motor Accident Claims Tribunal between the same parties which is based on different evidence led by the claimants and the parties therein.

12. It is also argued that once the jurisdiction of Motor Accident Claims Tribunal which cannot be understood to be "the court', is mutually exclusive, the principle of res judicata on the question of fact will not bind the forum trying an identical issue.

13. It is in view of the aforesaid submissions that an important question viz. as to whether the principle of res judicata in a subsequent claim would apply on an issue of fact which in the former proceedings was decided by a forum of competent jurisdiction between the same parties.

14. Before delving into such a question, it would be fruitful to refer to some of the provisions under the relevant statute as well as the rules framed thereunder.

15. Section 169 of Motor Vehicle Act, 1988 postulates as under:

"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 purpose 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."

16. The State Government has also framed the statutory rules known as U.P. Motor Vehicle Rules, 1998. Rule 221 of the statutory rules limits the application of the provisions of CPC to the claim petitions instituted before the Motor Accident Claims Tribunal. It is true that Section-11 CPC does not apply to the proceedings before the Tribunal, yet the principle embodied therein would apply on the decided issues between the same parties arising out of the same subject matter. The procedure applicable to the framing of issue and decision thereof is gathered from the following provisions..

17. Rule 209 of the aforesaid rules provides as under:

"209. Framing of issues.- *After considering the application and the written statements and oral statements of the parties, the Claims Tribunal shall proceed to frame the issues on which the right decision of the claim appears to it to depend."*

18. Rule 215 and 220 also being relevant, may thus be extracted hereunder:

"215. Power of examination.- *The Claims Tribunal may if it thinks necessary, examine any person likely to be able to give information relating to the injury, irrespective of the fact whether such person has been or is to be called as a witness or not."*

"220. Judgment and award of compensation.- *(1) The Claims Tribunal, in passing orders, shall record concisely in judgment the findings on each of the issues framed and the reasons for such finding and make an award, specifying the amount of compensation to be paid by the insurer or in the case of a vehicle exempted under sub-section (2) and (3) of Section 146 by the owner thereof and shall also specify the person and persons to whom compensation shall be payable.*

(2) Where compensation is awarded to two or more persons under sub-rule (1) the Claims Tribunal shall also specify the amount payable to each of them.

(3) The Claims Tribunal may, while disposing of claims for compensation, make such order regarding costs and expenses incurred in the proceeding as it thinks fit."

19. From a bare reading of the aforesaid rules, it is clear that the Motor Accident Claims Tribunal is under an obligation to frame the issues on which the right decision of the claim appears to depend.

20. The Tribunals are created under Section 165 of Motor Vehicles Act, 1988. The nature of jurisdiction exercised by each Tribunal over a specified territory is exclusive. The principle as to the finality of an issue decided by a forum of exclusive jurisdiction for the purpose of binding the parties and disabling them to reagitate the same in the subsequent proceedings is well settled.

21. To substantiate such an argument, learned counsel for the appellant has placed reliance upon a judgement reported in **AIR 1965 SC 1153 (Gulabchand Chhotalal Parikh v.**

State of Gujrat) and referring to paragraph 33 of the said judgement, it was argued that the issue decided by a forum of exclusive jurisdiction would bind the parties in the subsequent proceedings in the same manner in which a forum of concurrent jurisdiction stands bound by an earlier judgement rendered on the same issue and between the same parties. Para 33 of the judgement (supra) is reproduced hereunder:

33. Before discussing the law of res judicata as laid down in the Code of Civil Procedure, we may refer to the opinion of the Judges expressed in 1776 in the Duches of Kingston's Case(1) to which reference has been invariably made in most of the cases to be considered by us. It was said in that case :

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true : first that judgment of a Court of concurrent jurisdiction, directly upon the point. is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, t between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

It is to be noticed that the opinion does not take into account whether the earlier judgment was in a suit or any other proceeding and whether it was used as res judicata in another suit or proceeding. The emphasis is that the judgment be of a Court and that it is relied upon as res judicata in another Court. Of course, the essential conditions that the judgment be directly upon the same point which is for determination in the subsequent suit and be between the same parties are also to be satisfied. It is obvious that the judgment of a Court of exclusive jurisdiction is to be treated as res judicata upon the same matter in another Court which will not be a Court having jurisdiction over the matter.

22. It is worthwhile to note that the Motor Accident Claims Tribunals are a substitute of civil courts for the redressal of motor accident claims.

23. It is no more res integra that such forums are the forum of exclusive jurisdiction, therefore, determination of an issue between the same parties must attain finality to subserve the policy of judicial economy, consistency and finality in adversial litigation. An issue once determined and acted upon by the same parties arising out of the same subject matter, therefore, cannot be left open for leading evidence before another forum of equal jurisdiction which otherwise may frustrate the purpose of finality of a judgement in the preceding case and the decre would thus loose the essence of sacredness.

24. In the present case when the principle of finality is tested on the parameters as spelt out in the judgement referred (supra), this Court has no hesitation to put on record that the aspect of composite negligence which was

decided by the Motor Accident Claims Tribunal at Gonda in the earlier claim petition arising out of the same accident in the normal course ought to have bound the two insurance companies without any protest. The principle of res judicata binds the parties on the question of fact is also a well settled proposition of law for which reference can be made to para-34 of the judgement reported in ***(2018) 16 SCC 228 (Canara Bank v. N.G. Subbaraya Setty and another).*** That being the position of law, the objection taken by the present appellant before the Motor Accident Claims Tribunal at Lucknow ought to have been considered and adverted to in accordance with law. Since the plea taken was not adverted to at all by the Tribunal in the subsequent proceedings, therefore, to the extent of fixation of entire liability upon the appellant, the findings arrived at by the Motor Accident Claim Tribunal, Lucknow are not tenable in the eye of law. The principle of res judicata was thus applicable between the parties i.e. the two insurance companies on the aspect of proportional liability which ought to have been applied in terms of the earlier judgement/award.

25. The appellant has already deposited 75% of the decretal amount which may be released in favour of the claimants subject to the protection of right of recovery against the respondent no. 4. For the purpose of apportioning the liability, it would not be fruitful to remit the matter back to the Motor Accident Claims Tribunal, Lucknow once on principle the Court is satisfied that the principle of res judicata ought to have been applied while rendering the impugned judgement/award.

26. Looking to the fact that the previous judgement has duly been acted upon by both the parties, the claim awarded by the Tribunal in the present case of which the liability has exclusively been fixed upon the appellant, deserves modification. Accordingly, the liability to pay the compensation awarded by the Tribunal in the impugned judgement/award is fixed upon the appellant as well as respondent no. 4 in equal proportion. The appellant shall deposit the remaining decretal amount before the Tribunal within a period of three months from today which may be released in favour of the claimants. The appellant shall have a recovery right against the respondent no. 4 to the extent of half of the claim allowed by means of the impugned judgement/award dated 16.2.2016 as contained in Annexure-1 to this appeal.

27. With the modification as above, the quantum of compensation awarded by the Tribunal is affirmed granting protection of recovery rights as above to the appellant as against the respondent no. 4.

28. It shall be open to the appellant to enforce the recovery rights by means of execution proceedings against the respondent no. 4. The execution proceedings taken up by the appellant, if any, may be concluded not later than a period of six months from the date of its filing.

29. Insofar as the aspect of wrong multiplier is concerned, this Court is convinced that the Tribunal looking to the age of injured being 31-35 years ought to have applied the multiplier as 16. This is what follows in accordance with the judgement rendered in ***Sarla Verma*** case. Ordered accordingly.

30. The impugned judgement/award to the aforesaid extent stands modified

and the appeal is accordingly disposed of.

(2020)08ILR A284
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2020

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. Bail Application No. 13331 of 2020

Ram Ladaite @ Shaukeen ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri R.P.S. Chauhan

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

Criminal Law- Code of Criminal Procedure, 1973- Section 53-A Cr.P.C- Examination of person accused of rape by medical practitioner- Is of worth only when the accused is apprehended and medically examined immediately- The question of examination of an accused of rape by a medical practitioner as per the said Section is necessary only if there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. The immediate corroboration of the offence through medical evidence that too by examination of the accused is only of any worth if the same is done immediately after the accused is apprehended and subjected to medical examination for corroborating the same.

Medical examination of the person accused of rape u/s 53-A of the Cr.Pc can give any resilts only if the accused is apprehended shortly after the commission of the offence and the medical examination is done immediately.

Criminal Law- Indian Penal Code, 1860- Section 375/ 376- Rape of minor - Statement of victim corroborated by medical/ injury report- The victim was also assaulted by the accused persons and had received injuries on her head and leg which was bleeding, the same is mentioned in the complaint. The victim was given medical treatment for her injuries. She has specifically stated that she was subjected to rape by the applicant and co-accused. The prosecution in the present case has been consistent so far as the allegation of rape is concerned.

Where the statement of the victim is consistent with regard to the factum of rape and the same is corroborated by the injuries sustained by her in course of the commission of the offence, then there is no ground to doubt the version of the prosecution.

Bail Application rejected. (E-3)

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

1. Heard Sri R.P.S. Chauhan, learned counsel for the applicant and Sri Manu Raj Singh, learned A.G.A. for the State.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant, **Ram Ladaite @ Shaukeen**, seeking enlargement on bail in S.S.T. No. 1765 of 2019, arising out of Complaint Case No. 102 of 2019, under Section 376-D Indian Penal Code, 1860, Section 6 of The Protection of Children from Sexual Offences Act, 2012 and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station Ujhani, District Budaun.

3. Notice was issued to the opposite party no. 2 vide order dated 12.06.2020.

As per office report dated 15.07.2020 placing reliance on the report of the Chief Judicial Magistrate, Budaun, dated 06.07.2020 notice has been served on the opposite party no. 2. No one appears on behalf of the opposite party no. 2 even in the revised list.

4. The present case arises out of an application dated 07.05.2019 which was filed by the opposite party no. 2 under Section 156 (3) Cr.P.C. before the Additional District Judge- VIII, Budaun titled (Maina Devi vs. Shaukeen and Another), P.S. Ujhani, District Budaun for offences under Section 452, 376-D Indian Penal Code, 1860 & 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and The Protection of Children from Sexual Offences Act, 2012 which was directed to be treated as a complaint by the concerned Court. Subsequently, the statement under Section 200 Cr.P.C. of the complainant, Smt. Maina Devi, under Section 202 Cr.P.C. of the victim / prosecutrix, Brijpal the husband of the complainant and father of the victim was recorded under Section 202 Cr.P.C. Vide order dated 02.09.2019, a copy of which is annexed as Annexure- 3 to the affidavit, the applicant and co-accused Ranjeet were summoned under Section 376-D I.P.C., Section 6 of The Protection of Children from Sexual Offences Act, 2012 and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to face trial.

5. Learned counsel for the applicant argued that the occurrence in the present matter is alleged to have taken place on 22.04.2019 for which the application under Section 156 (3) Cr.P.C. which was treated as a complaint was filed on 07.05.2019 after a delay of 15 days of the said incident. It is argued that the delay is fatal to the prosecution and is unexplained. The moving of the application under Section 156 (3) Cr.P.C. is an afterthought. It is further argued that no medical examination of the prosecutrix has been conducted which would corroborate the prosecution version. He further argued that the valuable right of the applicant / accused under Section 53-A Cr.P.C. has been violated as he has not been subjected to any medical examination. It is further argued that the prosecution has withheld relevant and important piece of evidence i.e. the public witnesses and as such the accused is entitled to get the benefit of Section 114(g) of Indian Evidence Act.

6. Arguing on merits of the matter, learned counsel for the applicant has argued that in the complaint it is mentioned that the said incident had taken place at around 4.00 a.m. which has been later on shifted to 10.00 a.m. by the complainant in her statement recorded under Section 200 Cr.P.C. It is further argued that the victim / prosecutrix has not given the exact time when the said incident has occurred. It is then argued that the husband of the complainant and father of the victim who was also examined under Section 202 Cr.P.C. has given the time of occurrence as that at about 9.00 a.m. and it is thus argued that the prosecution has failed to give the correct time of occurrence in the present matter. It is further argued that there are various and substantial contradictions in the prosecution version particularly relating to the location of the house of the accused for which it is argued that the victim has in her

statement stated that the house of the accused is situated at some distance from her house whereas the husband of the complainant has stated that the house of the accused is opposite to his house. It is thus argued that the prosecution gets suspicious even on the count of the fact that the exact location of the house of the accused where the incident is alleged to have taken place is not fixed in the said statements. For supporting the arguments, learned counsel has drawn the attention of the Court to paragraph nos. 9, 16, 19, 20, 26 and 27 of the affidavit in support of the bail application. It is further argued that the entire prosecution case is a lie and has been initiated just in order to falsely implicate the applicant without any reliable and cogent evidence.

7. Per contra, learned A.G.A vehemently opposed the prayer for bail and argued that the prosecutrix as per the complaint is aged about 15 years. In the complaint, it has been specifically mentioned that after the said incident the complainant along with her daughter went to the police station and gave an application for lodging of the FIR but neither the police registered the FIR nor took the daughter of the complainant for her medical examination. There was a delay-dally from the side of the police in getting the medical examination done. Then the complainant approached the Senior Superintendent of Police, Badaun on 24.04.2019 who in turn advised her to approach the concerned police station on which she again went to the police station where the police personnels started creating pressure on her to settle the matter but they did not register the case. Then subsequently, on 25.04.2019 and 27.04.2019 she again went to the S.S.P., Badaun and gave her applications on which the Circle Officer, P.S. Ujhani took the statement of the girl, got a video clip recorded and sent her to the police station for getting the case registered but due to some political interference her FIR could not be registered. It is further stated in the complaint that later on, on 29.04.2019 application through e-mail was sent by the complainant to the I.G., Bareilly, D.G.P., Lucknow, Chief Minister, Uttar Pradesh and the National President SC / ST Commission, New Delhi from where no response was received and then she sent an application on 30.04.2019 by registered post to the S.S.P., Badaun for which there was again no action and in the last the present application under Section 156 (3) Cr.P.C. dated 07.05.2019 has been moved. It is thus argued that the delay in moving of the application under Section 156 (3) Cr.P.C. is well explained and the complainant resorted to the remedy available to her as per law. He further argued that the applicant is named in the complaint. There is specific allegation of committing rape against him in the complaint and the statements recorded under Section 200, 202 Cr.P.C.

8. Section 53-A Cr.P.C. is reproduced herein below:-

"(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen

kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section."

9. The question of examination of an accused of rape by a medical practitioner as per the said Section is necessary only if there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence.

10. In the present case the occurrence is dated 22.04.2019. The application under Section 156 (3) Cr.P.C. is dated 07.05.2019. The immediate corroboration of the offence through medical evidence that too by examination of the accused is only of any worth if the same is done immediately after the accused is apprehended and subjected to medical examination for corroborating the same. By passage of time the evidence for corroborating and linking him with an offence of rape looses its efficacy. The prosecution case right from the very inception has been that the victim was taken away by the accused persons at about 4.00 a.m. on 22.04.2019 and was locked up in the house for about 5 hours. The complainant has in her statement mentioned that she had gone to the field for harvesting wheat and when she returned at about 10.00 a.m. she did not find her daughter. The victim has in her statement mentioned that on 22.04.2019 at about 4.00 a.m. her parents had gone to harvest the crop of wheat after which she went to attend the call of nature and while coming back she was taken away by the applicant and co-accused, Ranjeet to the house of the co-accused, Ranjeet. She stated that the applicant and Ranjeet live in the same house. The husband of the complainant and the father of the victim has in his statement stated that he had gone to harvest the crop of wheat on 22.04.2019 at about 4.00 a.m. and was returning at about 9.00 a.m. In so far as, time of the present incident is concerned, the same

finds its consistency throughout the complaint and in the statements of the complainant, the victim and Brijpal. The victim was also assaulted by the accused persons and had received injuries on her head and leg which was bleeding, the same is mentioned in the complaint. The victim was given medical treatment for her injuries. She has specifically stated that she was subjected to rape by the applicant and co-accused, Ranjeet. The prosecution in the present case has been consistent so far as the allegation of rape is concerned. There is no suppression of any material fact which would go to the extent of extending any benefit to the accused at this stage as argued to be extended under Section 114(g) of the Indian Evidence Act. The offence is serious in nature of committing rape of a minor girl aged about 15 years as stated in the complaint and the statements of the prosecutrix recorded under Section 202 Cr.P.C.

11. Looking to the facts and circumstances of the case, nature of evidence and gravity of offence, I do not find it a fit case bail, hence, the bail application is **rejected**.

12. It is clarified that any observation as made in this order is only for the purpose of deciding this bail application and shall have no effect in the proceeding of trial.

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

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

15. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)08ILR A288
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2020

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. Ist Bail Application No. 14299 of 2020

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

Counsel for the Applicant:
Sri Vivek Kumar Singh, Sri Mayank Yadav

Counsel for the Opposite Party:
A.G.A., Sri Anjani Kumar Raghuvanshi

A. Criminal Law - Criminal Procedure Code, 1973 – Section 439 – Bail – Non-explanantion of Injuries – There is no forensic report that the recovered weapon was used in the commission of the present offence – It's effect – Period of detention already undergone, the unlikelihood of early conclusion of trial and the absence of any convincing material to indicate the possibility of tampering with the evidence – Considered – Held, the applicant may be enlarged on bail. (Para 11, 12 and 15)

Bail Application allowed (E-1)

Cases relied on :-

1. Lakshmi Singh & ors. Vs St. of Bihar, (1976) 4 SCC 394.

2. Bashishth Singh & anr. Vs St. of Bihar, (2002) 10 SCC 384.

3. Bhagwan Sahai & anr. Vs St. of Rajasthan, (2016) 13 SCC 171.

4. State of Gujarat Vs Bai Fatima (1975) 2 SCC 7

5. Special Leave to Appeal (Criminal) No. 9957 of 2019; Vikas Kumar Vs Akshay & anr. decided by Supreme Court on 28.02.2020

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

1. Heard Sri Vivek Kumar Singh, learned counsel for the applicant, Sri Anjani Kumar Raghuvanshi, learned counsel for the first informant and Sri Manu Raj Singh, learned A.G.A. for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant, **Moti**, seeking enlargement on bail during trial in connection with Case Crime No. 375 of 2019, under Sections 147, 148, 149, 307, 302 and 506 I.P.C., registered at Police Station Modinagar, District Ghaziabad.

3. The prosecution case as unfolded in the First Information Report lodged on 17.04.2019 at about 21:54 hrs at P.S. Modinagar, District Ghaziabad by Vikas son of Bijendra Singh for an incident which took place on 17.04.2019 at about 5.00 p.m. is that labours were sowing the crop of sugar-cane his field and when he was returning from his field in the evening then at about 5.00 p.m. he saw the accused persons namely Akshay and Sunny both sons of Jitendra, Ankit and Moti both sons of Satbir and Bhanu entering in the house of Vicky Tyagi and then he heard the sound of firing from inside the house to which he entered in the house of Vicky Tyagi and saw all the accused person brandishing their weapons, threatening of dire consequences and running away from there. He saw his brother-in-law, Dipendra @ Dippan having received several gun shot injuries and Pratham who was inside the house has also received firearm injury in his leg. The first informant is then said to have taken Dipendra @ Dippan and Pratham to Jeevan Hospital for their medical aid wherein Dipendra @ Dippan was declared dead. It is stated that the accused persons are persons of criminal intent and bad nature and they collectively fired indiscriminately upon Dipendra @ Dippan and murdered him. It is further stated that Ruby and Vinod and various other persons have seen the incident. It is then stated that apart from the named accused persons other persons may also have joined them in the said assault. He then states that he has come to the police station from the hospital for getting the FIR registered. The said application for getting the FIR registered is scribed by one Praveen son of Madan Singh.

4. Dipendra @ Dippan died and the doctor conducting the postmortem examination opined that the death is as a result of shock and haemorrhage due to ante mortem gun shot injury.

5. Learned counsel for the applicant argued that the present case is a cross case. He has drawn the attention of the Court to Annexure- 6 of the affidavit in support of the bail application which is the FIR of Case Crime No. 0511 of 2019, under Sections 147, 148, 149, 307, 504, 506 I.P.C., registered at P.S. Modinagar, District Ghaziabad on 26.05.2019 at about 23:54 hrs for an incident which

took place from 15.04.2019 to 17.04.2019 at 17:00 hrs (5.00 p.m.) by Smt. Nisha wife of Jitendra against Vikas, Vicky Tyagi, Sappu Gujar, Pratham and 03 unknown persons. The said FIR has been registered on the basis of an application dated 06.05.2019 moved under Section 156 (3) Cr.P.C. in the Court of the Additional Chief Judicial Magistrate, Court No. 5, Ghaziabad which was numbered as Application No. 338 / ACJM-5 of 2019 (Smt. Nisha vs. Vikas and others). He argued that from the side of the applicant in the cross case Ankit and Akshay received injuries. He has drawn the attention of the Court to paragraph 13 of the affidavit and argued that Ankit received firearm injury on his leg. The said injury has been placed from Annexure- 7 to the affidavit in which the doctor noted that the said gun shot injury has an exit also. Further Annexure- 7 & 8 to the affidavit are the medical examination report and the further documents of treatment including the discharge summary of Akshay and learned counsel has argued that initially Akshay was taken to CHC, Ghaziabad where he was medically examined on 17.04.2019 at 6:10 a.m., from there was referred to surgeon for management of his injury. A copy of the medical examination report and reference slip is at page 62 of the paperbook. The injuries as found by the doctor are as follows:-

(1) 1 cm x 1 cm wound over the Rt. side of Abdomen 3 cm above from umbilicus. Around wound burning present. Tatooing not present.

(2) 1 cm x 1 cm wound over Rt. side Abdomen 3 cm below from umbilicus. Around wound burning present. Tatooing not present.

The opinion of the said doctor was " Both injury? Gun shot.

6. Subsequently, he was taken to District Combined Hospital, Ghaziabad from where he was after giving treatment referred to higher centre / Guru Teg Bahadur Hospital, New Delhi for management. The said reference slip is at page 66 of the paperbook. In pursuance thereof, Akshay was admitted in GTB, Hospital, New Delhi on 27.04.2019 and continued to be under treatment there. In between Akshay was admitted to Yashoda Super-speciality Hospital, Ghazaiabad on 17.04.2019 where he was operated upon for exploring and removal of bullet from his sacrum which was done on 21.04.2019. The relevant documents of treatment at Yashoda Hospital & Research Centre are annexed from page 70-76 of the paperbook. From the documents pertaining to the treatment of Akshay at GTB, Hospital, New Delhi annexed at page 67, 68, 78 and 79 of the paperbook, it is argued that injuries as received by Akshay were grievous in nature for which he struggled a lot and it was a matter of luck that he survived and his medical examination which started from CHC, Ghaziabad continued up to AIIMS, New Delhi. It is argued that in the cross case the police initially submitted a final report which has been rejected by the court concerned and the matter has been sent for further investigation which is still continuing.

7. Learned counsel for the applicant argued that the injuries as received by Ankit and Akshay are firearm injuries which cannot be self-inflicted. It is further argued that the prosecution has concealed the factum regarding the injuries as received by Ankit and Akshay

and is totally silent about the same which goes to show that the prosecution version of the occurrence is doubtful and the prosecution has suppressed the genesis and the origin of the occurrence and has not come out with clean hands. It is further argued that the falsity of the case of the prosecution as per the FIR itself becomes under doubt from the fact that the first informant states that all the accused persons who were stated to be five in number including Akshay and Ankit the injured persons from the side of the accused left the place of occurrence brandishing their weapons, extending threats to life and they ran away. It is further argued that nature of injuries injuries received by Akshay it was not possible for him to run away from the place of occurrence and the said injuries and his receiving injury could not have got unnoticed by the first informant. Learned counsel then places reliance upon the following judgements:-

1. Lakshmi Singh and Others vs. State of Bihar: (1976) 4 SCC 394.

2. Bashishth Singh and Another vs. State of Bihar: (2002) 10 SCC 384.

3. Bhagwan Sahai and Another vs. State of Rajasthan: (2016) 13 SCC 171.

8. In the case of Lakshmi Singh *(supra)* while placing reliance upon the case of ***State of Gujarat vs. Bai Fatima (1975) 2 SCC 7***, the Apex Court held that in a situation when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

"(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all."

9. It was held in the case of Lakshmi Singh (supra) in paragraph 12 :-

"It seems to us 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 it is rendered probable so as to throw doubt on the prosecution case."

10. Further, while relying upon the case of Bashishth Singh *(supra)*, learned counsel for the applicant argued that the Apex Court has granted bail to the accused persons in the said case on the ground that a counter case was built on the strength of the First Information Report lodged by one of the accused and had granted bail to them.

11. While, relying on the case of Bhagwan Sahai *(supra),* learned counsel for the applicant argued that even in the said case the judgement of Lakshmi Singh and Others vs. State of Bihar has been referred and relied upon and the information non-explanation of the injuries on the side of accused by the prosecution has been considered by the Apex Court and an adverse inference has been drawn against the prosecution for not offering any explanation much less a plausible one.

12. Learned counsel has then placed before the Court an order dated 30.09.2019 passed by a co-ordinate Bench of this Court in Criminal Misc. Bail Application No. 39170 of 2019 ***(Akshay vs. State U.P.)*** and has stated that co-accused, Akshay has been granted bail by the said order. Further, learned counsel has placed before this Court the order dated 28.02.2020 passed by the Apex Court in Special Leave to Appeal (Criminal) No. 9957 of 2019 ***(Vikas Kumar vs. Akshay and Another)*** and has stated that the said Special Leave to Appeal was preferred against the order dated 30.09.2019 granting bail to Akshay and the same has been dismissed by the said order. It is argued that there is a recovery shown against the applicant for which Case Crime No. 447 of 2019, under Section 25/27 Arms Act has been registered but it is alleged that the said recovery was a planted recovery by the police on 10.05.2019 and there is no forensic report that the recovered weapon was used in the commission of the present offence. Paragraph 24 and 30 of the affidavit have been placed for the said argument. It is further stated that charge-sheet in the present case has been submitted on 20.04.2019. In the last, while placing reliance on paragraph 24 of the affidavit again learned counsel has stated that the applicant has no criminal antecedents and the case under the Arms Act as of now is against the applicant as the sole case which relates to the alleged recovery of weapon said to have been used in the present case. It is stated that the applicant is in jail since 01.05.2019.

13. Learned counsel for the first informant opposed the prayer for bail and argued that filing of the application under Section 156 (3) Cr.P.C. by Smt. Nisha was an afterthought just in order to create a defence in the present matter. It is argued that the Apex Court, while dismissing the Special Leave to Appeal has categorically clarified that the same is being refused to be entertained in the peculiar circumstances of the said case. It is thus argued that the applicant is not entitled to the claim of parity with co-accused. Further it is argued that the present case is a case in which one person received injury and died and there is one injured and the injuries received by Ankit and Akshay are self-inflicted injuries.

14. Learned A.G.A. also opposed the prayer for bail but could not dispute the aforesaid arguments of the learned counsel for the applicant. Even the fact that the applicant has no criminal history and the other case under the Arms Act is after the present matter could not be disputed.

15. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the

unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

16. Let the applicant, **Moti**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

i) The applicant will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

ii) The applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

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

(iv) The applicant will not misuse the liberty of bail in any manner whatsoever. In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(v) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law and the trial court may proceed against him under Section 229-A IPC.

(vi) The trial court may make all possible efforts/endeavour and try to conclude the trial expeditiously after the release of the applicant.

17. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

18. The bail application is allowed.

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

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

21. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the

order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)08ILR A294
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.07.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE MRS. SANGEETA CHANDRA, J.

First Appeal No. 30 of 2020

Mrs. Nalini Singh ...Appellant
Versus
Lt. Col. Rajesh Kumar Singh ...Respondent

Counsel for the Appellant:
Ram Raj, Priyal Agarwal

Counsel for the Respondent:

(A) Civil Law - Family law - Hindu Marriage Act, 1955 - Section 11- void marriages, Section 12 -Voidable marriages , Section 13 - Divorce , Section 19(1) - Court to which petition shall be presented - original civil jurisdiction - marriage solemnised - Code of Civil Procedure ,1908 - Order 7 Rule 11 C.P.C. - rejection of plaint - read with Section 151 C.P.C. - Order 10 - Examinaion of parties by the court .

Marriage of appellant and respondent solemnized according to Hindu Rites and Customs - respondent filed a Petition under Section 11 read with Section 12 read with section 13 of the Hindu Marriage Act, 1955, in the Court of Principal Judge, family court - Family Court rejected the appellant's application under Order 7 Rule 11 C.P.C. read with Section 151 C.P.C. (Para 3,4,7)

HELD :- The plaint filed by the plaintiff can only be rejected when the same is barred by any law or no cause of action has accrued to the plaintiff for filing the same. No illegality or infirmity in the impugned order passed by the family court. (Para - 29,30)

First Appeal dismissed. (E-7)

List of Cases cited:-

1. Canara Bank Vs P. Selathal & ors., (2020) SCC Online Supreme Court 245

2. T. Arivandandam Vs TV Satyapal & anr., (1977) 4 SCC 467

3. ITC Limited Vs Debt Recovery Appellate Tribunal & ors., (1998)2 SCC 70

4. F.B. Smt. Kiran Bala Srivastava Vs Jai Prakash Srivastava, 2005 LCD 1 F.B.

5. Bhagwati Prasad Misra Vs Deputy Commissioner, Barabanki, AIR 1945 Oudh 177

6. Manohar Lal Chatrath Vs Municipal Corporation of Delhi, AIR 2000 Del 40)

7. Rakesh Kumar Vs Umesh Kumar, AIR 2009 Del 129)

8. A.B.C. Laminart Pvt. Ltd. Vs A.P. Agencies, Salem, (1989) 2 SCC 163

9. I.T.C. Ltd. Vs Debt Recovery Appellate Tribunal and others, (1998)2 SCC 70

10. Sopan Sukhdeo Sable Vs Assistant Charity Commissioner, (2004) 3 SCC 137

11. Church of Christ Charitable Trust & Educational Charitable Society Vs Ponniamman Educational Trust, (2012) 8 SCC 706

12. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal, (2017) 13 SCC 174

13. Smt. Kiran Bala Srivastava Vs Jai Prakash Srivastava, 2005(23) LCD 1

(Delivered by Hon'ble Anil Kumar, J.)

1. Heard Sri Ram Raj, learned counsel for the appellant.

2. Present first appeal under section 19(1) of the Family Court Act has been filed by the appellant against the order dated 11.02.2020 passed by learned Additional Principal Judge, Family Court, Court no.1 Lucknow in Regular Suit No.1274 of 2017 (Lt. Col. Rajesh Kumar Singh Vs. Mrs. Nalini Singh) whereby application filed by the appellant under Order 7 Rule 11 of C.P.C. has been rejected.

3. Facts, in brief, as submitted by learned counsel for the appellant are that marriage of appellant and respondent was solemnized according to Hindu Rites and Customs on 13..02.2005 at Nakodha Garden, Swaroop Sagar Choraya, Udaipur(Rajasthan).

4. Thereafter their matrimonial relation became estranged, so respondent/ Lt. Col. Rajesh Kumar Singh filed a Petition under Section 11 read with Section 12 read with section 13 of the Hindu Marriage Act, 1955, registered as Regular Suit No.1274 of 2017 (Lt. Col. Rajesh Kumar Singh Vs. Smt. Nalini Singh) in the Court of Principal Judge, Family Court, Lucknow with the following relief:-

" A decree be kindly be passed under Section 11 of the Hindu Marriage Act, 1955,declaring the marriage of the parties dated 13.02.2005 as ab-initio null and void by a decree of nullity for the reason that the defendant had a spouse living at the time of her marriage with the plaintiff

Or in the alternative,

A decree be kindly be issued under section 12 of the Hindu Marriage Act,1955, declaring the marriage of the parties dated 13.02.2005 as null and void and annulled by a decree of nullity, for the reason that the consent of the plaintiff had been obtained by fraud and also for want of free and fair consent as aforesaid.

Or in the alternative

A decree of divorce be kindly passed under Section 13 of the Hindu Marriage Act, 1955 dissolving the marriage of the parties dated 13.02.2005.

b. The cost of suit be also awarded in favour of he plaintiff against the defendant.

c. Any other relief which the Hon;ble Court deems just and proper be also granted."

5. On 25.10.2019 appellant/defendent had filed her written statement.

6. Learned counsel for the appellant further submits that on 15.03.2019 an application under Order 7 Rule 11 C.P.C. read with Section 151 C.P.C. had been filed by the appellant/ defendant, registered as Application no. C-14 to which respondent/plaintiff had filed objection on 23.03.2019.

7. By order dated 11.02.2020, Additional Principal Judge, Family Court no.1, Lucknow rejected the appellant's application under Order 7 Rule 11 C.P.C. read with Section 151 C.P.C.

8. Learned counsel for the appellant while challenging the impugned order submits that Additional Principal Judge, Family Court, Court no.1 Lucknow while passing the impugned order dated

11.02.2020 in Regular Suit No.1274 of 2017; Lt. Col. Rajesh Kumar Singh Vs. Smt. Nalini Singh has committed serious error of both law and fact in rejecting the application preferred by the appellant under Order 7 Rule 11 C.P.C. and has passed the impugned order on conjectures and surmises.

9. On behalf of the appellant, it has also been argued that the court below has arbitrarily and illegally rejected the appellant's application under Order 7 Rule 11 C.P.C. without considering the documentary evidence submitted by the appellant proving that the plaintiff/respondent had full and definite knowledge of appellant's earlier marriage on 13.02.2005 itself and the plaintiff/respondent had filed online documents uploaded in his own handwriting on 20.05.2015 to the passport department.

10. So the impugned order dated 11.02.2020 passed by court below is liable to be set aside primarily on the ground that the said order is in violation of a settled principle of law that a person who does not come to the court / judicial forum with clean hands is not entitled to be heard on merits of his grievance and in any case, such person is not entitled to any relief from the Court.

11. In this regard it is further submitted that court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute stream of justice by resorting to falsehood or by making misstatements or by suppressing facts which have a bearing on adjudication of the case; the plaintiff/respondent since did not come with clean hands before the court below, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum, thus the application under order 7 Rule 11 ought to have been allowed by the court below as the same was filed without disclosing a true cause of action.

12. In this regard , he has placed reliance in paragraph 49 of the plaint reads thus:

"49 That the cause of action in favour of the plaintiff against the defendant firstly accrued on 13.02.2005, on the date of the marriage of the parties itself, as the defendant had a spouse living at the time of her marriage with the plaintiff and if it had been known to the plaintiff, the plaintiff would never have got involved in the matrimonial relationship with the defendant and alternatively the cause of action again accrued in favour of the plaintiff against the defendant in March, 2017 when the said fraud of concealment of the said material fact of her subsisting marriage accidentally came to the knowledge of the plaintiff who realized that his consent for the said marriage was obtained by the said fraud committed by the defendant and her parents on him and his family and further alternatively the cause of action has accrued in favour of the plaintiff against the defendant repeatedly and throughout the continuation of the matrimonial relationship between the parties as the defendant has throughout, repeatedly and continuously treated the plaintiff with utmost mental and physical cruelty. The aforesaid cause of action in faour of the plaintiff against the defendant has accrued in Lucknow as the parties have lastly resided together as

husband and wife and Lucknow at House No.37/2 MGSF Qaurters , MG road, Lucknow Cantt-226002 (U.P.) under the jurisdiction of this Hon'ble Court and the cause of action continues till the relief prayed by the plaintiff in finally granted."

13. Learned counsel for the appellant also submits that in view of the averments made in para 49 of the plaint it transpires that the facts which are stated by the plaintiff/respondent therein are wholly incorrect and wrong. In the said paragraph plaintiff/respondent incorrectly stated that alternative cause of action again accrued in his favour against the defendant in March, 2017. It amounts to concealment of material fact as on the said date no cause of action accrued in favour of plaintiff in regard to filing of suit which accrued prior to that date so the suit filed by the plaintiff deserved to be dismissed. However, the court below has manifestly erred on both law by facts and not considering the said fact and passing the impugned order which is contrary to provisions as provided under Order 7 Rule 11 C.P.C .

14. In support of his arguments, learned counsel for the petitioner has placed reliance on the following judgments.

1. Canara Bank Vs. P. Selathal and others (2020) SCC Online Supreme Court 245.

2. T. Arivandandam Vs. TV Satyapal and another (1977) 4 SCC 467

3. ITC Limited Vs. Debt Recovery Appellate Tribunal and others (1998)2 SCC 70

4. F.B. Smt. Kiran Bala Srivastava Vs. Jai Prakash Srivastava 2005 LCD 1 F.B.

15. Accordingly, Sri Ram Raj, learned counsel for the appellant submits that the impugned order may be set aside and the present First Appeal may be allowed.

16. We have heard learned counsel for the appellant and perused the record.

17. In order to decide the controversy involved in the preset case, we feel appropriate to go through the relevant provisions under Order 7 Rule 11 C.P.C. which reads as under:-

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 written 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;

(e) where it is not filed in duplicate;

(f) Where the plaintiff fails to comply with the provisions of Rule 9.

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp- papers 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 from correcting the valuation or supplying the requisite stamp- papers, 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."

18. From the bare perusal of aforesaid provisions the position which emerges out is that the plaint can be rejected only if it appears from the statement in the plaint to be barred by any law. Even if the expression of the statement in the plaint is given a liberal meaning, documents filed with the plaint may be looked into but nothing more. The court must give a meaningful reading to the plaint and if it is manifestly vexatious or meritless in the sense of not disclosing a clear right to sue, the court may exercise its power under Order 7 Rule 11 of the Code of Civil Procedure, 1908.(see ***Bhagwati Prasad Misra Vs. Deputy Commissioner, Barabanki, AIR 1945 Oudh 177*** and ***Manohar Lal Chatrath Vs. Municipal Corporation of Delhi, AIR 2000 Del 40)***

19. Further, for the purpose of deciding an application under this Rule, it is only the facts pleaded in the plaint which are to be taken into account and if on the basis of those facts the plaint falls within any of the infirmities enumerated in Rule 11 of Order 7, then alone the plaint is liable to be rejected.(See ***Rakesh Kumar Vs. Umesh Kumar, AIR 2009 Del 129***)

20. Hon'ble the Apex Court in the case of **T. Arivandandam** (Supra) has held as under :-

"We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, be should exercise his power under Or. VII r. 1 1 C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi

"It is dangerous to be too good."

21. In ***A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem (1989) 2 SCC 163***, Hon'ble the Apex Court explained the meaning of "cause of action" as follows:

"12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law

applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

22. The Apex Court in ***I.T.C. Limited Vs. Debt Recovery Appellate Tribunal and others (1998)2 SCC 70*** in para 16 and 27 held as under:-

"16. Question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 C.P.C. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (See T. Arivandandam vs. T.V. Satyapal & Another [1977 (4) SCC 467])

27. As stated above non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word "fraud" in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer,J. in T.Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11(a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint."

23. In the case of Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner (2004) 3 SCC 137, Hon'ble the Apex Court in para 11 and 12 has observed as under:-

"11. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

12. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V. Satyapal (supra)."

24. In the case of ***Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust (2012) 8 SCC 706***, Hon'ble the Apex Court in para-13 has held as under:-

"13. While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the Plaintiff the right to relief against the Defendant. Every fact which is necessary for the Plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue."

25. Hon'ble the Apex Court in the case of **Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal (2017) 13 SCC 174** has observed in para 7 as under :-

"7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

26. In the case of **Canara Bank** (supra) Hon'ble the Supreme Court after taking into consideration the relevant law on the issue in T. **Arivandandam** (supra) case has held as under:-

"At this stage, it is also required to be noted that the suits have been filed after a period of 15 years from the date of mortgage and after a period of 7 years from the date of passing of the decree by the DRT. In the plaints, it is averred that the plaintiffs came to know about the mortgage and the judgment

and decree passed by the DRT only six months back. However, the said averments can be said to be too vague. Nothing has been averred when and how the plaintiffs came to know about the judgment and decree passed by the DRT and the mortgage of the property. Only with a view to get out of the law of limitation and only with a view to bring the suits within the period of limitation, such vague averments are made. On such vague averments, plaintiffs cannot get out of the law of limitation. There must be specific pleadings and averments in the plaints on limitation. Thus, on this ground also, the plaints were liable to be rejected. As observed hereinabove, the plaints are vexatious, frivolous, meritless and nothing but an abuse of process of law and court. Therefore, this is a fit case to exercise the powers under Order 7 Rule 11 (d) of the CPC. Both the courts below have materially erred in not rejecting the plaints in exercise of powers under Order 7 Rule 11(d) of the CPC. Both the courts below have materially erred in not exercising the jurisdiction vested in them."

27. In a nut shell, it can be said that for deciding whether the plaint discloses cause of action or not, the court has to see only the averments in the plaint and the accompanying documents relied upon in the plaint and the facts elicited from the plaintiff by examining him under Order 10 of the Code of Civil Procedure. For the purpose of deciding the application under Order 7 Rule 11 for rejecting the plaint, the court has also to presume the facts stated in the plaint as correct.

28. In the instant matter,the court below rejected the application moved by the appellant under Order 7 Rule 11 C.P.C. read with section 151 C.P.C. with the following observations:-

"जहाँ तक प्रथम आपत्ति का प्रश्न है आदेश-7 नियम-11 में यह प्रावधान है कि जहाँ वाद पत्र हेतुक प्रकट नहीं करता है वहां वाद पत्र नामंजूर कर दिया जायेगा | वादी द्वारा प्रस्तुत दावे के अवलोकन से यह स्पष्ट है कि वाद पत्र कागज संख्या ए -3 के पैरा 49 में वादी का वाद कारण को करमवार अंकित किया है जिस पर प्रतिवादिनी का कथन है कि वह बिना आधार के और पूर्णतया असत्य है | वादी द्वारा प्रस्तुत वाद कारण सत्य है अथवा असत्य है यह साक्षयोपरांत ही तय हो सकता है | धारा 7 नियम 11 के अधीन वाद पत्र की अपेक्षा केवल वाद हेतुक प्रकट करना है न की इस स्तर पर सत्यता अथवा असत्यता परिलक्षित होनी है | चुकिं वाद पत्र वाद हेतुक प्रकट करता है ऐसे स्थिति में आदेश-7 नियम-11 के अधीन वाद पत्र नामंजूर किये जाने का कोई औचित्य आधार नहीं है |"

29. Keeping in view the observations made by the court below while rejecting the application of the appellant under Order 7 Rule 11 C.P.C. read with section 151 C.P.C. as well as the settled legal proposition of law on the point in issue that the plaint filed by the plaintiff can only be rejected when the same is barred by any law or no cause of action has accrued to the plaintiff for filing the same.

30. However, from the bare perusal of the plaint in the instant matter , the said position does not exist, so we do not find any illegality or infirmity in the impugned order passed by the court below.

31. Further, appellant/ respondent cannot derive any benefit from the

judugment given by a Full Bench of this Court in the case of ***Smt. Kiran Bala Srivastava Vs. Jai Prakash Srivastava, 2005(23) LCD 1*** as the same does not relate to the controversy relating to Order 7 Rule 11 read with section 151 C.P.C.

32. For the foregoing reasons, the first appeal lacks merit and is dismissed.

(2020)08ILR A302
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Second Appeal No. 156 of 2020

Suresh Khiyani ...Appellant
Versus
Jassi Apartment Welfare Society ...Respondent

Counsel for the Appellant:
Sri Gulrez Khan, Sri Adil Jamal

Counsel for the Respondent:
Sri Ashish Kumar Srivatava

(A) Civil Law - Code of Civil Procedure ,1908 - Section 100 CPC - Order 7 Rule 11 CPC - rejection of plaint - Specific Relief Act, 1963 - Section 41 - Injunction when refused - Order 41 Rule 31 CPC - the U.P. Apartment (Promotion of Constructions, Ownership and Maintenance) Act, 2012 - Section 25 (3) and (4) - RERA, 2016 - Section 43 - plaintiff is 'dominus litis' - it is his discretion to add a party to implead any person - suit for injunction - maintainable against the person - who has raised illegal construction or has shown to have done some unauthorized act or has encroached the open area - substantial question of law - if the question is settled then it would not be a substantial question of law - merely because in the substantial questions of law so framed in the memo of appeal involving interpretation of any particular provision of the law by itself could not be substantial questions of law. (Para - 12,16,21,22)

It is a civil suit for injunction regarding encroachment on common open area - Plaintiff-respondent filed a suit for permanent prohibitory injunction as well as mandatory injunction in respect of a common area shown as parking place by dotted line in the plaint map and that the defendant be restrained from encroaching upon any other common area of the apartment campus. (Para - 3,8,13,20)

HELD:- No substantial question of law is involved in the present appeal, which requires any interpretation by this Court in view of the law laid down by Hon'ble Apex Court in **Sir Chunilal Vs Mehta and sons Ltd (supra)** and the questions framed in the memo of appeal, even if are treated to be questions of law, they are not open to interpretation.(Para - 23)

Second Appeal dismissed. (E-7)

List of Cases cited:-

1. Mumbai International Airport Private Limited Vs Regency Convention Centre & Hotels Private Limited and others, (2010) 7 SCC 417

2. Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors., 2019 AIR (SC) 3577

3. Kasturi Vs Uyyamperumal, (2005) 6 SCC 733

4. Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors., 2020 (1) ARC 381.

5. Sir Chunilal Vs Mehta & sons Ltd Vs Century Spining & Manufacturing Co. Ltd, AIR 1962 SC 1314

6. Harihar Tiwari Vs Kshetriya Sri Gandhi Ashram (Second Appeal No. 94 of 2020)

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the appellant and Sri Ashish Kumar Srivastava, learned counsel for the respondent.

2. Present appeal has been filed for setting aside the judgment and decree dated 4.11.2019 passed by Additional District Judge, Court No. 23, Kanpur Nagar in Civil Appeal No. 33 of 2019 (Jassi Apartments Welfare Society vs. Suresh Khiyani) arising out of O.S. No.1079 of 2011 (Jassi Apartments Welfare Society vs. Suresh Khiyani), which was dismissed by the trial court vide judgment dated 11.02.2019.

3. The plaintiff-respondent filed a suit for permanent prohibitory injunction as well as mandatory injunction for removal of the constructions raised during pendency of the suit. The suit was filed on the ground that Flat No. 102 was purchased by the defendant alongwith common space, which was encroached upon by him alongwith his wife during pendency of the suit on 25.1.2014 and the open common parking area was surrounded by a wall for personal use and illegally encroached upon by his wife Smt. Arti Khiyani and his son Rishi Khiyani. The suit was contested by the defendant and denying the plaint allegations it was pointed out that Flat No. 102 was purchased in the name of Smt. Arti Khiyani through registered sale deed dated 9.12.2010 and as such she is a necessary party to the suit and therefore, the suit is bad for non-joinder of parties. It was alleged that the area in dispute is not a common passage and the same is under the ownership of Smt. Arti Khiyani. The same is not for common use of the residents. The suit was dismissed by the trial court vide judgment dated 11.2.2019 holding that it is not proved from the documentary evidence that it was a common parking place. It was further found that PW-1 and PW-2 through their oral evidence though supported the plaint case, however, their statement does not inspire confidence and on this ground the issue no. 1 as to whether the plaintiff is entitled for mandatory injunction was decided against the plaintiff and ultimately the suit was also dismissed. Issue no. 4 as to whether the court has jurisdiction to hear the suit; issue no. 5 as to whether the suit is barred by Order 7 Rule 11 CPC; and issue no. 6 as to whether the suit is barred by Section 41 of the Specific Relief Act, 1963 were decided against the respondents.

4. The appeal filed by the plaintiff was allowed by the lower appellate court. Two points for determination as per Order 41 Rule 31 CPC were framed by the lower appellate court (1) whether the land in front of Flat No. 102 is a common place open for use of all the flat owners of Jassi Apartment? and (2) whether the suit is barred by any legal infirmity? While deciding first point of determination as to whether the space in front of Flat No. 102 (belonging to the defendant) is a common place open for use of flat owners of Jassi Apartments, upon consideration of the sale deed (Paper No. 20-Ga) it was found that the constructed area of 37.16 sq. mts., which consist of 1 room 1 hall, latrine, bathroom, kitchen was sold to the defendant. An undivided share in the land measuring 24 sq. mts. together parking space was also mentioned in the sale deed and the map. Thus, it was found that the undivided share for common use has not been sold. In the

building there are 12 flats. It was admitted by the PW-1 that the outer wall of the building was demolished by the Nagar Nigam and he again raised the wall allegedly on the oral instructions of the Society. He stated that some wall was existing but he had raised the wall in his own area. Thus, points of determination no. 1 was decided against the defendant and in favour of the plaintiff. Insofar as second points for determination as to whether the suit suffers from any legal infirmity it was also noticed that Paper No. 35-Ga is the registration certificate of the society and it was found that although a society was registered during pendency of the suit, however, the suit for injunction can be filed against the person against whom cause of action is existing and therefore, there is no mis-joinder or non-joinder of the parties and the suit does not suffer from any legal infirmity.

5. Challenging the same learned counsel for the appellant-defendant submitted that the suit was not cognizable by the civil court in absence of written complaint to the Board and prior permission of the competent authority in view of Section 25 (3) and (4) of the U.P. Apartment (Promotion of Constructions, Ownership and Maintenance) Act, 2012; suit filed by the unregistered society was not maintainable in view of Section 6 of the Societies Registration Act, 1980; after commencement of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'RERA') and in view of Section 43 of the Act of 2016 civil appeal shall not be cognizable by the civil court; the property / place in dispute is in front of Flat No. 102, which belongs to Smt. Arti Khiyani, who has not been impleaded in the suit and thus, the same is bad for non-joinder of necessary parties; and the findings recorded by the lower appellate court are perverse in nature and the same is liable to be set aside. Learned counsel for the appellant has also drawn attention to substantial questions of law framed in the memo of appeal. The same are quoted as under:-

"(i) Whether the suit plaintiff/respondent was cognizable by civil court in absence of any written complaint to the board and without prior permission of the Competent Authority in view section 25(3) & (4) of the U.P. Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010?

(ii) Whether the suit on behalf of unregistered society was maintainable in view of section 6 of the Society Registration Act, 1980?

(iii) Whether the Civil Appeal pending before the Civil Court after commencement of Real Estate (Regulation and Development) Act, 2016 was cognizable by the Appellate Tribunal in view of section 43 of the Act 2016 and judgment of Appellate court is without jurisdiction?

(iv) Whether the suit of the plaintiff was liable to be dismissed on the ground of non joinder of necessary party Smt. Arti Khiyani who is the owner of Flat No.102?

(v) Whether the documents relied upon by the appellate court were admissible in evidence and conclusive to prove that the disputed place/property is reserved for common and parking area?

(vi) Whether Pw-1 could depose on behalf of Secretary of alleged society in the absence of any registered power of attorney?

(vii) Whether the finding of the appellate court is based on surmises and conjectures?"

6. Per contra, learned counsel for the respondent has submitted that the grievance was against the defendant, who has encroached the open common area and as such the suit was not bad for non-joinder of necessary parties even if the wife of the defendant was the owner of Flat No. 102; provisions of the Acts being relied on by learned counsel for the appellant, are not applicable in the present case; the society was undisputedly registered; further, in a suit for injunction an aggrieved person can file a suit against another person and therefore, the suit was perfectly maintainable and at the time of filing of the suit even if the society is not registered and was registered during pendency of the suit the relief of injunction cannot be refused to the plaintiff on this ground alone; there is no perversity in the findings recorded by the lower appellate court and findings are based on correct appreciation of the documentary evidence on record.

7. I have considered the submissions and have perused the record.

8. On perusal of record I find that the suit has been filed in respect of a common area shown as parking place by dotted line in the plaint map and that the defendant be restrained from encroaching upon any other common area of the apartment campus. The suit was filed in November, 2011. During pendency of the suit this area was encroached upon by raising a permanent wall on 25.1.2014 regarding which even a complaint to the police was also made and therefore, the relief clause was amended and a relief was added by seeking relief in the nature of mandatory injunction regarding removal of the wall constructed during pendency of the suit.

9. Before proceeding further it would be necessary to note the relevant contents of the sale deed dated 10.9.2004 of Flat No. 102 executed in favour of Smt. Arti Khiyani w/o defendant no. 1. Relevant extract of the sale deed is quoted as under:-

"..…

AND WHEREAS Smt. Narinder Kaur W/o Balbir Singh and Jasvinder Singh S/o Balbir Singh as a land owner and Trimurti Builders through its proprietor Rajendra Kumar Agarwal S/o lat Devi Dayal Agarwal as a builder jointly sold and transferred Flat No. 192 on Ground Floor having covered area admeasuring 37.16 Sq. constructed at freehold plot No. 179 Block R.N. Ratan Lal Nagar Kanpur Nagar known as 'Jassi Apartment' alongwith undivided share in the land admeasuring 24 Sq. Meters together with parking space on ground floor of the premises alongwith common use of entire facilities and amenities provided in the Apartment by virtue of registered sale deed dated 9.0.2004 .....…

..…

1. That in pursuance of the agreement and in consideration of Rs. 7,25,000/- (Seven Lacs twenty five thousand only) paid by the Vendee to the Vendor, as per details given at the foot of this Sale Deed, the receipt of which the Vendor hereby acknowledge and confirm before Sub-Registrar, Kanpur. The Vendor as full and absolute owner and in full possession of his senses, hereby

transfer, conveys and sell to the Vendee by way of absolute sale of Flat No. 102 on Ground Floor having covered area admeasuring 37.16 Sq. Meters constructed at freehold plot No. 179 Block R.N. Ratan Lal Nagar Kanpur Nagar known as 'Jassi Apartment' alongwith undivided share in the land admeasuring 24 Sq. Meters together with parking space on ground florr of the premises alongwith common use of entire facilities and amenities provided in the complex fully detailed and bounded given at the top of this Sale Deed and more fully delineated and shown in the map annexed herewith, together with absolute use of common areas and facilities as the foundations, columns, girders, beams, supports, main walls, corridors, lobbies, stairs - stairways and entrance to an exit from the building constructed on the said premises and intended for common use and installation of common services such as power, light, water, sewerage etc., water reservoir, lift pump, motor, pipes, ducts and all apparatus and installation in the said premises existing for common use and the passage etc. shall also be in common use of the flat owners in the premises belonging or in any wise appertaining to or usually held or enjoyed therewith or reported to belong to the flat hereby demised and all the estate, rights, title and interest whatsoever of the Vendor in the said flat and free from all charges and encumbrances TO HOLD the same UNTO and to the use of the Vendee forever and as absolute owner thereof without let or hindrance.

2. That the Vendor has on this day handed over the vacant and physical possession of the said flat to the Vendee. Now the Vendee is full and absolute owner of the said flat with all rights, title absolute and perfect. They are now authorized and empowered to get their name mutated in the records of Nagar Nigal Kanpur etc. as absolute owner and to get the membership of the Flat Owners Association. She has also full right to make any addition, alteration ***within the walls of the flats without damaging the existing wall, roofs, etc.*** and to exercise all their rights over the said flat as absolute owner.

.....

9. That the Vendor has handed over the original sale deed document No. 9095 of 2004 to the Vendee. The Vendee has read and understands the contents of the said sale deed and they are fully satisfied with entire contents thereof. All the terms and conditions of the said sale deed shall be applicable on this Sale Deed and the Vendee shall abide by the same henceforth."
(Emphasis Supplied)

10. It is also pertinent to note that the area sold has been clearly mentioned in the map annexed with the sale deed at page 95 of the paper book. This map clearly indicates that the covered area of Flat No. 102 is 37.16 sq. mts. and undivided share in the land is 24 sq. mts. In the map on western side of the flat open space has been clearly shown. This document was not appreciated by the trial court although the defendant himself has place the photocopy of the same as Paper No. 21-Ga/1 to 21-Ga/15. This document which was admittedly filed by the defendant himself, was considered by the lower appellate court while deciding points for determination no. 1, which was framed to the effect that the space in front of Flat No. 102 is a common open space available for use of flat owners of Jassi Apartments.

11. I find that the property purchased by the wife of defendant no. 1 is well defined and leaves no room for doubt that the area in question is an undivided open space for use of all the flat owners. Internal page 6 of the sale deed (Page 86 of the paper book) clearly mentions the covered area 37.16 sq. mts. constructed at freehold plot No. 179 Block R.N. Ratan Lal Nagar Kanpur Nagar known as Jassi Apartment alongwith undivided share in the land admeasuring 24 sq. mts. together with parking space on ground floor of the premises alongwith common use of entire facilities and amenities provided in the apartment by virtue of registered sale deed dated 9.9.2004. In paragraph 2 of internal page 9 of the sale deed (page 89 of the paper book) it has been clearly provided that the flat owners has full right to make any addition, alteration within the walls of the flats without damaging the existing walls, roofs, etc. Thus, it clearly indicates that they are fully aware of the same and are bound by such terms. It is, therefore, clear that the defendant, whose wife was owner of Flat No. 102, who has purchased the flat in the name of his wife, (in other words, his wife is owner of Flat No. 102), is fully aware of the area sold and that the common area is for use of all the flat owners. He is also aware of the fact that the construction or making addition or alteration is permitted only within the walls of the constructed area and not beyond that and that the constructed area is 37.16 sq. mts. only and the undivided share in the land measuring 24 sq. mts., is a common space open for use of all the flat owners.

12. It is pertinent to point out that admittedly, construction in the shape of wall was not raised within the walls of the constructed area measuring 37.16 sq. mts. sold to him or his wife. The allegations of encroachment are against the defendant that he has encroached the open land. A suit for injunction is maintainable against the person, who has raised illegal construction or has shown to have done some unauthorized act or has encroached the open area. Therefore, I find that the objection that the suit was bad for non-joinder is not attracted in the present case. Photocopy of the sale deed was filed by the defendant, which was not disputed by the plaintiff and thus, it was his own document regarding which now he now cannot take u-turn that the same was not admissible as evidence being a photocopy.

13. Insofar as provision of Section 25 (3) and (4) of the U.P. Apartment (Promotion of Constructions, Ownership and Maintenance) Act, 2012 is concerned, suffice to note that the same is in respect of an offence or is criminal in nature and refers to the offence that may have been committed by a person. It is a civil suit for injunction regarding encroachment on common open area. The criminal aspect of any act of a person is a different aspect and for this reason alone it cannot be said that the suit for injunction was not cognizable by the civil court against the private individual, who, according to him, was not the owner of the flat.

14. It is not in dispute that the society was registered during pendency of the suit. Even otherwise, at the instance of the appellant no issue was framed on this ground and even in appeal the same was not raised or insisted upon for framing of points of determination.

Therefore, the same cannot be agitated now. Even otherwise, I do not find that this question is a substantial question of law, which is attracted or is required to be answered or requires a decision of this Court in the present appeal, when as per his own document, the defendant was not the owner of the space / property in dispute and has encroached upon the common area open for use of the flat owners of the society, which was ultimately registered during pendency of the suit and defect, if there was any, was removed during pendency of the suit.

15. Insofar as Section 43 of RERA, 2016, which came into force during pendency of the suit is concerned, suffice to note that the order was not passed by the RERA authority under the Act and therefore, the aforesaid provision of the Act is not attracted in the present case, which has arisen out of the suit for injunction instituted in a civil court. Even otherwise, all such grounds were not taken before the trial court or the lower appellate court and I am not inclined to entertain the same.

16. The law is settled that the plaintiff is 'dominus litis' and therefore, it is his discretion to add a party to implead any person. In case no relief is being claimed against any person, he is the best Judge to see against whom he is claiming relief and he cannot be pressed to add party against whom he does not want to fight unless it is the compulsion of the rule of law. In other words, he may choose the persons against whom he wishes to litigate.

17. A reference may be made to judgment of Hon'ble Supreme Court in **Mumbai International Airport Private Limited vs. Regency Convention Centre and Hotels Private Limited and others 2010 (7) SCC 417**, paragraphs 13 to 15 whereof are quoted as under:-

"13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure (`Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"10 (2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who

ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A `necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a `necessary party' is not impleaded, the suit itself is liable to be dismissed. A `proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance." *(Emphasis Supplied)*

18. Same view was expressed by the Hon'ble Supreme Court in **Gurmit Singh Bhatia Vs. Kiran Kant Robinson and others 2019 AIR (SC) 3577** after considering earlier law in paragraph 5.2 it was held as under, extract whereof is quoted as under: -

"..... The Plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the plaintiffs." (emphasis supplied)

19. A reference may be made to judgment of Hon'ble Supreme Court in the case of **Kasturi vs. Uyyamperumal 2005 (6) SCC 733**, wherein the Hon'ble Supreme Court has considered the principle of dominus litis. This judgment was recently relied on by Hon'ble Supreme Court in the case of **Gurmit Singh Bhatia vs. Kiran Kant Robinson and others 2020 (1) ARC 381.**

20. In the present case the plaintiff was not seeking relief against the wife of the defendant, who may be the owner of Flat No. 102 and the allegation was against the defendant that he has encroached upon the common area, may be in active support of his immediate family members i.e. wife and son, as such wife of the defendant was not a necessary party to the suit and it cannot be said that the suit is bad for non-joinder of necessary parties.

21. A Constitutional Bench of 5 Judges of Hon'ble Apex Court in **Sir Chunilal vs. Mehta and sons Ltd vs. Century Spining and Manufacturing Co. Ltd AIR 1962 SC 1314** has considered the question 'as to what is the substantial question of law'. Various judgments of High Courts and Full Bench were considered by the Hon'ble Constitutional Bench and it was held that if the question is settled then it would not be a substantial question of law. Paragraph 6 of the aforesaid judgment is quoted as under:-

"6. We are in general agreement with the view taken by the

Madras High Court and we think that while the view taken by. the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law." (emphasis supplied)

22. Therefore, it is clear that merely because in the substantial questions of law so framed in the memo of appeal involving interpretation of any particular provision of the law by itself could not be substantial questions of law.

23. In the opinion of this Court, no substantial question of law is involved in the present appeal, which requires any interpretation by this Court in view of the law laid down by Hon'ble Apex Court in **Sir Chunilal vs. Mehta and sons Ltd (supra)** and the questions framed in the memo of appeal, even if are treated to be questions of law, they are not open to interpretation.

24. I have already considered this issue in the case of **(Harihar Tiwari vs. Kshetriya Sri Gandhi Ashram (Second Appeal No. 94 of 2020)** decided on 27.1.2020.

25. For the discussions made hereinabove I find that no substantial question of law is involved in the present case.

26. The appeal is devoid of merits and is accordingly dismissed.

(2020)08ILR A310
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Second Appeal No. 277 of 2020

Yogendra Pal Singh ...Appellant
Versus
Hari Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Arjun Singhal, Sri Sunil Kumar Singh

Counsel for the Respondents:

(A) Civil Law - Code of Civil Procedure ,1908 - Plaintiffs-respondents filed a suit for permanent injunction against the defendant-appellant - ground - they are the owners of the property in question - on the basis of a registered sale deed executed in favour of their father - defendant-appellant is trying to dispossess them - trial Court allowed the suit for injunction - ground - receipt does not confer any right or title to the defendant - failed to prove the possession - suit decreed by the trial Court - appeal filed by the defendant was dismissed by the lower appellate court. (para -3)

HELD:- No substantial questions of law arise in the present second appeal and the other

questions that have been framed in the memo of appeal are related to the findings of facts. The findings recorded by the courts below are not perverse in nature so as to attract any substantial question of law. (Para - 23)

Second Appeal dismissed. (E-7)

List of Cases cited:-

1. St. of U.P. Vs D.J. & ors., AIR 1997 Supreme Court 51

2. M/S Sada Ram Ganga Pd. Vs U.O.I., AIR 1982 Allahabad 246

3. Sir Chunilal vs. Mehta & sons Ltd Vs Century Spining and Manufacturing Co. Ltd, AIR 1962 SC 1314

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the defendant-appellant and perused the record.

2. Present appeal has been filed challenging the judgement and decree dated 17.1.2020 passed by Additional District Judge, Amroha in Civil Appeal No. 78 of 2018 by which appeal filed by the defendant-appellant, arising out of judgement and decree dated 25.8.2018 passed by the Civil Judge (Sr. Division), Amroha decreeing the suit of the plaintiff-respondent, was dismissed.

3. The plaintiffs-respondents filed a suit for permanent injunction against the defendant-appellant on the ground that they are the owners of the property in question on the basis of a registered sale deed dated 13.9.1971 executed in favour of their father and the defendant-appellant is trying to dispossess them. The defendant-appellant came out with a case that half of the property was sold by father of the plaintiffs-respondents to the father of the defendant-appellant and a receipt dated 6.12.1971 was executed. It was asserted that the possession was handed over to the defendant-appellant and he is in possession over the property in question. The registered sale deed dated 13.9.1971 was filed by the plaintiffs-respondents and the defendant-appellant filed the receipt dated 6.12.1971, for a sum of Rs. 520/- which is also on record as paper no. 22-Ga. The boundaries of the property have been shown in the receipt. The trial Court allowed the suit for injunction on the ground that the receipt does not confer any right or title to the defendant and he has also failed to prove the possession. It was asserted that the documentary evidence in respect of the possession i.e. photographs and other receipts etc. could not prove that the same are in respect of the property in question as it was admitted by the defendant that he has several properties in the village and the electricity bill and other connection receipts etc. could not establish their possession over the property in question or that they are in respect of the property in question. It was also found that the defendant is alleging the transfer of the immovable property, however, alleged receipt dated 6.12.1971, which is being claimed to be a sale deed, is not registered as required under Section 17 of the Indian Registration Act, 1908 and therefore, the same is not a valid document in law regarding transfer of immovable property for consideration. The suit was decreed by the trial Court and the appeal filed by the defendant was dismissed by the lower appellate court.

4. Challenging the impugned judgment, submission of learned counsel

for the appellant is that the defendant-appellant is in possession over the property in question since 6.12.1971 and he has been residing there since then. He further submits that the courts below have committed gross mistake of law in rejecting and discarding receipt the paper no. 22-Ga dated 6.12.1971, which was about 30 years old. The possession over the property in question has been duly proved. Submission is that the findings recorded by the courts below are wholly perverse in nature. Attention was also drawn to the substantial questions of law framed in the memo of appeal. In support of the arguments the provisions of Sections 17 and 49 of the Indian Registration Act, 1908 and Section 53-A of the Transfer of the Property Act, 1882 were also referred to. Submission is that even if the document / receipt dated 6.12.1971 is not a registered document, still in view of the provisions of Section 49 of the Indian Registration Act, 1908, the same can be looked into as evidence of any collateral transaction not required to be effected by registered instrument. He submits that the defendant-appellant is in possession since 6.12.1971 and his possession cannot be disturbed by the plaintiffs-respondents and the said document is binding on the parties. He has placed reliance on a judgement of Hon'ble Apex Court rendered in the case of *State of Uttar Pradesh vs. District Judge and others*, AIR 1997 Supreme Court 51 (paragraph 6). He further submits that issue regarding possession of the defendant-appellant should have been framed and thus, the matter is liable to be remanded back for framing such issue and deciding the same on merits. In support of this argument, he has placed reliance on a judgment of Hon'ble Single Judge of this Court in M/S Sada Ram Ganga Pd. vs. Union of India AIR 1982 Allahabad 246.

5. I have considered the submissions of learned counsel for the defendant-appellant and perused the record as well as the substantial questions of law framed in the memo of appeal, which are quoted as under:

"(A) Whether a suit of injunction can be decreed in the events the plaintiff has failed to prove and establish averments regarding his possession and ownership over land in dispute made in plaint and courts below have committed illegality in decreeing the suit.

(B) Whether plaintiff who has not come with clean hands in filing injunction suit against defendant, miserable failing in establishing prima facie case, balance of convenience and irreparable injury, the decree of injunction passed by courts below is sustainable in the eyes of law.

(C) Whether section 17 of Indian Registration Act 1908 completely prohibits reliance on unregistered document as has been observed by court below and the decree passed in consequence is sustainable.

(D) Whether the defendant appellant's possession for about 30 years over land in dispute, which has been duly proved and established can be ignored in passing decree of injunction against him.

(E) Whether the decree passed by courts below based on misreading and misinterpreting of evidence placed on record is sustainable in the eyes of law.

(F) Whether the burden of proving plaintiff case having been wrongly shifted on defendant and decree passed thereafter is liable to be sustained.

(G) Whether the suit of injunction preferred after 30 years is barred by limitation and decree passed is liable to be sustained."

6. That apart, learned counsel for the appellant further submits that one more substantial question of law arises in the present case is as to whether the possession of the defendant-appellant can be disturbed in view of provisions of Section 53-A of the Transfer of Property At, 1882?

7. In the present case, the execution of the registered sale deed dated 13.9.1971 executed in favour of the father of the plaintiffs-respondents is not in dispute. The case of the defendant-appellant is that he is owner in possession on the basis of the receipt dated 6.12.1971 paper no. 22-Ga. The case of the plaintiffs-respondents is that by registered sale deed, which is more than 30 years old, the plaintiffs-respondents are the owners in possession. The defendant-appellant claims that half of the property as per boundaries shown in the receipt dated 6.12.1971 was sold by Rampal Singh, Nathhu Singh and Hari Singh s/o Bannu Singh, father of the plaintiffs-respondents to Shiv Nath singh, father of the defendant no. 2 for a sum of Rs. 520/-. Thus, according to him, the receipt dated 06.12.1971 is, in fact, a sale deed though unregistered, by which specific property was sold for consideration.

8. Before proceeding further, it would be relevant to take note of certain provisions of law.

9. Section 53-A of the Transfer of Property Act, 1882 is quoted as under:

"53-A. Part performance- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part, performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

(Emphasis supplied)

10. Section 49 of the Registration Act is quoted as under:

"49. ***Effect of non-registration of documents required to be registered.-*** *No document required by section 17 [or*

by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) 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 by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.]

(Emphasis supplied)

11. State Amendment (Uttar Pradesh) of the Registration Act, 1908 is also quoted as under:

(i) in the first paragraph, after the words "or by any provision of the Transfer of Property Act, 1882", insert the words "or of any other law for the time being in force."

(ii) for clause (b), substitute the following clause, namely

"(b) confer any power or create any right or relationship, or";

(iii) in clause (c), after the words "such power", insert the words "or creating such right or relationship";

(iv) in the proviso, omit the words "as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or".

(vide Uttar Pradesh Act 57 of 1976, sec. 34 (w.e.f. 1.1.1977).

(Emphasis supplied)

12. It would be relevant to note that the words " or by any provision of the Transfer of Property Act, 1882" were added by Act 21 of 1929 (Section 10).

13. It would be pertinent to note that the words, "or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act 1882" were omitted by Act 48 of 2001 section 6 (w.e.f. 24.09.2001).

14. It is not in dispute that this receipt is not a registered document. Undisputedly, the defendant-appellant is claiming that this is in fact a sale deed although not registered. It is also not in dispute that this receipt is for a sum of Rs. 520/- and is allegedly for a sale of immovable property worth above Rs. 100/-. In case it is a receipt for transaction towards sale of immovable property, the document was required to be registered under Section 17 of the Indian Registration Act, 1908.

15. Thus, clearly, reference to Section 49 of the Registration Act 1908 is of no help to the defendant-appellant.

16. Insofar as Section 53-A of the Transfer of Property Act, 1882 is concerned, it clearly provides that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the

transferee has, in part performance of the contract, taken possession of the property or any part thereof.

17. It would be appropriate to note the contents of receipt dated 6.12.1972, which are quoted as under:

मैं कि आज बतारीख 6 दिसंबर 1972 ई0 को रामपाल सिंह व नत्थू सिंह व हरी सिंह पुत्र बन्नू सिंह कौम चौहान पेशा खेती ग्राम गजाना परगना अमरोहा जिला मुरादाबाद ने बदस्त शिवनाथ सिंह पुत्र जगत सिंह कौम चौहान पेशा खेती ग्राम गजाना के हाथ 520 पांच सौ बीस जिसके आधे दो सौ साठ 260/- रु0 होते है नकद रु0 वसूल पाकर यह रसीद टिकट चस्पा लिख दी किवत्ता पर काम आवे और सन्द हो जिसका हट व चौहदी आधी इस प्रकार है पूरब का हिस्सा-रामपाल सिंह व नत्थू सिंह व हरि सिंह-पश्चिम में विश्व नाथ सिंह का हिस्सा है। चौहद्दी-उत्तर जालम सिंह का बाग

दक्षिण रास्ता
पच्छिम- गौकहा सिंह ग्राम समाज
पूरब-सिपाही सिंह

18. A bare glance over the receipt would clearly reflects that the terms necessary to constitute the transfer are not ascertainable. There is not a single word that any property is being transferred and the receipt is towards the consideration received for transfer of certain property. In other words, receipt could have been given for any purpose whatsoever, may be for covering a loan taken by persons who have executed the receipt. Neither the term sale nor any term indicating handing over of the possession have been mentioned in the aforesaid receipt. It is noticeable that case of the defendant-appellant is that he is in possession of the property in question since 06.12.1971 (i.e. the date of receipt) when possession was handed over to him. This receipt is, therefore, on a plain reading, does not refer to any transaction or contract to transfer any immovable property. The word 'sale' is nowhere mentioned in the receipt and there is no mention of handing over of the possession of the property mentioned in the receipt. Therefore, the provisions of Section 53-A of the Transfer of Property Act,1882 are not attracted in the present case as the necessary ingredients thereof are clearly missing in this case.

19. Insofar as the possession is concerned, a categorical case of the plaintiffs-respondents is that they are in possession over the property in dispute through a registered sale deed dated 13.9.1971 executed in favour of their father. Various documents in the shape of electricity connection and other receipts filed before the trial Court by the defendant-appellant were disbelieved by the trial Court on the ground that the defendant-appellant has himself admitted that he has several properties in the village and this receipt filed by the defendant-appellant are not indicative of the fact that they are in respect of the property in dispute. Even otherwise, such receipts, bills etc. are not conclusive proof of actual possession. Therefore, clearly, while deciding the issue no. 1, whether the plaintiffs are owner in possession of the property in question, it was rightly held that plaintiffs are in possession over the property in dispute. The question, therefore, in respect of the possession of the defendant over the property in dispute, has been duly considered by the trial court while deciding the issue no. 1 by disbelieving the evidence, documentary as well as oral given by the defendant-appellant and this finding has been rightly affirmed by the lower appellate court.

20. Insofar as other questions involved in the present case is concerned, much emphasis was given before this Court as to whether this receipt was necessarily required to be a registered document or not. This question has already been decided against the defendant-appellant by both the courts below. However, in view of the fact that the alleged receipt dated 6.12.1971, which was being claimed by the defendant-appellant to be a sale deed, nowhere mentions that it is a sale deed and the property in question is being transferred for consideration to the father of the defendant-appellant. Therefore, the reference to question relating to Section 17 of the Indian Registration Act, 1908 cannot be said to be substantial question of law involved in the present case. From the alleged receipt, nature of the transaction is not at all clear and it cannot presume or could not be proved by any other document that this transaction was in fact a transaction of sale for consideration or even the possession of the property in dispute was handed over to the father of the defendant-appellant.

21. A Constitutional Bench of 5 Judges of Hon'ble Apex Court in *Sir Chunilal vs. Mehta and sons Ltd vs. Century Spining and Manufacturing Co. Ltd AIR 1962 SC 1314* has considered the question 'as to what is the substantial question of law'. Various judgments of High Courts and Full Bench were considered by the Hon'ble Constitutional Bench and it was held that if the question is settled then it would not be a substantial question of law. Paragraph 6 of the aforesaid judgment is quoted as under:-

"6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by. the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law." (emphasis supplied)

22. Therefore, it is clear that merely because in the substantial questions of law so framed in the memo of appeal involving interpretation of any particular provision of the law by itself could not be substantial questions of law.

23. I have already noticed and has also gone through substantial questions of law framed in memo of appeal. I find that no substantial questions of law arise in the present second appeal and the other questions that have been framed in the memo of appeal are related to the findings of facts and I do not find that the findings recorded by the courts below are perverse in nature so as to attract any substantial question of law.

24. I am of the opinion that no substantial question of law is involved in the present second appeal and the case is covered by the concurrent findings of fact recorded by the courts below.

25. Appeal is devoid of merit and is accordingly dismissed at the admission stage itself.

(2020)08ILR A317
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.06.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 567 of 1995

Indraj Singh ...Appellant
Versus
Kashi Ram ...Respondent

Counsel for the Appellant:
Sri H.N. Sharma, Sri Akhtar Ali, Sri Anupam Kulshreshtha, Sri Manish Mishra, Sri Ram Lal Mishra

Counsel for the Respondent:
Sri Pramod Jain, Sri R.P. Srivastava

(A) Civil Law - Code of Civil Procedure ,1908 - Section 100 CPC - case of an opportunity lost - Suit for Specific Performance - Order LXI Rule 11, - Specific Relief Act - Section 26(1)(b) & (c) read with sub-Sections (2) and (4) of Section 26 - Indian Evidence Act - Section 92 - Limitation Act of 1908 - Order XLI Rules 23 - Remand of case by Appellate Court and Rules 23-A - Remand in other cases - Order XLII Rule 1, read in conjunction with Order XLI Rules 16 and 31 CPC. - Indian Evidence Act - Section 92, Section 101 - no law that makes it incumbent upon the Lower Appellate Court to decide the point relating to rectification, in terms of the order of remand, which the appellant did not urge . (Para-47)

Suit for Specific Performance of an agreement to reconvey the suit property and recovery of possession - defendant is the appellant before the Lower Appellate Court - unsuccessful in the first instance before the Lower Appellate Court - carried a second appeal to this Court - secured a remand with a direction to decide the point regarding his plea relating to rectification of the contract, subject matter of action - plea was to be decided bearing in mind the provisions of Section 26 of the Specific Relief Act and Section 92 of the Indian Evidence Act. - At the hearing, the defendant who secured the order of remand in the earlier second appeal did not address the Court on the point that the Lower Appellate Court was ordered to decide - Rather, he appears to have addressed the Court on other points, all of which were decided against him. (Para - 47)

HELD:- It is, therefore, not open to the defendant to ask this Court to decide those substantial questions of law, based on a point that he did not at all canvass at the hearing of the appeal before the Lower Appellate Court. Indeed, it is a case of an opportunity lost. This Court, therefore, refrains from answering the two substantial questions of law under reference. (Para - 48)

Second Appeal dismissed. (E-7)

List of Cases cited:-

1. St. of Mah. Vs Ramdas Shrinivas Nayak & anr., AIR 1982 SC 1249.

2. Konappa Mudaliar Vs Kusalaru @ Munuswami Pillai, AIR 1970 MAD 328

3. Nair Service Society Ltd. Vs K. C. Alexander & ors., AIR 1968 SC 1165

4. Rama Kant Vs Board of Revenue & ors., 2005 1 AWC 929 All

5. Bal Govind Lohia Vs Narayan Prasad Lohia & ors, (2009) 17 SCC 349

6. A.P. SRTC Vs S. Jayaram, (2004) 13 SCC 792

7. Thakur Sukhpal Singh Vs Thakur Kalyan Singh & anr., AIR 1963 SC 146

(Delivered by Hon'ble J.J. Munir, J.)

1. "You can lead a horse to water but you can't make it drink'. The facts of this case bear reaffirming testimony to the wisdom of this proverb.

2. This is a defendant's Second Appeal arising from a Suit for Specific Performance of an agreement to reconvey the suit property and recovery of possession. The suit property is agricultural land bearing *Khasra* no.694, admeasuring 2 *bigha*, 9 *biswa* and 3 *biswansi*, situate at Mauza Rampur, *Pargana* and District Muzaffar Nagar.

3. The Appeal has been brought by the defendant, Indraj Singh from the appellate decree of Sri Ram Surat, the then Second Additional District Judge, Muzaffar Nagar, dated 31.03.1995, dismissing Civil Appeal no.234 of 1976 with costs, and affirming an original decree of Sri D.C. Srivastava, the then Additional Civil Judge, Muzaffar Nagar, dated 27.08.1976, decreeing with costs Original Suit no.64 of 1974 for the relief mentioned hereinbefore.

4. The decree of the Court of first instance was affirmed earlier by the Lower Appellate Court in Civil Appeal no.234 of 1976 by its judgment and decree of 30th April, 1977. The said decree was set aside by this Court in Second Appeal no.1732 of 1977 with an order of remand to the Lower Appellate Court requiring the appeal to be decided afresh. It is in consequence of the order of remand made by this Court in the Second Appeal, last mentioned that the impugned appellate decree has come to be passed.

5. The defendant who has failed before the Lower Appellate Court, a second time, has brought the present Second Appeal.

6. Kashi Ram, the plaintiff-respondent (for short the plaintiff) instituted Original Suit no.64 of 1974 with allegations to the effect that the defendant on the plaintiff's request lent him a sum of Rs.2500/-. The plaintiff could not repay the debt. Rather, he was in further need of Rs.2000/- that led him to request the defendant again. The defendant agreed to lend a further sum of Rs.2000/- on condition that the suit property be conveyed by the plaintiff to the defendant for a period of three years with a covenant that if within this period of three years, the plaintiff would liquidate the debt by repaying a sum of Rs.7000/- to the defendant, the defendant shall reconvey the suit property in favour of the plaintiff by a registered conveyance, and that thereupon the entire debt, the principal and accrued interest included, shall stand discharged. It is the plaintiff's case that he needed the money, and, therefore, agreed to the terms. The plaintiff, in consequence, executed a registered sale deed dated 27.07.1971 transferring the suit property in favour of the defendant. The sale deed carried a recital that a sum of Rs.7000/- has been advanced by the defendant. It is pleaded that the plaintiff received a sum of Rs.4500/- (and not Rs.7000/-) in the manner that Rs.2500/- were received by the plaintiff as loan from the defendant, and further that Rs.2000/- (also by way of loan) were received by the plaintiff from the defendant. Thus, according to the plaintiff, he received a total sum of Rs.4500/- in loan from the defendant. The plaintiff's case is that a sum of Rs.7000/- was shown as consideration in the sale deed, where the additional sum of Rs.2500/- accounts for the interest payable on the principal of Rs.4500/-, which the plaintiff had promised to pay back within the time period of three years. The plaint case shows that the

plaintiff was to remain in possession of the suit property.

7. There is a pleading also to the effect, on behalf of the plaintiff, that the defendant secured the plaintiff's thumb impressions on some blank papers. The plaint case then proceeds that contemporaneously with the execution of the sale deed dated 27.07.1971 in favour of the defendant by the plaintiff, an agreement dated 27.07.1971 was also executed between the plaintiff and the defendant, where the defendant agreed to reconvey the suit property to the plaintiff on the following conditions:

"(a) that in case the plaintiff or his heirs paid a sum of Rs.7000/- to the defendant or his heirs, the defendant or his heirs would execute a sale deed in favour of the plaintiff or his heirs (reconvey the suit property);

(b) the expenditure towards execution of the sale deed (re-conveyance) would be borne by the plaintiff;

(c) in the event the defendant or his heirs showed any slackness or refuse to execute a deed of re-conveyance to the plaintiff or his heirs, it would be open to the plaintiff to enforce execution of the sale deed (re-conveyance) through an action brought for the purpose in Court; and

(d) it was also covenanted that in the eventuality of the plaintiff failing to get a sale deed executed in his favour, on or before 26.07.1974, the rights of the plaintiff to enforce re-conveyance would be extinguished."

8. It is then pleaded in paragraph no. 4 of the plaint that the plaintiff asked the defendant to receive the contracted sum of Rs.7000/- and execute a sale deed in favour of the plaintiff, but to no avail. The plaintiff was, therefore, compelled to serve a notice dated 14.06.1974 through his learned Advocate by registered post calling upon the defendant to execute a sale deed and get it registered in favour of the plaintiff, upon receipt of the contracted sum of Rs.7000/-. The notice aforesaid fixed 15th July, 1974 as the date on which the defendant may execute the sale deed. It is the plaintiff's case that the said notice was answered by the defendant taking an incorrect stand that it was agreed between parties that in addition to the sum of Rs.7000/-, interest would also be payable, which amounted to Rs.6,350/-. It is pleaded specifically that no such term regarding payment of interest was ever contracted by parties.

9. It is averred that on 15th July, 1974, the plaintiff with Rs.7000/- in hand to be paid to the defendant, along with requisite expenses for the execution of a sale deed, went to the office of the Sub-Registrar, Muzaffar Nagar, but the defendant did not turn up. Thereupon, the plaintiff also made an application to the Sub-Registrar. It is specifically pleaded in paragraph no. 7 of the plaint that the plaintiff has always been ready and is still ready to get the sale deed executed, and further that he has always been ready and is still ready to perform his part of the contract. However, faced with a denial by the defendant, the plaintiff brought this suit for Specific Performance of the agreement to reconvey. Further, relief for recovery of possession of the suit property was sought that in case the Court comes to the conclusion that the plaintiff is not in possession, he may be delivered possession.

10. The defendant in his written statement has denied the plaintiff's case on allegations that it is incorrect to urge that the plaintiff received Rs.4500/- only. It is averred that Rs.5000/- were advanced to the plaintiff initially and Rs.2000/- were paid before the Sub-Registrar. It is pleaded that it was covenanted between parties that interest would be chargeable on the sum of Rs.7000/- at the rate of Rs.2/- per *mensem*, payable annually. It is also pleaded that in the event of default in the payment of interest, compound interest would become chargeable. The defendant has admitted that it was agreed between parties that the plaintiff would retain possession of the suit property for three years and that he will bear expenses of the sale deed (re-conveyance), which was covenanted to be executed within the time period of three years. In the event of default on the plaintiff's part to get a deed of re-conveyance executed in his favour, he would loose his right to secure re-conveyance of the suit property. It is pleaded by the defendant that he was entitled to receive a sum of Rs.13,350/- on account of the transaction, but the plaintiff was not willing to pay the aforesaid sum of money. The plaintiff offered a sum of Rs.7000/-, in consideration for the re-conveyance contracted. It is, therefore, claimed that there was breach of the plaintiff's part of the agreement to reconvey the suit property. It was also pleaded that the plaintiff was not willing to get the sale deed executed. The fact that expenses to secure the deed of re-conveyance were to be borne by the plaintiff, is not disputed. But, the other plea that the defendant had secured the plaintiff's thumb impression on several blank papers was denied. Then there is this crucial plea in the written statement that the agreement to reconvey the suit property does not express the entire agreement between parties, or their intention in all its fullness and detail. The agreement is liable to be rectified. It is also the defendant's case that in the event the agreement to reconvey is rectified to bring it in accord with the true intention of parties, the plaintiff would loose his right to re-conveyance on the terms that he has pleaded. It is the further case of the defendant that he did appear before the Sub-Registrar on 15.07.1974, where he met the plaintiff. The plaintiff wanted an extension of time for performance of the suit agreement which was not acceptable to the defendant. It is, thus, the defendant's case that the plaintiff committed breach of contract. Upon the plaintiff refusing to get the property re-conveyed, the defendant took possession of the suit property. The suit property was mutated in the defendant's name, who is in possession. On the strength of the aforesaid case, the defendant asked the suit to be dismissed.

11. Based on the pleadings of parties, the following issues were struck:

"1. Whether the defendant agreed to pay interest at the rate of Rs.2% per month as alleged in para II of the W.S. on the amount of Rs.7000/- the sale consideration and the property in suit was to be reconveyed to the plaintiff on the said conditions as alleged in para 11 of the W.S.?

2. Whether the plaintiff or the defendant committed the breach of the terms of the agreement for sale in suit dated 7.7.1971 as alleged?

3. To what relief, if any, is the plaintiff entitled?

4. Whether the plaintiff is in possession on the plot in suit?

5. Whether the agreement for resale in suit is liable to be rectified for

the reasons mentioned in para 3 of the W.S. 13 Ka?"

12. The Trial Court decided issue no.4 in favour of the defendant holding him to be in possession. Issues nos.1 and 5 were dealt with together by the Trial Court and answered in the manner that the 5th issue was decided against the defendant, holding that the agreement to reconvey was not liable to be rectified, and likewise, issue no.1 also was decided against the defendant holding that there was no covenant to pay interest or compound interest, over and above the sum of Rs.7000/-, as a condition precedent to re-conveyance. In answer to issue no.2, the Trial Court considered the question of readiness and willingness and held in favour of the plaintiff with an answer to the issue in terms that it was the defendant who committed breach of the contract to reconvey. On these findings, the Trial Court decreed the suit.

13. Aggrieved, the defendant preferred Civil Appeal no.234 of 1976 to the District Judge, Muzaffar Nagar. This appeal on assignment came up for determination before the llnd Additional District Judge, Muzaffar Nagar on April, 30th, 1977. The learned Additional District Judge by his judgment and decree dated 30.04.1977 dismissed the appeal with costs, and affirmed the Trial Court.

14. The defendant dissatisfied, carried a Second Appeal to this Court being Second Appeal no.1732 of 1977. The appeal was allowed by this Court vide judgment and order dated 26.03.1993, setting aside the decree of the Lower Appellate Court with a remand to that Court to hear and decide the appeal afresh in accordance with law. The decision on remand was to be rendered bearing in mind the guidance in the judgment of this Court.

15. Civil Appeal no.234 of 1976 was, thus, restored to file of the Lower Appellate Court, and heard afresh. The Lower Appellate Court by its judgment and decree dated 31.03.1995 has dismissed the appeal with costs and affirmed the Trial Court, again. It is against this decree of the Lower Appellate Court that the defendant is now in Appeal.

16. At the time when this Appeal was heard under Order LXI Rule 11 CPC, the following order was passed on the memorandum of Appeal, on 18.05.1995:

"Heard learned counsel for the appellant.

It is argued that the Ist appellate Court has failed to comply with the directions given by this Court in the remand order dated 26.3.93 which is Annexure 3 to the stay application.

Second appeal is admitted.

Issue notice."

17. Heard Sri Anupam Kulshreshtha, learned Counsel for the defendant and Sri Pramod Jain, learned Senior Advocate assisted by Sri R.P. Srivastava, learned Counsel appearing on behalf of the plaintiff. During the course of hearing on 13.03.2019, though much was made by Sri Anupam Kulshreshtha about the manifest error of law committed by the Courts below in patently misconstruing the provisions of Section 26(1)(b) & (c) read with sub-Sections (2) and (4) of Section 26 of the

Specific Relief Act, it was pointed out by this Court to learned Counsel appearing for the parties that there was no substantial question of law framed on this point at the time of admission of this Appeal to hearing. Accordingly, on 13.03.2019, the following substantial question of law was framed by this Court:

"Whether rectification to an instrument based on a plea of fraud or mutual mistake of the parties can be sought by the defendant in a suit relating to a right arising under such instrument without a specific plea in the written statement to that effect?"

18. It must be remarked here that the order dated 13.03.2019 mentions that the question above extracted is being framed as a further substantial question of law, that arises for consideration in this Appeal, apart from the question on which this Appeal has been admitted. This order came to be passed on the assumption that this Court's note of the argument advanced by the learned Counsel for the defendant constituted a substantial question of law as recorded in the order dated 18.05.1995, admitting the Appeal to hearing. But, a little further into the hearing, it was agreed by learned Counsel for both parties that the order of admission passed by this Court on 18.05.1995, in fact, did not frame any substantial question of law or was any other substantial question of law framed later, on which this Appeal could be heard except the one framed on 13.03.2019.

19. This Court also finds that the order dated 18.05.1995 does no more than to take notice of the submissions of the learned Counsel in support of the motion to admit this Appeal to hearing, but does not frame any substantial question of law. The learned Counsel appearing for both sides, therefore, by agreement limited and confined their submissions to the substantial question of law extracted above, until conclusion of hearing on 26.04.2019 when judgment was reserved. Notwithstanding the very comprehensive submissions of parties on the substantial question of law under reference, it appeared to this Court that certain vital aspects of the matter that stemmed from the substantial question of law on which parties had so elaborately addressed, required clarification. Accordingly, this appeal was posted for further hearing on 20.01.2020. It was heard on 23.01.2020 for a short while and then again on 03.02.2020. On 03.02.2020, two other substantial questions, that are an inseparable part of the one framed on 13.03.2019, were further framed for reasons assigned. The relevant part of the order dated 03.02.2020 framing the two additional substantial questions of law, numbered as questions nos. (1) and (2) is extracted below:

"During the course of hearing, certain clarifications were required of the learned counsel appearing for the parties regarding non decision of the issue about rectification of the agreement by the Lower Appellate Court on the basis of oral evidence, that being the purpose for which this matter was remanded to the Lower Appellate Court by this Court, vide judgment and order dated 26.03.1993, passed in Second Appeal No. 1732 of 1977. There was also this issue about the standard by which a plea seeking rectification on ground of mutual

mistake to a solemn document of parties ought to be proved. This question arose also during the course of hearing. This Court finds that for the effective disposition of this appeal, two additional questions are required to be framed further for the reasons given above. These reasons have been recorded bearing in mind the decision of Supreme Court in Vijay Arjun Bhagat and others vs. Nana Laxman Tapkire and others 2018 (6) SCC 727. In the opinion of this Court, the following additional substantial questions of law arise for consideration in this appeal:

"(1) Whether in the event of remand to the first Appellate Court requiring it to decide a certain point, or issue arising between parties, the Appellate Court is bound to decide the said question, even if the party being the appellant before it, does not urge the point on which the matter has been remanded to the first Appellate Court?

(2) Whether in the case of a plea of mutual mistake under Section 26(1) (c) of the Specific Relief Act being raised by the defendant, the defendant is required to prove the case of mutual mistake by the most satisfactory evidence of a very(sic high) standard?

.....…"

20. At the resumed hearing on 03.02.2020, learned Counsel for the parties addressed this Court very elaborately on all the substantial questions of law, including the one on which they had earlier been heard. The hearing remained inconclusive on that date and was adjourned to 10.02.2020. On 10.02.2020, this appeal was adjourned without hearing to 18.02.2020. On the last mentioned date, learned Counsel for both sides concluded their submissions, and judgment was reserved.

21. Sri Anupam Kulshreshth, learned Counsel for the defendant and Sri Pramod Jain, learned Senior Advocate for the plaintiff, very elaborately addressed this Court on the requirements of Section 26(1)(b) & (c) read with sub-Sections (2) and (4) of the Specific Relief Act, asking this Court to answer the substantial question of law framed on 13.03.2019 and the second question framed on 03.02.2020, in the manner urged by them. Before, this Court may venture to consider those two questions, it would be apposite to place in a different sequence the three substantial questions of law for an answer. The reasons to do so is that an answer to substantial question of law no.(1) framed on 03.02.2020 one way, might obviate the necessity to answer the other two.

22. This Court has carefully perused the judgment of the Trial Court, the judgment in appeal earlier rendered that was set aside by this Court in second appeal with an order of remand, the judgment of this Court in Second Appeal no.1732 of 1977, and, of course, the judgment passed by the Lower Appellate Court, now under appeal. A perusal of the judgment passed by the Trial Court shows that it did address the question relating to rectification of the contract, subject matter of action here. It appears that the issue was elaborately tried by the Trial Court and the parties heard fully, as the judgment reflects. The Trial Court answered issue no.(5) about the defendant's plea for a rectification against him in the following words that appear at the end of a very elaborate finding based on evidence:

"Thus, after considering the entire material on record and the circumstances of the case, I am of the view that there was no agreement to charge interest and compound interest on 24% per annum over Rs.7000/- and that Rs.4500/- only were advanced to the plaintiff. The result, therefore, is that there is no case of mutual mistake and as such the defendant is not entitled to get the agreement for resale rectified. Issue no.(5) is, therefore, answered in negative."

23. A perusal of the judgment earlier rendered in appeal on April, the 13th 1977 shows that rather cryptic findings of affirmation were recorded by the learned Additional District Judge on the issue relating to mutual mistake in the drawing up of the contract, subject matter of action. This Court need not say anything further about that judgment since it has already been set aside in the earlier appeal from the appellate decree by this Court. It is nevertheless of prime importance to look into the terms of the judgment of remand passed by this Court in Second Appeal no.1732 of 1977. This Court while allowing the earlier second appeal took careful note of the defendant's plea about a claimed rectification to the contract which according to him had not been considered by the Lower Appellate Court in the judgment, then under challenge. This Court was of opinion that the plea seeking rectification or reformation of the contract, subject matter of action, required a careful decision by the Lower Appellate Court in view of the provisions of Section 26 of the Specific Relief Act and Section 92 of the Indian Evidence Act. This Court, therefore, ordered a remand to the Lower Appellate Court with a clear guidance that the said Court would decide this point about the claimed rectification by the defendant on the basis of evidence on record. At the same time, the judgment of this Court made open to the parties all other pleas that they may be advised to urge in support of their respective cases. The judgment was, therefore, an open remand to the Lower Appellate Court for decision of the appeal afresh. Nevertheless, the judgment did, particularly, open an opportunity to the defendant to canvass his plea about rectification to the contract, subject matter of action, in terms that he had pleaded. The relevant part of the judgment of this Court in the earlier second appeal is quoted *infra*:

"In para 13 of the written statement the defendant had pleaded that the agreement deed Ext. 1 was rectified as there was an oral agreement for payment of interest. Learned counsel for the appellant has relied section 26 of the Specific Relief Act and section 92 of the Evidence Act. He has also referred to the decision of this Court in Brij Kishore Rai versus Lakhan Tewari AIR 1978 Alld. 314. In the said decision it was held that even if a document is silent as to interest, oral evidence with regard to the terms and conditions of the loan and right of interest should be allowed. He has also referred to Radha Singh versus Munshi Ram AIR 1927 Cal. 605. On the other hand learned counsel for respondent has contended that there was no error of law in the impugned judgment. He has also urged that only a sum of Rs.2000/- was paid to the plaintiff and not Rs.7000/- at the time of sale deed.

So far as amount which was paid to the plaintiff is concerned, a perusal of the sale deed 27.7.71 shows

that there is mentioned that a sum of Rs.5000/- was paid to the plaintiff before execution of the sale deed. Hence, primafacie I cannot accept this contention of the learned counsel for the respondents, although I am not deciding this point finally. In the judgment of the lower court dated 30.4.77 there is no discussion as to whether the version of the defendant-appellant about the alleged oral agreement for payment of interest is correct or not. When there was a specific plea of the defendant-appellant that there was oral agreement regarding payment of interest then the lower appellate Court should have considered this plea on the basis of evidence on record and giving his findings as to whether this plea of the defendant is correct or not. A perusal of the impugned judgment shows that the lower court has not at all considered whether there was an oral agreement for payment of interest or not and it has only observed that since the term and condition for reconveyance are clearly stated in the agreement there is no question of any oral agreement for payment of interest. In my opinion this view of the Court below is not correct and it should have considered the plea about an oral agreement of payment of interest. No doubt after considering the plea the Court below could have held that there was in fact no such oral agreement but the court below could not have ignored this plea totally."

24. The Lower Appellate Court while writing the impugned judgment has dealt with the various points, urged before it by the defendant. The judgment shows that the Lower Appellate Court first considered the defendant's case about the plaintiff's failure to prove his readiness and willingness to perform the part of the contract obliging him. The Lower Appellate Court answered the point against the defendant and in the plaintiff's favour. The next point considered is about the defendant's plea that the suit is premature. This too was answered against the defendant. A third point that has been considered is based on the defendant's plea that time is essence of the contract and the plaintiff did not pay the agreed consideration for re-conveyance within that time. This point has also been answered against the defendant and in the plaintiff's favour. The fourth and the last point urged, as the impugned judgment would show, is about the plaintiff not coming to Court with clean hands. The Lower Appellate Court has found against the defendant on this count, as well.

25. In an unnumbered and the penultimate paragraph of the impugned judgment, the Lower Appellate Court has recorded a specific finding in the following words:

"No other points (sic point) has been argued by the learned counsel for the defendant-appellant."

26. A reading of the judgment impugned from one end to the other, together with the finding above extracted, does not spare any doubt that the defendant did not canvass at all before the Lower Appellate Court his plea based on a case for rectification of the contract.

27. Mr. Kulshreshtha and Mr. Jain appearing for the parties had, during earlier of the two hearings, urged this point about the case of parties regarding rectification of the contract with much emphasis and their characteristic

erudition. Much to the dismay of this Court, the learned Counsel appearing for both parties and the Court too somehow glossed over the fact that this point though fully tried, heard and decided by the Trial Court, was apparently not argued at all before the Lower Appellate Court; and, the defendant does not seem to have argued this point, even though it was the foundation of the judgment of remand earlier passed by this Court, at the instance of the defendant, in second appeal. On account of the aforesaid glitch that occurred during the earlier hearing, causing it to go awry, this Court found it imperative to post the matter for further hearing. At the re-hearing, this Court pointed out to Mr. Kulshreshtha the fact that the defendant had not at all argued the point that was the basis of the judgment of remand. Mr. Kulshreshtha, again in his characteristic fairness, admitted that the point was not argued before the Lower Appellate Court. Mr. Jain too, conceded that this aspect had escaped his attention during the earlier hearing.

28. It is not the case of the defendant before this Court that the point that had been so vociferously argued before this Court during the earlier hearing and formed the basis on which the earlier judgment of remand *inter partes* was founded, was indeed argued but not decided by the Lower Appellate Court. The first and the second grounds set out in the memorandum of appeal, also do not disclose a complaint to the effect that the point relating to rectification, which the Lower Appellate Court was asked by this Court to decide in terms of the judgment of remand, was in fact argued. There is no grievance remotely made in the present appeal, that the Lower Appellate Court has incorrectly recorded for a fact the points canvassed in support of the appeal, or the fact mentioned in the impugned judgment that no other point was urged. This Court is, thus, assured for a fact that the point relating to rectification of the contract, directed to be considered by the judgment of remand, was never pressed before the Lower Appellate Court by the defendant. This satisfaction of the Court is founded on a careful scrutiny of the impugned judgment and the grounds urged in this appeal on the one hand, as also the very fair concession of Mr. Kulshreshtha in this regard, on the other. Upon a note of the most remote caution, this Court finds that a plea to the effect that the point relating to rectification was indeed argued on behalf of the defendant but not decided, even if urged as a ground in the present appeal, could never have been examined by this Court. That could be done by means of a review alone, before the same Judge who has rendered the judgment impugned. The aforesaid principle of law is too well settled to call attention to authority. Nevertheless, an eloquent statement of the principle is to be found in the decision of their Lordships of the Supreme Court in **State of Maharashtra vs. Ramdas Shrinivas Nayak and another, AIR 1982 SC 1249.**

29. Mr. Kulshreshtha, confronted with the aforesaid facts submitted before this Court, that it is for this reason that the order dated 18.05.1995 admitting this appeal refers to the issue whether directions carried in the order of remand, dated 26.03.1993, were observed in breach by the Lower Appellate Court. However, as noticed earlier in this judgment, the order admitting this appeal

to hearing does not formulate any substantial question of law. It is for this reason that this seminal question about the obligation of an inferior Appellate Court to decide the particular point which has been remanded to it by a superior court, escaped attention at the earlier hearing. Mr. Kulshreshtha with reference to substantial question of law no.(1) (the one formulated vide order dated 03.02.2020) submits before this Court that the judgment of the Lower Appellate Court is not only one that is manifestly illegal, but a nullity for the reason alone that it fails to carry out the terms of the order of remand. He submits that notwithstanding the defendant's failure to press the point relating to rectification that this Court required the Lower Appellate Court to decide on remand, it was the Lower Appellate Court's obligation to decide, nevertheless. According to the learned Counsel for the defendant, the Lower Appellate Court was bound by the order of remand to decide the point relating to rectification of contract, with reference to Section 26 of the Specific Relief Act and Section 92 of the Indian Evidence Act, notwithstanding the defendant's silence about it. According to Mr. Kulshreshtha, the Lower Appellate Court was obliged to decide this point, by command of this Court, on the basis of evidence, where the said Court would also be required to examine the validity of the findings of the Trial Court elaborately written on this issue. Learned Counsel for the defendant in support of his submission has called attention of this Court to a decision of the Madras High Court in **Konappa Mudaliar vs. Kusalaru alias Munuswami Pillai**, **AIR 1970 MAD 328**. In paragraph 3 of the report in **Mudaliar** *(supra)*, it has been held:

"3. The question whether it was open to the lower appellate Court to apply the provisions of the Limitation Act of 1963 notwithstanding the order of remand directing it to consider the question from the point of view of Art. 142 of the Limitation Act 1908 presents no difficulty whatsoever. It was not open to the lower appellate Court to do anything, but to carry out the terms of the order of remand, which it has done. Even if it considered that the order of remand made by this Court on the earlier occasion was not in accordance with law, it was not open to that Court to apply what it might consider to be the correct provision of law. The decision of the Supreme Court on which reliance is placed for the appellant was rendered on 12-12-1968. This appeal was disposed of by the lower appellate Court after remand on 26-6-1964. On that date, the only decision that was binding on the lower appellate Court was the decision of the Full Bench of this Court. Therefore, the decision of the lower appellate Court was correct on the facts of the case."
(emphasis supplied)

30. The decision in **Mudaliar** *(supra)* was rendered in the context of facts where the plaintiff had apparently sued for possession of a house that he had purchased from the wife of the owner's son, the owner's son having left his father's house some 13 years before the suit was instituted. The suit was filed against the vendee from the father's widow, that is to say, the mother-in-law of the plaintiff's vendor. The two Courts below had held title in favour of the plaintiff. In earlier appeal to the High Court by the defendant, there was a remand to the Lower appellate Court requiring it to record a finding whether

the plaintiff was in possession within 12 years of the suit. The Lower Appellate Court post remand had held on the basis of evidence on record that the plaintiff was not in possession within 12 years of the suit. By time a second appeal was brought by the plaintiff, the law of limitation had undergone a change. Under the Limitation Act of 1908, a suit for possession based on title was governed by Article 142, where a plaintiff holding title, in order to succeed, had to show his possession within 12 years of suit. It was in the context of the aforesaid provisions of the old Limitation Act, that in the earlier appeal, the High Court had remanded the matter to the Lower Appellate Court to record a finding whether the plaintiff was in possession within 12 years of suit. It appears that by time the appeal came up for decision before the Lower Appellate Court, the Limitation Act of 1963 had replaced the old Act, where Articles 64 and 65 took place of Article 120 of the old Act. Under the Limitation Act, 1963, there was no requirement for a person holding title to succeed in his suit for possession to show that on the date of suit, within a particular period of time, he had been in possession. The position of law regarding the applicability of the Limitation Act of 1963 to an action commenced under the old Limitation Act was that the new Act applied generally, and not the Act of 1908, where the suit was taken in appeal etc. after commencement of the Act of 1963. The only exception was Section 30 of 1963 Act, which provided that in the event a shorter period of limitation under the new Act was prescribed, the provisions of the Act of 1908 would continue to govern the suit. The suit here did not fall under Section 30 *(supra)*, and, therefore, the provisions of Section 142 would not apply. The order of remand, as already indicated, required the Lower Appellate Court to decide the question about possession going by the provisions of Article 142 of the old Act. The Lower Appellate Court decided the appeal, after remand, on 26.06.1964. On 12.12.1968, their Lordships of the Supreme Court rendered decision in **Nair Service Society Ltd. vs. K. C. Alexander and others, AIR 1968 SC 1165** holding that the provisions of Articles 64 and 65 are merely declaratory and not remedial. The legislative declaration was designed to cure the defect in the old Act, that required a title holder to prove his possession as well, within 12 years of his suit to recover possession. The effect of the decision of the Supreme Court was that the law would always be deemed to have been that the holder of title who successfully established it, would no longer be required in a surviving action, at whatever stage of proceedings, to further prove his possession within 12 years of suit. Under the changed law, it was for the defendant to prove, if he had to succeed in his defence, to show that he had been in adverse possession for the prescribed period. It was in the context of all this statutory change in the law about limitation and its interpretation by the Supreme Court in **Nair Service Society Ltd.** *(supra)*, that the question arose whether the Lower Appellate Court, or for that matter even the High Court were bound to carry out and decide, according to the order of remand made in the earlier appeal. The Appellate Court decided in accordance with the order of remand, which meant in accordance with law under the old Act, governed by Article 142 thereof. It was in that context that it was held in **Mudaliar** *(supra)* that on the

date the Appellate Court decided, it was bound by the order of remand and further that, the High Court too, in the appeal after remand was bound by its order of remand that had attained finality. It was also, in the context of the aforesaid facts that the principle about the utmost binding effect of an order of remand was approved. **Mudaliar** *(supra)* was not a case where the defendant after remand did not canvass the point relating to the plaintiff's failure to establish his possession over the suit property within 12 years of suit. It was a case where the defendant availed of the order of remand and pressed the point that the High Court required the Lower Appellate Court to decide after remand. Here, the defendant never pressed the point about rectification of the contract that he had failed to establish at the trial. He simply did not address the Appellate Court on that point. The question, therefore, would be whether the Lower Appellate Court is required to decide a point that it has been ordered to do afresh on remand by a Court of superior appellate jurisdiction, even though the defendant, that is to say, the appellant before it, who has the matter remanded to it, never urges that point. Is it the duty of the Appellate Court to decide a point remanded to it on the basis of the evidence on record even though the appellant before it never presses for its decision? This question which is the quintessence of the substantial question of law under consideration, would have to await answer until a little later in this judgment.

31. Mr. Anupam Kulshreshtha has next drawn support from the decision of this Court in **Rama Kant vs. Board of Revenue and Ors., 2005 1 AWC 929 All**. He has invited attention of the Court to paragraphs 7, 8 and 9 of the report in **Rama Kant** *(supra)*, where it has been held thus:

"7. It is not open to an inferior Court or Tribunal to refuse to carry out the directions or to act contrary to directions issued by a superior Court or Tribunal. Such refusal to carry out the directions or to act in defiance of the directions issued by the superior Court or Tribunal is in effect denial of justice and is destructive of the basic principle of the administration of justice based on hierarchy of Courts in our country. If a subordinate Court or Tribunal refuses to carry out the directions given to it by a superior Court or Tribunal in exercise of its appellate power, the result would be chaos in the administration of justice.

8. The order of remand dated 22.11.1979, became final between the parties and same was not challenged. Thus, it was not open to the trial court being an inferior court to reframe fresh issues and to record fresh findings. The only course open to the trial court was to give finding on the two issues reframed by the first appellate court and decide the suit accordingly as directed in the order of remand. The trial court exceeded its jurisdiction by travelling beyond directions contained in the remand order and this vital aspect have been illegally ignored by the court of first appeal as well as second appeal.

9. The arguments advanced by the learned counsel for the respondents that no prejudice has been caused and substantial justice has been done between the parties cannot constitute a ground to affirm an order passed in disregard of the directions issued by the higher court. In the case of Bhopal Sugar Industries Limited v. Income-tax Officer, Bhopal,

AIR 1961 SC 182, where the Income-tax Officer refused to carry out the directions issued by Income Tax Appellate Tribunal in exercise of its appellate power in respect of an order of assessment made by him the Hon'ble Apex Court has observed as follows:

"In such a case a writ of mandamus should issue ex debito justiciae to compel the Income Tax Officer to carry out directions given to him by the Income Tax Appellate Tribunal. The High Court would be clearly in error if it refuses to issue a writ on the ground that no manifest injustice has resulted from the order of the Income Tax Officer, in view of the error committed by the Tribunal itself in its order. Such a view is destructive of one of the basic principles of administration of justice.""

32. Again, it is beyond cavil that an order of remand by a superior court directing an inferior court to decide a particular point, obliges the latter to decide in accordance with the directions of the superior court. The decision in **Rama Kant** *(supra)* is distinguishable in point of law on account of the fact that there it was not a case where the petitioner before this Court, who complained of violation of the order of remand by the Trial Court did not press his case on issues nos.1 and 2, involved in the suit, that were remanded by the Appellate Court to the Trial Court for decision afresh. This is certainly not the case here.

33. Learned Counsel for the defendant last called to aid the decision of the Supreme Court in **Bal Govind Lohia vs. Narayan Prasad Lohia and others, (2009) 17 SCC 349**. Learned Counsel has drawn the attention of the Court to paragraphs 4 and 5 of the report in **Bal Govind Lohia** *(supra)*, where it is held:

"4. On an earlier occasion, when the matter had come before us, this Court in Civil Appeal No. 1382 of 2002 made an order on 28-1-2003 [*Narayan Prasad Lohia v. Nikunj Kumar Lohia*, (2003) 2 SCC 251]. In that order, this Court noticed that the learned Single Judge had set aside the award on several grounds, which were not considered and decided by the Division Bench. When Civil Appeal No. 1382 of 2002 [*Narayan Prasad Lohia v. Nikunj Kumar Lohia*, (2003) 2 SCC 251] was heard by this Court, this Court noticed that the Division Bench had not expressed its views with regard to several findings made by the Single Judge on different grounds for setting aside the award. Cognizant of this fact, this Court remitted the matter to the Division Bench of the High Court with the following observations: (SCC p. 254, para 9)

"9. Accordingly, we dispose of these appeals with the direction that the matters be remitted to the High Court for the Division Bench to consider the other grounds on which the learned Single Judge had set aside the award by its judgment and order dated 17-11-1998, which have not been considered by the Division Bench in its judgment and order dated 18-5-2000."

5. In view of the aforesaid limited or restrictive order of remit, it was necessary for the Division Bench of the High Court to consider the correctness of other grounds on which the learned Single Judge had set aside the award by his judgment dated 17-11-1998. Unfortunately, in the impugned judgment

before us, it appears that the direction made while remitting the matter has not been noticed by the Division Bench. A reading of the impugned judgment does not indicate the views of the High Court with regard to the "other grounds" on which the Single Judge had set aside the award. Thus, we are of the view that the High Court has not complied with the conditions of the remit. Consequently, on this short ground alone, the appellant is entitled to succeed."

34. The decision of their Lordships in **Bal Govind Lohia** *(supra)* is again not an authority about the question as to consequences that would follow in the event a party, for whose benefit a cause is remanded to a lower Court for decision afresh on a specified point or points, does not at all press those point (s). This issue is not even remotely involved, considered or decided in **Bal Govind Lohia** *(supra)*. This Court is, therefore, of opinion that the authority under reference is of little assistance to the defendant.

35. Sri Pramod Jain, learned Senior Advocate appearing for the plaintiff submits that it is not at all incumbent upon the Appellate Court to decide a point remanded to it by a superior court, where the appellant before it, does not urge that point in support of his appeal. He contends that by dint of the order of remand passed by a Court of superior appellate jurisdiction, the appellant is not entitled to a decision of the point remanded to the Appellate Court unless he supports his appeal pressing that particular point. According to Mr. Jain, the Appellate Court bears no obligation to decide a point remanded to it for decision by a superior court, undertaking that enterprise of its own, sans the appellant before it canvassing that point.

36. Mr. Jain says that non-address by the appellant post remand on a point required by the superior court to be decided afresh by the Appellate Court would work as a relinquishment of his right to canvass that point. He contends that the principles relating to relinquishment of a right by an individual, that includes a party to the *lis*, like the appellant before the Appellate Court, is well-acknowledged. He says that if an appellant relinquishes a particular plea that the Appellate Court has been required to decide on remand by a superior court, the appellant cannot claim any right based on the remand once he relinquishes. All that is required to be examined is whether in point of fact there was relinquishment. This fact according to the learned Senior Advocate is to be determined by the Court with reference to the record of proceedings and the judgment of the Appellate Court. Once the judgment of the Appellate Court shows that the appellant before it has not urged the point that the order of remand directed to be determined, relinquishment is to be accepted by a Court of superior jurisdiction. Mr. Jain, however, clarifies that the other fact required to be seen by a superior court is whether the appellant, who has chosen not to press a point that has been required by the order of remand to be decided by the Appellate Court, was at all aware about it. He submits that if it could be shown that the appellant who did not avail himself of the benefit of a remand order on the particular point required to be decided, was not at all aware about it, he may have a case to make out in a Court of superior jurisdiction, but not otherwise. Here, the learned Senior Advocate submits that there is not the slightest scope to say that the defendant, who was the appellant

before the Lower Appellate Court, did not know the terms of the remand order or the point required to be decided by the Appellate Court. It is pointed out that the judgment and order of remand was passed in a case that was a second appeal before this Court, where the defendant was represented by learned Counsel, no less in stature than an Advocate of the High Court. Again, before the Appellate Court, the defendant was represented by a learned Advocate, practicing before the District Court. In these circumstances, according to Mr. Jain, it cannot be said that the defendant was not aware about his rights post remand, and what particular point was ordered to be decided by this Court at the instance of the defendant by the Appellate Court.

37. To sum up, the learned Senior Advocate submits that it cannot be a case where the defendant did not canvass the point regarding rectification of contract, in terms directed by this Court by the order of remand, because he was not aware about it. Rather, it was a decision consciously taken, well-advised by legal Counsel and, therefore, a fair and square case of relinquishment. This part of his submission regarding relinquishment, so to speak, Mr. Jain seeks to support on the authority of a decision of the Supreme Court in **A.P. SRTC vs. S. Jayaram, (2004) 13 SCC 792**. He has called attention of this Court to paragraph 5 of the report in **A.P. SRTC** *(supra)*, where it was held:

"5. It was next submitted that the respondent should be deemed to have waived his rights under Circular No. 45/81 by submitting tender in response to the notice inviting tenders in the year 1984 and he must be held bound by the terms of the contract which he entered into pursuant to the tender submitted by him. The High Court has formed an opinion that the respondent cannot be deemed to have waived the right or the benefit available to him under Circular No. 45/81 because he was not even aware of the existence of the circular. To constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right or conduct such as warrants an inference of the relinquishment of a known right or privilege (*Basheshar Nath v. CIT* [AIR 1959 SC 149]). Moreover, the circular itself stipulates the Corporation making an offer to the contractors for taking benefit of the policy decision and it is undisputed that the Corporation never made such an offer to the respondent. Inasmuch as there is a failure on the part of the Corporation to extend the benefit of the circular to the respondent, the Corporation cannot be permitted to take shelter behind its own wrong."

38. So far as the very painstaking and elaborate submission of Mr. Jain based on the principle of relinquishment is concerned, this Court is of opinion that the principle, properly so called belongs to the law relating to substantive rights; it is not so much about procedure governing the hearing of appeals. Relinquishment is defined in the Black's Law Dictionary, Eighth Edition (South Asia Edition) as, "The abandonment of a right or thing". The substantive rights of a party, involved in a case, are those that constitute his claim in the action. If a part of the claim were to be given up, it would be relinquishment; not if one or the other points or pleas, on the foot of which the

claim is supported, is/ are given up at the hearing, or not urged at all. A particular point or plea on the foundation of which, besides others, a claim is sought to be established at the hearing of the appeal, is not canvassed or pressed, it would not involve the principle of relinquishment that governs the substantive rights of parties, expressed in the form of relief they seek in the action. Thus, the law relating to relinquishment need not be imported with all its niceties into the purely procedural domain of the law relating to the hearing of an appeal. This is not to say that a point, that is formally given up at the hearing of the appeal or not urged altogether, entitles a party to turn around later and fault the judgment for its non-consideration. Not canvassing a particular point involved in an appeal forbears a party, including the appellant, to say lateron that the judgment in appeal is bad for its non-consideration. This consequence in law is referable to the procedure about hearing of appeals, as already said; it may resemble relinquishment, but it is not that.

39. The attention of this Court has not been called to any authority where the question under consideration might have been decided. Indeed, the position that obtains on facts here, would be very rare to come by, if not altogether a freak. This is so because it would really be surprising that a point on which a cause is remanded to the Appellate Court by a Court of superior jurisdiction at the instance of a party, witnesses that party not addressing the Appellate Court on the very point that he/ she had secured a remand. A perusal of the entire scheme of Order XLI Code of Civil Procedure, does not indicate any special obligations for the Appellate Court to undertake an exercise of an inquisitorial nature about a point that the Appellate Court has been asked to decide by a superior court on remand. No doubt, there is ample authority that where a cause is remanded to an Appellate Court to decide a particular point or carries guidance to decide certain issues or points, those directions bind the Appellate Court if the appellant before it addresses the Court on those points/ issues. If, however, despite a remand order carrying a direction to the Appellate Court to decide a particular point together with the appeal afresh, as in this case and the appellant does not at all urge that point, there is nothing in Order XLI CPC or elsewhere under the Code, obliging the Appellate Court to decide the point. The hearing of an appeal post remand is in no way different from the hearing in the first instance, except that if a particular point is required to be decided by the judgment of the Superior Court, the Appellate Court would be obliged to decide the same in accordance with those directions that may carry some guidance about the law or the manner of its application. But, again to emphasize, the obligation would be attracted where the point is canvassed; not otherwise.

40. The reasons for these conclusions are to be found in the provisions of Order XLI Rules 23 and 23-A, Order XLII Rule 1, read in conjunction with Order XLI Rules 16 and 31 CPC. The provisions of Order XLI Rules 23 and 23-A are extracted below:

"**23. Remand of case by Appellate Court.**--Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in

appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A. Remand in other cases.--Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

41. The provisions of Order XLII Rule 1, read:

"**1. Procedure.**--The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

High Court Amendments

Allahabad.--*Substitute* the following for Rule 1:

"1. The rules of Order XLI and Order XLI-A shall apply, so far as may be, to appeals from appellate decrees subject to the following proviso:

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and unless the Court sees fit to dispense with either or all of them:

(1) a copy of the judgment on which the said decree is founded;

(2) a copy of the judgment of the Court of first instance; and

(3) a copy of the finding of the civil or the revenue court, as the case may be, where an issue is remitted to such Court for decision." (22-12-1951)."

42. A perusal of the provisions of Rule 23 of Order XLI, CPC shows that this Rule and Rule 23-A are framed in the context of a remand by the Appellate Court to the Trial Court. The provisions of Rule 1 of Order XLII, CPC provide for the application of all the Rules carried in Order XLI, CPC to appeals from appellate decrees or what are commonly called, second appeals. However, the provisions of Rule 1 of Order XLII while making the provisions of Order XLI applicable to second appeals, make it explicit that the application of those Rules shall be *mutatis mutandis*. Now, the provisions of Rule 23 of Order XLI are concerned with a case where a suit has been disposed of on a preliminary point by the Trial Court and the decree is reversed in appeal. It provides that in the event of a reversal in a case envisaged by the said Rule, the Appellate Court may, if it thinks fit, order a remand to the Trial Court for a trial *de novo*. The Rule further empowers the Appellate Court that instead of ordering an open remand, the Trial Court may be restricted as to what issue or issues shall be tried in the remanded suit. In the latter case, the Trial Court would not be free to decide all issues framed by it, or those that it may further frame. Rather, where the Appellate Court restricts the Trial Court to decide a particular issue or issues on remand, the trial is to be confined to those issues alone and no other. However, there could be cases where apart from ordering a general remand, particular issues may be directed to be tried. Generally speaking, where a Trial

Court is directed to determine specific issues along with a general remand or restricted to particular issues, the Trial Court would be bound to try and determine those issues. But, there could be a different result depending on the fact whether there is evidence already available on record; if available, whether further evidence is required to be led by parties, and, if required, whether further evidence is, in fact, adduced. Particularly different would be the case where there is no evidence available on record regarding an issue remanded and the party who bears the *onus probandi* (Section 101, Indian Evidence Act) does not lead any evidence. In all cases where some evidence is forthcoming, the Trial Court has to return findings on the issues, specifically required to be decided by the order of remand. In case, however, an issue, specifically required to be decided on remand, is one in relation to which no evidence has been adduced and the party who bears the evidential burden or *onus probandi* does not adduce any evidence, there is no scope for the Trial Court to return a finding on the issue. All that the Court can say is that no evidence was adduced and answer the issue against the party who bears the evidential burden.

43. The principles applicable to the case of a remand under Rule 23 of Order XLI CPC have been extended by Rule 23-A to all those cases where the suit is disposed of otherwise than on a preliminary issue and the Appellate Court after setting aside the decree, orders trial *de novo*. These provisions, as already said, have been extended in their application to a second appeal. A second appeal or an appeal from an appellate decree is heard by the High Court under Section 100 CPC. A second appeal is preferred from the decree of the Lower Appellate Court by a party to the appeal aggrieved by the decree, or by a non-party aggrieved thereby with leave of the High Court. These appeals are to be heard only on a substantial question of law, if involved. Since a second appeal is one preferred from the appellate decree, an order of remand by the High Court under Rule 23 or Rule 23-A of Order XLI, CPC may either involve a remand to the Trial Court or to the First Appellate Court. Since a remand to the First Appellate Court involves a re-determination of an appeal on all points, already raised and decided, but set aside in second appeal, a remand order may direct a general remand or a restricted remand for a decision of certain points alone, or a remand where together with a general remand, a particular point or points are directed to be decided by the First Appellate Court. There is no quarrel that the present case falls in the last category.

44. The obligations of the First Appellate Court under an order of remand would be conditioned by the nature of the appellate jurisdiction, which is essentially different from a trial. This holds true notwithstanding the fact that an appeal, particularly a first appeal, is a continuation of the trial. The nature and exercise of the jurisdiction is, however, essentially different. Before the Trial Court, the parties are on a level field, except the Rule as to burden of proof which requires the plaintiff to establish his case on its own strength and, of course, certain Rules relating to *onus probandi* on particular issues. In an appeal, there is an existing decree against one party, be it the plaintiff or the defendant, and the one who appeals, has

a judgment against him which he seeks to dislodge. The appellant is, therefore, asked to convince the Appellate Court that the Trial Court is wrong. It is this particular feature of the exercise of appellate jurisdiction that makes it different from a trial. For the same reason, an appeal remanded to the First Appellate Court by the High Court, would involve a necessarily modified application of the provisions of Rules 23 and 23-A of Order XLI, CPC. It is on this account that Rule 1 of Order XLII, CPC makes allowance for a modified application of the various Rules of Order XLI, CPC in case of appeals from appellate decrees, that include Rules 23 and 23-A.

45. The procedure applicable to the hearing of appeals is to be borne in mind before the implications of an order of remand by the High Court to the First Appellate Court are worked out. It is the concern of this Court to determine whether the Appellate Court is bound to decide a point, that it has been particularly directed to decide by the High Court, together with a general order of remand made in second appeal, where the appellant does not at all address the Appellate Court on the point directed to be decided. This is precisely what the substantial question of law under consideration is about. The obligation of an Appellate Court to decide the appeal on merits where the appellant appears at the hearing but does not address the Court, were the subject matter of decision of the Supreme Court in **Thakur Sukhpal Singh v. Thakur Kalyan Singh and another, AIR 1963 SC 146**. The question was considered generally with regard to the obligations of the Appellate Court to decide on merits, where the appellant appears but does not address it. The question of the Appellate Court's obligations to decide a particular point directed by an order of remand of a superior Appellate Court, was not the subject matter of the decision of their Lordships in **Thakur Sukhpal Singh** *(supra)*. Nevertheless, the decision in **Thakur Sukhpal Singh** *(supra)* is a beacon light authority about the manner in which the Appellate Court is to act when the appellant appears but does not address the Court, *vis-a-vis* the Court's obligation still to decide on merits. In the context of the aforesaid question that emerged on facts about which there is a very short statement in paragraph 2 of the report in **Thakur Sukhpal Singh** *(supra)*, it was held thus:

"3. The contention raised for the appellant is that the High Court had no jurisdiction to decide the appeal fixed for final hearing without considering the proceedings of the Trial Court and the memorandum of appeal before it and that the right of the appellant to have the case decided on merits on the material before the Court was not dependent on his addressing the Court, Reliance is placed on the provisions of Order XLI. Rules 30,31 and 32, C. P. C. We do not agree with this contention.

4. Order XLI. R. 16 of the Code provides the procedure to be followed by the appellate Court on the hearing of an appeal which has not been dismissed under sub-r. (1) of R. 11 of that Order. Rule 16 reads:

"(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear

the respondent against the appeal, and in such case the appellant shall be entitled to reply."

It is clear from sub-r. (1), that it is the duty of the Appellate Court to hear the appellant in support of the appeal. This, however, does not mean that the appellate Court cannot decide the appeal if the appellant does not make his submissions to the Court showing that the judgment and decree under appeal were wrong. The appellate Court is not to force the appellant-to address it. It can, at best, afford him an opportunity to address it. If the appellant does not avail of that opportunity the appellate Court can decide the appeal. Sub-rule (2), indicates that the appeal can be dismissed without hearing the respondent. The appellate Court will do so if it was not satisfied that the judgment under appeal was wrong.

5. Learned counsel for the appellant does not dispute these propositions. His contention, however, is that even if the appellant does not address the Court, the Court must go through the record and the Judgment under appeal and come to its own conclusion about the correctness of the decision under appeal. Support for this contention is sought from the provisions of R. 31 of O. XLI which reads:

'"The judgment of the Appellate Court shall be in writing and shall state -

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

It is urged that the judgment of the appellate Court has to state the points for determination, the decision thereon and the reasons for the decision, and these the appellate Court cannot do till it has gone through the record and considered the entire matter on record including the judgment under appeal. These matters have to be in the judgment when points in dispute between the parties are raised before the appellate Court. If no such points are raised for consideration the appellate judgment cannot refer to the points for determination in its judgment and, when there be no points raised for determination, there can possibly be no decision thereon and no reasons for such decision. Such is the position when the appellant does not address the Court and does not submit anything against the decision of the Court below.The memorandum of appeal does contain the grounds of objection to the decree appealed from, without any argument or narrative as laid down in sub-r. (2) of R. 1, O. XLI. Such grounds cannot take the place of the points for determination contemplated by R. 31. Not unoften certain grounds of objection raised in the memorandum of appeal are not argued or pressed at the hearing and in that case such grounds cannot be taken to be the points for determination and are rightly not discussed in the judgement at all. It is for the appellant to raise the points against the judgment appealed from. He has to submit reasons against its correctness. He cannot just raise objections in his memorandum of appeal and leave it to the appellate Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the appellate Court itself to find out what the

points for determination can be and then proceed to give a decision on those points.

6. The Privy Council observed in Mt. Fakrunisa v. Moulvi Izarus, AIR 1921 PC 55, at p. 56:

"In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered, to justify the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged."

With respect, we agree with this and hold that it is the duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the appellate Court can fully contain all the various matters mentioned in R. 31, O. XLI.

7. This Court observed in Sengram Singh v. Election Tribunal, Kotah, 1755-2 SCR 1: (S) AIR 1955 SC (425) at p. 8 (of SCR): (at p. 429 of AIR)

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: --------Too technical construction of section that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

The provisions of R. 31 should therefore be reasonably construed and should be held to require the various particulars to be mentioned in the judgment only when the appellant has actually raised certain points for determination by the appellate Court, and not when no such points have been raised as had been the case in the present instance when the appellant did not address the court at all.

8. The provisions of R. 30 of O. XLI support our construction of R. 31. This rule reads:

"The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders."

It is to be noticed that this rule does not make it incumbent on the appellate Court to refer to any part of these proceedings in the court from whose decree the appeal is preferred. The appellate Court can refer, after hearing the parties and their pleaders, to any part of these proceedings to which reference be considered necessary. It is in the discretion of the appellate Court to refer to the proceedings. It is competent to pronounce judgment after hearing what the parties or their pleaders submit to it for consideration. It follows therefore that if the appellant submits nothing for its consideration, the appellate Court can decide the appeal without any reference to any proceedings of the Courts below and, in doing so, it can simply say that the appellants have not urged any-thing which would tend to show that the judgment and decree under appeal were wrong."

What their Lordships have held in **Thakur Sukhpal Singh** *(supra)*

summarizes the salutary principles governing exercise of jurisdiction by the Appellate Court, in relation to an appeal where the appellant appears but does not address the Court. There is nothing in the scheme of Order XLI Rules 23, 23-A, Order XLII Rule1 read with Order XLI Rules 16, 30 and 31, CPC, that may make it incumbent upon the Appellate Court to decide a point, that it is particularly directed to decide by an order of remand made in second appeal, where the appellant does not canvass that point. It is the obligation of the appellant generally always to establish his case before the Appellate Court. It is, particularly, also the obligation of the appellant to establish his case with reference to a point, remanded by a higher Appellate Court to the Appellate Court for decision.

46. The order of remand that directs the Appellate Court to decide a particular point, with or without guidance about the law and the manner of its application does no more than formulate a point that the Appellate Court would be obliged to decide, if the appellant were to address the Court on it. The point would be raised for decision on the appellant pressing it before the Appellate Court. The order of remand is, thus, an opportunity to the appellant and also the respondent to address the Court about the point directed to be decided by the order of remand. The entire scheme of the relevant Rules of Order XLI do not envisage the Appellate Court bound to decide a point which the judgment of remand requires it to do, where the appellant does not address the Court on that point. It might be a different case where the point remanded for decision by the Court of second appeal is one that is formulated at the instance of the respondent to the appeal before the Court of first appeal, or in any case, the point is one that enures to the respondent's benefit before the First Appellate Court. This aspect is not being dealt with in this appeal, as it does not arise on the facts here.

47. In this appeal, the defendant is the appellant before the Lower Appellate Court. Being unsuccessful in the first instance before the Lower Appellate Court, he carried a second appeal to this Court and secured a remand with a direction to decide the point regarding his plea relating to rectification of the contract, subject matter of action. The plea was to be decided bearing in mind the provisions of Section 26 of the Specific Relief Act and Section 92 of the Indian Evidence Act. Besides, this direction, the appeal was to be heard as a whole, a matter already noticed hereinbefore. At the hearing, the defendant who secured the order of remand in the earlier second appeal did not address the Court on the point that the Lower Appellate Court was ordered to decide. Rather, he appears to have addressed the Court on other points, all of which were decided against him. There is no law that makes it incumbent upon the Lower Appellate Court to decide the point relating to rectification, in terms of the order of remand, which the appellant did not urge. Accordingly, **substantial question of law no.(1)** (the one formulated vide order dated 03.02.2020) **is answered in the negative.**

48. Substantial question of law no.(2) (the one framed on 03.02.2020) and the substantial question of law

framed on 13.03.2019 are based on the defendant's plea about rectification of the contract, subject matter of action. This plea was made open to be canvassed as a point for determination by the judgment and order of remand passed by this Court in Second Appeal no.1732 of 1977, decided on 26.03.1993. The point was not at all addressed at the hearing of the appeal before the Lower Appellate Court by the defendant, who was the appellant there. It is, therefore, not open to the defendant to ask this Court to decide these two substantial questions of law, based on a point that he did not at all canvass at the hearing of the appeal before the Lower Appellate Court. Indeed, it is a case of an opportunity lost. This Court, therefore, refrains from answering the two substantial questions of law under reference.

49. The result would be that there is no good ground to interfere with the judgment and decree impugned.

50. The appeal fails and is hereby **dismissed**. The plaintiff would be entitled to his costs in this Court and the two Courts below.

51. Let a decree be drawn up, accordingly.

(2020)08ILR A340
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 764 of 1981

Vidya Shanker ...Appellant

Versus

Suresh Chand ...Respondent

Counsel for the Appellant:
Sri D.P. Yadav, Sri Neeraj Kushwaha, Sri O.P. Yadav, Sri R.N. Bhakt

Counsel for the Respondent:
Sri Kamleshwar Singh, Sri S.C. Kushwaha, Sri Sartita Gupta, Sri V.P. Ojha

(A) Civil Law - Code of Civil Procedure ,1908 - Section 100 CPC - adverse possession - party who claims adverse possession - has to plead and prove that his possession is *nec vi nec clam nec precario i.e. peaceful, open, and continious* - plea of adverse possession is not available when contradictory pleas are taken -'Permissible possession' shall not mature a title since it cannot be treated to be an 'adverse possession' - Pleadings are necessary if case is founded on adverse possession .
(Para -12,13,21,30)

Appellant in the present case clearly pleaded its own title - pleaded that none else was owner - plea of adverse possession was impermissible in this case - Trial Court failed to examine the legal aspect and exposition of law - hence Lower Appellate Court has rightly reversed the judgment. (Para - 48)

HELD:- In absence of anything to show before this Court that appellant in any manner adduced any evidence to prove his title, while plaintiff's title was clearly shown, I have no option but to answer the above substantial question of law against him. (Para- 49)

Second Appeal dismissed. (E-7)

List of Cases cited:-

1. P.T. Munichikkanna Reddy & ors. Vs Revamma & ors., AIR 2007 SC 1753

2. Des Raj & ors. Vs Bhagat Ram(Dead) by LRs. & ors., 2007(3) SCALE 371

3. Govindammal Vs R. Perumal Chettiar & ors., JT 2006(1) SC 121.

4. Annakili Vs A. Vedanayagam & ors., AIR 2008 SC 346

5. Hemaji Waghaji Jat Vs Bhikhabhai Khengarbhai Harijan & ors., AIR 2009 SC 103

6. D. N. Venkatarayappa & anr. Vs St. of Karn. & ors., (1997) 7 SCC 567

7. Ram Charan Das Vs Naurangi Lal & ors. ,AIR 1933 Privy Council 75

8. Smt. Bitola Kuer Vs Sri Ram Charan & Ors., AIR 1978 All 555 in para 16

9. Md. Mohammad Ali Vs Jagadish Kalita & ors. ,(2004) 1 SCC 271

10. L.N. Aswathama & anr. Vs V.P. Prakash, JT 2009 (9) 527

11. R.N. Dawar Vs Ganga Saran Dhama, AIR 1993 Del. 19).

12. In Parwatabai Vs Sona Bai ,(1996) 10 SCC 266

13. Parsinnin Vs Sukhi,(1993) 4 SCC 375

14. Biswanath Agarwalla Vs Sabitri Bera & ors., JT 2009 (10) SC 538.

15. Gautam Sarup Vs Leela Jetly & others, (2008) 7 SCC 85

16. Ejas Ali Qidwai & ors. Vs Special Manager, Court of Wards, Balrampur Estate & ors., AIR 1935 Privy Council 53

17. S.M. Karim Vs Mst. Bibi Sakina, AIR 1964 SC 1254

18. B. Leelavathi Vs Honnamma & anr., (2005) 11 SCC 115

19. A.S. Vidyasagar Vs S. Karunanandam, 1995 Supp (4) SCC 570

20. Goswami Shri Mahalaxmi Vahuji Vs Shah Ranchhoddas Kalidas, AIR 1970 SC 2025,

21. P. Periasami Vs P.Periathambi & ors., (1995) 6 SCC 523

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

1. Heard Sri Neeraj Kushwaha, learned counsel for appellant. None has appeared on behalf of respondent, though called twice. Since it is an old appeal of 1981 and is pending for the last 38 years and find no reason but to proceed ex parte to decide it and proceed accordingly.

2. This is a defendant's appeal under Section 100 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"), arising from judgment and decree dated 18.03.1981 passed by Sri Jai Prakash Narayan, Civil Judge, Etawah allowing Civil Appeal No. 118 of 1977. Lower Appellate Court (hereinafter referred to as "LAC") has set aside judgment and decree dated 11.04.1977 passed by Sri Ravi Narayan, IInd Additional Munsif/Judicial Magistrate, Etawah in Original Suit No.399 of 1973 (hereinafter referred to as "O.S.") . Plaintiff's suit was dismissed by Trial Court but appeal has been allowed. Hence this appeal by defendant.

3. Suit for delivery of possession of the house in dispute and damages for use of it and pendente lite was instituted by plaintiff-Suresh Chandra against sole defendant-Vidya Shankar alias Daroga. Plaint case, set up by plaintiff, is that house in dispute belong to one Shamsher Khan, who executed a sale deed dated 29.06.1968 registered on 03.08.1968 in favour of plaintiff and thereafter he got possession thereof. The said house was purchased by Shamsher Khan from its erstwhile owner Ram Gopal through a

sale deed and at that time defendant was a tenant in the northern part of house, on monthly rent of Rs.5/- which was a month to month tenancy. Defendant was paying rent initially to Ram Gopal and thereafter to Shamsher Khan. After execution of sale deed and purchasing the house, plaintiff informed the above transaction to defendant and asked him to pay rent. In October 1968 when plaintiff went to the house for renovation/construction of rest part of the house which was not in tenancy, defendant raised dispute and also did not pay any rent. Consequently, by notice dated 14.12.1968 which was served upon him on 17.12.1968 his tenancy was terminated. Defendant replied the notice wherein even title of plaintiff was denied. Plaintiff filed suit in Small Cause Court but defendant raised dispute of title, hence plaint was returned and suit then was filed in a regular Court. Plaintiff claimed arrears of rent of Rs. 244/- for the period from 01.07.1968 to 25.07.1973 and pendente lite damages and delivery of possession of house in question.

4. Defendant disputed the claim. He said that he was never a tenant of the house even at the time of Ram Gopal. He was himself owner in possession, hence Ram Gopal had no authority to sell out suit property to anybody. Defendant in the additional pleas stated that the house in question initially belonged to his ancestor Lala Ram Sahai, who had purchased it vide sale deed dated 24.06.1862 from Beni Ram. After death of Lala Ram Sahai his sons Jwala Prasad, Gauri Shankar and Kali Sunder became onwers and in their mutual partition, house in question came to the share of Gauri Shankar. After death of Gauri Shankar, house in dispute is scucceeded by his sons Shiv Shankar Lal, Rama Shankar and vidya Shankar (i.e. plaintiff) and Laxmi Shankar. The middle part of house was in ruinous condition and repaired and reconstructed by defendant incurring his own expenses. No person in the name of Ram Gopal and Shamsher Khan were ever owners and resided in the house. In the alternative, it was also pleaded that in any case, the house in question, for the last more than 100 years, is in possession of defendants and his ancestors, openly and hostile, to the knowledge of erstwhile owner. Ram Gopal, if any, and others, therefore, their title has extinguished and defendant has become owner by way of adverse posssession.

5. The Trial Court formulated following issues:

1. Whether the plaintiff is the owner of the house in suit?

2. Whether the plaintiff is entitled for the damages as claimed? If so its effect?

3. Whether the suit is barred by time?

4. Whether the suit is barred by principles of waiver estoppel and acquiescence?

5. Whether the suit is barred by adverse possession?

6. Whether the suit is bad for non-joinder of parties?

7. Whether the suit is under valued and Court fee paid is insufficient?

8. To what reliefs, if any, to the plaintiff entitled?

6. Issues- 1 and 2 were answered against plaintiff and sale deed was declared fictitious. Issues-3 and 5 were

answered in favour of defendant and Trial Court held that suit was barred by limitation and defendant has perfected title by way of adverse possession. Issues-4 was also answered against plaintiff. Issue-6 was answered in negative. Issues-6 and 7 were decided as preliminary issues in negative. Issue-8 was answered by dismissing the suit.

7. In the appeal, LAC formulated only single point for determination, i.e. "Whether house in question belong to Ram Gopal and at any point of time thereafter plaintiff became owner by virtue of sale deed or it was owned by defendant-Vidya Shankar?"

8. Aforesaid point for determination is answered in favour of plaintiff and appeal has been allowed by LAC and has set aside the judgment passed by Trial Court and decreed suit granting relief as prayed for.

9. This appeal was admitted on a single substantial question of law i.e. ground no.3 which reads as under:

"Because the appellant had produced and proved the sale-deed dated 24.06.1862 executed in favour of Sri Ram Sahai the grand father of the appellant in respect of the disputed house and it was never pleaded or proved by the respondent that Sri Ram Sahai or his decendants ever transferred their interest or possession since 1862. "

10. It is not in dispute that plaintiff-respondent placed on record sale deed dated 29.06.1968 i.e. Exhibit-9 wherein it was referred that Ram Gopal has taken a debt on 12.08.1958 of Rs. 350/- from Dr. Prithvi Nath Gupta and executed a mortgage deed, which he could not satisfy and aforesaid mortgage deed was transferred by Dr. Prithvi Nath Gupta to Sri Vansh Gopal for Rs. 500/- and since there was never any redemption of mortgage, Vansh Gopal executed a sale deed in favour of Ram Gopal. LAC has also examined record of Municipal Assessment Notice from 1951 to 1955 which showed that house in dispute was in the name of Kalloo father of Ram Gopal, and hence they were owners of house in question in 1955.

11. I repeatedly enquired from learned counsel for appellant as to in what manner he proved his title deed dated 24.06.1862 but despite repeated query, he could give no reply whatsoever.

12. Moreover, when questioned, learned counsel for appellant could not dispute that defendant-appellant had taken contradictory stand, inasmuch as, on the one hand he had claimed to be the owner of property in dispute and on the other hand he claimed that his title has been perfected by adverse possession. Trial Court had accepted aforesaid plea ignoring the settled principle of law that plea of adverse possession is not available when contradictory pleas are taken. One cannot claim to be the owner and simultaneously that his title was protected by way of adverse possession.

13. A person other than owner, if continued to have possession of immoveable property for a period as prescribed in a Statute providing limitation, openly, without any interruption and interference from the owner, though he has knowledge of such possession, would crystallise in

ownership after the expiry of the prescribed period or limitation, if the real owner has not taken any action for re-entry and he shall be denuded of his title to the property in law. 'Permissible possession' shall not mature a title since it cannot be treated to be an 'adverse possession'. Such possession, for however length of time be continued, shall not either be converted into adverse possession or a title. It is only the hostile possession which is one of the condition for adverse possession.

14. The law in respect of adverse possession is now well settled. It should be *nec vi nec clam nec precario*. (**Secretary of State for India Vs. Debendra Lal Khan, AIR 1934 PC 23, page 25**). This decision has been referred and followed in **P. Lakshmi Reddy Vs. L.Lakshmi Reddy AIR 1957 SC 314** (para 4). Court further says that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [**Radhamoni Debi Vs. Collector of Khulna, 27 Ind App. 136 at p. 140 (PC)**].

15. In **Thakur Kishan Singh Vs. Arvind Kumar, AIR 1995 SC 73** the Court said:

"A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession."

16. In **Saroop Singh Vs. Banto and others, 2005(8) SCC 330** the Court held in para 30:

"30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. . . . ."

17. In **T. Anjanappa and others Vs. Somalingappa and another 2006 (7) SCC 570** the pre-conditions for taking plea of adverse possession has been summarised as under:

"It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent to as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverese possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

18. In **P.T. Munichikkanna Reddy & Ors. Vs. Revamma & Ors. AIR 2007 SC 1753** it was held:

"Adverse possession in one sense is based on the theory or presumption that the owner has

abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile." (Para 5)

"Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title."(Para 6)

"Therefore, to assess a claim of adverse possession, two pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property" (Para 9)

19. In para 12 of the judgment, referring to its earlier decision in **T. Anjanappa (supra)**, Court held that if the defendants are not sure who is the true owner, the question of their being in hostile possession and the question of denying title of the true owner do not arise. It also referred on this aspect its earlier decision in **Des Raj and others vs. Bhagat Ram(Dead) by LRs. And others 2007(3) SCALE 371** and **Govindammal v. R. Perumal Chettiar and others JT 2006(1) SC 121**.

20. In **Annakili Vs. A. Vedanayagam and others, AIR 2008 SC 346** the Court pointed out that a claim of adverse possession has two elements (i) the possession of the defendant becomes adverse to the plaintiff; and (ii) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi is held to be a requisite ingredient of adverse possession well known in law. The Court held:

"It is now a well settled principle of law that mere possession of the land would not ripen into possessor title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for

a period of more than 12 years without anything more do not ripen into a title."

21. Pleadings are ncessary if case is founded on adverse possession. Court has considered in detail the various authorities on the question of adverse possession in **Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan & Others AIR 2009 SC 103** and in para 18 observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show : (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

22. The Court also referred to its earlier decision in **D. N. Venkatarayappa & Anr. Vs. State of Karnataka & Ors. 1997 (7) SCC 567** observing :

"Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession."

23. In **D.N. Venkatarayappa (Supra)**, Court emphasized the importance of pleading as also the pre requisites of plea of adverse possession and said :

"3. ...What requires to be pleaded and proved is that the purchaser disclaimed his title under which he came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the later allowed the former, without any let or hindrance, to remain in possession and enjoyment of the property adverse to the interest of the true owner until the expiry of the prescribed period. The classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario."

"... ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario and the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor."

"apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession."

"A person who under the bona fide belief thinks that the property belongs to him and as such he has been in possession, such possession cannot at all be adverse possession because it lacks necessary animus for perfecting title by adverse possession."

"... one of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up title hostile to the title of the true owner."

"...there is not even a whisper in the evidence of the first petitioner with regard to the claim of adverse possession set up by the petitioners. It is not stated by the petitioners that they have been in continuous and uninterrupted possession of the lands in question."

"But, the crucial facts to constitute adverse possession have not been pleaded. Admittedly, the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

"Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession"

"...person, who comes into possession under colour of title from the original grantee if he intends to claim adverse possession as against the State, must disclaim his title and plead his hostile claim to the knowledge of the State and the State had not taken any action thereon within the prescribed period."

"5. ... in claiming adverse possession certain pleas have to be made such as when there is a derivative title as in the present case, if the appellants intend to plead adverse possession as against the State, they must disclaim their title and plead this hostile claim to the knowledge of the State and that the State had not taken any action within the prescribed period, it is only in those circumstances the appellants' possession would become adverse. There is no material to that effect in the present case. Therefore, we are of the view that there is no substance in any of the contentions advanced on behalf of the appellants."

24. The pleading must be specific to the date when possession become adverse. In **Ram Charan Das Vs. Naurangi Lal & Ors. AIR 1933 Privy Council 75**, property of a Mutt was alienated by Mahant by executing a Mukararri (permanent lease) in favour of one Munshi Naurangi Lal. Sale deed of the land in dispute was also executed to another one and both the documents contain a stipulation that they were executed to meet expenses and necessities of Mutt. After death of Mahant, a suit was filed by successor in office against the lessee and purchaser etc. claiming possession of property in dispute to Mutt. The defendants besides others, took the plea of adverse possession also. The question was, did possession of the concerned defendant became adverse to Mutt or Mahant representing the Mutt on the date of relevant assurance or date of death of the concerned Mahant. Trial Court held latter

date to be correct while High Court took a contrary view and upheld the former date. Privy Council held:

"In other words a mahant has power (apart from any question of necessity) to create an interest in property appertaining to the Mutt which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of mahant of the mutt, with the result that ***adverse possession of the particular property will only commence when the mahant who had disposed of it ceases to be mahant by death or otherwise.*** *If this be right as it must be taken to be, where the disposition by the mahant purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the same where the disposition purports to be an absolute grant of the property nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the mahant had power to create an interest in the property of the mutt." (emphasis added)*

25. The pleading is necessary since burden also lies on the person who claims adverse possession. In **Smt. Bitola Kuer Vs. Sri Ram Charan & Ors. AIR 1978 All 555 in para 16** the Court said:

"It is well settled that title ordinarily carries with it the presumption of possession and that when the question arises is to who was in possession of land, the presumption is that the true owner was in such possession. In other word" possession follows title. The inevitable Corollary from this principle is that the burden lies on the person who claims to have acquired title by adverse possession to prove his case."

26. In order to defeat title of a plaintiff on the ground of adverse possession it is obligatory on the part of the respondent to specifically plead and prove as to since when their possession came adverse. If it was permissive or obtained pursuant to some sort of arrangement, the plea of adverse possession would fail. In **Md. Mohammad Ali Vs. Jagadish Kalita & Ors. (2004) 1 SCC 271** with reference to a case dealing with such an issue amongst co-sharers it was observed that *"Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription.*

27. It was also observed in para 21 that for the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.

28. In **L.N. Aswathama & another Vs. V.P. Prakash JT 2009 (9) 527** the Court, in para 17 and 18 said:

*"**17.** The legal position is no doubt well settled. To establish a claim of title by prescription, that is adverse possession for 12 years or more, the possession of the claimant must be* ***physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years.*** *It is also well settled that long and continuous possession by itself*

would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The ***pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence."***

"18. *...When a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, t****he two pleas put forth by the defendant in this case are not inconsistent pleas but alternative pleas available on the same facts.*** *Therefore, the contention of the plaintiffs that the plea of adverse possession is not available to defendant is rejected."*

29. Where a plea of adverse possession is taken, the pleadings are of utmost importance and anything, if found missing in pleadings, it may be fatal to such plea of adverse possession. Since mere long possession cannot satisfy the requirement of adverse possession, the person claiming it, must prove as to how and when the adverse possession commenced and whether fact of adverse possession was known to real owner. (**R.N. Dawar Vs. Ganga Saran Dhama AIR 1993 Del. 19**)**. In Parwatabai Vs. Sona Bai 1996 (10) SCC 266**, it was stressed upon by the Apex Court that to establish the claim of adverse possession, one has to establish the exact date from which adverse possession started. The claim based on adverse possession has to be proved affirmatively by cogent evidence and presumptions and probabilities cannot be substituted for evidence. The plea of adverse possession is not always a legal plea. It is always based on facts which must be asserted, pleaded and proved. A person pleading adverse possession has no equities in his favour since he is trying to defeat the right of the true owner and, therefore, he has to specifically plead with sufficient clarity when his possession became adverse and the nature of such possession. [See **Mahesh Chand Sharma (supra)].**

30. In **Parsinnin Vs. Sukhi (1993) 4 SCC 375**, it said that burden of proof lies on the party who claims adverse possession. He has to plead and prove that his possession is *nec vi, nec clam, nec precario* i.e., peaceful, open and continuous.

31. Besides, alternative plea may be permissible, but mutually destructive pleas are not permissible. The defendants may raise inconsistent pleas so long as they are not mutually destructive as held in **Biswanath Agarwalla Vs. Sabitri Bera & others JT 2009 (10) SC 538.**

32. In **Gautam Sarup Vs. Leela Jetly & others (2008) 7 SCC 85**, the Court said that a defendant is entitled to take an alternative plea but such alternative pleas, however, cannot be mutually destructive of each other.

33. In **Ejas Ali Qidwai & Ors. Vs. Special Manager, Court of Wards, Balrampur Estate & Ors. AIR 1935 Privy Council 53** certain interesting questions cropped up which also attracted certain consequences flowing from annexation of province of Oudh in 1857 by the British Government. It

appears that one Asghar Ali and his cousin Muzaffar Ali granted a mortgage by conditional sale of the entire estate of Ambhapur (commonly known as the Taluka of Gandara) and certain villages to the then Maharaja of Balrampur. The mortgaged property situated in District Bahraich, which was in the Province of Oudh. The mortgagee brought an action to enforce his right, got a decree in his favour and ultimately possession of the property in 1922. The sons of Asghar Ali thereafter brought an action in civil court for recovery of their share of the mortgaged property on the ground that it was the absolute property of their father and on his death devolved on all the persons who were his heirs under the Mahomedan Law. They challenged Iqbal Ali's right to mortgage the whole of estate and impeached the mortgaged transaction on various grounds. The claim was resisted on the ground that succession to the estate was governed by the rule of primogeniture according to which the whole of the estate descended first to Asghar Ali and after his death to his eldest son Iqbal Ali. The defence having been upheld the claim was negatived by the trial court as well as the court of appeal. Before the Privy Council the only question raised was whether the succession to the property was regulated by the rule of primogeniture or by Mahomedan Law.

34. The Privy Council while considering the above question observed that the Province of Oudh was annexed by the East India Company in 1856 but in 1857 during the first war of independence by native Indians much of its part was declared independent. Soon after it was conquered by the British Government and it got reoccupation of the entire province of Oudh. Thereafter in March 1858 the British Government issued a proclamation confiscating, with certain exceptions "the proprietary right in the soil of the Province" and reserved to itself the power to dispose of that right in such manner as to it may seem fit. On 10th October 1859 the British Government (the then Government of India) declared that every talukdar with whom a summary settlement has been made since the re-occupation of the Province has thereby acquired a permanent, hereditary and transferable proprietary right, namely in the taluka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka. Pursuant to that declaration, Wazir Ali with whom a summary settlement of Taluka has already been made was granted a Sanad which conferred upon him full proprietary right, title and possession of the estate or Ambhapur. In the said grant, there contained a stipulation that in the event of dying intestate or anyone of his successor dies intestate, the estate shall descend to the nearest male heir according to rule of primogeniture. Subsequently, in order to avoid any further doubt in the matter, Oudh Estates Act I of 1869 was enacted wherein Wazir Ali was shown as a Tallukdar whose estate according to the custom of the family on or before 13.2.1856 ordinarily devolved upon a single heir. However, having noticed this state of affairs, the Privy Council further observed that this rule was not followed after the death of Wazir Ali and the Taluka was mutated in favour of his cousin Nawazish Ali. He was recorded as owner of Taluka. Thereafter in 1892 Samsam Ali entered the joint possession with Nawazish Ali

and after death of Nawazish Ali, Samsam Ali was recorded as the sole owner. The system of devolution of the property was explained being in accordance with the usage of the family and when the name of Asghar Ali was recorded, he also made a similar declaration. Faced with the situation the appellant sought to explain the possession of Nawazish Ali as adverse possession but the same was discarded by the Privy Council observing:

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

35. In **S.M. Karim Vs. Mst. Bibi Sakina AIR 1964 SC 1254**, Court has held that the alternative claim must be clearly made and proved, adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point on limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "a possible title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and prayer clause is not a substitute for a plea. Relevant paras 3 to 5 of the said judgment read as follows:

"3. In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because S. 66 of the Code of Civil Procedure bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it."

"4. It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on tie ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claim of creditors and not to the claims of transferees. The latter are dealt with in first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were to be accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to

another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under S. 66 of the Code."

"5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on Sukan v. Krishanand, ILR 32 Pat 353 and Sri Bhagwan Singh and others v. Ram Basi Kuer and others, AIR 1957 Pat 157 to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in Bishun Dayal v. Kesho Prasad, A.I.R. 1940 P.C. 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea."

36. In **B. Leelavathi Vs. Honnamma and another, (2005) 11 SCC 115**, Court has held that the adverse possession is a question of fact which has to be specifically pleaded and proved and in the absence of any plea of adverse possession, framing of an issue and adducing evidence it would not be held that the plaintiffs had perfected towards the title by way of adverse possession. Para 11 of the judgment read as follows:

"11. Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse

possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession."

37. In **A.S. Vidyasagar Vs. S. Karunanandam 1995 Supp (4) SCC 570**, Court has held that permissive possession is not adverse possession and can be terminated at any time by the rightful owner. Relevant para 5 of the judgment reads as follows:

"5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on her death in 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time-barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was no licence at all. Permissible possession of the appellant could rightfully be terminated at any moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B-39 and 40, even though suggestedly reflecting payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence, at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs."

38. In **Goswami Shri Mahalaxmi Vahuji Vs. Shah Ranchhoddas Kalidas, AIR 1970 SC 2025**, Court held that a party cannot be allowed to set up a case wholly inconsistent with that pleaded in its written statement.

39. In the matter of plea of adverse possession, mutually inconsistent or mutually destructive pleas must not be taken in the plaint. Whenever the plea of adverse possession is raised, it pre supposes that onwer is someone else and the person taking the plea of adverse possession is not the actual owner but has perfected his title by prescription since the real owner failed to initiate any proceeding for restoring the possession within the prescribed period under the statute.

40. In **P. Periasami Vs. P.Periathambi & Ors., 1995 (6) SCC 523** it was said:

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

41. In **Mohan Lal v. Mirza Abdul Gaffar (1996) 1SCC 639**, the Court said"

*"As regards the **first plea, it is inconsistent with the second plea**. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario."*

42. In **Karnataka Board of Wakf Vs. Government of India & others (2004) 10 SCC 779**, Court held that whenever the plea of adverse possession is projected, inherent therein is that someone else is the owner of the property. In para 12 it said:

"The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced."

43. The decision in **Mohal Lal (supra)** has also been followed in **Karnataka Board of Wakf (supra)** and in para 13, Court said:

"As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act. The element of the respondent's possession of the suit property to the exclusion of the appellant with the animus to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable."

44. It would be useful to refer certain observations of a Single Judge of this Court in **Abdul Halim Khan Vs. Raja Saadat Ali Khan and others, AIR 1928 Oudh 155**, which, in my view, squarely applies to the facts and pleadings of this case and I am in respectful agreement therewith:

"One of the general principles governing the law of limitation is that a person can only be considered to be barred, if he has a right to enter and does not exercise that right within the period fixed by the Limitation Act. The maxim of law is contra non valentem agree nulla currit praescriptio (prescription does not run against a party who is unable to act); vide Broom's Legal Maxims, 9th edn., p. 576. Accordingly possession cannot become adverse against a person as long as he is not entitled to claim immediate possession. Ex facie it must follow that a person who is not in existence cannot be considered to be in a position to claim whether immediate or otherwise. It is evident that in the eyes of the law the plaintiff did not come into existence as long as he was not adopted. His adoption took place on 27th July 1914. He must be deemed to have come into existence only then. It was, therefore, obviously not

*possible for him to claim possession of the property before that date, and if he was not in a position to claim it at all, having not been then in existence, it would be absurd to say that another person was in possession adversely to him. One might fairly ask: "**Adverse against whom?" It certainly cannot be adverse against the plaintiff, who was not then in existence.** It may have been adverse against any other person, but we are not concerned with such person unless the plaintiff can be shown to have derived his title from such person." (page189-190)*

45. Recently, in **Vishwanath Bapurao Sabale Vs. Shalinibai Nagappa Sabale and others, JT 2009(5) SC 395**, Court, with respect to a claim of title, based on the pleading of adverse possession, said as under:

*"for claiming title by adverse possession, it was necessary for the plaintiff to **plead and prove animus possidendi.***

A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession."

46. What should have been pleaded and what a person claiming adverse possession has to show, has been laid down by the Apex Court categorically in **Karnataka Board of Wakf (supra)**:

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. ..... Physical fact of exclusive possession and the animus posdendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

47. Earlier also, a three-Judges Bench of Apex Court in **Parsinni & another Vs. Sukhi (supra)** laid down the following three requisites for

satisfying the claim based on adverse possession:

"5. The appellants claimed adverse possession. The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents. .... Possession is prima facie evidence of title. Party claiming adverse possession must prove that his possession mast be "nee vi nee clam nee precario" i.e. peaceful, open and continuous. The possession ***must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner."***

48. In the present case appellant clearly pleaded its own title. He pleaded that none else was owner. That being so the plea of adverse possession was impermissible in this case. Trial Court failed to examine the legal aspect and exposition of law, hence LAC has rightly reversed the judgment.

49. In absence of anything to show before this Court that appellant in any manner adduced any evidence to prove his title, while plaintiff's title was clearly shown, I have no option but to answer the above substantial question of law against him.

50. Appeal lacks merit and dismissed accordingly. Costs throughout.

(2020)08ILR A356
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.06.2020

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Second Appeal No. 1039 of 2007

Rishipal Singh & Ors. ...Appellants
Versus
Balram Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri K.M. Garg

Counsel for the Respondents:
Sri Anil Sharma, Sri Arvind Srivastava, Sri Shodan Singh

A. Civil Law - Code of Civil Procedure, 1908 – Sections 4(1) and 11 – Principle of Res Judicata – Application – Finding of Consolidation court regarding lunacy, idiocy or mental unsoundness – Held, finding given in the consolidation case will not operate as res judicata to the suit for Cancellation of Sale-deed. (Para 28 and 31)

A. Civil Law - Code of Civil Procedure, 1908 – Order XXXII Rule 1 to 15 – Enquiry regarding incapability of plaintiff – Duty of the Trial Court – Interest of the next friend, plaintiff-respondent no. 2, was adverse to the interest of plaintiff-respondent no. 1, who is alleged to be incapable – By reason of such adverse interest, prejudice has been caused to the interest of plaintiff-respondent no. 1 – In view of the averment that the plaintiff-respondent no. 2 was not competent to maintain the suit on behalf of the plaintiff-respondent no. 1, it was bounded duty of the court to undertake an enquiry contemplated under Order 32 Rule 15 CPC and record a finding – Lack of a proper enquiry and a finding of the court thereon, as envisaged in Order 32 Rule 15 CPC has led to a situation that is not comprehended by law – Held, the suit was not maintainable and the courts below were not justified in decreeing the suit. (Para 47, 52, 53, 59 and 60)

Appeal allowed (E-1)

Cases relied on :-

1. Sajjadanashin Sayed Md. B.E. EDR Vs Musa Dadabhai Ummer & ors. (2000) 3 SCC 350

2. Civil Appeal No. 9918 of 2011 - Nand Ram Vs Jagdish Prasad; decided on 19 March 2020

3. Prabhat Sharma Vs Hari Shankar Srivastava; (1988) ALJ 436

4. Keshav Deo Tulshan Vs Jagadish Prasad Tulshan 1971 SCC OnLine Cal 100 : AIR 1973 Cal 83

5. Ram Chandra Arya Vs Man Singh AIR 1968 SC 954

6. Nagaiah & anr. Vs Chowdamma (2018) 2 SCC 504

7. Somnath Vs Tipanna Ramchandra Jannu AIR 1973 Bombay 276

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

1. This second appeal has been filed by the defendant-appellants against the judgement and decree dated 11.7.2007 and 24.7.2007 respectively passed by the Additional District Judge, Court No. 2, Bijnor dismissing the Civil Appeal No. 96 of 2006 filed by the appellants whereby the judgement and decree dated 30.11.2006 passed by the Additional Civil Judge (Junior Division), Court No. 3, Bijnor in Original Suit No. 72 of 1995, was affirmed.

2. The following substantial question of law was framed by the Court on 11.10.2007:

"(i) Whether the finding given in the Consolidation Suit regarding Balram Singh will operate as res judicata in the subsequent suit as the said finding is a nullity in view of the decision of this Court in Prabhat Sharma and another Vs. Hari Shankar Srivastava and others 1988 ALJ 436 which has relied upon the decision of the Supreme Court in Ram Chandra Arya Vs. Man Singh AIR 1968 SC 954?"

Two other substantial questions of law were framed by the Court on 24.7.2019:

"ii) Whether the courts below were justified in decreeing the suit without appointing the plaintiff-respondent no.2 as the guardian of the plaintiff-respondent no.1 in view of the provisions of Sections 4 and 6 of the Hindu Minority and Guardianship Act, 1956 and the provisions of Order 32 Rule 3 read with Rule 15 of the CPC?

iii) Whether the failure of the trial court to conduct an enquiry as envisaged in Order 32 Rule 15 of the CPC in respect of the plaintiff-respondent no.1 had rendered the suit not maintainable on behalf of the plaintiff-respondent no.1?"

3. The suit was purportedly filed by the plaintiff-respondent No.1 through the plaintiff-respondent no.2, seeking relief of cancellation of a sale deed dated 23.9.1994 executed by the plaintiff no. 1, Balram Singh, in favour of the defendant-respondents in respect of a plot of land. Balram Singh, the plaintiff no. 1 was described in the plaint as of unsound mind. The plaintiff-respondent no. 2, Raghunath Singh, who verified and signed the plaint on behalf of the plaintiff-respondent no.1, stated in the plaint that the plaintiff no. 1 is of unsound mind (mad) since the beginning and he is totally unable to think for himself. It is stated that during consolidation proceedings under the U.P. Consolidation of Holdings Act, 19531, it was held by the Consolidation Officer that the plaintiff no. 1 was an idiot ('Jad Buddhi') and that his guardian was required to be appointed. The mother of the plaintiff no. 1 was appointed as his guardian, and the plaintiff-respondent no. 2 and late Ram Nath (father of the defendant-appellants) were parties and as such the order of the Consolidation

Officer operates as res judicata. It is stated that after the death of the mother of the plaintiff no. 1, Ram Nath became the guardian of the plaintiff no. 1 and after his death, the plaintiff-respondent no. 2 came to be the guardian of the plaintiff no. 1. The defendants are brothers and they are the sons of late Ram Nath and had full knowledge of the unsound mind of the plaintiff no. 1, Balram Singh. The defendants illegally got executed an agreement to sell and got the plaintiff no. 1 to put his thumb impression on that document by exercising undue influence. Fraud was alleged. That document was registered and no money was paid to the plaintiff no. 1. Thereafter the defendants got executed a forged and fabricated sale deed dated 23.8.1994 and by exercising undue influence on the plaintiff no. 1 obtained his signature on that document. It is alleged that that forged and fabricated sale deed was a void document. No money was paid to the plaintiff no. 1, the sale deed was not executed by the plaintiff no. 1 in a fit state of mind and that no permission was taken from the District Judge, Bijnor for execution of the agreement to sell and the sale deed. That on coming to know of a rumour about the fabricated and forged sale deed, the plaintiff-respondent no. 2 obtained a copy of the same from the office of the Sub-Registrar, Bijnor and so in January 1995 for the first time he came to know of that sale deed. Since the plaintiff-respondent no. 2 is the real brother of the plaintiff-respondent no. 1, he is his guardian and therefore he has a right to file the suit on behalf of the plaintiff-respondent no. 1.

4. In the written statement filed on behalf of the defendant-appellants, the contents of the plaint were not admitted. It was denied that the plaintiff-respondent no. 1, Balram Singh, was a person of unsound mind since the beginning. It was denied that the Consolidation Officer had declared the plaintiff-respondent no. 1, Balram Singh, as a person of unsound mind and had appointed a guardian for him. It was also denied that the father of the defendant-appellants - Ram Nath was a party to the proceedings before the Consolidation Officer. It was stated that the plaintiff-respondent no. 1, Balram Singh, was a person of healthy mind and capable of looking after himself and the agreement to sell and sale deed were executed by the plaintiff-respondent no. 1, Balram Singh, after obtaining appropriate sale price for the property and after fully reading and understanding the contents of the same. It was stated that since the plaintiff-respondent no. 1 was a normal and capable person, therefore, no permission for executing the agreement to sell or sale deed was required from the District Judge.

5. On 06.08.1997 a statement of the plaintiff-respondent no. 1, Balram Singh, was recorded by the trial court (Paper No. 43A) purportedly under Order 10 Rule 1 of the CPC.

6. During pendency of the suit, the plaintiff no. 1 died on 25.7.1998 whereafter an amendment application (Paper No. 69 A) was filed by the plaintiff-respondent no. 2. After considering the objections, the trial court allowed the application by an order dated 18.9.1999. By means of the amendment, the plaintiff-respondent no. 2 stated, inter alia, that after the death of plaintiff no. 1, he is the sole heir of the plaintiff no. 1. It

was further stated that since plaintiff no. 1 was kept by the defendant-appellants in their custody therefore if any forged or fabricated will deed was got executed by the defendant-appellants in their favour from the plaintiff no. 1 then no rights thereunder would accrue to the defendant-appellants.

However, no amendment was sought in the relief clause of the plaint.

7. In the additional written statement filed by the defendant-appellant it was stated that the consolidation court has no authority to declare a person as a lunatic but the District Judge was entitled to appoint a person as his guardian. That Balram Singh (plaintiff-respondent no. 1) had instituted a Suit No. 553 of 1994 in the Court of Munsif, Bijnor (Balram Singh Vs. Jagdish and others) in which he had testified and which was decreed on 30.01.1995. That by means of a registered will dated 05.06.1998, the plaintiff-respondent no.1 had bequeathed his movable and immovable properties in favour of the defendant-appellant no.1, Rishi Pal Singh. That the deceased Balram Singh used to love the defendant-appellant no. 1 a lot. The defendant-appellant no. 1 served and looked after the plaintiff-respondent no. 1 till the end and also performed his funeral and last rites.

8. The trial court, initially, framed 5 issues as follows:

"1. क्या बैनामा दिनांक 23.9.94 बहक प्रतिवादीगण एक जाली फर्जी व शून्य दस्तावेज है?

2. क्या वादी नं.–1 जडबुद्धि व बुद्धिहीन व्यक्ति है और अपना अच्छा बुरा समझने में असमर्थ है?

3. क्या वादीगण ने वाद का मूल्यांकन कम किया है और अदा किया गया न्यायशुल्क अपर्याप्त है?

4. क्या वादीगण का वाद धारा 331 यू0पी0जैड0ए0एल0आर0 एक्ट के प्राविधानों से बाधित है?

5. क्या वादीगण किसी अनुतोष को यदि हॉ तो प्रभाव?

Subsequently, after amendment of the plaint and filing of an additional written statement, two other issues were framed on 17.04.2001:-

6. क्या वादी नं.–2 रघुनाथ वादी नं. –1 बलराम मृतक का वारिस है?

7. क्या मृतक बलराम सिंह ने दिनांक 5.6.98 को अपनी चल व अचल सम्पत्ति की वसीयत प्रतिवादी ऋषिपाल सिंह के हक में निष्पादित की जैसा कि प्रतिवादगण का कथन है?''

1. Whether the sale deed dated 23.9.94 in favour of the defendants is a forged, fraudulent and void document?

2. Whether the plaintiff no. 1 is an idiot and a person of unsound mind and is incapable to understand his interest?

3. Whether the plaintiffs have undervalued the suit and the court fees deposited is insufficient?

4. Whether the suit of the plaintiffs is barred by the provisions of Section 331 of the U.P.Z.A.L.R. Act?

5. Whether the plaintiffs are entitled to any relief, if yes, its effect?

6. Whether plaintiff no.2 Raghunath is the heir of the deceased plaintiff no. 1, Balram?

7. Whether the deceased Balram Singh had executed a will on 5.6.98 of his movable and immovable properties in favour of the defendant Rishipal Singh, as is stated by the defendants?

(English translation of the issues by court)

9. The trial court held that the sale deed dated 23.9.1994 is a void document as the plaintiff-respondent no. 1, Balram Singh was a mad person and such a person had no right to execute the sale deed or to enter into any contract. It held that though the plaintiff-respondent no.2 had repeatedly moved applications for getting the medical examination of the plaintiff-respondent no.1 done but it was objected to by the defendant-respondents which proves that they did not want his medical examination to be done, which all reveals that Balram Singh was not mentally fit. It observed that in this regard the Consolidation Officer has also said in his order that Balram Singh (plaintiff-respondent no.1) was a mad man. The trial court referred to the provisions of Section 11 and its Explanation VIII of the CPC in this regard. It held that the plaintiff-respondent no.1 was a mad person since birth and a mad person has no right to to execute a sale deed or any other contract. It referred to the revenue records (khatauni) where the plaintiff-respondent no.1 was recorded as an idiot and held that the medical report of the plaintiff-respondent no.1 appears to be false and fabricated. It held that since the PW 1 (plaintiff-respondent no.2) and the PW-2 have both said that the guardian of the plaintiff-respondent no.1 is the plaintiff-respondent no.2 therefore it has to be believed that Raghunath Singh is the heir of Balram Singh. The trial court held that the plaintiff-respondent no. 1 could not have executed the will deed dated 5.6.1998 as he was a person of unsound mind. The suit was decreed and the sale deed was cancelled.

10. In the appeal filed by the defendants against the decree of the trial court, the lower Appellate Court did not frame any points for determination, but observed that the issue no.2 (framed by the trial court) was of paramount importance which was whether the deceased, Balram Singh, was a person of unsound mind. The statement made by the plaintiff-respondent no.1 bearing Paper No. 43A, purportedly made under the provisions of under Order 10 Rule 1 of Code of Civil Procedure2 was considered and held that this would not be a statement under the provisions of Order 10 Rule 1 C.P.C. The court referred to the provisions of Sections 13, 80 and 114 of the Evidence Act and held that no presumption can be drawn that the executor of documents was of normal mind or a brainless idiot at the time of execution of the documents. The court observed that the Consolidation Officer had held the plaintiff-respondent no.1 as an idiot which order was never challenged before any court and held that the decision of the Consolidation Officer would operate as res judicata in the present case. It held that admittedly, at the time of execution of the sale deed the plaintiff-respondent no.1 was not a person of sound mind and thus he had no right to execute the agreement and as such the sale deed dated 23.09.1994 executed by him is a fabricated and a void document. It was also held that during consolidation proceedings the mother of Balram Singh, who was his natural guardian, was appointed as his guardian, but she has died. Under the provisions of Section 171 of the U.P. Zamindari Abolition and Land Reforms Act, Raghunath Singh (plaintiff-respondent no.2) being the real brother of the plaintiff-respondent no.1 is his heir and guardian. Accordingly, the appeal was dismissed and the judgement and decree of the trial court were affirmed.

Submission of the learned counsel

11. The learned counsel for the appellants has contended:

(i) The decision of the consolidation authority dated 21.10.1981 in Case No. 4147 under Section 9A(2) of the UPCH Act cannot operate as res judicata in so far as it declared the plaintiff-respondent no. 1, Balram Singh, as a person of unsound mind. The learned counsel has referred to the provisions of Rule 14 of the U.P. Consolidation of Holdings Rules, 19543 to contend that the Consolidation Officer had no power to declare the plaintiff-respondent no. 1 as a lunatic and that order of the Consolidation Officer is a nullity. The learned counsel referred to the provisions of Lunacy Act, 19124 to contend that no power is vested in the consolidation authorities for conducting an inquisition as provided under Section 62 of the Lunacy Act. It is further contended that since that order dated 21.10.1981 passed by the Consolidation Officer declaring the plaintiff-respondent no. 1, Balram Singh, as a person of unsound mind is without jurisdiction and is a nullity, it cannot operate as res judicata. It is contended that the Consolidation Officer, while deciding objections under Section 9A(2) of the UPCH Act is not a court as defined under the C.P.C. While referring to the Explanation VIII of Section 11 C.P.C. the learned counsel has contended that the Consolidation Officer is not competent to decide on the issue of lunacy/unsoundness of mind of the plaintiff-respondent no. 1.

(ii) It was incumbent on the courts below to appoint the plaintiff-respondent no. 2 as the guardian of the plaintiff-respondent no. 1 in view of the provisions of the Hindu Minority and Guardianship Act, 19655 and the provisions of Order 32 Rule 3 read with Rule 15 of C.P.C. The learned counsel, while referring to the array of parties in the plaint, has pointed out that the plaintiff-respondent no. 1, Balram Singh, has been described as 'fatrul aqal', that is, of unsound mind / feeble minded. The plaintiff-respondent no. 2, Raghunath Singh, who had signed the plaint is not shown in the array of parties as the next friend or guardian of the plaintiff-respondent no. 1, Balram Singh. It is contended with reference to the provisions of Hindu Guardianship Act and the provisions of the Guardians and Wards Act, 18906 that the suit is incompetent because the plaintiff-respondent no. 2, Raghunath Singh, was never appointed as guardian of the plaintiff-respondent no. 1. The learned counsel has also referred to the provisions of Sections 52 and 53 of the Mental Health Act, 1987 to contend that it is a special law for the purpose of appointment of guardian of a mentally ill person.

(iii) The learned counsel contends that the suit was not maintainable on behalf of the plaintiff-respondent no. 1 as the trial court had failed to conduct an enquiry as envisaged in Order 32 Rule 15 of C.P.C. in respect of the plaintiff-respondent no. 1.

12. Shri Arvind Srivastava, learned counsel appearing for the plaintiff-respondent no. 2 has contended that the documents filed by the defendant-appellants, namely, the medical certificate dated 19.8.1994 (Paper No. 21C) and the documents/pleadings of Suit No. 553 of 1994 allegedly filed by the plaintiff-respondent no. 1, Balram Singh, on which reliance has been placed

by the learned counsel for the defendant-appellants, would not be of any assistance to them. He stated that the medical certificate affirming the sound mental condition of the plaintiff-respondent no. 1 was not duly proved by the person who had issued that certificate, because a minor employee of the health department was produced as defendant witness to prove that document. The learned counsel has referred to the proximity of the date of the medical certificate and the the allegedly suit filed by the plaintiff-respondent no. 1, Balram Singh, on 19.8.1994 and 5.9.1994 respectively on the one hand, with the sale deed dated 23.9.1994 on the other, to contend that the medical certificate was obtained for a fraudulent purpose and the suit was purposely and motivatedly instituted at the behest of the defendant-appellant without there being any cogent reason to do so, only with a view that they could be used by the defendant-appellants for purpose of upholding the impugned sale deed dated 23.9.1994 should it be challenged in a court of law.

The learned counsel further contends that a reading of the provisions of Section 9A(2) of the UPCH Act read with Rule 14 of the UPCH Rules leave no room for doubt that the earlier suit filed before the Consolidation Officer was relevant to the extent that the order of the Consolidation Officer dated 21.10.1981 would operate as res judicata and that the Consolidation Court had jurisdiction to decide the lunacy of the plaintiff-respondent no. 1. It has been urged by the learned counsel that the issue whether the decision of the Consolidation Officer is a nullity would not be a substantial question of law in the facts of the present case and moreover a question regarding when would a finding operate as nullity has already been answered by this Court in the case of Prabhat Sharma and another Vs. Hari Shanker Srivastava reported in 1988 ALJ 436. The learned counsel while referring to Section 99 of C.P.C. contends that non-appointment of guardian of the plaintiff-respondent no. 1 was not a fatal defect and it can be cured because it does not affect the merits of the case or the jurisdiction of the Court. Protection is given to a minor/lunatic under the provisions of Order 32 of C.P.C. and he can be defended by the person having no adverse interest. The learned counsel has referred to the judgements reported in 2019 (1) ADJ 246, AIR 1954 Alld 599, AIR 1994 SC 152, AIR 2000 SC 3335.

Discussion

13. *Substantial question of law no. (i) : Whether the finding given in the Consolidation Suit regarding Balram Singh will operate as res judicata in the subsequent suit as the said finding is a nullity in view of the decision of this Court in Prabhat Sharma and another Vs. Hari Shankar Srivastava and others 1988 ALJ 436 which has relied upon the decision of the Supreme Court in Ram Chandra Arya Vs. Man Singh AIR 1968 SC 954?*

The provisions of Section 11 of C.P.C. and its Explanation VIII are as follows:

"**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 VIII.--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

14. As far as the proceedings of the consolidation case are concerned, apart from a certified copy of the order dated 21.10.1981 passed by the consolidation officer in Case No. 4147 under Section 9A(2) of the UPCH Act, no other document has been filed by the plaintiff-respondent no. 2. The pleadings / applications / objections could have revealed whether the matter in the present suit was directly and substantially in issue in the case before the Consolidation Officer, and, whether the same parties, or, the parties under whom they or any of them claim litigating under the same title in the present suit were there before the Consolidation Officer and, whether the Consolidation Officer was competent to try the present case.

15. The proceedings under Section 9A(2) of the UPCH Act stood concluded by means of the aforesaid order passed by the Consolidation Officer dated 21.10.1981.

16. Before considering the order dated 21.10.1981 passed by the Consolidation Officer, it is pertinent to refer to the provisions of Section 9A of the UPCH Act which are as follows:

"9A. Disposal of cases relating to claims to land and partition of joint holdings.--(1) The Assistant Consolidation Officer shall :

(i) Where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned ; and

(ii) Where no objections are filed, making such enquiry as he may deem necessary

settle the disputes, correct the mistakes and effect partition as far as may be by consolidation between the parties appearing before him and pass orders on the basis of conciliation.

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of trees, wells or other improvements, for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under Sub-section (1) and the Consolidation Officer, while acting under Sub-section (2), shall be deemed to be a court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding."

17. Rule 14 of the UPCH Rules reads as follows:

"14. *[Section 54(1)]*. - (1) The Assistant Consolidation Officer shall, in consultation with the Consolidation Committee, appoint guardians, for purposes of proceedings under the Act,

of such tenure-holders who are minors, idiots or lunatics unless such guardians have been already appointed by order of a competent Court.

(2) The guardian appointed for a minor, idiot or lunatic under sub-rule (1) shall be his natural guardian unless the natural guardian possesses, an interest adverse to the interest of the minor, the idiot or the lunatic. If the natural guardian is not so appointed, the Assistant Consolidation Officer shall record reasons therefor and shall then appoint the nearest male relative of the minor, the idiot or the lunatic, not possessing an interest adverse to him, as his guardian.

(3) A list of all such guardians together with the names of their wards shall be published in the village and any person interested in the ward may file an objection against such appointment before the Consolidation Officer within fifteen days of such publication, whose orders shall, subject to the modification, if any, made by orders passed under Section 48, be final."

18. The UPCH Act was enacted to provide for the consolidation of agricultural holdings in State of Uttar Pradesh for the development of agriculture. Chapter II of the UPCH Act deals with the revision and correction of maps and records. Section 4 to Section 12D constitute Chapter II. The Consolidation Officer while acting under the provisions of sub-section 2 of Section 9A of the UPCH Act is deemed to be a Court of competent jurisdiction notwithstanding anything to the contrary contained in any other law for the time being in force with respect to all rights and claims of tenure-holders as reflected in Section 9A. Section 11A of the UPCH Act bars questions in respect of claims to land, partition of joint holdings and valuation of plots, trees, wells and other improvements, relating to consolidation area, to be raised or heard at any subsequent stage of consolidation proceedings. Rule 14 of the UPCH Rules confers a limited jurisdiction upon the Consolidation Officer for appointment of guardians, for the purposes of proceedings under the UPCH Act, of such tenure holders who are minors, idiots or lunatics unless such guardians have been already appointed by order of the competent court.

19. The present suit is for cancellation of a sale deed executed by Balram Singh, plaintiff-respondent no. 1 in favour of the defendant-appellant nos. 1 to 3. The sale deed was executed on 23.9.1994.

20. The certified copy of the order dated 21.10.1981 passed by the Consolidation Officer, Najibabad Camp, Bijnor pertains to Case No. 4147 under Section 9A(2) of the UPCH Act in respect of Villages Mohd. Alipur Tara and Maheshwari, Pargana Mandawar, Tehsil & District Bijnor. The parties mentioned therein are Ram Singh and others Vs. State. The opening paragraph of that order states that since the Case No. 4147 to 4154 and Case No. 4521 are related to each other, they are consolidated and Case No. 4147 would be the main case. The second paragraph of the judgement reads that the present case pertains to Khata Nos. 17, 14, 19, 32, 21, 20, 31, 18. It is mentioned that partition has to be affected between the recorded tenure holders of the aforesaid Khatas. It is further mentioned in the order that there is no objection with

regard to the proposed portions as appearing in C.H. Form No. 5.

The order further reads that the dispute is that in all the aforesaid Khatas the name of Balram Singh, unsound mind, guardian Raghunath Singh, brother appears. During preparation of 'tasdik' khatauni, Balram Singh was not shown as of unsound mind and the name of his guardian has also been deleted. The order further reads that Raghunath Singh has objected that Balram Singh be recorded as of unsound mind and his own name be recorded as his guardian as it previously appeared and that by means of an application, Raghunath Singh has prayed that Balram Singh, unsound mind, and his guardian Raghunath Singh, be allotted a single Khata number. The order states that Balram Singh on the other hand moved a separate application that against his name the word unsound mind be removed and his 1/3rd share be separated and a separate chak be made. An issue was framed that whether Balram Singh is not of unsound mind. It was held that Balram Singh was an idiot ('jad'). After considering the facts and the record, the Consolidation Officer recorded that Balram Singh stays with his mother and he does not appear to be a stable minded person and, therefore, held that the natural guardian of Balram Singh would be his mother, Bhagwan Dei and thus, in place of Raghunath Singh, the name of Bhagwan Dei, the mother of Balram Singh would be recorded as guardian. The order finally passed by the Consolidation Officer was one of recording of the partition between each tenure-holder, including the plaintiff-respondent no.1, Balram Singh, and direction was passed for the entries in the revenue records to be made accordingly.

21. In the aforesaid matter before the Consolidation Officer, it is nobody's case that there existed any dispute between the plaintiffs and the defendants who are arrayed in the present case. There is no document on record that shows that the plaintiffs and the defendants of the present suit were arrayed as opposite parties in all or any of the cases before the Consolidation Officer. No copy of any plaint, application, written statement pertaining to the proceedings before the Consolidation Officer were brought on record. The matter under Section 9A(2) of the UPCH Act before the Consolidation Officer was one of partition which was to be effected between the recorded tenure holders of the relevant Khatas. There was no objection to the proposed portions mentioned in C.H. Form No. 5. There was, thus, no dispute with regard to the share of Balram Singh, the plaintiff-respondent no.1. Only one incidental dispute was raised by the plaintiff-respondent no. 2- Raghunath Singh, that was whether he was entitled to be recorded as the guardian of plaintiff-respondent no. 1- Balram Singh. For decision of this dispute the aforesaid issue was framed by the Consolidation Officer. The Consolidation Court negatived the contention of Raghunath Singh, holding that the mother of Balram Singh, Bhagwan Dei, would be his guardian which was to be recorded in the revenue records. There is no material to demonstrate that the proceedings before the Consolidation Officer were between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

22. The matter directly and substantially in issue before the Consolidation Officer was one of partition of the holdings in which a

dispute was raised by Raghunath Singh regarding guardianship and an issue was framed by the court that whether Balram Singh is not of unsound mind. The issue of appointment of guardian and unsoundness of mind of Balram Singh was thus, not an issue directly or substantially in issue before the consolidation court but, rather, it was a collaterally or incidentally in issue.

23. In this regard it is pertinent to refer to the following two judgements of the Supreme Court.

The Supreme Court in the case of **Sajjadanashin Sayed Md. B.E. EDR v. Musa Dadabhai Ummer & others**7 observed that difficulty has been felt in various jurisdictions in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and test have been laid down in various courts. It was observed as follows:-

"18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). **One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue** (Ishwer Singh v. Sarwan Singh [AIR 1965 SC 948] and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105):

"It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."

(emphasis by Court)

The Supreme Court referred to three cases relating to instances where in spite of a specific issue and an adverse finding in an earlier suit, the finding was treated as not res judicata as it was purely incidental or auxiliary or collateral to the main issue in each of those cases, and not necessary for the earlier case nor its foundation.

24. In a case before the Supreme Court (**Civil Appeal No. 9918 of 2011 - Nand Ram v. Jagdish Prasad** - decided

on 19 March 2020), the judgment and order passed by the High Court in a Second Appeal filed by the defendant was challenged, whereby the appeal was allowed and the suit for possession of land comprising in Khasra No. 9/19 measuring 3 Bighas 11 Biswas was dismissed. The plaintiffs filed a suit for possession asserting that they were owners in possession of two plots of land bearing two khasra numbers. Portions of the two plots of land were taken on lease for 20 years till 22nd September, 1974 on annual rent by the defendant. It was agreed between the parties that it will not be open to the plaintiff-lessor to seek ejectment of the defendant-lessee from the leased premises, however, if the rent for one year remained in arrear, then the lessor would have the right to eject the lessee. The entire leased land was acquired pursuant to the notification dated 24th August 1959 under Section 4 of the Land Acquisition Act, 1894. The Land Acquisition Collector determined the market value of the land acquired including the super structure upon it. A dispute arose with regard to apportionment of compensation and the same was referred to the Reference Court. The defendant-respondent claimed apportionment of compensation in lieu of his lease-hold rights on the ground that they were deprived of the right to retain possession of that land for the unexpired period of 14 years of the lease in their favour, which was for 20 years in total. In its award, the reference court held that the respondent had not paid rent for more than 12 months and, thus, in accordance with clause 9 of the lease deed, the lease had come to an end. Therefore, the defendant had no right to claim a share in the compensation payable for the land leased to them. A part of the land acquired, comprising in one of the plots of land, was de-notified under Section 48(1) of the Act. Such land, measuring 1 Bigha 19 Biswas continued to be in possession of the defendant-lessee. Thereafter, the suit was filed. In the written statement it was asserted that the land which was in possession of the defendant did not form a part of the alleged lease deed and that the defendant was in possession of this land in his own legal right. The defendant contended that if the plaintiffs had any right in the land in possession of the defendant, then the defendant had become the owner of the land in question by adverse possession. The trial court decreed the suit after evidence was led by the parties. The First Appellate Court affirmed the findings recorded by the trial court. In the Second Appeal, the High Court framed two substantial questions of law, the first of them being:

"Whether the judgment rendered by the Land Acquisition Court on 21st August, 1961 (Ex.PW-1/12) operates as res judicata between the parties as regards the title of the suit property?"

The High Court allowed the Second Appeal holding that the finding recorded in the award that upon non-payment of rent for 12 months, the lease had come to an end, had attained finality, and therefore, such finding would operate as res judicata. The Supreme Court disagreed with that and held as follows:-

"27. Thus, the finding returned in the award of the Reference Court (Ex. PW1/12) that the lease stood determined on account of non- payment of rent was a finding made by the reference Court for a limited purpose i.e. not to accept the defendant's claim for compensation. Such finding cannot be binding on the parties

in a suit for possession based on title or as a lessor against a lessee. Section 11 of the Code bars the subsequent Court to try any suit or issue which has been directly and substantially issue in a former suit. The issue before the Reference Court was apportionment of compensation and such issue having been decided against the defendant, the reference to notice for termination of tenancy does not operate as res judicata. Therefore, the finding recorded by the High Court that the order of the Reference Court operates as res judicata was clearly not sustainable. The first substantial question of law has been, thus, wrongly decided."

25. As far as the aspect of the 'finding' by the Consolidation Officer of mental unsoundness of the plaintiff-respondent no.1, Balram Singh, operating as res judicata is concerned, it is important to note, that for persons afflicted by lunacy or unsoundness of mind, special enactments have been in force from time to time.

26. Chapter V in Part III of the repealed **Indian Lunacy Act**, **1912** provides for 'proceedings in Lunacy outside the Presidency-towns' for inquisition, etc. Proceedings for inquisition, etc. are required to be taken by a District Court as per the procedure prescribed in that Chapter. However, as provided in Section 82 thereof, where subsequent to a finding by the District Court of a person with unsound mind, it is shown to that Court that there is reason to believe that such unsoundness of mind ceased, the Court may make an inquiry in the nature of an inquisition as provided in Chapter V, and if it is found that the unsoundness of mind ceased, the Court shall order all proceedings in the lunacy to cease or to be set aside on such terms and conditions as to the Court may seem fit. Section 82 reads as follows:

"82. Proceedings in lunacy to cease or to be set aside if the court finds that the unsoundness of mind has ceased.-

(l) When any person has been found under this chapter to be of unsound mind and it is subsequently shown to the District Court that there is reason to believe that such unsoundness of mind ceased, such Court may make an order for inquiring whether such person is still of unsound mind and incapable of managing himself and his affairs.

(2) The inquiry, shall, as far as may be, be conducted in the same manner as if prescribed in this chapter for an inquisition into the unsoundness of mind of an alleged lunatic, and if it is found that the unsoundness of mind ceased, the Court shall order all proceedings in the lunacy to cease or to be set aside on such terms and conditions as to the Court may seem fit."

27. Then came the Mental Health Act, 1987. Chapter VI thereof provides for judicial inquisition regarding alleged mentally ill person possessing property, custody of his person and management of his property. Section 75 thereof reads as follows:

"***75. Action taken in respect of mentally ill person to be set aside if District Court finds that his mental illness has ceased.--****(1) Where the District Court has reason to believe that any person who was found to be mentally ill after inquisition under this Chapter has ceased to be mentally ill, it may direct any court subordinate to it to*

inquire whether such person has ceased to be mentally ill.

(2) An inquiry under sub-section (1) shall, so far as may be, conducted in the same manner as an inquisition conducted under this Chapter.

(3) If after an inquiry under this section, it is found that the mental illness of a person has ceased, the District Court shall order all actions taken in respect of the mentally ill person under this Act to be set aside on such terms and conditions as that Court thinks fit to impose."

28. Therefore, the aforesaid special Acts governing alleged lunacy or unsoundness of mind of persons have, all through, recognised the possibility that the mental illness of a person may cease even after an inquisition under the relevant provisions of such laws have found him to be mentally ill. Under the circumstances, in view of the aforesaid special Acts, and keeping in view the provision of sub-section (1) of Section 4 of the CPC, the principles of res judicata would not have any application in the facts of the present case insofar as the Consolidation Officer recorded any finding with regard to the alleged lunacy, idiocy or mental unsoundness of the plaintiff-respondent no.1, Balram Singh. Mental unsoundness or mental health of a person is a medical condition of a substantive nature and such condition of such a person is subject the provisions of the aforesaid and related special laws. Thus the doctrine of res judicata, being purely procedural in nature, cannot be invoked for purpose of imparting finality to mental unsoundness or mental health of a person.

29. On consideration of the various aspects of the matter discussed above, it cannot be said that the findings given in the consolidation case regarding Balram Singh would operate as res judicata in the present suit.

30. In the case of Prabhat Sharma v. Hari Shankar Srivastava (1988 ALJ 436), a revision before the High Court was filed by Prabhat Sharma, who was a co-tenant of the house of which the respondent was the owner-landlord. Mamta Sharma, who was the second applicant, was the wife of Hari Krishna Sharma through whom Prabhat Sharma filed the revision. The background of the case was that a suit of 1981, for recovery of arrears of rent and eviction was decreed, and a revision challenging the same, filed before the High Court in 1982, was dismissed. The High Court, however, granted two months further time to vacate the accommodation on the request made by the counsel for the revisionist, subject to an undertaking being filed before the trial court that they would deliver the vacant possession to the respondent no.1 immediately on expiry of two months. Though the undertaking was filed, but the accommodation was not vacated. The decree was put to execution. Two applications were filed by the tenants in the execution proceedings, one of which was under O.32 R.5 read with Section 47 CPC. Two interlocutory orders passed on that application were challenged separately in revisions before the High Court. One revision was dismissed and the other was disposed off observing that the execution case be decided expeditiously. Thereafter, on the objection under Section 47 CPC being dismissed, the revision was filed before the High Court challenging the same. It was held, inter alia, that Prabhat Sharma was not a person of unsound mind but he

was capable of defending himself and signed the notice meant for him and also signed a vakalatnama engaging a counsel. The written statement in the suit was signed by him. Therefore, the decree against him did not deserve to be set aside on the ground that he was a person of unsound mind and should have been represented through a next friend in the suit. It was argued on behalf of the revisionist that the conclusion arrived at by the court below that Prabhat Sharma was not a person of unsound mind had not been arrived at in accordance with law. Prabhat Sharma deserved to be treated at par with a minor and a guardian should have been appointed for him. Since it was not done, the decree in the suit was a nullity as far as Prabhat Sharma was concerned and it could not be executed against him. While considering the Lunacy Act, 1912, this court observed that the object of that Act is to find out whether the person is a lunatic, with a view to placing drastic checks upon his rights and privileges which otherwise, as a normal individual he would be entitled to enjoy. It observed that it is entirely different from determination of the question whether a person is of unsound mind for purposes of O. 32 CPC. It held as follows:

"12. By itself, O. XXXII, C.P.C. does not lay down the procedure by recourse to which the unsoundness of mind of a person is to be determined. ***The matter has been left for determination by the court on basic material which is relevant. It is to be determined objectively. The guiding principle should be whether the person in question is capable of looking after his own interest like a normal human being or is he bereft of the extent of intelligence necessary for awareness about his own interest sufficiently****. If the actions and conduct of a person are such that a reasonable person would consider them to be sufficient indication of normal human behavior, unsoundness of mind cannot be attributed to that person. . . . . "*

(emphasis by Court)

This Court noticed that the executing court had considered the evidence on record before it, which included documentary evidence as well as the statement of a medical practitioner who had treated Prabhat Sharma. The conclusion recorded was that Prabhat Sharma could not be said to be a person of unsound mind and that at the relevant time he was capable of looking after his interest like a normal person. Such a conclusion was found to be reasonable. Under the facts and circumstances of that case, the revision of Prabhat Sharma was dismissed.

31. As already held above, the finding given in the consolidation case with regard to the plaintiff-respondent no.1, Balram Singh, will not operate as res judicata. Having held so, there is no need to answer whether the said finding is a nullity or otherwise in view of the decision of this Court in **Prabhat Sharma** for purpose of answering this substantial question of law.

32. Substantial question of law nos. (ii) and (iii) :

ii) Whether the courts below were justified in decreeing the suit without appointing the plaintiff-respondent no.2 as the guardian of the plaintiff-respondent no.1 in view of the provisions of Sections 4 and 6 of the

Hindu Minority and Guardianship Act, 1956 and the provisions of Order 32 Rule 3 read with Rule 15 of the CPC?

iii) Whether the failure of the trial court to conduct an enquiry as envisaged in Order 32 Rule 15 of the CPC in respect of the plaintiff-respondent no.1 had rendered the suit not maintainable on behalf of the plaintiff-respondent no.1?

Since, the answers to the substantial question of law nos. (ii) and (iii) are based on similar facts and evidence, they are being decided together.

33. It is the contention of the learned counsel for the defendant-appellant that since the plaintiff-respondent no. 2 is not the natural guardian of the plaintiff-respondent no. 1, he can only be a guardian under the Hindu Minority and Guardianship Act, 19568 in case he demonstrates that (i) he is appointed by a Will of father or mother of the plaintiff no. 1, (ii) he is appointed or declared a guardian by a court and (iii) he is empowered to act as such by or under any enactment relating to any court of ward. The learned counsel contends that the sole case being put forth by the defendant-respondent no. 2 is that he being the brother of the defendant-respondent no. 1, is his guardian. He contends that such a statement and stand is unrecognized by law.

34. A perusal of the plaint reveals that the plaintiff-respondent no.2 has not described himself as the next friend or guardian of the plaintiff-respondent no.1 in the array of parties, but, he has verified and signed the plaint on behalf of the plaintiff-respondent no.1. There is no signature / thumb impression of the plaintiff-respondent no.1 in the plaint. The rest of the contents of the plaint have already been referred to above.

35. Rules 1 to 14 of Order 32 CPC (as applicable in the State of Uttar Pradesh) pertain to suits by or against minors. Order 32 Rule 15 CPC makes Rules 1 to 14 (except rule 2A) applicable to persons of unsound mind. Rule 16 is the savings rule.

36. The issue with regard to validity of a suit by a minor being instituted in his name by his next friend, without the next friend being so appointed by a court, is not *res nova*. The case of **Keshav Deo Tulshan v. Jagadish Prasad Tulshan**9, decided by the Calcutta High Court, arose out of an application for an order, inter alia, for stay of further proceedings relating to and/or arising out of the ex parte decree passed in a suit of 1953. Jagadish Prasad Tulshan, being a minor, instituted the suit through his next friend and certificated guardian, Puranmall Jaipuria. Thereafter, the guardian was discharged by the court and in his place, the mother of the minor was appointed the certificated guardian and next friend of the minor. Later, on an application of Jagadish Prasad Tulshan, it was recorded by an order dated 28.08.1961, that he had obtained majority. By another order dated 11.09.1961, his mother was discharged from further acting as his certificated guardian and next friend in the suit. The suit was decreed ex parte on 28.03.1964. It was argued that Jagadish Prasad Tulshan did not attain majority on 11.09.1961 and, accordingly, the discharge of the mother from acting as his next friend left the minor without a representative and as such no decree could be validly passed in such a suit and

that the decree is null and void. The court observed as follows:

"9. If the provisions of Order 32 of the CPC are analysed it would appear that a distinction between the two lines of cases have been maintained in procedural matters connected with a suit by and against the minor. Various decisions have been placed before me and, in my opinion, the same distinction has been maintained in the said decided cases. It would also appear that the principles involved in such procedural matters are somewhat different in respect of the cases where the minor is the plaintiff and where the minor is the defendant.

10. The provision of Order 32, R. 1 of the Code requires that although the minor plaintiff would himself be the party to the suit, yet because of his immaturity his interest should be looked after or watched by a matured and/or an adult person. It contemplates that prior to the institution of the suit the minor must have the assistance of such an adult person. The underlying principle appears to be this that if the minor gets a decree in his favour then his interest is not prejudiced but if he fails in his attempt and the suit is dismissed with costs then the defendant's right to recover such costs would be in jeopardy. To protect such interest of the defendant under such circumstances, Rule 2 thereof provides that if the defendant did have the opportunity to know about the minority of the plaintiff the defendant could have come up before the Court and applied under the said Rule 2, and the plaint, under such circumstances, might be directed to be taken off the file and the pleader or other person by whom such plaint was presented might be personally saddled with costs so that the defendant would be in a position to recover such costs when so awarded in his favour, but in such an application the Court would not be bound to make an order directing the plaint to be taken off the file. Discretion has been given to Court to make such order as it would think fit. This clearly shows that the institution of the suit by the minor is not, ipso facto, bad and the plaint does not become defective and it remains a good and an effective one. In such an application whether the minor has attained majority or not can be decided. But if no such objection is taken and no application is made by the defendant, the question as to the minority of the plaintiff cannot arise after the decree is passed in the suit on the question relating to the validity thereof. In such a case the defendant would be deemed to have taken advantage of the position. He took the chance of the suit being dismissed on the basis of his written statement and after having failed in that attempt and after allowing the decree to be passed against him he will be precluded from raising the point of defect in procedure for the purpose of challenging the said decree. In such a case when the plaintiff minor gets a decree in his favour there is no question of the defendant's suffering any prejudice as is contemplated under Rule 2 of Order 32 of the CPC. From that point of view it must be held that the provision of Order 32 has been enacted for the purpose of protecting the interest of the minor without causing any prejudice to the interest of the defendant.

* * * *

12. The propositions discussed above in respect of such cases would find sufficient support from the principles underlying the express language used in

Rule 5 of the said Order 32. It provides to the effect that in respect of orders passed either in the suit or in an application by the minor without such a next friend or a guardian, the Court in its discretion may discharge the same if it will go to affect the interest of the minor. In other words, it will remain a valid order if in spite of such defect in procedure it would enure for the benefit of the minor. This clearly shows that the underlying principle involved therein is that if the minor with an immature brain has done something resulting in an order which has benefited him instead of causing him prejudice, such an order may not be disturbed. The order will remain a valid order. But if by obtaining such an order his interest would be affected thereby then only such an order may be discharged by the Court. The expression "by which a minor is in any way concerned or affected" in sub-rule (2) of Rule 5 of the said Order, when read along with the discretion conferred on Court and the provision for personal liability for costs, must mean, when the order has gone against the minor or against his interest; otherwise the provision would have been made mandatory.

13. The distinction, as discussed above, would be further revealed from an analysis of the said provisions of Order 32 of the CPC. Whereas in the case of a minor plaintiff the person who comes to his assistance as the next friend is a private person, subject to his filing an affidavit of competency, the guardian of a minor defendant is an officer of the Court. Such a guardian is appointed by the Court after the institution of the suit. At the time of the institution of the suit the minor defendant is not represented by any person. He is brought into the suit as a party defendant without any act or volition on his part. Normally reliefs will be claimed against him when he is made a party defendant in the suit. His rights have to be protected. Unless somebody would be there to represent him in the suit the minor would not be deemed to be a party to the suit. Hence, if the decree is passed against him without any guardian being appointed it would be deemed as though he didn't have any existence in the suit. Accordingly, when the decree would be passed against him it would be deemed as though there was no decree against him and such a decree would be a nullity. In the case of a minor defendant, the absence of the guardian does not make it only an irregularity in procedure. It is a matter of substance and goes to the very root because until the minor is represented he would not be a party to the suit and consequently to the decree.

* * * *

15. In my opinion, the provision of Rule 2 of Order 32 has been enacted for the purpose that in case a suit instituted by or on behalf of a minor without a next friend the Court acting under sub-rule (2) might be in a position to regularise the irregularity as soon as it is brought to the notice of the Court. If the defect in procedure cannot or should not be cured in the facts and circumstances of the case, then in the interest of the minor the Court is likely to order that the plaint be taken off the file.

16. It necessarily follows that the irregularity in instituting the suit does not make the suit wholly bad but makes it a defect in procedure. The only way it can be corrected is when the defendant makes an application under the said Rule 2 of Order 32. If such an application is not made in between the time of the institution of the suit and the passing of

the decree thereon the defendant would be precluded from raising the said point thereafter and will not be permitted to assert that the decree passed in such a suit is in any way a bad decree. In sub-rule (2) of Rule 2 of Order 32 the Court has been given wide powers to make such order as the Court might think fit after hearing the objections raised by the pleader or the person concerned who presented the said suit on behalf of the minor. The initial onus will be on the defendant in such an application to prove that the plaintiff is a minor. If the Court would be satisfied upon the materials placed before it that the plaintiff is a minor and that such fact was suppressed on behalf of the minor to deceive the Court then the Court may direct the suit to be taken off the file and make such person or pleader personally liable for costs. If there is no such mala fide motive the Court might make such order whereby an opportunity would be created for the minor being represented by a next friend and until that would be done the suit might be stayed. These are various orders which the Court might think of passing in appropriate cases but if the defendant would not make such an application and a decree would be passed in a suit by the minor without a next friend then the defendant would be precluded from taking the point at a subsequent stage after the minor had attained majority. The decree, in such circumstance, does not become a nullity because the Court proceeds in the basis that it was not a suit by the minor and the suit was properly instituted. The decision of the question as to whether at the time of the passing of the decree the plaintiff was a minor would be quite immaterial at a stage when such a minor had already attained majority. Similarly, when the plaintiff at the time of the institution of the suit was a minor and duly sued by a next friend and subsequently the next friend is discharged on the statement by the minor that he has since attained majority and if it ultimately transpires that he actually did not attain majority at the date of the discharge of the next friend, any decree passed in such a suit under such circumstances will not make the decree a nullity and will be an effective and a valid decree on the very same principle that unless the objection would be taken by and on behalf of the defendant prior to the passing of the decree the defendant would be precluded from raising the said question of minority of the plaintiff at a subsequent point of time. The defect in procedure, if any, would be deemed to have been waived by the defendant. This it seems is based on sound principle. What could not be expected to be done by the minor without the assistance of an adult person had actually been done by his own skill and wisdom. Hence he needed no further protection."

After considering the gamut of case laws cited on behalf of the defendant on the issue, including the judgement of the Supreme Court in **Ram Chandra Arya v. Man Singh**10, the High Court observed that the cases have not in any way touched the principle laid down in a series of cases where the plaintiff as a minor has sued without a next friend and a decree has been passed thereon. The court therefore, concluded that the decree cannot be a nullity.

37. In the case of **Nagaiah and another v. Chowdamma**11, the facts of the case before the Supreme Court were that a suit was filed in 1989 by the appellants praying for a declaration that

the suit schedule property is the joint property of the appellants alongwith their father, Kempaiah (defendant no.1) and that they are entitled to 2/3rd share in the said property; that the sale deed executed by their father in favour of the defendant no.2, Chowdamma, was not binding on their 2/3rd share in the suit schedule property. A relief for permanent injunction was also sought. At the time of filing of the suit the plaintiff-appellant no.2 was aged about 17 years. The plaintiff-appellant no.1 being the elder brother of the plaintiff-appellant no.2, filed the suit not only on his personal behalf, but also on behalf of the plaintiff-appellant no.2 (who was a minor). The suit was dismissed but the first appellate court decreed the suit. The second appeal before the High Court was allowed and the suit was dismissed mainly on the ground that the plaintiff-appellant no.1, being the elder brother of the plaintiff-appellant no.2, could not act as his guardian during the lifetime of Kempaiah, the father of the plaintiffs. Since the first defendant is the father of the plaintiff-appellant no.2, he was the natural guardian and hence only he could represent him and none else. The only question before the Supreme Court was that whether the first plaintiff being the elder brother of minor second plaintiff (at the time of filing of the suit) could have filed the suit on behalf of the minor as his next friend / guardian. After noticing the provisions of S.4(b) of the Hindu Guardianship Act and O. 32 CPC, the Supreme Court observed as follows:

"10. A bare reading of Order 32 Rule 1 of the Code makes it amply clear that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the "next friend" of the minor. The next friend need not necessarily be a duly appointed guardian as specified under clause (b) of Section 4 of the Hindu Guardianship Act. "Next friend" acts for the benefit of the "minor" or other person who is unable to look after his or her own interests or manage his or her own law suit (person not sui juris) without being a regularly appointed guardian as per the Hindu Guardianship Act. He acts as an officer of the court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The aforesaid provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order 32 of the Code.

11. Order 32 Rules 1 and 3 of the Code together make a distinction between a next friend and a guardian ad litem; i.e.

(a) where the suit is filed on behalf of a minor, and

(b) where the suit is filed against a minor.

In case, where the suit is filed on behalf of the minor, no permission or leave of the court is necessary for the next friend to institute the suit, whereas if the suit is filed against a minor, it is obligatory for the plaintiff to get the appropriate guardian ad litem appointed by the court for such minor. A "guardian ad litem" is a special guardian appointed by a court in which a particular litigation is pending to represent a minor/infant, etc. in that particular litigation and the status of guardian ad litem exists in that specific litigation in which appointment occurs.

* * * *

14. Not only is there no provision for appointment of next friend by the court, but the permission of the court is also not necessary. However, even in respect of minor defendants, various High Courts are consistent in taking the view that the decree cannot be set aside even where certain formalities for the appointment of a guardian ad litem to represent the defendant have not been observed. The High Courts have observed in the case of minor defendants, where the permission of the court concerned under Order 32 Rule 3 of the Code is not taken, but the decree has been passed, in the absence of prejudice to the minor defendant, such decree cannot be set aside. The main test is that there has to be a prejudice to the minor defendant for setting aside the decree. . . . . In the matter on hand, the suit was filed on behalf of the minor and therefore the next friend was competent to represent the minor. Further, admittedly no prejudice was caused to Plaintiff 2.

15. "Guardian" as defined under the Hindu Guardianship Act is a different concept from the concept of "next friend" or the "guardian ad litem". Representation by "next friend" of minor plaintiff or by "guardian ad litem" of minor defendant is purely temporary, that too for the purposes of that particular law suit.

16. There is no hurdle for a natural guardian or duly constituted guardian as defined under the Hindu Guardianship Act to represent minor plaintiff or defendant in a law suit. But such guardian should not have adverse interest against minor. If the natural guardian or the duly constituted guardian has adverse interest against the minor in the law suit, then a next friend or guardian ad litem, as the case may be, would represent the minor in the civil litigation.

* * * *

19. The principles arising out of the Guardians and Wards Act, 1890 and the Hindu Guardianship Act may not be apposite to the next friend appointed under Order 32 of the Code. The appointment of a guardian ad litem to represent the defendant or a next friend to represent the plaintiff in a suit is limited only for the suit and after the discharge of that guardian ad litem/next friend, the right/duty of guardian as defined under clause (b) of Section 4 of the Hindu Guardianship Act (if he has no adverse interest) automatically continues as guardian. In other words, a next friend representing the minor in the suit under Order 32 Rule 1 of the Code, will not take away the right of the duly appointed guardian under the Hindu Guardianship Act as long as such guardian does not have an adverse interest or such duly appointed guardian is not removed as per that Act."

The Supreme Court noted that the plaintiff-appellant no.2 was pursuing the matter from the date of attaining majority till the present date on his own, and held that the defendant no.1, though was his father, could not have represented him in the suit as his guardian because his interest was adverse to that of the plaintiff-appellant no.2. Therefore, it was held that it was not open to the High Court to non-suit the plaintiff-appellant no.2.

38. In the present suit, as noted above, in the array of parties in the plaint, the name of plaintiff-respondent nos. 1 and 2 are specified separately. The relief claimed is for cancellation of a sale deed

executed by the plaintiff-respondent no.1, which is in respect of his own property, in favour of the defendant-appellants. No relief has been claimed by the plaintiff-respondent no.2 for himself. Nowhere in the plaint is there any allegation that the plaintiff-respondent no.2 has any right in the transferred property during the lifetime of the plaintiff-respondent no.1. As a matter of fact, in paragraph no.9 of the plaint, it is stated that the plaintiff no.2 is filing the suit on behalf of the plaintiff no.1. Moreover, in paragraph no.11 it has been stated that the plaintiff no.2 being the real brother and guardian of the plaintiff no.1 has a right to file the suit.

39. Rule 3 of Order 48 of the CPC provides that the forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned. In Appendix A of the CPC, which deals with pleadings, Part (2) deals with "Description of Parties in Particular Cases". For a minor, and, a person of unsound or weak mind, the description mentioned therein are as follows:

"A.B., a minor *(add description and residence)*, ... by *C.D.* [or by the Court of Wards], his next friend."

"*A.B. (add description and residence)* ....., a person of unsound mind [or of weak mind], by *C.D.* his next friend."

40. Under Order 32 Rule 12 CPC, it is provided, inter alia, that a minor plaintiff shall, on attaining majority, elect whether he will proceed with the suit. Where he elects to proceed with the suit, he shall apply for an order discharging the next friend and for leave to proceed in his own name. In such a case, the title of the suit shall be corrected so as to read henceforth thus:

"*A.B.*, late a minor, by *C.D.*, his next friend, but now having attained majority."

Thus, the description of parties relating to a minor or a mentally unsound plaintiff that are mentioned in Appendix A are also in accordance with the substantive provision of Order 32 Rule 12 CPC. The purpose of stating the name of the next friend of such a plaintiff in the manner specified, is to leave no ambiguity regarding that it is the minor/mentally unsound plaintiff who is the party in the suit.

41. In the present suit, the plaintiff-respondent no.2, while claiming to be the guardian of the plaintiff-respondent no.1, has verified and signed the plaint on behalf of the plaintiff-respondent no.1. Thus, it is to be deemed for all facts and purposes, that at the time of institution of the suit, the name of plaintiff-respondent no.2 appeared in the plaint only as the next friend of the plaintiff-respondent no.1 and for no other purpose and in no other capacity. The separate name of the plaintiff-respondent no.2 in the plaint is, therefore, to be read as a variation to the description of plaintiff as provided in Appendix A of the CPC in such cases. If that would not be the case, then the suit itself would be rendered defective as the plaint is neither signed nor verified by the plaintiff-respondent no.1.

42. However, a decree may not be set aside, provided that the interest of the next friend is not adverse to that of the plaintiff and provided further that the

decree has not caused prejudice to the plaintiff.

43. It is pertinent to note that the plaintiff-respondent no.1, Balram Singh, had filed an application Paper no.33C along with an affidavit Paper no.34 C on 14.02.1996 stating that he is not a person of unsound mind, and, that Raghunath Singh, plaintiff-respondent no.2, has filed the suit on wrong facts and he has no right to file the suit on behalf of the plaintiff-respondent no.1; that the plaintiff-respondent no.1 can well understand his interest and he has executed a sale deed of his agricultural land in favour of the defendants Rishipal, Sushil Kumar and Rakesh Kumar on 23.08.1994 and they are in possession of the same; that the plaintiff is filing the present application on which his photograph is also affixed, and the court itself can enquire from the plaintiff regarding his insanity or otherwise and ask any questions.

On 15.02.1996 the plaintiff-respondent no.1, Balram Singh, filed another application Paper No.37C stating that the applicant is not of unsound mind and he does not wish to continue with the present suit, and therefore, the suit be dismissed. On 19.02.1996 another application Paper No.39C was filed by the plaintiff-respondent no.1 praying for disposal of the applications Paper Nos.33C and 37C prior to recording of evidence in the suit.

44. Thereafter, the plaintiff-respondent no.2, Raghunath Singh, filed an application Paper No.40C dated 03.04.1996, stating that during consolidation proceedings, Balram Singh was declared as a person of unsound mind and under Rule 14 of the UPCH Rules his guardian was appointed, and therefore, it is necessary that his medical examination be done at the Mental Hospital at Bareilly. Objections to this application was filed by the defendant-appellants on 23.05.1996.

45. On 06.08.1997, the plaintiff-respondent no.1, Balram Singh, was personally present before the trial court and his statement was recorded. The parties were heard on application Paper no.33C and 11.08.1997 was fixed for orders. The order of the court on that date is as follows:-

"Case called out. Parties are present and Balram personal present and statement recorded. Heard on C33. Fix 11.8.97 for order."

On 11.08.1997, the court ordered that the counsel for the parties have to be further heard on the applications Paper No.33C and Paper no.40C and 02.09.1997 was fixed as the next date. However, these applications were never decided by the trial court.

46. Another application Paper no.44C dated 11.08.1997 was filed by the plaintiff-respondent no.2, Raghunath Singh, stating that the application dated 14.02.1996 filed by the plaintiff-Balram Singh (Paper no.33C) contains false statements and that Balram Singh is a person of unsound mind. It was prayed that a report be called from the Government Mental Hospital at Bareilly regarding the mental condition of Balram Singh, for which the plaintiff-respondent no.2 would bear the entire expenses. Against this application, a detailed reply/objection Paper no.45C was filed by the plaintiff-respondent no.1 on 20.08.1997 alongwith an affidavit. The

application Paper no.44C was dismissed in default on 04.01.1999.

47. Order 32 Rule 15 CPC reads as follows:

*"**15. Rules 1 to 14 (except Rule 2-A) to apply to persons of unsound mind.-** Rules 1 to 14 (except Rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being suit."*

The mandate of Order 32 Rule 15 CPC for purpose of applicability of the relevant Rules of Order 32 CPC to persons of unsound mind, requires an adjudgment by the Court, before or during the pendency of the suit, regarding unsoundness of mind of a plaintiff or a defendant or, if not so adjudged, an enquiry recording a finding that he is incapable, by reason of any mental infirmity, of protecting his interest when suing or being sued.

48. From perusal of the plaint itself it is apparent that the plaintiff-respondent no. 1 was alleged to be a person of unsound mind by the plaintiff-respondent no. 2 which was denied by the defendant-appellants in the written statement. The plaintiff-respondent no. 2 had stated that exercising undue influence on plaintiff-respondent no. 1, the defendant-appellants got executed the sale deed dated 23.8.1994 in their favour. These facts were denied in the written statement. Repeated applications were filed by the plaintiff-respondent no.1 that he was not mentally unsound and had executed the sale deed on his own free will and accord. On 06.08.1997 the statement of the plaintiff-respondent no.1 was recorded by the trial court. This statement is on record as Paper no.43A. It reads as follows:

"My name is Balram Singh. Father's name is Harkesh Singh. Village Maheshwari Pargana Mandavar Tehsil and District Bijnor.

I have sold the disputed land to Rishi Pal and others. This land had been sold by me about 3 years ago. This land is 12 bighas (kachchi). I am not able to state the khasra number of the disputed land. I had executed the sale deed of the disputed land in the registration office at Bijnor. Raghunath Singh is my brother. Now I do not reside with my brother Raghunath but I live with Rishi Pal and others."(English translation by Court)

49. It is in the judgement of the lower appellate court that it has been observed that Balram Singh has not been able to state the khasra number of the land sold nor has he specified the date of any sale deed, and, nor has he stated that for what value the land was sold. It was observed by the court that the statement of Balram Singh does not come within the purview of O.10 R.1 CPC and so it cannot be his testimony and for this reason, it is inadmissible in evidence. It is further observed that even otherwise, the statement is defective as neither was it read out to Balram Singh nor has he affirmed the same.

50. There are no separate orders of the courts below with regard to either the applications (Paper nos.33C, 37C and 39C) filed by the plaintiff-respondent no.1, Balram Singh, or with regard to his

statement. It is thus evident, that though an enquiry was started by the trial court pertaining to the capability or otherwise of the plaintiff-respondent no.1 of protecting his interest, by reason of any alleged mental infirmity, no finding or order was passed on the enquiry. Resultantly, the issue of maintainability of the suit on behalf of the plaintiff-respondent no.1 by the plaintiff-respondent no.2 was never looked into. In view of the provisions of Order 32 Rule 15 of the CPC it was necessary for the court of first instance to look into the fact of maintainability of the suit on behalf of the plaintiff-respondent no.1 by the plaintiff-respondent no.2 where a statement was made in the plaint under Order 7 Rule 1(d) of the CPC that the plaintiff-respondent no.1 is of unsound mind.

51. In the judgement of **Somnath v. Tipanna Ramchandra Jannu**12, the Bombay High Court held as follows:

"17. The above discussion clearly leads to the logical conclusion that when the plaint is being examined for the purpose of admission, it if contains a statement as required by clause (d) of Rule 1 of Order 7 that the plaintiff is a person of unsound mind and that a next friend is suing on his behalf, the court must at once hold an inquiry. It is the duty of the court to do so, and it is not necessary for the next friend to make a separate application for that purpose. This inquiry should ordinarily include the calling of the plaintiff himself and questioning him in Court. If the Court entertains doubt about the mental capacity or the soundness of his mind, it is open to the Court to take further assistance in the form of medical examination and the evidence of the doctor under whose observations the plaintiff may be kept. The quantum and extent of inquiries must be left in each case to the circumstances prevailing. There may be a plaintiff who on immediate view may appear to be a person of unsound mind, and the Court may not need much evidence beyond recording of the questions put to and the answers given by the person concerned. There can be other cases which are not so clear and more evidence may be necessary. However, apart from the total extent of the evidence that might be led, we would suggest that as a matter of strong commonsense approach, the plaintiff who is alleged to be of unsound mind should be invariably called for being questioned when the case falls under the second part of Rule 15 of Order 32. This inquiry is made for the purpose of recording a finding by the court that the plaintiff is a person of unsound mind, or a person mentally so infirm as to be incapable of protecting his own interests. The provisions of Rule 15 of Order 32 make it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction, or if not so adjudged, is found by the court on inquiry to be so. That is the foundation, prima facie, for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the court to give a finding and to admit the plaint and issue the process to the other side."

The Bombay High Court went on to hold that it was the duty of the court to conduct an enquiry where the defendant contradicts the unsoundness of mind of the plaintiff and if, on such enquiry the court finds that the plaintiff is

not of unsound mind, the presentation of the plaint is itself improper and is liable for rejection.

52. There is merit in the contention of the learned counsel for the appellant-respondents that given the strong objections being raised by the plaintiff-respondent no.1 regarding his alleged mental unsoundness and in view of the averment that the plaintiff-respondent no.2 was not competent to maintain the suit on his behalf, it was bounded duty of the court to undertake an enquiry contemplated under Order 32 Rule 15 CPC and record a finding. Though the statement of Balram Singh recorded on 06.08.1997 purports to be under Order 10 Rule 1 CPC, a perusal of the statement reveals that it is apparently his statement recorded by the trial court pursuant to his examination under Order 10 Rule 2 CPC for purpose of conducting an enquiry under Order 32 Rule 15 CPC. However, the enquiry remained inconclusive as is reflected from the order dated 06.08.1997. The lower appellate court, without properly appreciating the nature of the statement made by the plaintiff-respondent no.1, has misdirected itself in holding that that statement is inadmissible in evidence and is defective.

53. The lack of a proper enquiry and a finding of the court thereon, as envisaged in Order 32 Rule 15 CPC has led to a situation that is not comprehended by law. The death of plaintiff-respondent no.1, Balram Singh, on 25.07.1998, was brought to the notice of the trial court by the defendant-appellant no.1 in his application Paper no.54C dated 24.8.1998 by means of which, dismissal of the suit was sought. By means of an application Paper no.69A dated 18.11.1998 moved by the plaintiff-respondent no.2, amendment of the plaint was sought. The trial court, by its order dated 18.09.1999 allowed the amendment application while observing that the plaintiff-respondent no.2 is already a party to the suit and as such the suit would not be barred under Section 5 (sic) of the Limitation Act, and, that the plaintiff-respondent no.2 is stating himself to the guardian of the plaintiff-respondent no.1 who is stated to be a person of unsound mind. The plaint was accordingly amended.

54. It is pertinent to note some of the amendments made in the plaint. In the array of parties, after the description of plaintiff-respondent no.1, Balram Singh, the words added were '*(deceased) and whose heir is the plaintiff no.2*'. A new paragraph no. 11-A was added in which it was stated that *' the plaintiff Balram Singh has died during pendency of the suit and the plaintiff no.1(sic), legally and by heirship, is his sole heir who is plaintiff no.2 since earlier'.*

55. It is, therefore, evident that the plaintiff-respondent no.2 has contrived and used this device of amendment of the plaint to be a party to the suit as a plaintiff, without actually being one, and has continued the suit even after the death of the plaintiff-respondent no.1 without even seeking substitution under the provisions of Order 22 of the CPC. After the death of the plaintiff-respondent no.1, it was necessary for the plaintiff-respondent no.2 to apply and demonstrate to the court that the right to sue survives and that the suit did not abate; and, that he had a right to be substituted in place of the plaintiff-respondent no.1. After the death of the

plaintiff-respondent no.1, Balram Singh, the plaintiff-respondent no.2 could not continue the suit without being duly substituted, and, that too only in case the suit was maintainable. Merely because an issue was framed by the trial court as to whether the plaintiff-respondent no.2, Raghunath Singh is the heir of the deceased plaintiff-respondent no.1, Balram Singh, would not have the effect of waiving the mandate of Order 22 of the CPC.

56. The plaintiff-respondent no.2, Raghunath Singh, has staked his claim to be the guardian of the plaintiff-respondent no.1, Balram Singh, since a very long time. Even when the natural guardian of Balram Singh, his mother Bhagwan Dei, was alive, he wanted his name to be recorded as the guardian of Balram Singh during the consolidation proceedings. In his cross-examination, the plaintiff-respondent no.2 has admitted that after the death of their mother, Bhagwan Dei, neither he nor anyone else had moved any application before the District Judge (for appointment of a guardian). He denied knowledge that with whom was Balram Singh residing. He admits that neither he attended the funeral nor the thirteenth day ('terahi') ritual of Balram Singh. He even denies knowledge of who performed the 'terahi' ritual of Balram Singh. He further states in his cross-examination that the funeral and last rites of his mother, Bhagwan Dei, were done by the father of the defendant-appellants, Ram Nath.

Thus it can be presumed that the plaintiff-respondent no.2, Raghunath Singh, had apparently, no interest whatsoever in the plaintiff-respondent no.1, Balram Singh, till the time he executed the sale deed in favour of the defendant-appellants.

57. The statement and applications/objections made and filed by the plaintiff-respondent no.1 before the trial court, put a question mark on the alleged mental unsoundness of the plaintiff-respondent no.1. As a matter of fact the statement of the plaintiff-respondent no.1 recorded by the trial court (Paper no.43A) appears to be coherent and understandable, and appears to be in response to the examination and queries by the court. Just because he has not specified the khasra number does not lead to a conclusion of unsoundness of mind. Though the lower appellate court has observed that the date of the sale deed and the amount of sale consideration have not been mentioned by Balram Singh in his statement, it is not reflected in the statement whether trial court examined him in these regards.

58. Had the trial court recorded a finding on completion of the enquiry envisaged under Order 32 Rule 15, that the plaintiff-respondent no.1, Balram Singh, was incapable of protecting his interest due to any mental infirmity, the name of the next friend in the plaint, who was the plaintiff-respondent no.2, could have been justified, had his interest not been adverse to the plaintiff-respondent no.1 and had such adverse interest not caused prejudice to the interest of the plaintiff-respondent no.1. On the other hand, in case a finding after enquiry was recorded that the plaintiff-respondent no.1 was capable of protecting his interest, then there was no need at all of the next friend.

59. In view of the facts and circumstances of the case, as discussed

above, to my mind, there is no doubt that the interest of the next friend, plaintiff-respondent no.2, Raghunath Singh, was adverse to the interest of plaintiff-respondent no.1, Balram Singh, and by reason of such adverse interest, prejudice has been caused to the interest of plaintiff-respondent no.1.

Thus the suit was not maintainable and the courts below were not justified in decreeing the suit.

60. This appeal is, accordingly, **allowed**. The judgement and decree dated 11.7.2007 and 24.7.2007 respectively passed by the Additional District Judge, Court No. 2, Bijnor dismissing the Civil Appeal No. 96 of 2006 filed by the appellants, and the judgement and decree dated 30.11.2006 passed by the Additional Civil Judge (Junior Division), Court No. 3, Bijnor in Original Suit No. 72 of 1995 are set aside. The Original Suit No. 72 of 1995 is dismissed.

(2020)08ILR A383
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 1403 of 2014
with
Second Appeal No. 1404 of 2014

Baijnath Prasad Dwivedi ...Appellant
Versus
Smt. Asha Devi ...Respondent

Counsel for the Appellant:
Sri Ashutosh Srivastava, Sri Prashant Kumar Tripathi, Sri Santosh Kumar Gupta, Sri Sanjai Kumar, Sri Shreesh Srivastava

Counsel for the Respondent:
Sri Rahul Sahai, Sri Ashish Kumar Srivastava, Sri Ganesh Shanker Srivastava, Sri Ram Dular, Sri Saurabh Raj Srivastav

(A) Civil Law - Code of Civil Procedure ,1908 - Order 7 Rule 11 of the C.P.C. - rejection of plaint - order 41 rule 31 - contents, date and signature of judgement - First Appellate Court canot give a decision without formulating the points for determination in the First Appeal - (Para-14)

Suit for specific performance filed by the Plaintiff/Appellant - decreed in part by the Trial Court - instead of a direction that a sale deed be executed upon the payment of the remaining amount, Rs. 30,000/- alongwith 6 per cent interest was ordered to be returned to the Plaintiff/Appellant - cross case was brought by the defendant praying that possession be delivered to her by the plaintiff if in case he was found to be in possession - First Appelate court reversed the judgment of trial court. (para - 1)

HELD:- The cross-claim of the Defendant that possession be handed over to the Defendant is dismissed. The Suit is, therefore, decreed in toto. (Para-17)

Second Appeal allowed. (E-7)

List of Cases cited:-

1. C. Venkata Swamy Vs H.N. Shivanna (dead) by legal representative & anr., (2018) 1 SCC 604

2. Kanailal & ors.Vs Ram Chandra Singh & ors., (2018) 13 SCC 715

3. Laliteshwar Prasad Singh & ors. Vs S.P. Srivastava (dead) through Lr's), (2017) 2 SCC 415

4. Ram Pher Vs Deputy Director of Consolidation Faizabad, 2008 RD (105) 618

5. Smt. Sawarni Vs Smt. Inder Kaur & ors., (1996) 6 SCC 223

6. Faqruddin Vs Tajuddi), 2009 RD (106) 440

7. Suraj Bhan & ors. Vs Financial Commissioner & ors., 2007 RD (103) 116

8. Smt. Veena Agarwal Vs M/s Unjha Ayurvedi Pharmacy & ors, 2018 (7) ADJ 840

(Delivered by Hon'ble Siddhartha Varma, J.)

1. A Suit for specific performance was filed by the Plaintiff/Appellant Baijnath Prasad Dwivedi which was decreed in part by the Trial Court on 30.11.2010 and instead of a direction that a sale deed be executed upon the payment of the remaining amount, Rs. 30,000/- alongwith 6 per cent interest was ordered to be returned to the Plaintiff/Appellant. A cross case was brought by the defendant praying that possession be delivered to her by the plaintiff if in case he was found to be in possession. The cross case of the defendant was dismissed for want of court fees. Against the decree, both the Plaintiff/Appellant and the Defendant filed separate Appeals. The Appeal filed by the Plaintiff/Appellant was numbered as 52 of 2011 and the First Appeal filed by the Defendant was numbered as 168 of 2010. The Plaintiff/Appellant had filed the Appeal for decreeing the Suit in toto meaning thereby that the Defendant be directed to execute the sale deed as per the registered agreement dated 5.1.1988 and the Defendant filed the First Appeal for dismissing the Suit as a whole and for decreeing her cross-claim. The First Appeal of the Plaintiff/Appellant was dismissed whereas the First Appeal of the Defendant was allowed.

2. The Second Appeal No. 1403 of 2014 as also the Second Appeal No. 1404 of 2014 were filed by the plaintiff. At the time of admission, the following questions of law were framed.

"(I) Whether the failure on the part of the court below to decide the civil appeal after formulating the points of determination as required under the mandatory provisions of order 41 Rule 31 C.P.C. is manifestly illegal and consequently the judgment and decree passed by the court below is liable to be set-aside.

(II) Whether in the facts and circumstances of the case the finding recorded by the trial court on issue no. 1 refusing the decree of specific performance on account of contingency even when the registered agreement to sell was duly proved in evidence is manifestly illegal."

3. The Original Suit being Original Suit No. 98 of 1991 was instituted by the Plaintiff/Appellant on 29.1.1991 wherein it was stated that the Plaintiff/Appellant was entitled for getting a sale deed executed in pursuance of the registered agreement to sell dated 5.1.1988. It was further stated that the cause of action had arisen on 11.1.1991 when the Defendant Asha Devi it was learnt had entered into a compromise with Rambabu, the brother of Budh Prakash from whom Asha Devi herself had bought the property on 26.5.1987. It was stated in the Plaint that initially one Budh Prakash, the son of Mata Prakash resident of Balkaranpur was the owner of the property with regard to which the Defendant Asha Devi had entered into an agreement to sell on 5.1.1988. The Plaintiff/Appellant had stated that when the Defendant had purchased the property on 26.5.1987 from Budh Prakash, she had filed an application for mutation in her name before the Consolidation Officer, Soraon and this application was still pending. The sale deed executed by Budh Prakash

was admitted by him. After Budh Prakash had sold the property to the Defendant Asha Devi, the brother of Budh Prakash, Rambabu had tried to get his name mutated over the property in question, to the exclusion of Asha Devi. However, when Asha Devi contested the case with Rambabu, the name of Budh Prakash had continued despite the fact that the Defendant Asha Devi had agreed to sell the property to the Plaintiff/Appellant by a registered agreement dated 5.1.1988. When on 11.1.1991, the Plaintiff/Appellant came to know that the Defendant was entering into a compromise with Rambabu then he filed the instant Suit. Before filing the Suit, he had put the Defendant Asha Devi to notice that she had to appear before the Registrar for executing the sale deed.

4. The Defendant Asha Devi had contested the Suit and had come forward with a case that the Defendant Asha Devi was neither the owner of the property in question nor was the Plaintiff/Appellant in possession over it. She also stated that the agreement was entered into under some misconception. She also stated that the Plaintiff/Appellant by some illegal means had got himself entered as a person in possession under proceedings initiated under Section 145 of the Cr.P.C. and had got possession over the property illegally. She also, therefore, prayed that the Plaintiff/Appellant be dispossessed and she be given possession.

5. During the course of trial as many as 10 issues were framed. The **First Issue** was with regard to the fact as to whether any agreement was entered into between the Defendant and the Plaintiff/Appellant on 5.1.1988 and as to whether it was to be enforced.

6. The **second issue** was as to whether the agreement to sell dated 5.1.1988 was a result of fraud and misrepresentation.

7. On the basis of the decision of these two issues, the Suit was partly decreed. However, the relief of specific performance and therefore the execution of the sale deed was refused saying that the name of Budh Prakash was still entered and mutation proceedings were still going on and that the Defendant had yet not got any permission to sell. The Plaintiff/Appellant's money which he had paid to the Defendant amounting to Rs. 30,000/- was, however, ordered to be returned. The Second Issue with regard to the fact that as to whether the agreement was a result of fraud and misrepresentation was decided in favour of the Plaintiff/Appellant. The cross-claim of the Defendant though was found to be within limitation was dismissed under Order 7 Rule 11 of the C.P.C. as no court fee was paid and the Suit was decreed only to the extent that the Plaintiff/Appellant was to be returned Rs. 30,000/- with an interest of 6 per cent.

8. The First Appellate Court, however, reversed the decree. With regard to the fact as to whether the agreement dated 5.1.1988 was enforceable, it held that it was not enforceable as the statement given by the witnesses of the Plaintiff/Appellant and the Statement as was recorded at the time of the registration before the Sub-registrar had some discrepancies. The statement of P.W. 1 stated that Rs. 30,000/- advance was given in two installments whereas the Sub-registrar had noted that Rs. 30,000/- were paid by the Plaintiff/Appellant(purchaser) and

that Rs. 15,000/- was still to be paid to the seller.

9. Further more, the Appellate Court while deciding the issue no. 2 had found that the agreement to sell was not a result of a bonafide agreement but was a result of misrepresentation and fraud. This it had said because Devi Shankar Ojha even though was a marginal witness did not appear before the Registrar and further the husband of the Defendant, Hari Shankar, who was as per the Defendant, an alcoholic had put in his signature on the agreement. After reversing the two findings given on the two issues by the Trial Court the Appeal of the Plaintiff/Appellant was dismissed in toto and the appeal of the Defendant was allowed. When the Appeal was allowed it meant that the cross-claim was decreed and eviction of the Plaintiff/Appellant was directed from the property in dispute. With regard to substantial questions of law, learned counsel for the Plaintiff/Appellant submitted that a judgement of the First Appellant Court which did not contain points for determination was an erroneous one. In this regard, learned counsel for the Plaintiff/Appellant relied upon the following judgements:

1. 2018 (1) SCC 604 (C. Venkata Swamy v. H.N. Shivanna (dead) by legal representative and another)

2. 2018 (13) SCC 715 (Kanailal & others v. Ram Chandra Singh & others)

3. 2017 (2) SCC 415 (Laliteshwar Prasad Singh & others vs. S.P. Srivastava (dead) through Lr's)

10. So far as the substantial question of law no. 2 is concerned, learned counsel for the Plaintiff/Appellant submitted that when the Trial Court had found that the Defendant Asha Devi had purchased the property from Budh Prakash then there was no other option with the courts below but to conclude that she was the owner. Execution of the sale deed could not have been denied simply on account of the fact that the name of Asha Devi had yet not been mutated. He submitted that it is settled principle of law that mutation is only an exercise which is undertaken by the Revenue Authorities to collect revenue. The mutation of the name of a particular individual does not bestow any title in that person. He submits that if Budh Prakash was the owner and Asha Devi had purchased the property in question from him on 26.5.1987 then the claim of the Plaintiff/Appellant could not have been denied simply because the name of Asha Devi had not been entered.

11. Learned counsel for the Plaintiff/Appellant relied upon ***2008 RD (105) 618 (Ram Pher v. Deputy Director of Consolidation Faizabad), 1996 (6) SCC 223(Smt. Sawarni v. Smt. Inder Kaur and Ors.), 2009 RD (106) 440 (Faqruddin v. Tajuddin) and 2007 RD (103) 116 (Suraj Bhan and Ors. vs. Financial Commissioner and Ors.)*** and submitted that mutation entries in revenue records did not confer any title. In fact, the court below erred in not looking into the sale deed dated 26.5.1987 by which the defendant had got the title.

12. Learned counsel for the respondent/defendant, however, supported the judgement of the First Appellate Court and submitted that when

issues as had been framed at the Trial Stage and had been decided once again by the First Appellate Court then there was no error as such committed by the First Appellate Court. Learned counsel for the Defendant submitted that when the agreement dated 5.1.1988 was a result of misrepresentation and fraud then no indulgence had to be granted to the Plaintiff/Appellant. He once again reiterated the reasons as had been mentioned by the First Appellate Court, namely, that there was discrepancy in the statements of the witnesses and the statement of the Assistant Registrar as was endorsed on the registered agreement to sell.

13. Learned counsel for the Defendant also relied upon ***2018 (7) ADJ 840 (Smt. Veena Agarwal vs. M/s Unjha Ayurvedi Pharmacy and Others)*** and submitted that there was no right with plaintiff to get the sale deed executed.

14. Having heard the learned counsel for the parties and after having gone through the judgements of the two courts below and also the record, I am of the view that the Appellate Court had erred in reversing the findings as had been arrived at by the Trial Court. Furthermore, I am of the view that the Trial Court also had erred in not granting the relief of Specific performance to the plaintiff. The Defendant ought to have been directed to execute the sale deed as per the registered agreement to sell dated 5.1.1988. The facts as they were had been proved to the hilt at the stage of Trial that Budh Prakash had sold the property to the the Defendant Asha Devi on 26.5.1987 and thereafter the Defendant Asha Devi had agreed to sell the property to the Plaintiff/Appellant on 5.1.1988 by means of a registered agreement to sell. If the name of the Defendant had not been entered it did not mean that the title had not flown to the Defendant. The agreement to sell had been proved to the hilt and the execution of the sale deed should, therefore, have been directed. I also find that when the Defendant had denied her title then she should not have contested the suit itself. Further the Court finds that the reversal of the judgement of the Trial Court by the First Appellate Court by relying upon the discrepancies in the statement of the witnesses and the statement made on the agreement to sell by the Assistant Registrar also was an error which resulted in a wrong decision of the First Appeal. The First Appellate Court also wrongly relied upon the fact that in the agreement another individual had signed whereas before the Registrar another individual had signed. The First Appellate Court also erred in finding that the husband of the defendant who, as per the Defendant, was an alcoholic should not have signed on the agreement. The Court finds that when there was no issue framed with regard to the reliability of the husband's evidence then the First Appellate Court could not have concluded that the signature of the husband of the Defendant on the agreement could lead to a conclusion that the agreement was entered into fraudulently. The First substantial question of law as to whether the First Appellate Court could have given a decision without formulating any point of decision is answered in favour of the plaintiff/appellant. It is settled law that the First Appellate Court could not have given a decision without formulating the points for determination in the First Appeal. The Second substantial question

of law as was formulated at the time of admission of the Second Appeal is also answered in favour of the Plaintiff/Appellant. When in fact, the agreement to sell was not a result of fraud and misrepresentation as had been found by the Trial Court then the suit ought to have been decreed in toto. The Trial Court had concluded that the agreement to sell was entered into and had also correctly concluded that there was no fraud or misrepresentation at the time when the agreement to sell was entered into.

15. I also find that the Plaintiff/Appellant was always ready and willing to perform his part of the `agreement as he had put to notice the Defendant to reach the Registrar's office.

16. Under such circumstances, the substantial question no. 2 is also answered in favour of the Plaintiff/Appellant.

17. Under such circumstances, the Second Appeals No. 1403 of 2014 and 1404 of 2014 are allowed. The Plaintiff's Suit for the execution of the sale deed upon the payment of the remaining amount of Rs. 15,000/- is decreed. The cross-claim of the Defendant that possession be handed over to the Defendant is dismissed. The Suit is, therefore, decreed in toto.

(2020)08ILR A388
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.06.2020

BEFORE

THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

FAFO No. 1022 of 1999
with
FAFO No. 1010 of 1999

National Insurance Co. Ltd., Allahabad ...Appellant
Versus
Smt. Urmila Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri K.S. Amist

Counsel for the Respondents:
Sri C.P. Mishra

A. Civil Law - Motor Accident Claim – Driving Licence – Evidentiary value – Strict Proof – Necessity – Motor Vehicles Act, 1988 is a beneficent and benevolent piece of legislation – It has been enacted to award just and reasonable compensation to the victims of the road accident – While deciding the claim petition filed by the claimants, it is not necessary for the Tribunal to insist for strict proof of the documents produced by the claimants – Tribunal is obliged not to make these strict principles applicable to the proceedings before the Claims Tribunal if the documents produced by the claimants are found to be genuine and correct – The document, i.e., driving lincence, unless proved to be unreliable or proved to be a fake driving lience, has to be considered and not be neglected. (Para 7 and 8)

B. Civil Law - Motor Accident Claim – Computation of Compensation – Future loss – Multiplier – The amount of pension or other benefits received by the family on account of death of a person in service cannot be deducted – Held, the Pay Commission's report if we take into consideration which came into effect after 2006 but was made applicable from 1999 a rough figure of addition of 70 per cent for future loss of income would be just and proper – The multiplier should be 17 as per Sarla Varma's case. (Para 16 and 17)

C. Civil Law - Motor Accident Claim – Determination of Interest – Rate of interest should be 9 per cent from the date of filing of claim petition before Tribunal till the Judgment and 6 per cent thereafter till the amount is deposited. (Para 19)

Appeal partly allowed (E-1)

Cases relied on :-

1. Ram Chandra Singh Vs Rajaram & ors., AIR 2018 SC 3789

2. First Appeal From Order No.1818 of 2012 (Bajaj Allianz General Insurance Company Limited Vs Smt. Renu Singh & ors.) decided on 19.7.2016

3. Mohammed Siddique & anr. Vs National Insurance Co. Ltd. & ors., 2020 ACJ 751

4. Suresh Chandra Bagmal Doshi & anr. Vs New India Assurance company Limited & ors., (2018) 15 Supreme Court Cases 649

5. Sunil Sharma & ors. Vs Bachitar Singh & ors., 2011 (3) T.A.C. 629 and Manasvi Jain Vs Delhi Transport Corporation & ors., 2014 ACJ 1416

6. Suman & ors. Vs Anisa Begum & anr. 2020 ACJ 555

7. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr., 2020 ACJ 526

8. First appeal No. 1373 of 2010 (Guj.), New India Assurance co. Ltd. Vs Hiraben WD/O Motibhai Ganabhai Prajapati

9. National Insurance Company Limited Vs Pranay Sethi & ors., 2017 Supreme (SC) 1050

10 K.R. Madhusudhan & ors. Vs Administrative Officer & anr., (2011) 4 SCC 689.

11. Sarla Verma Vs DTC, (2009) 6 SCC 121

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

1. Both these appeals arise out of the same Judgment/award dated 29.5.1999 passed by Motor Accident Claim Tribunal VIth, Allahabad (hereinafter referred to as the Tribunal) in M.A.C.P. No. 227 of 1997 whereby the objections raised by the Insurance Company regarding breach of policy condition were rejected and compensation was awarded to the claimants.

2. Being aggrieved by the award, National Insurance Company Ltd. filed above First Appeal From Order No. 1022 of 1999 before this Court with the submission that the compensation so awarded is not as per the settled legal position of law as enunciated by High Court and the Apex Court and the Insurance Company is no liable as there is breach of policy condition and also contended that it is a case of contributory negligence. A new ground in memo of appeal is raised, namely, insured vehicle was being towed by one another vehicle as it had met with an accident earlier. However, at the outset, this ground in the appeal was neither raised before the Tribunal nor it is substantiated by leading any cogent evidence and, therefore, the said submission requires to be rejected at the outset without delving further in the matter. Being dissatisfied with the above award, the claimants have also preferred above First Appeal From Order No. 1010 of 1999 requesting for enhancement of compensation awarded by the Tribunal for the death of sole bread winner, a police constable of 34 years, who died in the vehicular accident leaving behind six heirs.

3. Claim Petition No. 227 of 1997 was instituted by widow Smt. Urmila Devi and five minor children of young police Constable, Ashok Kumar Shukla, who died at the young age of about 34 years. The Tribunal considered his income as Rs.4,000/- as per salary slip. It is submitted by counsel for claimants that

Tribunal did not award any amount under the head of future prospect and deducted 1/3rd towards personal expenses of the deceased from the the assessed income. It applied multiplier of 16 and added Rs.20,000/- for loss of love and affections and loss of consortium. It further granted Rs.2,000/-for funeral expenses and Rs.2,000/- for cost of litigation and thus, it awarded total sum of Rs.7,95,000/- as compensation with 12 per cent rate of interest.

4. The offending vehicle being insured with the Insurance Company is not in dispute. Unfortunately, neither before the tribunal nor before this Court, the owner has appeared so as to contest the litigation. Further the driver or the owner did not produce any driving licence and, therefore, it is contended by the Insurance Company that the Judgment of the Tribunal requires to be modified.

5. Brief facts, which are required to be gone into are that the accident took place involving the truck insured by the Insurance Company. The parties are referred to as claimants as they appear before the Tribunal and Insurance company as it appeared before the Tribunal. The deceased was a police constable is not in dispute. The claimants filed copy of the driving licence of the driver of the truck is also not in dispute. However, the issues, which arise before this Court for decision, are as to the liability of Insurance Company, the quantum awarded and whether document, namely, the copy of the driving licence produced by the claimants should have been not considered by the Tribunal and negligence.

The accident has taken place on 1.1.1997 at 1.15 a.m. when the deceased was returning on feet after patrolling duty. At that point of time, the driver of the offending truck came from behind without blowing any horn and dashed with the police constable on the road whereby he died instantaneously. The claimants produced several documentary evidence and claimed Rs.25,00,000/- as compensation in the claim petition filed under Section 163 A and 166 of Motor Vehicles Act as it was not settled law that whether claim petition under Section 163A would also be maintainable or not. However, while going through the Judgment, it is clear that the Tribunal considered the matter under section 166 of the Motor Vehicles Act.

6. The Insurance Company in its reply, submitted that it was a case of sole negligence of the deceased as he was walking in the middle of the road. It was further contended that the truck was driven in breach of policy condition and that the driver and the owner of the vehicle did not appear before the Tribunal nor produced any documentary evidence and, therefore, it should be held non liable to indemnify the owner and in turn the claimants. Before the Tribunal, claimants examined Urmila Devi as P.W. 1 and Rajiv Kumar as P.W.2 and produced First Information Report, Post Mortem Report, site plan, technical report, charge sheet, driving licence of the driver Tej Bahadur Singh, who was driving the vehicle U.M.W 826, photo copy of the Fifth Pay Commission's report and other relevant documents pertaining to the service conditions of the deceased. the Insurance Company neither produced any document nor examined any witness. In the backdrop of factual

data the compensation and the exoneration of the Insurance Company will have to be looked into.

7. At the outset, as far as, the objection of the Insurance Company regarding consideration of the copy of the driving lience is concerned, the law is well settled that it has not been proved by evidence by the Insurance company that the said document is either a forged document or it is not issued by the transport authorities, the claimants cannot be expected to find original document and the same document has to be considered by the Tribunal. The admitted position of law is that Motor Vehicles Act, 1988 is a beneficent and benevolent piece of legislation. *It is an admitted fact that the Motor Vehicles Act, 1988 is a benevolent piece of legislation, which has been enacted to award just and reasonable compensation to the victims of the road accident and therefore, according to this Court, while deciding the claim petition filed by the claimants, it is not necessary for the Tribunal to insist for strict proof of the documents produced by the claimants and the strict proof as per Indian Evidence Act is not to be insisted upon and the Tribunal is obliged not to make these strict principles applicable to the proceedings before the Claims Tribunal if the documents produced by the claimants are found to be genuine and correct. If the Tribunal on facts has found them to be correct and has relied upon those documents, this court while reappreciating those documents also find them to be genuine. It can be relied for coming to the conclusion that the driver of the said vehicle, namely, truck had proper driving licence. The Insurance Company did not lead any evidence to prove that the licence was a fake licence. In absence of proving the same, this Court cannot accept the submission of the learned counsel for the Insurance Company.*

8. Hence, the submission that the said document should not have been considered by the Tribunal and the Insurance company should have been exonerated, cannot be accepted. I am unable to accept this submission as the proposition of law is very clear that the document, i.e., driving lincence, unless proved to be unreliable or proved to be a fake driving lience, has to be considered and not be neglected. The Tribunal has considered this aspect in detail and has rejected the contention of the Insurance company that it is not liable. The driver was Tej Bahadur Singh, who was driving the offending vehicle on the fateful day and was charge-sheeted. His driving licence fitness and other documents were there, therefore, the Tribunal has come to the conclusion that there was no breach of policy condition. The Tribunal has dealt with the issue no. 2 raised by the Insurance Company that whether the driver of the said vehicle was driving the vehicle in breach of policy conditions. The Insurance Company has only averred in the written statement that the vehicle was being driven against the policy conditions. The Tribunal referred the Judgment reported in 1985 TAC 396 of this High court and held that it was the duty of the Insurance Company to prove that the vehicle was being driven in breach of policy condition. The submission of the Insurance company has been that the driver and the owner should have appeared before the Tribunal then only the same document would have been relied on. The Tribunal has given

cogent reasons for not accepting this submission. I am in complete agreement with the Tribunal. It is a cardinal principle of law that the person who asserts a fact must prove the same. The strict proof of law of evidence as enunciated in Civil Procedure cannot be very strictly made applicable in cases of Motor Vehicles Act, 1988. Otherwise, the object and purpose of beneficial legislation would be frustrated. In that view of the matter, the contention of the Insurance company that the Tribunal has materially erred cannot be accepted. I also supported in my view by the decision of the Apex Court in the case of **Ram Chandra Singh Vs. Rajaram and others, AIR 2018 SC 3789**, wherein it is held that the Insurance company should prove that the licence of the driver was fake driving licence. In this case, it is not proved that the licence produced by the claimant was not a proper driving licence.

9. This takes this Court to the other grounds raised by the Insurance company in its appeal, i.e., First Appeal From Order No. 1022 of 1999, namely, that there is contributory negligence on the part of the deceased and that it is not proved that the driver of the said vehicle was in any way negligent. It is further submitted that the accident was not admitted which is also one of the grounds raised in this appeal. It is submitted in this appeal, which was never contended before the Tribunal, that the said truck which is alleged to be involved in the present accident, had already met with a accident and was being taken to the workshop towing with other vehicle and during this period the accident occurred with the vehicle, which was propelling the said vehicle and the said vehicle was not made a party to the litigation and, therefore, also the claimants are not entitled to be reimbursed by the Insurance Company. Unfortunately, this was not the argument or submission ever raised before the Tribunal nor was it proved that the claimants have very cleverly not made the other vehicle a party. This argument is raised in the memo of appeal without any proof. The Insurance company has not even produced any witness nor is there any application for leading any additional evidence for a period of about 19 years, hence, this submission also fails.

10. This takes this Court to issue of negligence raised in the memo of appeal of Insurance company so as to contend that the deceased was solely negligent and or in the alternative, he was co-author of the accident.

11. The Division Bench of this Court in **First Appeal From Order No.1818 of 2012 (Bajaj Allianz General Insurance Company Limited Versus Smt. Renu Singh and others) decided on 19.7.2016** has held as under: -

"16. The term negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative

term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to cause physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, negligence of drivers is required to be assessed.

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

18. 10th Schedule appended to Motor Vehicle Act, 1988 contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle should slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection. This is termed negligence.

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

20. In light of the above discussion, I am of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, Courts cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits.

21. By the above process, the burden of proof may ordinarily be cast

on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle."

12. While going through the F.I.R, the charge sheet and the Judgment of the Tribunal impugned in these appeals, it is very clear that the deceased was on his feet and it was night hours. It goes to show that the accident occurred at about on 1.1.1997 at 1.15 (night). P.W. 2, namely, Rajiv Kumar, who is an eye witness stated that he was walking along with deceased and they were returning after performing their duties at H.L. Factory. When they reached at Munshiganj Sarai at about 1.15 a truck bearing Registration No. UMW 82, which came rashly and negligently, and dashed deceased. Constable 48 Jitendra Kumar Singh and Constable 355 Harun Khan flashing their torch had seen the driver and the number of truck and the truck was taken in their custody on the place qua Munshiganj. District Sultanpur and the driver had abandoned the said truck. It was stated that the driver had abandon the said truck after hundred meters of the place of occurrence. There were blood marks on the tyres of the said truck, which were fresh. There was confessional statement of the son of owner that the driver confessed that his truck had met with an accident. However, we may not consider this part of the evidence as being an inadmissible evidence. However, all these facts go to show that the vehicle was involved in the accident and the evidence also shows that deceased Ashok Kumar and other accompanying witnesses were walking on their correct side and he has even negatived the suggestion that he and deceased were walking in the middle of the road. While going through the record, it is clear that the Insurance Company has not been able to dislodge the evidence of this witness and his evidence requires to be be accepted. In this view of the matter, can it be said that the tribunal has committed any error in holding that the vehicle was involved in the accident and that the driver of the said truck was solely negligent. The term 'negligence' partakes with it failure to exercise required degree of care and caution expected of prudent driver. Driver did not take proper care and caution and, therefore, his act was a tortuous act. The Insurance Company in paragraph 7 has accepted the accident but has not accepted the involvement of the vehicle. They have not examined any eye witness, leave apart any witness so as to substantiate their claim of negligence of the deceased. The Tribunal has also drawn adverse inference as the driver of the said vehicle was not examined. However, as far as the deceased is concerned, looking to the F.I.R. and manner in which the accident has occurred, it cannot be said that the deceased has in any way contributed to the accident having taken place. The accident was authored by the driver of the truck and his negligence as attributed hundred per cent is to be accepted and the finding of the Tribunal is accepted. Thus, the concept of contributory negligence pressed into service by the Insurance Company cannot be accepted. Even as per the principles enunciated by the Apex Court in **Mohammed Siddique and another Vs. National Insurance Co. Ltd. and others, 2020 ACJ 751, dated 8.1.2020**, it cannot be said that the Tribunal has committed any error in holding that the driver of the truck

negligent. The reasoning of the Tribunal cannot be flawed. The fact that the deceased was on his feet and there was no evidence to show that there was any wrongful act on the part of the deceased victim which contributed either to the accident or to the nature of the injuries which he had sustained. Hence, the said issue is also decided against the Insurance Company.

13. This takes this Court to the compensation to be awarded. At the outset Sri K.S. Amist has submitted that the interest at 12 per cent could not have been granted and that the quantum requires to be reconsidered. Paragraphs 13 and 14 of the memo of appeal (FAFO No. 1022 of 1999) reads as under:-

"13. Because the salary of the deceased as Rs.6000/- per month and the dependency of claimants on deceased as Rs.4000/- per month, fixed by the Motor accident claims Tribunal, are high and exhorbitant.

14. Because future increaement of salary could not be taken into account and the Motor Accident Claims Tribunal illegally and arbitrarily fixed the salary of the deceased as Rs.6000/- per month taking into consideration the future increasement of the salary."

14. It is further submitted that the family of the deceased would be getting family pension as deceased was a Constable in the police force. It is further submitted that the multiplier of 16 is erroneous and that Rs.20,000/- under non pecuniary damages is also bad. The Tribunal according the K.S. Amist could not have awarded any interest.

15. Learned counsel for the appellants in First Appeal From Order No. 1010 of 1999 has contended that the deceased was in service and the claimants should have granted what is known as future loss of income, but, it has not been considered by the Tribunal and that Tribunal ought to have considered this fact has not considered that the deceased would have been entitled to full fledged pension had this accident not occurred. It is further submitted that the deceased left behind five minor children and his widow and Tribunal should have deducted 1/5th and not 1/3rd for his personal expenses. The computation of the compensation is on lower side. Sri Mishra appearing for the claimant has relied on decision rendered in the case of **Suresh Chandra Bagmal Doshi and another Vs. New India Assurance company Limited and others, (2018) 15 Supreme Court Cases 649**, and has contended that this Court should consider that future rise of income of the deceased was 100 per cent. He has further contended that it is settled legal position that the amount of pension received cannot be deducted from the compensation paid.

16. At the outset, before I start computing compensation, it has to be borne in mind that the amount of pension or other benefits received by the family on account of death of a person in service cannot be deducted. I am supported in my view by the decision of the Apex court in **Sunil Sharma & Others Vs. Bachitar Singh & Others, 2011 (3) T.A.C. 629 and Manasvi Jain Vs. Delhi Transport Corporation and others, 2014 ACJ 1416** and the Judgment of this Court in First Appeal From Order No. 3159 of 2013, Regional Manager, U.P.S.R.T.C. Vs. Smt. Nisha Dube and others decided on 9.12.2016, wherein it

has been held that the deduction of House Rent, Allowance, Medical Allowance, Dearness Allowance, Dearness Pay, Employees Provident Fund, Government Insurance Scheme, General Provident Fund, C.C.A. cannot be made. Recently the Apex Court in Mohammed Siddique (supra) holding that the Tribunal is under an obligation to award what is known as future loss of income, Judgment of this High Court in **2020 ACJ 555, Suman and others Vs. Anisa Begum and another**, the future loss of income will have to be granted and the multiplier will have to be granted on the basis of the age of the deceased. In the decision in **Malarvizhi and others Vs. United India Insurance Co. Ltd. and another, 2020 ACJ 526** wherein principles of grant of rate of interest and principles for deciding the quantum in fatal accident have been considered. In dealing with the similar case in **First appeal No. 1373 of 2010 (Guj.), New India Assurance co. Ltd. Vs. Hiraben WD/O Motibhai Ganabhai Prajapati**, the undersigned has held that the quantum will have to be calculated as the deceased was a person having Government job and the earlier Judgment of 2012 in **K.R. Madhusudan (supra)** was not considered by the Apex Court while dealing with the matter of salaried persons in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and but has been been considered by earlier Judgment, i.e. **K.R. Madhusudhan and others Vs. Administrative Officer and another, (2011) 4 SCC 689**. It has been now reiterated in **Suresh Chandra Bagmal Doshi and another (supra)** wherein the Judgment in the case of Pranay Shetty has been distinguished and it has been held that computation for future loss of income can be considered in a different manner also for persons having job. In the said decision the Apex Court considered both **Sarla Verma Vs. DTC, (2009) 6 SCC 121, and Pranay Shetty (supra).**

17. Having heard the learned counsel for the parties and considered the factual data, income of the deceased can be considered to be Rs.4,000/- per month to which we can add what he would have earned by way of Fifth Pay Commission and Sixth Pay commission, namely, 2000, in 2012 and 2019. Pay of the deceased would increase every year as he would be getting yearly increments and the Pay Commission's recommendations and revise what is known as yearly increment and at the time of his retirement, even if, we do not consider the Pay Commission's reports the DA would have increased and his pay would be Rs.18,217/- and though this calculation is by the learned Advocate placed on record of the Tribunal. The Pay Commission's report if we take into consideration which came into effect after 2006 but was made applicable from 1999 a rough figure of addition of 70 per cent for future loss of income would be just and proper. As per Madhusudan **(supra)** the average can be taken. The multiplier should be 17 as per Sarla Varma **(supra)**. Thus the claimants would be entitled to Rs.4000+ Rs. 2800 (monthly) out of which as there are five nimors and a widow 1/4th will have to be deducted, hence, the family would be entitled to Rs.5100 (Rs. 5000 round figure) x 12x 17=Rs.1020000/ + 70,000/- +50,000 (for minor children) Rs.1,20,000/- which is equal to Rs.11,40,000/-.

18. In light of this, it is submitted by Sri K.S. Amist that interest also requires to be re-calculated as being consistent in the old matter.

19. In view of decision of the Apex Court in **Civil Appeal No.242/243 of 2020 (National Insurance Company Ltd. vs Birender and others)** decided on 13 January, 2020 which is the latest in point of time, rate of interest should have been 9 per cent from the date of filing of claim petition before Tribunal till the Judgment and 6 per cent thereafter till the amount is deposited. The Insurance Company shall recalculate the amount and deposit the same before the Tribunal as expeditiously as possible not later than December, 2020. Record and proceedings be sent back.

20. As more than twenty years have elpased, by now, the minor children would have become major. The amount be disbursed in equal proportion to all and no amount be kept in fixed deposit as per the latest Judgment of Apex Court in **A.V. Padma and others Vs. R. Venugopal and others, 2012 (3) SCC 378.**

21. Both the appeals are partly allowed.

(2020)08ILR A397
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 410 of 2020

Smt. Madhubala Mishra & Anr. Petitiners

Versus

Shyam Dhar Dubey @ Dada & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vivek Tiwari, Sri K.S. Tiwari

Counsel for the Respondents:
A.G.A.

A. Constitution of India, 1950-Article 226-Habeaus Corpus writ-In compliance with the rule nisi issued to ascertain whether detenue is staying with her daughter of her free will or she is illegally confined, a lady judicial officer went over to the residence of the detenue to record her statement-she finds there is no illegal confinement of dentenue, she is living there of her free will-therefore, no good ground to make the rule nisi absolute. The rule is discharged.(Para 1 , 5)

B. Principle-Rule Nisi-it is well settled as a result of several decisions that the writ of habeas corpus is not granted as of course as would an original writ for initiating an action. it is issued only on probable cause being shown by an affidavit either of the person detained or of some other person on his behalf. The applicant for the writ must show prima facie that there is sufficient ground for his discharge the writ would not issue and his application would be summarily rejected. if no legal ground was made to appear justifying detention, the person detained would be immediately discharged. On the other hand, the application would be dismissed if the detention was shown to be justified. (Para 1 to 5)

The Petition is dismissed. (E-6)

(Delivered by Hon'ble J.J. Munir, J.)

1. In compliance with the *rule nisi* issued by this Court vide order dated

24.08.2020, the learned Chief Judicial Magistrate, Jaunpur nominated a lady Judicial Officer to go over to the residence of the detenue, Smt. Prabhawati Devi, who stays with her other daughter Manju Devi Dubey and to record her statement. This *rule nisi* was issued to ascertain whether Smt. Prabhawati is staying with respondent no. 2, Manju Devi Dubey of her free will or she is illegally confined.

2. This modified rule was issued looking to the extraordinary circumstances prevalent due to Covid-19 pandemic. Normally, this Court, under the prevalent circumstances, would have required Smt. Prabhawati Devi to be produced before the learned Chief Judicial Magistrate or some other Judicial Officer, who would be asked to record her statement acting on this Court's Commission. The Commission here was, however, modified to ask a lady Judicial Officer nominated by the learned Chief Judicial Magistrate to go over to the residence of Smt. Prabhawati Devi, considering her extreme old age which would imperil her life if she were forced to be produce in court.

3. In compliance with the Court's order, the learned Chief Judicial Magistrate, Jaunpur nominated Smt. Sneha, Judicial Magistrate-II, Jaunpur to execute the Commission issued by this Court. The learned Chief Judicial Magistrate has sent a copy of the statement of Smt. Prabhawati Devi through electronic mode recorded by the learned Judicial Magistrate on 26.08.2020 at the former's residence.

4. It must be remarked that the Judicial Officer has gone about the exercise very carefully and has done a remarkable effort. She has gone over to the residence of Smt. Prabhawati, who stays with her other daughter, Manju Devi Dubey and ascertained her identity very carefully. Thereafter she has recorded the fact that Smt. Prabhawati Devi is very old and hard of hearing. The learned Judicial Magistrate has also ascertained whether her mental faculties are good enough to understand what she is being asked. Once satisfied, the learned Judicial Magistrate has proceeded to record Smt. Prabhawati's statements which is in the following words:

"मुझे मझेरी उम्र नहहीं ममाललूम हहै। ,ममंजलू दझेवरी ककी तरफ इशमारमा कर कहमा द्ध यझे मझेररी बबिबटियमा हहै। मधमुबिमालमा मझेररी बिझेटिरी हहैए ममुझझे ज्यमादमा ध्यमान नहहीं हहै। महै ममंजलू दझेवरी कझे समाथ कबि सझे रह रहरी हहह ममुझझे ध्यमान नहहीं हहै। महै ममंजलू कझे समाथ अपनरी मजर्जी सझे रह रहरी हहह। मधमु कझे पमास नहहीं जमाउमंगरीए अपनझे कमरझे मम जमाउमंगरी। मधमु कमा बबियमाह मनझे गगोपमालपमुर म म म बकयमा थमा। मधमु कझे पमास बिहहत वरर पहलझे गयरी थरी अबि नहरी जमानमा हहै। ममंजलू मझेररी सझेवमा करतरी हहै। समुनकर तस्दरीक बकयमा।

प्रभमावतरी दझेवरी दमारमा बिगोलझे जमानझे पर अक्षरससः अमंबकत बकयमा गयमा।

Sneha
26/08/2020

JM-IInd
Jaunpur"

5. The aforesaid statement does not spare a shadow of doubt that the second petitioner, Smt. Prabhawati Devi is staying with her other daughter Smt. Manju Devi Dubey of her free will and without any restraint. She is not confined there, much less illegally confined. There is, therefore, no good ground to make the *rule nisi* absolute. The rule is discharged and this petition is **dismissed**.

6. This Court places on record its appreciation for the excellent work done by Smt. Sneha, Judicial Officer-II, Jaunpur.

7. Let this order be communicated to the learned District Judge, Jaunpur by the Joint Registrar (compliance) within 24 hours.

(2020)08ILR A399
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 937 of 2020

Sunita Maurya ...Petitioner
Versus
Principal Judge Family Court Distt. Pratapgarh & Anr. ...Respondents

Counsel for the Petitioner:
Sunil Kumar Singh

Counsel for the Respondents:
Bajrang Bahadur Singh

A. Civil Law - Hindu Marriage Act (25 of 1955)- Section 13B - Divorce by mutual consent - Cooling off six months' statutory period u/s 13-B - can be waived - purpose to avoid further agony of parties, if marriage irretrievably broken down - Waiver pre-condition - only when all efforts for mediation, conciliation etc. to reunite parties have failed & there is no likelihood of success

Applicant, without getting her marriage dissolved by decree of divorce, declared herself as divorcee in her job application - Only to cover up false statement made by her subsequently filed divorce petition by mutual consent alongwith application for waiver of statutory six months period - vaguely stated in application that petitioner going to get a job for which decree of divorce needed & in case waiting period was not waived, she would be deprived of the job - *Held* – in present case purpose of seeking waiver of six months statutory period is only to get decree of divorce as early as possible to get government job - petitioner cannot be heard to allege her own fraudulent purpose as the reason for waiving the statutory waiting period (Para 15)

B. Civil Law - Hindu Marriage Act, 1955- Section 23 (2) - Family Courts Act, 1984 - Section 9 - Code of Civil Procedure,1908 - Rule 32-A, Rule 3 -. Divorce - Settlement - Duty of Court to first make sincere efforts for Settlement - to bring the parties to reconciliation (Para 19)

Petition for mutual divorce presented on 07.12.2019, case registered on 11.12.2019, parties directed to appear before mediator on 20.01.2020 - alleged mediation taken on 11.12.2019 & 12.12.2019 without any order from court - No explanation as to how matter taken up on 11.12.2019 & 12.12.2019 - possibility of the mediator submitting report on extraneous consideration - no efforts by mediator to reunite parties - straightaway submitted report to facilitate the parties to move an application for waiver - *Held* - In the absence of any effort to reconcile the contesting parties, the statutory waiting period could not be condoned (Para 26, 31, 34)

Dismissed. (E-5)

List of cases cited:-

1. Amardeep Singh Vs Harveen Kaur (2017) 8 SCC 746

2. V.K. Gupta Vs Nirmala Gupta, (1979) 4 SCC 25

3. K. Srinivas Rao Vs D.A. Deepa (2013) 5 SCC 226

4. Santhini Vs Vijaya Venketesh (2018) 1 SCC 62

5. Mrs. Pramila Bhagat Vs Ajit Raj Singh Bhagat 1988 SCC OnLine Pat 258

6. Nazir Ahmad Vs King-Emperor AIR 1936 PC 253

7. Dhananjaya Reddy Vs St. of Karnataka (2001) 4 SCC 9

8. Commissioner of Income Tax, Mumbai Vs Anjum M.H. Ghaswala (2002) 1 SCC 633

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Smt. Sunita Maurya (wife), the petitioner and Anil Kumar Maurya (husband), the respondent no. 2 were married according to Hindu rites and ceremonies, at Pratapgarh, on 12.06.2003. The parties continued to peacefully live together up to 26.02.2011, after which serious differences arose between the couple. This led to the wife initiating proceedings against the husband under Section 125 Cr.P.C. (registered as Case No. 3087 of 2013). In the said proceedings, the parties entered into a compromise. As per the said compromise the respondent no. 2 paid a sum of Rs. 2,51,000/- to the petitioner, as full and final settlement towards permanent alimony.

2. In February, 2019 the petitioner filed a Divorce Petition bearing Suit No. 104 of 2019 titled Sunita Maurya v. Anil Kumar Maurya under Section 13 of the Hindu Marriage Act, 1953 (for short "Act') seeking a decree of dissolution of marriage. On 06.12.2019 the said petition was got dismissed as not pressed. On 07.12.2019, the petitioner as well as the respondent no. 2 filed a joint petition under Section 13-B of the Act (Original Suit No. 1093 of 2019) before the Principal Judge, Family Court, Pratapgarh seeking divorce by mutual consent.

3. On 19.12.2019 the petitioner moved an application for waiver of the statutory six months period on the ground that the petitioner was going to get a job shortly and in case the marriage was not dissolved, she would loose the job and her career would be spoiled. The respondent no. 2 endorsed "no objection' on the said application. The relevant portion of the application is extracted below:

"विनम्र निवेदन है कि उक्त मुकदमा उभयपक्षों की सहमति के आधार पर प्रस्तुत किया जा रहा है प्रथम पक्ष व द्वितीय पक्ष के मध्य वर्ष 2015 में ही सुलह समझौता हो गया था तथा सभी मुकदमें समाप्त हो चुके थे।

प्रथम पक्ष एक सर्विस प्राप्त हो रही है जिसकी तिथि नजदीक है जिसमें विवाह विच्छेद के डिग्री की आवश्यकता है यदि डिग्री न मिली तो प्रथम पक्ष नौकरी से विमुख हो जायेगी तथा उसका कैरियर बर्बाद हो जायेगा प्रथम पक्ष के पिता जीवन मृत्यु से जूझ रहें हैं प्रथम पक्ष व द्वितीय पक्ष के शेष मुकदमें गुजारा, विदाई, दहेज वर्ष 2015 में अलग अलग रहने हेतु निस्तारित हो चुके है तथा उभय पक्ष अलग–अलग जीवन यापन कर रहे हैं।

अतः प्रार्थना है कि उभय पक्षों द्वारा प्रस्तुत उपरोक्त मुकदमा निस्तारित करने की कृपा करें।" (emphasis supplied)

4. Through an order dated 02.01.2020, the said application has been

rejected by the Principal Judge, Family Court, Pratapgarh. The relevant portion of the order, to which the attention of the Court was drawn by the counsel for the petitioner, is extracted below:

"Heard learned counsel for the party and perused the record.

Applicant Sunita mentioned the reasons for waiving six months statutory period that she is going to obtain Government job very soon in which decree for dissolution of marriage is required if she will not get decree as early as possible then she may lost the job and her career will be destroyed. She is living separately from her husband since 2015 and all her disputes and differences have been settled.

From the perusal of the papers annexed alongwith the application being paper number 9 (x)1/8 shows that application form for the post of Physical Training Instructor Grade lll 2018 was filled up by the applicant on 15th June 2018 and in this application she has declared her marital status as divorcee without getting her marriage dissolved by way of decree of divorce. She has declared herself as divorcee in her application for job and now she has filed petition under section 13(B) for dissolution of marriage on 11/12/2019. *From the above facts it is clear that without getting the decree of divorce from the court, she has falsely stated in her application her marital status as divorcee. It is clear that to mitigate her previous false statement regarding her marital status she has filed present petition for divorce.*

The reasons given by applicant for waiving of six months statutory period is that she required decree of divorce for getting government job cannot be accepted ground for waiving statutory period. From the reasons given by applicant for waiving of six months statutory period it is crystal clear that just to obtain Government job in which she has falsely declared her marital status as divorcee she has filed the present petition under Section 13(B) alongwith the present application. The reasons given by applicant cannot be accepted at all for waiving six months statutory period.

While admitting petition under Section 13 (B) on the first motion on 11/12/2019, date for second motion was fixed for 22/07/2020 and for compromise and mediation in between party for reunite date was, fixed on 20/01/2020 and matter was referred to mediation center, but it is matter of surprise that on 11/12/2019 and 12/12/2019 before the date fixed by court hurriedly the matter was placed before the mediation center and learned members of mediation center without order from the court and without looking the order dated 11/12/2019 passed by the court while admitting the main petition under Section 13(B) wherein date was fixed on 20/01/2020 for mediation entertained the mediation and decided hurriedly and one compromise agreement was executed on 12/12/2019 as per the paper 10(Ga)2/2 and 10(Ga)2/3 and all these facts shows that without order from the Court and in contravention of the order dated 11/12/2019 this mediation was conducted. The purpose of referring the petition under Section 13(B) Hindu Marriage Act to mediation center was to made efforts to reunite the parties and not to separate the party but it is matter of surprise that learned members of mediation center have executed the compromise agreement for separation of parties and that to in contravention of the order dated 11/12/2019 of Court.

From the above facts it is prima facie found that no real efforts

were made by the mediation center to reunite the parties. Which is the main purpose of referring the case to mediation center.

Honorable Supreme Court in Amardeep Sing Vs Harveen Kaur has also held that where the court dealing with matter is satisfied that the case is made out to waive the statutory period under section 13(B)2 it can do so after considering the fact that all efforts for mediation, conciliation etc. to reunite parties have failed and there is no likelihood of success in that direction by any further efforts, but from the above facts and circumstances it is clear that the reasons for waiving of six months statutory period given by applicant is not satisfactory and it cannot be accepted at all and the case is not made out for waiving six months statutory period and also mediation and conciliation process in this case is not properly done to reunite the parties. In the instant case it appears that purpose of waiving six months statutory period is only to get decree of divorce as early as possible to get government job, where as Honorable Supreme Court in the above judgment has held that the purpose must be to avoid further agony of parties. So the purpose given by applicant in her application for waiving six months statutory period is not satisfying the requirements of Honorable Supreme Court's judgment.

Under the above facts and circumstances, I reached to the conclusion that the application 6(ग)2 of applicant is being devoid of merit and is liable to be rejected. Hence the application 6(ग)2 is rejected." (emphasis supplied)

It is this order which is under challenge in this petition.

5. Pleadings have been exchanged between the contesting parties and with the consent of their counsels the matter has been heard finally. Sri Sunil Kumar Singh, learned counsel for the petitioner has vehemently submitted that the marriage between the parties had irretrievably broken down and the parties had genuinely settled their differences. Relying upon the decision of the Apex Court in the case of *Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746*, the counsel submits that in the absence of any chance of reconciliation, the Family Court ought to have exercised its discretion to waive off the cooling period of six months in favour of the petitioner in order to enable her to secure a job and rehabilitate herself. Sri Bajrang Bahadur Singh, learned counsel appearing on behalf of respondent no. 2 has supported the petitioner.

6. Heard the counsel for the contesting parties and carefully perused the order impugned in the present petition.

7. Section 13-B of the Act reads as under;

"13-B. Divorce by mutual consent.--(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) *On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."* (emphasis supplied)

8. The three ingredients for initiating proceedings under Section 13-B of the Act for divorce by mutual consent are: *firstly*, that the parties to the marriage have been living separately for a minimum period of one year. *Secondly*, they have not been able to live together, and *thirdly*, they have mutually agreed that marriage should be dissolved.

9. Sub-section (1) of Section 13-B of the Act is an enabling section. It enables the parties to file a petition for divorce by mutual consent. Sub-section (2) of Section 13-B lays down the procedure for the parties to adhere to after expiry of six months from the date of filing of the petition for divorce by mutual consent. The second motion, which as per Sub-section (2) of Section 13-B is to be made not earlier than six months after the date of presentation of the petition, enables the court to proceed with the case. If the court is satisfied that the consent of the parties was not obtained by force, fraud or undue influence and they mutually agree that the marriage should be dissolved, the court is left with no other option but to pass a decree of divorce.

10. Sub-section (2) of Section 13-B of the Act, in unequivocal terms, provides that the second motion has to be made not earlier than six months from the date of presentation of the petition before the Court. Prior to the judgment in *Amardeep Singh* (supra), sub-section (2) was treated to be mandatory in nature. In *Neeti Malviya v. Rakesh Malviya, (2010) 6 SCC 413*, a Bench of two Judges of the Apex Court, while dealing with the question as to whether the period prescribed in Sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 could be waived off or reduced by the Apex Court in exercise of its jurisdiction under Article 142 of the Constitution, observed as under:

"7. As already stated, the language of the said provision is clear and *prima facie* admits of no departure from the time-frame laid down therein i.e. the second motion under the said sub-section cannot be made earlier than six months after the date of presentation of the petition under sub-section (1) of Section 13-B of the Act."

11. However, in *Amardeep Singh* (supra), the Apex Court for the first time opined that the statutory period of six months specified under sub-section (2) of Section 13-B of the Act is not mandatory and the court, in exceptional circumstances, can waive the same, subject to certain conditions specified therein. Paragraph 19 of the said report is extracted below:

"19. Applying the above to the present situation, we are of the view that *where the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-*

B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) *all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;*

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. *If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned."*
(emphasis supplied)

12. Keeping the aforesaid dictum of the Apex Court in mind, it is now to be seen as to whether the Family Court has erred in rejecting the application for waiver of the six months period filed by the petitioner.

13. A perusal of the order rejecting the application for waiver of the cooling period shows that the application has been rejected by the Principal Judge on two counts. *Firstly*, that no good ground for waiver of the statutory period was made out, and *secondly*, that no mediation took place between the parties.

14. In the instant case, a bare reading of the application made by the petitioner shows that the same is absolutely vague and bereft of substance. It has been vaguely stated that the petitioner was going to get a job in the near future for which the decree of divorce was needed and in case the waiting period was not waived, she would be deprived of the job and her career would be ruined. The application is conspicuously silent regarding the nature of job, the co-relation between the petitioner getting the job and the decree of divorce, the date, month and year when she was to get the alleged job.

15. From the documents annexed as annexure no. SA-2 to the supplementary affidavit filed by the petitioner, it appears that on 15.06.2018, the petitioner submitted her form for appearing in the Direct Recruitment for Physical Training Instructor Grade III Examination being conducted by Rajasthan Employees Selection Board, Jaipur. In her application form, she falsely mentioned her marital status as "Divorcee'. She was selected for appointment to the post of Physical Training Instructor and was asked to provide district-priorities for provisional district allotment latest by 15.11.2019. At this juncture, the petitioner, it appears, realized that the false entry made in her application form regarding her marital status could result in the cancellation of her candidature. No sooner had the said fact dawned upon the petitioner, than she moved an application for divorce by mutual consent, followed by an application for waiver of the statutory period of six months. The entry made by the petitioner in her application form regarding her marital status is admittedly false and to cover up the false

statement made by her she has urged urgency in the matter and seeks waiver of the cooling period for the second motion. The petitioner cannot be heard to allege her own fraudulent purpose as the reason for waiving the statutory waiting period. In any case, the courts would not aid the petitioner in her pursuit of a job based upon her false statements. The Court below has committed no wrong in rejecting the application of the petitioner on this ground. The learned counsel for the petitioner submits that the petitioner had committed no fraud by making a wrong entry. He submits that it was essentially an inadvertent error on her part.

16. Be that as it may. The second ground on which the application made by the petitioner for waiver of the statutory period has been rejected is good enough to sustain the order under challenge.

17. Hindu marriage is a religious sacrament in which a man and a woman are bound in a permanent relationship. It is precisely for the said reason that when the provision for mutual divorce was introduced in the Statute it was specifically provided that before proceeding with the matter, the courts would make an earnest effort to reunite the contesting parties.

18. Order 32-A Rule 3 of the Code of Civil Procedure, Sub-section (2) of Section 23 of the Act and Section 9 of the Family Courts Act, are relevant and are extracted below:

ORDER 32-A RULE 3 OF THE CODE OF CIVIL PROCEDURE

3. Duty of Court to make efforts for settlement.-- (1) *In every suit or proceedings to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.*

(2) If, in any such suit of proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

(emphasis supplied)

* * *

SUB-SECTION (2) OF SECTION 23 OF THE ACT

23. Decree in proceedings.--

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties :

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause *(ii)*, clause *(iii)*, clause *(iv)*, clause *(v)*, clause *(vi)* or clause *(vii)* of sub-section (1) of Section 13.

* * *

SUB-SECTION (1) OF SECTION 9 OF THE FAMILY COURTS ACT, 1984

9. Duty of Family Court to make efforts for settlement.-

(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, *follow such procedure as it may deem fit. -(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit."*
(emphasis supplied)

19. On a conjoint reading of the provisions extracted above, it is apparent that a duty is cast upon the Family Court, in every suit or proceeding before it, to first make a sincere effort at reconciliation before proceeding to deal with the case in the usual course. Even where the estrangement between the parties to the marriage might seems to be acute, Sub-section (2) of Section 23 of the Act enjoins upon the court to make every endeavour to bring the parties to reconciliation. Of course, the court cannot help, if in spite of its endeavour no reconciliation can be brought about.

20. In *V.K. Gupta v. Nirmala Gupta, (1979) 4 SCC 258*, Justice Krishna Iyer, in his inimitable style, has opined that -

"It is fundamental that reconciliation of a ruptured marriage is the first essay of the Judge, aided by counsel in this noble adventure. The sanctity of marriage is, in essence, the foundation of civilisation and, therefore, Court and counsel owe a duty to society to strain to the utmost to repair the snapped relations between the parties."
(emphasis supplied)

21. In *K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226*, the Apex Court has emphasised the importance of mediation in family disputes. The Apex Court has observed thus:

"46.1. In terms of Section 9 of the Family Courts Act, the Family Courts shall make all efforts to settle the matrimonial disputes through mediation. Even if the counsellors submit a failure report, the Family Courts shall, with the consent of the parties, refer the matter to the mediation centre. In such a case, however, the Family Courts shall set a reasonable time-limit for mediation centres to complete the process of mediation because otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance of settlement, the Family Court in its discretion, can always extend the time-limit."
(emphasis supplied)

22. In *Santhini v. Vijaya Venketesh, (2018) 1 SCC 62* the Apex Court reiterated that in every matrimonial dispute an endeavour has to be made for the parties to restore their relationships in the following words -

"The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. *In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution.* In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. *In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation.* However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

(emphasis supplied)

23. A learned Single Judge of the Patna High Court, in *Mrs. Pramila Bhagat v. Ajit Raj Singh Bhagat, 1988 SCC OnLine Pat 258*, while setting aside the judgment and decree of dissolution of marriage passed by the trial court on the ground of non-compliance of Sub-section (2) of Section 34 of the Special Marriage Act, which is in pari materia with Sub-section (2) of Section 23 of the Act, held that the provisions of Sub-section (2) of Section 34 were mandatory and even where dissolution of marriage was sought on mutual consent, its non-compliance would be fatal. Paragraph 3 of the report is extracted below:

"3. When this appeal was taken up for hearing, it was urged on behalf of the appellant that the judgment and decree of the Court below were passed without complying with the mandatory provision of sub-sec. (2) of S. 34 of the Special Marriage Act and as such the case has to be remanded for fresh trial in accordance with law. *No doubt the petition for dissolution of marriage was filed jointly on the ground mentioned in S. 28 of the Act and is covered by Cl. C of sub-sec. (1) of S. 34 of the Act, but nevertheless endeavour by the Court to bring about reconciliation between the parties has to be made before the trial is taken up and the decree for dissolution of the marriage is passed.* It was contended that it will make no difference as regards compliance of S. 34(2) whether the trial is a contested one or whether the judgment and decree are to be passed on a joint petition of the parties. I think this submission is correct. *Even if the dissolution of marriage is sought by a joint petition of the parties, still it is incumbent on the Court to comply with the mandatory provisions of S. 34(2) of the Act and the Court has to make endeavour to bring reconciliation between the parties. If such an endeavour is made, there is still chance that the parties even though they may have initially mutually agreed for dissolution*

of their marriage through a joint petition, may retrace their step and an afterthought may abstain from taking the extreme step of separation from each other."

(emphasis supplied)

24. In the case at hand, the petition for mutual divorce was presented on 07.12.2019 and the same was placed before the Court for admission on 11.12.2019 on which date the case was ordered to be registered. While 22.07.2020 was fixed as the next date in the matter, the parties were directed to appear before the mediation centre on 20.01.2020. The order dated 11.12.2019 is extracted below:

"वादपत्र अन्तर्गत धारा 13 बी हि0 विवाह अधिनियम का प्रस्तुत हुआ। मुंसरिम रिर्पोट का अवलोकन किया दर्ज रजिस्टर है। पत्रावली वास्ते अग्रिम आदेश दि0 22.07.20 को पेश हो। उभयपक्ष सुलह समझौता हेतु मध्यस्थता केन्द्र मे दि0 20.1.20 को पेश हो।

ह0 अपठनीय"

25. As per the mediation report dated 12.12.2019, the mediation was held on 11.12.2019 and 12.12.2019 and the parties had resolved to terminate their marriage amicably. As per the order dated 11.12.2019, the parties were to appear before the mediation centre on 20.01.2020. It is not the case of the petitioner that any application for preponing the date fixed for appearance before the mediation centre was moved by her or that the order dated 11.12.2019 was modified by the Court suo moto. The divorce petition was ordered to be registered on 11.12.2019. It is beyond comprehension as to how the matter was taken up by the mediation centre on the same day and without there being any order from the Court.

26. It is not in dispute that mediation could be taken up only in pursuance of the order passed by the Family Court. Despite repeated queries, the learned counsel for the petitioner has not been able to explain as to how the matter was taken up by the mediator on 11.12.2019 and 12.12.2019. A perusal of the report submitted by the mediator also shows that the space meant for "date of filing the petition', the name of the Presiding Officer and the date of order passed by him' has been left blank. The possibility of the mediator having submitted his report on extraneous consideration cannot be ruled out. The report submitted by the mediator is extracted below:

अनुसूची–5
न्यायालय मध्यस्थता और सुलह केन्द्र
(निपटान का करार)

यह निपटान करार आज दिनांक 12/12/19 को श्रीमती सुनीता मौर्य जिनकी पहचान श्री राजेश कुमार वर्मा एडवोकेट अधिवक्ता द्वारा की गयी और श्री अनिल कुमार मौर्य जिनकी पहचान श्री सुभाष कुमार पाल एडवोकेट अधिवक्ता द्वारा की गयी के मध्य किया गया।

चूंकि,

1– *इनके पक्षकारो के मध्य विवाद और मतभेद हो गये थे और दिनांक ..... (संस्थित करने का दिनांक)* का परिवार न्यायालय प्रतापगढ़ (सम्बन्धित न्यायालय का विवरण दीजिए) के सक्षम u/s 13 B हिन्दू विवाह अधिनियम (वाद संख्या) दायर की गयी थी।

2– *श्री ..... व ..... (सम्बन्धित पीठासीन अधिकारी का नाम और पदनाम) द्वारा दिनांक ..... को पारित आदेश द्वारा यह मामला निर्दिष्ट किया गया था।*

3– पक्षकार गण सहमत है कि श्री नवीन कुमार श्रीवास्तव (मध्यस्थ का नाम) उनके मध्यस्थ के रूप में कार्य करेंगे।

4– मध्यस्थता की प्रक्रिया के दौरान दिनांक 11/12/19 से दिनांक 12/12/19 तक बैठके हुई और पक्षकारगण ने उपरिउल्लिखित विवादो और मतभेदो को सुलझाने के लिए मध्यस्थ की सहायता से सौहार्द समाधान कर लिया ळें

पक्षकारगण यहां पुष्टि करते है और घोषित करते है कि उन्होंने मध्यस्थ की उपस्थिति में स्वेच्छया और अपनी स्वतंत्र इच्छा से निपटान का करार किया ळें

5–निम्नलिखित करार इसके पक्षकारों के मध्य किया गया ळें

क– करार संलग्न ळे

ख– .....

ग– .....

इस करार पर हस्ताक्षर करके पक्षकारगण यह बयान करते है कि ..... (वाद संख्या) के सम्बन्ध में एक दूसरे के विरूद्व उनका अब कोई दावा या मांग नही रह गई है और मध्यस्थता की प्रक्रिया के माध्यम से इस सम्बन्ध में इसके पक्षकारों ने विवादो और मतभेदो को सौहार्द पूर्ण ढंग से निपटा लिया है।

ह0 राजेश कुमार शर्मा एडवोकेट

Reg No. 13229/10

अधिवक्ता के दिनांक सहित पूरे हस्ताक्षर ह0 अनिल कुमार मौर्या

ह0 सुभाष कुमार पाल एडवोकेट

R. No. 07/30/17

(emphasis supplied)

27. It is well settled that if a statute provides something to be done in a particular manner, it has to be done in that manner only, or not at all. Anything done otherwise would be illegal. The said principle recognized in *Nazir Ahmad v. King-Emperor, AIR 1936 PC 253* has been endorsed by the Apex Court in a number of subsequent cases.

28. In *Dhananjaya Reddy v. State of Karnataka, 2001 (4) SCC 9*, the Apex Court opined that -

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

29. A Constitution Bench of the Apex Court in *Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala, 2002 (1) SCC 633*, has held as under:

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

30. Thus, the alleged mediation having been undertaken without there being any order from the Court is no mediation in the eyes of law.

31. Even otherwise, the undue haste with which the mediation is alleged to have been conducted makes it apparent that no effort for reconciliation was made and straightaway the mediator has submitted his report to facilitate the parties to move an application for waiver of the statutory period of six months.

32. The normal rule is that the second motion under Sub-section (2) of Section 13-B can be made not earlier than six months after the date of presentation of the petition under sub-section (1) of the said Section. Waiver of the said period is an exception and in view of the law laid down by the Apex Court in the case of *Amardeep Singh*

(supra), the waiting period can be condoned only when the conditions mentioned therein are satisfied.

33. As per the judgment in *Amardeep Singh* (supra), one of the factors to be taken into account by the court before exercising its discretion to waive off the statutory period of six months is as to whether all efforts for mediation/conciliation including efforts to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts.

34. Neither in the application for waiver, nor in her petition before this Court has the petitioner mentioned about any mediation having taken place between the parties prior to the alleged mediation on 11.12.2019 and 12.11.2019. In the absence of any effort to reconcile the contesting parties, the statutory waiting period could not have been condoned.

35. The Family Court has committed no wrong in rejecting the application for waiver of six months statutory period. There is no infirmity or illegality in the order impugned. The petition is devoid of merit and is accordingly dismissed.

36. No order as to cost.

(2020)08ILR A410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.07.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 6016 of 2008

connected with
Misc. Single No. 5292 of 2010

Smt. Uma Mukerji ...Petitioner
Versus
The Board of Revenue Allahabad ...Respondent

Counsel for the Petitioner:
D.C. Mukerji, Devendra Mohan Shukla, Dhruv Mathur, K.K. Sharma, Sharavan Kumar Shukla

Counsel for the Respondent:
C.S.C., G.S. Nigam, Mohd. Adil Khan

A. Civil Law - U.P. Zamindari Abolition and Land Reforms Act,1950- Section 176-Suit for partition - plaintiff denied that the land in question was being used for agricultural purpose-she referred to the Master Plan -mere publication of Master Plan would not automatically convert agricultural land into urban land-since there was no declaration u/s 143 of the Act,1950, the provisions of Section 171 of the Act 1950 would continue to apply with respect to succession/devolution of the property of a Bhumidhar, who died interstate-Since the widow and son of Bhumidhar were alive, there was no question of grant of any share of the property in question to his widowed mother as she was not recorded as co-tenure holder in the Khatauni, she could not be heard in the Partition Suit-she had failed to show any right, title or interest on the property in question nor could she prove that the land in question was being used for residential/Abadi land-she had no right to object on the basis of personal law.(Para 45 to 87)

B. The question of jurisdiction of Civil Court qua the Revenue court involved in the case. Where on the basis of a cause of action, the main relief is cognizable by the Revenue Court, only the fact that the ancillary relief claimed are cognizable by the Civil Court would be

immaterial of determining the proper forum of the suit; the main relief is cognizable by the Civil Court, the suit would be cognizable by the Civil Court, the suit would be cognizable by the Civil Court only and the ancillary reliefs which could be granted by the Revenue Court may also be granted by the Civil Court.(Para 61)

The petitions are dismissed. (E-6)

List of Cases Cited:-

1. Hari Ram Arya Vs St, of U.P. & ors,(1984) ALJ 1275

2. Anand Kumar Singh & anr. Vs St. of U.P. & ors, W.P.No.8354 (MS) of 2017

3. Ram Lal & ors. Vs D.D.C.,Hamirpur & ors,(1988) RD 309

4. Hari Bans Bahadur Vs St. Of U.P.,(1980) ALJ 545

5. Maharaj Singh Vs D.D.C., Bareilly & ors,(1990) 8 LCD 609

6. Mahant Dooj Dass (Dead) thru LR. Vs Udasin Panchayati Bara Akhara & anr.(2008) 12 SCC 181

7. The Triveni Engineering Works Ltd. & anr. Vs Govt. Of U.P. & ors ,(1978) ALJ 744

8. Allauddin @ Makki Vs Hamid Khan,(1971) RD 160

9. Mahendra Singh Vs Attar Singh & ors,(1967) RD 191

10. Anis Ahmad & ors. Vs St. of U.P. & ors,(1967) RD 75

11. Magnu Ahir & ors. Vs Mahabir,(1987) Rev. Jdts. 146

12. Indrajeet Singh Vs Sardar Arjun Singh & ors., (1983) 1 LCD 10

13. Mewa & ors. Vs Baldev,AIR (1967) Alld. 358

14. Alauddin Vs Hamid Khan, AIR (1971) Alld. 348

15. Ratna Sugar Mills Co. Ltd. Vs St. Of U.P. & ors,(1976) 3 SCC 797

16. Dina Nath Verma & ors. Vs Gokarna & ors,(2003) 94 RD 323

17. Veer Bal Singh Vs St. Of U.P. & ors,(2009) 108 RD 124

18. Satgur Dayal Vs VI ADJ & ors., (2013) ALJ 595

19. Chandrika Singh & ors Vs Raja Vishwanath Pratap Singh & anr.,(1992) 3 SCC 90

20. Ram Awalamb & ors. Vs Jata Shankar & ors,(1968) RD 470

21. Ram Padarath & ors. Vs. II ADJ, Sultanpur (1989) RD 21 FB

22. Indrapal Vs Jagannath (1993) ALJ 235

23. Chandrika Misir Vs Bhaiya Lal, AIR (1973) SC 2391

24. Bismillah Vs Janeshwar Prasad & ors,(1990) 1 SCC 207

25. Jai Prakash Singh Vs Bachchu Lal & ors., (2019) SCC Online Alld. 3522

26. Suhrid Singh @ Sardool Singh Vs Randhir Singh,(2010) 12 SCC 112

27. Deoki Nandan Vs Surja Pal,(1996) RD 70

28. Shri Ram Vs Ist ADJ, (2001) 3 SCC 24

29. Azhar Hasan Vs DJ, Saharanpur,(1998) 34 ALR 152 SC

30. Kamla Prasad Vs Krishna Kant Pathak(2007) 4 SCC 213

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

1. Heard Sri Dhruv Mathur along with Sri Devendra Mohan Shukla,

Advocates appearing for the petitioner-Smt. Uma Mukharjee, who has been substituted by her legal heirs i.e. her grandsons by an order of the Court dated 23.4.2012, and Sri Mohd. Arif Khan, learned Senior Advocate assisted by Sri Mohiuddin Khan and Sri K.K. Sharma, Advocates, appearing for M/s. New Hassan Sahkari Awas Samiti, the private respondents contesting in both Writ Petition Nos.6016 (MS) of 2008 and 5292 (MS) of 2010.

2. These writ petitions are being taken up together as they relate to the same petitioners and the challenge raised relates to the same plot of land i.e. Plot No.254/2 at Village Kamta, District Lucknow.

Writ Petition No.6016 (MS) of 2008 has been filed, praying for quashing of the order dated 6.9.2005 passed by the Sub Divisional Magistrate concerned in a Suit relating to partition of the land in question, the order dated 10.4.2007 passed by the Additional Commissioner, Lucknow Division, Lucknow, rejecting the Appeal of the petitioners and the order dated 4.11.2008 passed by the Board of Revenue, rejecting the petitioners' Second Appeal also.

Writ Petition No.5292 (MS) of 2010 has been filed challenging the order dated 26.8.2010 passed by the opposite party no.1-Special Judge, Ayurvedic Scam Case, Lucknow in Revision filed against the order passed by the Civil Judge in Regular Suit No.320 of 2000.

The facts, in brief, are that one Sri Anil Dev Mukharjee, husband of the petitioner Smt. Uma Mukharjee, purchased three plots of land through registered Sale Deed in the name of his 12 year's old minor son Ajay Kumar Mukharjee in Village Kamta on 1.4.1959. The plot numbers given in the copy of the registered Sale Deed filed along with the Writ Petition are Plot Nos.453, 454, 443 ad-measuring 20 Bigha and 5 Biswa. The land in question was later numbered as Gata no.254 and recorded in the name of Ajay Kumar Mukharjee in the revenue records as Bhumidhar during consolidation operations. In 1976, the Urban Land Ceiling and Regulation Act was notified (hereinafter referred to as "the Urban Land Ceiling Act') and Ajay Kumar Mukharjee was given a notice regarding declaration of vacant land by the Prescribed Authority for the purpose of ceiling. Ajay Kumar Mukharjee filed his objection under Section 8(3), but the Prescribed Authority rejected such objections and declared the land in question as vacant land by order dated 26.11.1979. On 5.2.1987, the State Government declared the area where the plot in question was situated as within the municipal limits of the city of Lucknow. Ajay Kumar Mukherjee died on 29.5.1992. The land in question remained in possession of his widow Reena Mukharjee and minor son Raja Ajay Mukharjee as no action was taken by the State Government for taking possession of land declared vacant on 26.11.1979. After the repeal of the Urban Land Ceiling Act in 1999, Reena Mukharjee and her son Raja Ajay Mukharjee were recorded as tenure holders over Gata no.254 ad-measuring 15 Bigha, 17 Biswa on 25.12.1999. Reena Mukharjee sold off 5 Bighas of land in question to M/s. New Hassan Sahkari Awas Samiti on 19.7.2000.

The petitioner-Smt. Uma Mukharjee filed a Suit before the Civil Judge (Senior Division), Malihabad for declaration of her 1/3rd share in the

property in question along with a prayer for Permanent Injunction against the opposite parties, restraining further alienation of the property in question. Initially, an Injunction was granted ex-parte on 21.7.2000 by the trial court, restraining the defendants from alienating 1/3rd of the property in question. On service of notice, the defendant filed an application under Order VII Rule 11 of C.P.C., saying that Regular Suit No.320 of 2000 was not maintainable in view of the bar under Section 331 of the U.P.Z.A. and L.R. Act (hereinafter referred to as "the Act of 1950'). Reena Mukherjee thereafter sold off another 5 Bighas of land to M/s. New Hassan Sahkari Awas Samiti on 19.7.2001 and on the basis of the said Sale Deed, M/s. New Hassan Sahkari Awas Samiti filed a Partition Suit under Section 176 of the Act of 1950 before the Sub Divisional Magistrate, Lucknow. The petitioner-Smt. Uma Mukharjee was not impleaded as a party and the Suit was decreed, giving 2/3rd share of Plot No.254 to M/s. New Hassan Sahkari Awas Samiti and 1/3rd of the remaining plot was declared to be the property of Reena Mukharjee and Raja Ajay Mukharjee.

The petitioner being affected challenged the order passed by the Sub Divisional Magistrate in Revision, which was allowed and the matter was remanded for fresh consideration with a direction to the Sub Divisional Magistrate to give an opportunity of hearing to the petitioner. Against the order passed by the Additional Commissioner on 17.3.2007, M/s. New Hassan Sahkari Samiti filed an Appeal before the Board of Revenue, which was rejected on 27.8.2003. On remand, the Sub Divisional Magistrate proceeded to pass the order dated 20.10.2004 holding that the Partition Suit was maintainable and granting Decree of Partition, as claimed by the private opposite parties.

Against the order dated 20.10.2004, the petitioner filed Revision No.320/2004-05, which was disposed off on 7.5.2005 with a direction to the Sub Divisional Magistrate to reconsider the question of maintainability of the Suit. The Sub Divisional Magistrate reiterated his earlier decision and by his order dated 6.9.2005 held that the land in question was agricultural land as no declaration under Section 143 of the Act of 1950, had been made with respect to the said land and the question of extension of municipal limits and the question of alteration of land use by issuance of Master Plan declaring the area to be residential would be immaterial in so far as no declaration under Section 143 of the Act of 1950 had been made. The Partition Suit was decreed and the share of opposite party nos.4, 5 and 6 in Writ Petition No.6016 (MS) of 2008 was determined by metes and bounds. The Appeal filed by the petitioner was dismissed by the learned Commissioner on 6.9.2005. Second Appeal No.36 of 2006-07 (Smt. Uma Mukharjee vs. M/s. New Hassan Sahkari Awas Samiti) was also dismissed by the Board of Revenue on 4.11.2008.

Writ Petition No.6016 (MS) of 2008 was filed by the petitioner against the orders of the Revenue Courts. No interim order was granted by this Court initially.

In Regular Suit No.320 of 2000, initially the trial court rejected the application filed under Order VII Rule 11 of the C.P.C., but a Revision was filed against such an order dated 31.3.2001. The Revisional Court allowed the application under Order VII Rule 11 of

C.P.C. and rejected the plaint as not maintainable before the Civil Court by its order dated 26.8.2010, relying on the findings returned by the Revenue Court. Hence, Writ Petition No.5292 (MS) of 2010 was filed. An interim order was granted in Writ Petition No.5292 (MS) of 2010 on the first day of hearing i.e. on 1.9.2010 itself, directing the parties to maintain status quo.

It has been alleged during the course of argument that ignoring the said order, Sale Deed was executed by the opposite party nos.2 and 3 in favour of newly impleaded opposite party no.4 to 9, of the remaining 5 bigha and 17 biswa of land of Plot No.254/2.

3. Learned counsel for the petitioners has placed reliance upon a Notification issued on 3.2.1987 under Section 3 of the U.P. Nagar Mahapalika Adhiniyam, 1959 in the name of His Excellency the Governor of U.P., declaring the municipal limits of Lucknow city. It has been submitted that the Eastern Boundary of the city of Lucknow has included the whole of the village Chinhat upto NH-28 and Village Kamta has also been included within such municipal limits.

4. It has also been submitted by the petitioners' counsel that by virtue of the order passed on 26.11.1979 by the Prescribed Authority under the Urban Land Ceiling Act, the land in question i.e. Gata no.254 ad-measuring 15 Bigha, 17 Biswa i.e. 39,583.42 square meters was treated as vacant land, out of which, only 1500 m^2 of land was left for personal use of Sri Ajay Kumar Mukharjee and numbered as 254/2. Sri Ajay Kumar Mukharjee had filed his objections to the notice issued by the Prescribed Authority in which objections, he had taken the specific ground that the land in question was not included in the Master Plan of Lucknow, the land in question was in Village Kamta, District Lucknow and was not covered under the U.P. Urban Planning and Development Act, 1973 and that no Master Plan as defined under Section 10-A of the Regulation of Building Operations Act had also been notified. The Prescribed Authority had, however, rejected such objections on the ground that under the Regulation of Building Operations Act, a Master Plan had already been prepared and approved for the city of Lucknow by the competent Authority.

5. The Prescribed Authority was referring to a Master Plan prepared under the Regulation of Building Operations Act on 27.1.1970, which brought the land in question within the urban agglomeration earmarking it for "other than agricultural use". This finding was never challenged by Sri Ajay Kumar Mukharjee and became final between the parties. When the Urban Land Ceiling Act was repealed, the land which was declared as "vacant" land reverted back to Sri Ajay Kumar Mukharjee/his heirs. At the time of death of Ajay Kumar Mukharjee in 1992 and its mutation in the name of his heirs in 1999, the nature of land being already settled as a vacant urban land, it could not be now argued by the contesting respondents that the land was agricultural in nature and covered by the Act of 1950.

6. Learned counsel for the petitioners has referred to Section 2(o) of the Urban Land Ceiling Act, which defines open land as that land situated within the limits of an urban

agglomeration and referred to as such in a Master Plan or in case where there is no Master Plan, any land within the limits of an urban agglomeration and situated in any area included within the local limits of any municipality but does not include any such land which is mainly used for the purpose of agriculture. The Explanation (B) to Section 2(o) clearly provides that the land shall not be deemed to be used mainly for the purpose of agriculture, if such land is not entered in the revenue or land records before the appointed day as for the purpose of agriculture. Clause-C of this Explanation includes a non obstante clause, which says that notwithstanding anything contained in Clause-B of the Explanation, land shall not be deemed to be mainly used for the purpose of agriculture if the land has been specified in the Master Plan for a purpose other than agriculture.

7. It has been submitted that till such time as the notice was issued under the Urban Land Ceiling Act, 1976, no Master Plan was available under the Urban Planning And Development Act, 1973 (hereinafter referred to as the "Act of 1973'), but the land was held to be included within the local limits of the Municipality by the Prescribed Authority on the basis of Master Plan prepared and approved under the Regulation of Building Operation Act, 1956.

8. The fact that proceedings under Section 8 of the Ceiling Act were initiated and concluded treating the land in question as "urban land" by the Prescribed Authority, would mean that no further declaration under Section 143 of the Act of 1950 for using the land for any non-agricultural purpose was needed in the eyes of law. It would be deemed to be urban land having no agricultural use for all times to come.

9. It has been submitted further by the learned counsel for the petitioners that the term "land' as defined under Section 3(14) of the Act of 1950 meant land held or occupied for the purpose connected with agriculture. The operation of the Act of 1950 is limited over the land covered under this definition and once the land is included under an urban agglomeration by any order of the competent Authority, for example, by operation of the Urban Land Ceiling Act, the land seizes to be land under the Act of 1950 and the devolution of such land shall be governed by personal Laws and not according to Section 171 of the Act of 1950.

10. It has been submitted that declaration under Section 143 of the Act of 1950 is required when the land seizes to be agricultural because of it being used by the tenure holder for the purposes other than agricultural, but it does not envisage an eventuality where the land seizes to be agricultural by operation of any law. Section 143 does not prohibit any declaration made under any other Act holding the land to be non-agricultural. Therefore, there would be no need to obtain a fresh declaration under Section 143 of the Act of 1950, once the land has already been declared by the Prescribed Authority to be urban/non-agricultural land under the Ceiling Act. Land having been declared as urban land on 26.11.1979 continued to remain in possession of Sri Ajay Kumar Mukharjee and his heirs thereafter till the repeal of the Act in 1999. No doubt, the Act was repealed in the year 1999 and

the ownership reverted to Sri Ajay Kumar Mukharjee/his heirs, but such a reversion would not make the declaration of land as urban land redundant or null and void. The nature of the land would remain urban and reversion of land use from non-agricultural to agricultural would have to be done only by a declaration under Section 144 of the Act of 1950 by the Sub Divisional Magistrate after conducting an enquiry.

11. Learned counsel for the petitioners has emphasized the fact that repeal of the Ceiling Act in 1999 had a limited effect only of reverting the land and its ownership and such repeal would not render the declaration made on 26.11.1979 that the land in question was Urban vacant land meaningless. Learned counsel for the petitioners has placed reliance upon the case of ***Hari Ram Arya vs. State of U.P. and others, 1984 ALJ 1275*** (Paragraphs 7 to 12).

12. This Court in ***Hari Ram Arya*** (supra) has observed on the basis of definition under section 2(h) of the Urban Land Ceiling Act that Master Plan as defined under the Act in relation to an area within an urban agglomeration or any part thereof, means the plan, by whatever name called, prepared under any law for the time being in force, or in pursuance of an order made by the State Government for the development of such area or part thereof and providing for the stages by which such development shall be carried out. In the State of U.P., there are two major Acts which provide for Master Plan, they are: the U.P. Regulation of Building Operations Act, 1956 and the U.P. Urban Planning and Development Act, 1973. A Court of Law under the Urban Land Ceiling and Regulation Act, 1976 has not been empowered to go behind the Master Plan and to apply its own mind to the land uses given in the same. A Court dealing in a proceeding under the Act is bound to accept a Master Plan as it is. *".....When there is a Master Plan, the Act extends to all lands situated within the local limits of the Municipality or a local Authority and also covers the peripheral area thereof, but where there is no Master Plan, the applicability of the Act is confined to the municipal limit or the notified area as the case maybe....."*

13. Learned counsel for the petitioners has also placed reliance upon a decision rendered in ***Writ Petition No.8354 (MS) of 2017: Anand Kumar Singh and another vs. State of U.P. and others***, on 20.4.2017 by another Coordinate Bench, wherein this Court has dealt with the effect of repeal of an Act. In Paragraph-23 of the judgment, this Court had observed that the repeal of any Legislative enactment means that it must be considered as if such Act never existed. The purpose of repeal is to obliterate the Act from the Statute book except for certain purposes as provided in Section 6 of the General Clauses Act. However, unless a different intention appears, such repeal does not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder. It also does not affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability etc. incurred under the Act now repealed.

14. It has been argued by the learned counsel for the petitioners that extension of municipal limits of the city of Lucknow by the operation of the

Gazette Notification dated 5.2.1987 under the U.P. Municipal Corporation Act, 1959 over the land in question also excluded the land in question from operation of the Act of 1950. In the year 1999 also the city limits of Lucknow were extended beyond the boundaries of the land in question. By operation of Sections 31 and 32 of the U.P. Municipal Corporation Act, 1959, the area included within the municipal limits would be subject to all Notifications, Rules, Regulations, Bye-Laws, Orders and directions issued or made under the said Act or any other enactment in force in the city at the time immediately preceding the inclusion of such area. The exception to this inclusion is the land/area, which is declared agricultural area under the U.P. Urban Area Zamindari Abolition and Land Reforms Act, 1956, by undertaking the procedure prescribed under that Act. It is only a declaration made under the U.P. Urban Area Zamindari Abolition and Land Reforms Act, 1956, which provided for the applicability of U.P.Z.A. and L.R. Act over the agricultural area coming within the municipal limits.

15. There was no evidence adduced before the Revenue or the Civil Courts and even before this Court to show that the area in question was got declared agricultural by a notification issued under the U.P. Urban Area Zamindari Abolition and Land Reforms Act, 1956.

16. It has been argued that the Hindu Succession Act was applicable in the urban limits of the city of Lucknow and after extension of the city limits by a notification on 3.2.1987, the applicability of the said Act was also extended over the area in question and on the death of Sri Ajay Kumar Mukharjee intestate in 1992, the law as applicable for the devolution of the property in question would also apply to the land in question.

17. Learned counsel for the petitioners has placed reliance upon ***Ram Lal and others vs. Deputy Director of Consolidation, Hamirpur and others, 1988 RD 309; Hari Bans Bahadur vs. State of U.P., 1980 ALJ 545; and Maharaj Singh vs. Deputy Director of Consolidation, Bareilly and others, 1990(8) LCD 609***, to buttress this argument.

18. It has been argued by Sri Mohd. Arif Khan, learned Senior Advocate, appearing for the private opposite parties that the zamindari was abolished in agricultural areas lying in city and towns under the 1956 Act. The 1956 Act gave a specific procedure for demarcation of agricultural area within urban agglomeration and after inviting objections and deciding the same, a declaration needed to be published under Section 8 of the Act of 1956 for the demarcated agricultural area to vest in the State free from all encumbrances.

19. It has been argued that the grounds taken in the writ petition are misconceived as "urban land" has nowhere been defined either in the Act of 1950 or in the Act of 1973. The petitioners have raised vague pleas with regard to the definition of "urban land" and "agriculture land" becoming urban land, ignoring the provisions of Section 143 of the Act of 1950. It has been argued that the land in dispute has never been declared as land used for purposes other than agriculture by any of the authorities under the provisions of the Act of 1950.

20. In the counter affidavit filed by the contesting respondents, it has been stated that Anil Dev Mukharjee had purchased the property in question in the name of his minor son Ajay Kumar Mukharjee and remained in possession of the property in question till the death of Anil Dev Mukharjee in the year 1985. On the death of Anil Dev Mukharjee, Ajay Kumar Mukharjee remained in possession of the property in question till 28.5.1992 when he died. On the death of Ajay Kumar Mukharjee, the names of opposite party nos.2 and 3 were recorded as Bhumidhar by the Supervisor Kanoongo in exercise of his powers under Section 33-A of the U.P. Land Revenue Act. Because the property in question was agricultural in nature, it was beyond the scope of the Urban Land Ceiling Act, 1976 and though the declaration was made by the Prescribed Authority on 26.11.1979 of a major part of Plot No.254/2 as vacant land, the possession thereof was never taken from Late Ajay Kumar Mukharjee.

21. On repeal of the Act in 1999 and on the death of Ajay Kumar Mukharjee, the names of opposite party nos.2 and 3 were recorded as Bhumidhar on 25.12.1999. The opposite party nos.2 and 3 sold off 2/3rd of the property in question by two registered Sale Deeds on 19.7.2000 and 19.7.2001 to M/s. New Hassan Sahkari Awas Samiti, Khurram Nagar, Lucknow.

22. The contents of the writ petition have been vehemently denied by the contesting respondents in so far as they relate to the property in question being converted into Urban and non-agricultural land after the Master Plan was issued for the city of Lucknow, incorporating village Kamta therein in 1970 under the Regulation of Building Operations Act, 1956, and after the expansion of municipal limits in February, 1987 and the issuance of Master Plan under the U.P. Urban Planning and Development Act, 1973 in the year 2001 w.e.f. 1992.

23. It has been contended that there was no declaration under Section 143 of the Act of 1950, therefore, the property in question continued to be governed by the provisions of Section 171 of the Act and the petitioner-Smt. Uma Mukharjee could not be considered the legal heir of her son in view of the presence of the son's widow and his son i.e. opposite party nos.2 and 3.

24. Reena Mukharjee and Raja Ajay Mukharjee, the defendants in Regular Suit No.320 of 2000 had filed an application under Order VII, Rule 11 of C.P.C. numbered as Paper no.20-C, contending that no declaration under Section 143 of the Act of 1950 had been made with respect to the property in dispute and it continued to remain agricultural land situated in village Kamta. The names of the defendants in the Suit were recorded as Bhumidhar, not only in the Records of Rights i.e. Khatauni for 1407-1412 Fasli, but also in the Field Book i.e. Khasra of the relevant years. Kisaan Bahi had also been issued in the name of Ajay Kumar Mukharjee, showing the crops of Arhar/Toordaal having been sown on the property in question. It had been submitted in the Application numbered as 20-C that the Suit was not maintainable for declaration of rights on agricultural land in view of the bar mentioned under Section 331 of the Act of 1950.

25. Also, even in areas where Master Plan is available, the land may remain as agricultural or non-agricultural and would be governed by the Statute under which the same was covered before coming into force of the Master Plan. Merely because land was included within the municipal limits of the city of Lucknow would not take it out of the purview of the Act of 1950. It would continue to be governed by the provisions relating to devolution of property of Bhumidhar under Section 171 of the Act of 1950. The provisions of Hindu Law of Succession do not apply in such matters.

26. The contesting respondents further argued that Reena Mukharjee and Raja Ajay Mukharjee had sold of 2/3rd of the property in question to opposite party no.4 in 2000 and 2001 through registered Sale Deeds. The interim injunction granted by the Civil Court in Regular Suit filed by the petitioners was ex-parte and on receiving notices of the said Suit being filed, opposite party no.5 had moved an application under Order VII Rule 11 of the Code of Civil Procedure (for short "C.P.C.'), praying for rejection of the plaint. The interim injunction continued to operate only on 1/3rd of the property. The opposite party no.4 after purchasing 2/3rd share in the property in Suit wanted to have its land separated and demarcated and, therefore, filed a Suit for Partition under Section 176 of the Act of 1950 before the Sub Divisional Magistrate, Lucknow. Since the petitioner-Smt. Uma Mukharjee was not the recorded tenure holder of the property in question, there was no need to implead her as an opposite party. The rights of the petitioner have yet to be recognized by the competent Court of Law. In this Suit for Partition, a preliminary Decree was passed on 3.1.2003 in which, the rights of the parties were declared. The opposite party no.4 was recognized as purchaser of 2.530 hectares of land of Plot no.254/2 ad-measuring 3.957 hectares. The rest of the plot in question i.e. 1.427 hectares remained with Reena Mukharjee and Raja Ajay Mukharjee. The preliminary Decree was never challenged by the petitioner. Only when the opposite party no.3 ordered preparation of a final Decree on 31.5.2003, the said order for preparation of final Decree was challenged by way of Revision as well as Appeal simultaneously by the petitioner.

27. Learned counsel for the private opposite parties has placed reliance upon ***(2008) 12 SCC 181: Mahant Dooj Dass (Dead) through LR. vs. Udasin Panchayati Bara Akhara and another***, to say that unless a property is demarcated and vested as per procedure prescribed under Sections 3 to 8 of the 1956 Act, the provisions of section 331 of the 1950 Act incorporated in the 1956 Act would not apply and there would not be any bar to the Civil Court to entertain the Suit relating to declaration of rights on agricultural land.

28. Learned counsel for the opposite parties has also placed reliance upon the Statement of Objects and Reasons of the Urban Land Ceiling Act, the Regulation of Building Operation Act, 1956 and U.P. Urban Development and Planning Act, 1973 to say that the application of these three Acts to the Village in question i.e. Village Kamta, District Lucknow would not automatically mean that the requirement of following the procedure prescribed under Section 143

of the 1950 Act and getting a declaration from the Assistant Collector First Class after due enquiry under the said Section has been done away with. The Urban Land Ceiling Act of 1976 was merely aimed at declaring vacant land in urban agglomeration and vesting the same in the State of U.P. for future use of expansion of urban activities of Municipal Corporations etc. The Regulation of Building Operation Act and the Urban Planning and Development Act had only aimed at stopping haphazard growth in urban areas. There was no prohibition for carrying out agriculture in such areas. They only aimed to regulate development through constitution of Housing Boards/Development Authorities. It has been argued that if a Housing Society wishes to develop a residential colony, it shall have to seek a declaration under Section 143 of the Act of 1950. There cannot be any presumption as to automatic declaration under Section 143 and even if no agricultural activities are carried out for several years on such land.

29. Learned counsel for the opposite parties has relied upon ***The Triveni Engineering Works Ltd. and another vs. Government of U.P. and others, 1978 Allahabad Law Journal 744*** and ***Allauddin alias Makki vs. Hamid Khan, 1971 RD 160***, to argue that use of land for purposes not connected with agriculture for a long time would not avoid the necessity of obtaining a declaration under Section 143 of the Act of 1950.

30. Learned counsel for the opposite parties has also relied upon of judgment rendered in ***Mahendra Singh vs. Attar Singh and others, 1967 RD 191***, to say that personal Law like Hindu law or Mohammedan Law is irrelevant for the purpose of determination of Bhumidhari rights. It has been argued that Bhumidhari rights are special rights created by the Act of 1950 for the first time and these new rights are solely governed by the provisions of the Act. By Section 152 of the Act of 1950, the rights of a Bhumidhar are transferable, subject only to the conditions mentioned thereunder. Application of personal Laws regarding devolution of joint family property would curtail the right given to Bhumidhar by Section 152 of the Act. Sections 171 to 173 of the Act of 1950 lay down a special mode of Succession, which is wholly inconsistent with the rights of a coparcener in joint family property as per personal Laws.

31. Counsel for the opposite parties has also relied upon ***Anis Ahmad and others vs. State of U.P. and others, 1967 RD 75***, to argue that a plot of land on which a mosque or a house is situated would not cease to be a land within the meaning of Section 3(14) of the Act of 1950 unless a declaration under Section 143 of the Act is made by the Assistant Collector First Class/Tehsildar after due enquiry in this regard.

32. It has been further submitted that the plea regarding lack of jurisdiction was raised at the initial stage on the basis of Section 331 of the Act of 1950 as a Suit for Declaration of rights is covered under Serial No.34 of Schedule-II attached to the Act. The application under Order VII Rule 11(d) was wrongly rejected by the trial court, but in Civil Revision, the same was allowed and the suit was dismissed for want of jurisdiction, giving liberty to file the

same before the competent Revenue Court.

33. Counsel for the opposite parties has also relied upon ***Magnu Ahir and others vs. Mahabir, 1987 Revenue Judgments 146***, to argue that a land shall not be treated to be Abadi land on which Consolidation Authorities would not have jurisdiction, unless the declaration under Section 143 of the Act of 1950 is made, allowing him to use the land for the purpose other than agriculture. A Bhumidhar cannot transfer his land or deal with it otherwise during consolidation operations, on the ground that the land has become Abadi and he could deal with it in any manner he liked. The jurisdiction to grant a declaration under Section 143 lies exclusively in the Revenue Courts. If the question whether certain land has ceased to be used for agricultural purposes is raised before the Civil Court, it is bound to refer the question to the Revenue Court as per Section 331-A of the Act of 1950.

34. Learned counsel for the opposite parties have also relied upon ***Indrajeet Singh vs. Sardar Arjun Singh and others, 1983 (1) LCD 10***, to argue that no declaration having been made in respect of land in Suit as envisaged under Section 143 of the Act of 1950, the land in suit, did not cease to be "land', and rights of tenure holders could be determined by Consolidation Authority. Even if on certain plots of land, which form part of the holding, constructions were made, such land would not cease to be part of the holding and would continue to be recorded as such and the provisions of the Act of 1950 will cover such land and in the absence of any declaration being granted under Section 143, if any plot of the holding has become Abadi or is used as such, it will continue to be recorded in the holding with the remark against it as "Abadi Shamil Jot".

35. In a supplementary affidavit filed by the petitioners on 14.7.2017, it has been stated that the learned Court below has wrongly relied upon the revenue records, where there was no change of land use recorded in accordance with Section 143 of the Act of 1950. For deciding the issue regarding nature of land and whether it was agricultural or non-agricultural, the learned Courts below have relied upon the reports submitted to the Sub Divisional Magistrate by the subordinate Officials under Section 331-A of the Act of 1950. Under Section 331-A of the Act of 1950, if any Suit relating to land held by the Bhumidhar is instituted in any Court and the question arises whether the land in question is or is not used for the purposes connected with agriculture, and declaration has not been made in respect of such land under Sections 143 or 144 of the Act, the Court shall frame an issue on the question and send it to the Assistant Collector Incharge of the Sub Division for the decision of that issue only. In the proviso to the said Section, it has been mentioned that where the suit has been instituted in the Court of Sub Divisional Magistrate/Assistant Collector Incharge of Sub Division, it shall proceed to decide the question in accordance with the provisions of Section 143 or 144, as the case may be. The Assistant Collector Incharge of Sub Division after re-framing the issue, if necessary, shall proceed to decide such issue in the manner laid down for making of a declaration under Section 143 and return the record

together with his finding thereon to the Court which referred the issue. The Court shall then proceed to decide the suit accepting the finding of the Assistant Collector Incharge of Sub Division on the issue referred to it and such finding shall be deemed to be part of the finding of the Court which referred the issue.

36. Section 143 of the Act of 1950 provides that the Assistant Collector Incharge of Sub Division may either on application or Suo Moto make an enquiry in the manner prescribed and make a declaration that the Bhumidhar"s holding or a part thereof demarcated by him, is being used for a purpose not connected with agriculture. Upon the grant of such declaration, the Bhumidhari rights of land shall cease to be governed by the Act of 1950 in matters of devolution, but shall be governed by personal law to which, the Bhumidhar is subject.

37. The procedure to make an enquiry under Section 143 is prescribed under Rule 135 of the U.P.Z.A. and L.R. Rules, 1952. The Assistant Collector Incharge of the Sub Division will cause the enquiry to be made through the Tehsildar or any other officer not below the rank of Supervisor Kanoongo, to satisfy himself that the holding or a part thereof is really being used for the purposes not connected with agriculture. It is mandatory for the Enquiry Officer to make an on the spot inspection and submit his report in the prescribed proforma.

38. It has been submitted in the affidavit that, however, in the case of the petitioners, when objection regarding maintainability of the suit on the basis of land use was raised, the Sub Divisional Magistrate on 11.7.2005 directed the Tehsildar, Sadar, Lucknow to make an on the spot inspection himself and also inspect the records and submit a report. Such an order was again passed on 27.7.2005. On this order being passed, it became the personal responsibility of the Tehsildar, Sadar, Lucknow to have made an on the spot inspection and submit his report. However, the Tehsildar, Sadar, Lucknow deputed the Naib Tehsildar, Chinhat, Lucknow to make the inspection, who instead of making such inspection deputed the Area Lekhpal to carry out the inspection. The Lekhpal submitted two reports, one is dated 8.8.2005, which did not utter a single word regarding use of land at the time of spot inspection, but only spoke of entries in the revenue records, location of the land and non-conversion of land use under Section 143 of the Act. Again another report was submitted on 5.9.2005 reportedly in compliance of some order passed by the higher authority. This Report also is not on the prescribed proforma and an erroneous finding has been given that it was being used for agricultural purposes earlier, but because of pending litigation, it is now lying vacant.

39. Having heard the learned counsel for the parties at length and having perused the orders impugned in the two writ petitions, this court finds that there are four main issues that need to be decided to put the controversy at rest. Firstly, whether declaration under Section 143 of the Act of 1950 is necessary for conversion of land use from agricultural purposes to residential or industrial purposes or such conversion taking the land out of the purview of the Act of 1950 can be presumed by

operation of law? Secondly, whether in the absence of a declaration under Section 143 of the Act of 1950, the matter can be referred to under Section 331-A of the Act of 1950 and the finding recorded therein by the Assistant Collector Incharge of the Sub Division or the Sub Divisional Magistrate would automatically bring the land in question outside the purview of operation of the Act of 1950 and within the jurisdiction of the Civil Court? Thirdly, whether the Civil Court could look into the question of jurisdiction raised in an application under Order VII Rule 11 of C.P.C. without Reference to the Court of Sub Divisional Magistrate for a finding to be recorded under Section 331-A of the Act of 1950 and was bound to believe the statement made by the plaintiff as set out in the plaint to assume jurisdiction? and lastly, whether the observations recorded by the Sub Divisional Magistrate while considering the issue under Section 331-A of the Act of 1950 were unassailable and, therefore, rightly affirmed by the Additional Commissioner and the Board of Revenue?

40. For consideration of the aforesaid issues, this Court has first to consider the relevant Section 143, 331 and 331-A of the Act of 1950. The relevant extract of Section 143 of the Act of 1950 is being quoted here in below:

"***143. Use of holding for industrial or residential purposes.***-*[(1) Where a [bhumidhar with transferable rights] uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector-in-charge of the sub-division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.*

(1-A) Where a declaration under sub-section (1) has to be made in respect of a part of the holding the Assistant Collector-in-charge of the sub-divisions may in the manner prescribed demarcate such part for the purposes of such declaration.]

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the [bhumidhar with transferable rights] with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject."

41. The relevant extract of Section 331 of the Act of 1950 is being quoted here in below:

*"**331. Cognizance of suits, etc. under this Act.**- (1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof [,] [or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:]*

[Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under

Chapter VIII shall not apply to such holding or part thereof.]

[Explanation.- If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.]

[(1-A) Notwithstanding anything in sub-section (i), an objection, that a court mentioned in Column 4 of Schedule II, or, as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised jurisdiction with respect thereto shall not be entertained by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.]"

42. Section 331-A of the Act of 1950 provides as under:

*"**331-A. Procedure when plea of land being used for agricultural purposes is raised in any suit.**- (1) If in any suit, relating to land held by a bhumidhar, instituted in any court, the question arises or is raised whether the land in question is or is not used for purposes connected with agriculture, horticulture or animal husbandry, which includes pisciculture and poultry farming, and a declaration has not been made in respect of such land under Section 143 or 144, the court shall frame an issue on the question and send the record to the Assistant Collector in-charge of the sub-division for the decision of that issue only:*

Provided that where the suit has been instituted in the court of Assistant Collector-in-charge of the sub-division, it shall proceed to decide the question in accordance with the provisions of Section 143 or 144, as the case may be.

(2) The Assistant Collector-in-charge of sub-division after reframing the issue, if necessary, shall proceed to decide such issue in the manner laid down for the making of a declaration under Section 143 or 144, as the case may be, and return the record together with his finding thereon to the court which referred the issue.

(3) The court shall then proceed to decide the suit accepting the finding of the Assistant Collector-in-charge of the sub-division on the issue referred to it.

(4) The finding of the Assistant Collector-in-charge of the sub-division on the issue referred to it shall, for the purpose of appeal, be deemed to be part of the finding of the court which referred the issue]"

43. The manner prescribed for holding an enquiry under Section 331-A is given in Rule 135 of the U.P.Z.A. and L.R. Rules, 1952 (hereinafter referred to as "the Rules of 1952'), which is being quoted hereinbelow:

*"[**135.** (1) [On an application made by a bhumidhar under Section 143 or on facts coming to his notice otherwise, the Assistant Collector in-charge of the Subdivision may cause enquiry being made through the Tahsildar or any other officer not below the rank of a Supervisor-Kanungo for the purpose of satisfying himself that the bhumidhar's holding or a part thereof is*

really being used for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming. The enquiry shall be made on the spot and the enquiry officer shall, along with his report also furnish information in the proforma given below:]

Name of Village	*Name of bhumidhar with parentage and residence*	*Khata Khata uni number*	*Area of the holding*	*Land revenue*	*Area of the holding used for non-agricultural purpo*		*The specific non agricultural use to which the holding or part the reof is put to*	*Remarks*
					ses			
					(a) Plot No.	*(b) Area*		
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*

(2) Where the proceedings have been started by the Assistant Collector incharge of the Sub-Division on his own motion he shall issue notice to the bhumidhar concerned. Otherwise also he shall give him an opportunity of being heard before coming to a decision in the matter.

(3) Where the entire holding of the bhumidhar has been put to use for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector in-charge of the sub-division may make a declaration to that effect.

(4) Where only part of the holding of the bhumidhar has been put to use for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming the Assistant Collector-in-charge of the sub-division shall make a declaration to that effect accordingly and get the said part demarcated on the basis of existing survey map and actual user of the land.

(5) The Assistant Collector-incharge of the sub-division shall get prepared and placed on record a map showing in different colours the plots put

to use for purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming and for purposes not so connected. He shall also apportion the land revenue payable for each part of holding. The land revenue payable for each shall bear the same proportion to the total land revenue as the valuation of part bears to the total valuation of the holding calculated on the basis of rent rates applicable. An entry shall also be ordered to be made accordingly in the khatauni.

(6) The cost of the demarcation shall be realized from the bhumidhar concerned as an arrear of land revenue unless it has been deposited during the course of the proceedings. For the services of the government servants deputed for carrying out the demarcation, the cost shall be calculated according to the time taken in the work at the rates laid down in Paragraph 405 of the Revenue Court Manual.

The cost so calculated shall be deposited in the treasury under the head [LII-Miscellaneous 9-Collection of payments of services rendered.]"

44. With regard to the first question, the law that has been settled by the Supreme Court by its various pronouncements and also by this Court is that unless a declaration is made under Section 143 of the Act of 1950, no land, which is included in the Khasra and Khatauni of the Village concerned can be presumed to be used for non-agricultural purposes and thus, outside the purview of Chapter VIII of the Act of 1950 and the provisions of devolution/succession to such land shall continue to be governed by Sections 169 to 175 of the Act.

45. In ***Mewa and others vs. Baldev, AIR 1967 Allahabad 358***, a Division Bench of this Court was dealing with the issue whether a Suit for Cancellation of a document along with relief of possession would lie before a Civil Court or before the Revenue Court only by virtue of Section 331 of the Act of 1950. The Bench referred to the definition of Land as contained in Section 3(14) of the Act and observed in Para-14 of the report thus:

".....There is no provision now for "land "automatically seizing to be "land" if it is covered by buildings. On the contrary, an elaborate provision has been made in Section 143 onwards whereby land seizes to be land only after a declaration has been made to that effect by the Collector and.....Under the UPZA and LR Act therefore, land remains land until that declaration is given…"

The Bench was examining the question only with reference to the definition of land for purposes of Act of 1950.

46. In ***Alauddin vs. Hamid Khan, AIR 1971 Allahabad 348***, a coordinate Bench observed in Para-8 of the report that; *"....till such time that a Bhumidar does not get the requisite declaration he continues to be governed by the provisions of the UPZA and LR Act irrespective of the fact as to whether he uses his land for purposes connected with agriculture, horticulture etc. or not....'*. This case involved, as one of the questions, the question of jurisdiction of Civil Court qua the Revenue Court.

47. In ***Ratna Sugar Mills Company Limited vs. State of U.P. and others,***

(1976) 3 SCC 797, the Division Bench of the Supreme Court was considering the Appeal filed by the Mill, which had acquired disputed Banjar land measuring about 277 acres in 1951. Its application under Section 143 of the Act of 1950 for treating the land as industrial land had been rejected by the Sub Divisional Magistrate and against the demand raised for holding tax, the appellant approached the Board of Revenue, which directed levy of holding tax. Having failed before the High Court, the appellant approached the Supreme Court. The Supreme Court held that the appellant held the land as a Sirdar and a Sirdar under Section 146 of the Act of 1950, has the right to exclusive possession of the land and is entitled to use it for any purpose connected with agriculture, horticulture or animal husbandry. It was apparent that after the order was made on the application under Section 143 of the Act of 1950 rejecting the same, the appellant could not be said to hold the land in dispute for industrial purposes. The purpose for which, the appellant could after that date use the land was agriculture and allied activities only. The fact that the appellant did not cultivate the land in question would not warrant exemption from the liability to pay the holding tax. The definition of "land" includes uncultivated land held by a land holder as such. After the rejection of application under Section 143 of the Act of 1950, the land held by a Bhumidhar or a Sirdar continued to be agricultural land even if the appellant did not cultivate the same.

48. In ***Triveni Engineering Works Ltd. and another vs. Government of U.P. and others, 1978 Allahabad Law Journal 744***, a coordinate Bench of this Court while considering the petitioner's case under the U.P. Imposition of Ceiling on Land Holdings Act observed that land will continue to remain "land" if no declaration under Sections 143 or 144 and Chapter VII of the Act of 1950 has been given. The provisions of the Rural Ceiling Act shall, therefore, apply to a Bhumidhar or Sirdar, or anyone, who holds the land for the purposes connected with agriculture, horticulture or animal husbandry, which includes pisciculture and animal husbandry. It seizes to be so only after a grant of declaration under Section 143 and the land shall not form part of his holding as defined in sub-section (9) of the Rural Ceiling Act and the manner of establishing the claim, is by producing a declaration under Section 143(2) of the Act of 1950. So long as a declaration is not granted, a tenure holder continues to be the Bhumidhar thereof and the land although used for industrial purposes remains holding available for determination of ceiling area.

49. In the case of ***Magnu Ahir and others vs. Mahabir, 1988 RD 301***, it was held that land does not cease to be an agricultural land until a declaration under Section 143 is given by the Revenue Court. The decision in the case of *Magnu Ahir* (supra) proceeds on the basis that the land does not cease to be agricultural so long as it is held for the purpose of agriculture and even if a Sirdar raises constructions on the land held by him, it cannot be said that the provisions of U.P.Z.A. and L.R. Act ceases to have an application thereto. Now whether the land is being used for agricultural purposes or not can be decided only at a trial of the Suit or when the objections raised by the defendants relating to the jurisdiction is taken up for disposal.

50. This Court in ***Allauddin alias Makki vs. Hamid Khan, 1971 RD 160; Dina Nath Verma and others vs. Gokarna and others, 2003(94) RD 323; Veer Bal Singh vs. State of U.P. and others, 2009(108) RD 124;*** and ***Satgur Dayal vs. Sixth Additional District Judge and others, 2013(4) ALJ 595***; has consistently held that so long as declaration under Section 143 of the Act of 1950 is not made, the nature of Bhumidhari land will not be changed by raising construction over a part of it and the provisions of the Act of 1950 will continue to apply over it. As no declaration has been made under Section 143 of the Act of 1950, as such, the land remained Bhumidhari land throughout.

51. In ***Chandrika Singh and others vs. Raja Vishwanath Pratap Singh and Another, 1992 (3) SCC 90***, the Supreme Court was considering a case where the respondent had filed a Suit against the appellant seeking a Decree for Ejectment as well as ***pendente lite*** and future damages for use and occupation of the land in question. The appellant, who was the defendant stated in his written statement that the land in question ad-measuring 4 Bighas and 10 Biswa had a residential house, a Pucca well, and land appurtenant to the house on 10 Biswa only and the rest of the land ad-measuring 4 bighas was being cultivated by the defendants. The entire area came within the definition of land since no declaration was made under Section 143 of the Act. The defendants also produced extracts of the Khatauni, where in the plaintiffs had been recorded as Bhumidhar of the Suit property. On that basis, it was contended that Section 331-A of the Act of 1950 was attracted and the Suit was not maintainable in the Civil Court inasmuch as it related to agricultural land. The Civil Judge took the view that the land occupied by the building or appurtenant thereto was excluded from the definition of land under Section 3(1)(o) of the U.P. Tenancy Act and, therefore, the disputed property did not come within the definition of land as defined in that Act and was Abadi and it was not a land as defined in the Act of 1950 and the Revenue Court had no jurisdiction and the Suit could be entertained by the Civil Court. The High Court in Revision under Section 115 of the C.P.C. agreed with the Civil Judge.

52. The Supreme Court, however, found that the High Court had failed to exercise its Revisional jurisdiction properly and allowed the appeal. It observed after referring to the definition of land given under the Act of 1950 and Section 3(14) of the Act as that land, which was not mentioned in Sections 109, 143 and 144 and Chapter VII of the Act was to be treated as land held or occupied for the purposes connected with agriculture. It referred to Sections 143, 144 and 331(1) of the Act and then considered the provisions given under Section 331-A of the Act. It quoted the procedure to be followed when a plea of land being used for agricultural purposes is raised in any Suit. It observed that the provision of Section 331(1) gives exclusive jurisdiction in respect of Suits, Applications and Proceedings referred to in Schedule-II of the Act on Court specified in the said Schedule. The Proviso to Section 331(1) lifts the bar in relation to any holding or a part thereof where a declaration has been made under Section 143. Section 143 empowers the Assistant Collector to make an enquiry in

the manner prescribed and then to make a declaration that a holding or a part thereof is being used or held by a Bhumidhar for purposes not connected with agriculture. Where such a declaration is made in respect of a part of the holding, the Assistant Collector is required to demarcate the said part. It is only after obtaining such declaration, the land in question would not be covered by the provisions of Chapter VIII of the Act.

53. In Section 331-A where an issue is raised regarding whether the land in question is used or is not used for purposes connected with agriculture and a declaration has not been made in respect of such land under Sections 143 of 144 of the Act, the matter shall be referred to the Assistant Collector Incharge of the Sub Division to make an enquiry in the manner prescribed and give a finding. The Supreme Court observed in Para-10 as follows:

".....Since there is no declaration under Section 143 the proviso to sub-section (1) of the Section 331 would not be applicable and the bar to the jurisdiction of the court placed under sub-section (1) of Section 331 would be operative. Section 331-A is intended to serve the same purpose as Section 143 and this is done by requiring the court to frame an issue on the said question and send the record to the Assistant Collector in charge of the sub-division for the decision on that issue only and by laying down that the Assistant Collector shall decide the said issue in the manner laid down for making a declaration under Section 143 or Section 144, as the case may be. The court in which the suit is pending has to decide the suit accepting the finding recorded by the Assistant Collector in charge of the sub-division on the issue referred to it but the said finding can be challenged in appeal against the decision of the said court. This would mean that when there is no declaration under Section 143 the bar to jurisdiction of courts placed under sub-section (1) of Section 331 can be lifted by following the procedure laid down in Section 331-A." (Emphais Supplied)

54. The Supreme Court further observed that in respect of Abadi land, it is implied that the land is not being used for the purposes connected with agriculture and in view of definition of land contained in Section 3(14) of the Act, such land is not land for the purposes of the Act. In order to exclude the applicability of the Act on the ground that the land is Abadi land, it is necessary to determine whether the said land is or is not being used for purposes connected with agriculture. Such determination is envisaged by Sections 143 and 144 and where such a determination has not been made, it is required to be determined in accordance with the provisions of Section 331-A. What is not open to a Court dealing with the Suit in which, said question arises is to bypass the provisions of Section 331-A and to proceed to determine the said question itself. In order to invoke section 331A, three conditions must be satisfied: (a) The suit must relate to land held by a Bhumidhar; (b) The question whether the land is or is not being used for purposes connected with agriculture should arise or be raised in the said suit; and (c) A declaration has not been made in respect of such land under Sections 143 and 144 of the Act of 1950. The Supreme Court rejected the argument raised by the counsel for the

respondent that admittedly there is a building on the land in dispute and since the land surrounding the building is appurtenant to the building, the entire area has been rightly held to be Abadi by the Civil Judge and the High Court. It observed in Para-15 as follows:

".....In our opinion, the question as to whether a particular land is "land" under Section 3(14) to which the provisions of the Act are applicable would require determination of the question whether the land is held or occupied for purposes connected with agriculture, horticulture or animal husbandry and that is a matter which has to be determined either in accordance with the provisions of Sections 143 and 144 and if such a determination has not been made and such a question arises or is raised in a suit before a court, the procedure laid down in Section 331-A must be followed by the court. This would be so even in a case where a building exists on the land and the land is claimed to be appurtenant to the building because in such a case it will be necessary to determine the extent of the land that is appurtenant to the building, i.e. whether the entire land or only a part of it is so appurtenant to the building and for that reason is not held or occupied for purposes connected with agriculture, horticulture or animal husbandry. This determination has to be made in accordance with the provisions of Sections 143 and 144 or Section 331-A of the Act." (Emphasis Supplied)

Since the Civil Judge had decided the question himself, he had exercised jurisdiction not vested in him by law and in not following the procedure laid down in Section 331-A, he had committed an illegality in exercise of his jurisdiction, which was required to be rectified by the High Court in its Revisional jurisdiction under Section 115 of the C.P.C.

55. With regard to the third issue framed hereinabove, learned counsel for the petitioner has argued that the point of jurisdiction is based on the allegations of plaint and not the basis of written statement. It sometimes happens that the plaint is drafted in such a clever manner as to bring the Suit within the purview of the Civil Court and, as such, the case laws cited by the learned counsel for the petitioners are not applicable in the facts and circumstances of the present case.

56. The petitioner-Smt. Uma Mukharjee, in response to the application under Order VII Rule 11 of C.P.C., had filed her objections supported by an affidavit numbered as Paper no.26-C. She denied that the land in question was being used for agricultural purposes. She referred to the Master Plan issued on 25.1.1970 under the Regulation of Building Operations Act, 1956, where the property in question as well as other lands in Village Kamta were shown as earmarked for residential purposes. Reference was made to the expansion of municipal limits of the city of Lucknow by a Gazette Notification issued under the U.P. Municipal Corporation Act, 1959 by His Excellency the Governor on 5.2.1987. Reference was also made to the order passed by the Prescribed Authority under the Urban Land Ceiling Act dated 26.11.1979. Reference was also made to the issuance of Master Plan for the city of Lucknow in the year 2001 including the Village in question under the U.P. Urban Planning and Development Act, 1973. This Master Plan was made effective retrospectively w.e.f. 1991.

57. Taking into account the said contentions raised by the plaintiff in her objections Paper no.26-C, the

Application under Order VII, Rule 11 of C.P.C. numbered as Paper no.20-C was rejected by the learned trial court, holding that since the land question had come within the municipal limits of the city of Lucknow, it could no longer be governed by the Act of 1950.

58. Against such an order passed on 31.3.2001, opposite party nos.2 and 3 filed Civil Revision No.220 of 2003, which was entertained and allowed by the opposite party no.1 by the order dated 26.8.2001 in Writ Petition No.5292 (MS) of 2010.

59. In the order impugned dated 26.8.2010, first the facts as mentioned in the plaint by the plaintiff and the facts as mentioned in Application No.20-C and objections, Paper no.26-C have been mentioned by the opposite party no.1 in great detail as also the case laws relied upon by the rival parties. However, considering the record/documentary evidence as submitted along with the Application No.20-C i.e. Khatauni, Khasra, Kisaan Bahi and the case laws of this Court with regard to the necessity of declaration under Section 143 of the Act of 1950 for converting the agricultural land for non-agricultural use, the Revisional Court has allowed the Civil Revision.

60. One of the grounds taken for allowing the Civil Revision is also the order passed by the Board of Revenue dated 4.11.2008, reported in 2009 (106) RD 19 in respect of *Smt. Uma Mukharjee vs. Smt. Reena Mukharjee and others*, wherein the Board of Revenue has held that mere publication of Master Plan would not automatically convert agricultural land situated in the Village into urban and residential land. Since there was no declaration under Section 143 of the Act of 1950, the provisions of Section 171 of the Act of 1950 would continue to apply with respect to succession/devolution of the property of a Bhumidhar, who died interstate. It was held by the Revisional Court that since the widow and son of the Bhumidhar Late Ajay Kumar Mukharjee were alive, there was no question of grant of any share of the property in question to his widowed mother Smt. Uma Mukharjee.

61. In ***Ram Awalamb and others vs. Jata Shankar and others***, 1968 RD 470, a Full Bench of this Court has observed that *''if the Suit is maintainable for the main relief in the Civil Court, then there is no bar for the Civil Court to grant all possible reliefs flowing from the same cause of action. The determination of the question as to which out of the several reliefs arising from the same cause of action is the main relief will depend on the facts and circumstances of each case.'* It has been further clarified and observed that *''where on the basis of a cause of action- (a) the main relief is cognizable by the Revenue Court, only the fact that the ancillary relief claimed are cognizable by the Civil Court would be immaterial of determining the proper forum of the suit; (b) the main relief is cognizable by the Civil Court, the suit would be cognizable by the Civil Court only and the ancillary reliefs which could be granted by the Revenue Court may also be granted by the Civil Court.' (Emphasis Supplied)*

62. In ***Ram Padarath and others vs. IInd Additional District Judge, Sultanpur 1989 RD 21 (FB)***, a Full Bench of this Court after referring to

Section 31 of the Specific Relief Act, which makes a specific provision for cancellation of void as well as voidable documents, observed that voidable documents are those whose legal effect cannot be put to an end without they being cancelled by a declaratory decree in this regard by the civil court in a regular suit filed under Section 31 of the Specific Relief Act. A void document however is not required to be cancelled necessarily. Its legal effect, if any, can be put to an end by declaring it to be void and granting some relief based upon such observations instead of canceling it. Once it is held to be void it can be ignored by any court or authority, being of no legal effect or consequence. For such a void document to be declared so, a person may approach the competent civil court however if apart from cancellation, some other relief is claimed which is the "real relief" and the claim for which provides the proximate ground or reason for approaching the court of law, or when any other relief can be claimed or is involved in the matter cropping up because of the evidence of the void document or instrument, and the "real relief" claimed is one which is mentioned in schedule II of U.P. Zamindari Abolition and Land Reforms Act, the same can be granted by the revenue court only, and the jurisdiction of the civil court to grant such a relief or reliefs is ousted by section 331 of the U.P.Z.A. & L.R. Act . The law relating to right, title and interest over agricultural land is contained in U.P. Zamindari Abolition and Land Reforms Act. The said Act being a special Act, enumerates in schedule II the types of suits etc, the cognizance of which is to be taken by the Revenue Court specified therein. In the Explanation attached to Section 331, it has been specifically mentioned that if the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may be identical to that which the revenue court would have granted.

63. The Full Bench after considering the phrase "cause of action" and the phrase "any relief", as mentioned in Section 331 of the Act, came to the conclusion that the Explanation to Section 331 has enlarged its scope further. The cause of action may determine the form and keeps the jurisdiction of the revenue courts intact as also the reliefs of the nature which is mentioned under Schedule II of the U.P.Z.A. & L.R. Act. The Full Bench observed that the reliefs of the nature mentioned in Schedule II of the U.P.Z.A.& L.R. Act can be claimed from the Revenue Court which can take cognizance of such suit or proceeding, notwithstanding that the relief provided in a different language can also be granted by the Civil Court.

64. If no relief can be granted to a person unless the declaration of his tenancy rights is made, in that situation the suit would be cognizable by the revenue court as such a declaration can only be granted by the revenue court. Even in cases where the suit is for injunction and/or possession if he is out of possession, then the suit will be cognizable by the revenue court notwithstanding that any relief for injunction may otherwise be granted by the civil court.

65. The Full Bench observed in ***Ram Padarath*** (supra) in Para-19 thus:-

"19. If more than one reliefs are claimed by a particular person, no relief can be granted to that person unless declaration of his tenancy rights is made and in that situation the suit will be cognizable by the revenue court as declaration can be granted by the revenue court. Similarly if a person claims relief of injunction and in the alternative for possession if he is found to be out of possession and his name is not on the record then without declaration that in fact he is the tenant or he is in possession of the tenancy rights no further relief can be granted and the suit is cognizable by the revenue court. In case the suit is for injunction and/or possession if he is out of possession then the suit will be cognizable by the revenue court notwithstanding the relief for injunction is to be granted by the civil court.....The Civil Court would have no Jurisdiction as the case first involved declaration of right as tenure-holder which could be granted by the revenue court only and thereafter relief could have been granted only if he was held to be tenure-holder by succession....." (Emphasis Supplied)

Similarly, in ***Indrapal vs. Jagannath 1993 ALJ 235***, this Court observed in Para-9 as follows:

"9. Thus, the essence of the matter in deciding whether the suit is cognizable by the civil Court or the revenue court is whether Section 331 of the U.P. Zamindari Abolition and Land Reforms Act is attracted to the facts of the case. If in substance, the main question involved relates to declaration of right or title, then the suit would lie in the revenue court and not in the civil Court....." (Emphasis Supplied)

66. The Full Bench in ***Ram Padarath*** (supra) relied upon ***Chandrika Misir versus Bhaiya Lal; AIR 1973 SC 2391***, which had said in a case arising out of a suit for injunction and in the alternative for possession in respect of agricultural land, that in view of Schedule II of the U.P.Z.A. & L.R. Act, the relief of possession could only be granted by the revenue courts under Section 331 of the Act and thus ousted the jurisdiction of the Civil Court. The Supreme Court observed that the civil court would have no jurisdiction as the case first involves the declaration of rights as a tenure holder which could only be granted by the revenue courts, and thereafter relief could have been granted regarding injunction to protect possession. In paragraph 22, the Full Bench observed that the forum for action in relation to void documents or regarding agricultural land depends on the "real cause of action" with reference to the facts averred. Void documents necessarily do not require cancellation like voidable documents.

67. ***Ram Padarath*** (supra) has been quoted with approval by the Supreme Court in paragraph 18 of its judgment in ***Bismillah versus Janeshwar Prasad and others, 1990 (1) SCC 207.***

68. In ***Jai Prakash Singh vs Bachchu Lal and others, 2019 SCC Online Allahabad 3522***, a coordinate Bench of this Court was considering the question as to under what circumstances, the Suit for Cancellation of a Sale Deed of agricultural property would lie before the Civil Court or the Revenue Court?

69. In ***Jai Prakash Singh*** (supra), the Court was considering a case where

the Suit for relief sought was Permanent Injunction and Cancellation of Sale Deed. It has been stated that the defendant was the recorded tenure holder of the property in question at the time when the Sale Deed was executed. The plaintiff was not the recorded tenure holder. In the written statement, in Paragraph 24, a plea was taken to the effect that the Suit involves declaration of title and, therefore, it should have been filed before the Revenue Court and not in the Civil Court and that the Civil Suit is not maintainable. It was also submitted that the plaintiffs have no right title or interest in the property in Suit and they are not in possession of the same. In view of this plea of maintainability of the Suit being taken in written statement, the Issue No.1 was framed by the trial court. The trial court directed the return of plaint under Order VII Rule 1 for presentation before the competent Court. The Court considered the view taken by the learned Court below that declaration to the effect that transfer is void amounts to cancellation of Transfer Deed and as such, the declaration of right, title and interest by the Revenue Court would suffice. It observed that the Supreme Court in ***Suhrid Singh alias Sardool Singh versus Randhir Singh, (2010) 12 SCC 112***, had observed as under:

"Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him." (Emphasis Supplied)

This Court in ***Jai Prakash Singh*** (supra) observed that *"if sale deed executed by a person is challenged by another person on the ground that even though immediately before the sale deed only the name of vendor/vendors was undisputedly recorded in the revenue records, still plaintiff had a right in the revenue records, still plaintiff had a right in the said land, then such suit is not maintainable before Civil Court, as it primarily involves question of declaration of right in the agricultural land. In such a situation, it is not actually the sale deed and state of affairs coming in existence by execution of the sale deed which is being challenged. The challenge in such a situation in real sense is to the position and affairs in existence immediately before the execution of the sale deed. If a person asserts that apart from the recorded tenure-holder he also has got a right in the agricultural land then his only remedy lies in filing a suit for declaration before the Revenue Court.....'*
(Emphasis Supplied)

This Court held that the Suit would lie before the Revenue Court.

70. In ***Jai Prakash Singh*** (supra), this Court also considered the judgment rendered by the Supreme Court in ***Deoki Nandan vs. Surja Pal, 1996 RD 70***, and the judgment rendered in ***Shri Ram vs. First Additional District Judge, reported in 2001(3) SCC 24***, where the Supreme Court observed in Para-7 as follows:

"7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being

that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession." (Emphasis Supplied)

71. In ***Azhar Hasan versus District Judge, Saharanpur, 1998(34) ALR 152 (SC)***, the Supreme Court observed as under:

"On reading the plaint and on understanding the controversy, we get to the view that whether those persons who succeeded the recorded tenants, were rightly recorded as tenants or not, was a question determinable by the Revenue Authorities. Besides that, the sale deed which has been questioned on the basis of fraud, was not executed by the plaintiffs but by others, and they were not parties thereto so as to allege the incidence of fraud, In these circumstances, we are of the view that the plaint was rightly returned to the plaintiffs. They are even now at liberty to approach the Revenue authorities and claim deduction of time spent in these proceedings, in computing limitation for the purposes of the suit." (Emphasis Supplied)

72. In ***Kamla Prasad vs. Krishna Kant Pathak (2007) 4 SCC 213***, the Supreme Court observed, after referring to the judgment rendered in ***Azhar Hasan*** (supra) thus:

"...No doubt there is no relief of declaration of ownership of agricultural land specifically sought in the plaint, but in essence the claim of plaintiff was based on his ownership right of the disputed land, while the plea of defendant was that plaintiff was not owner of the property. Then adjudication of title of land in substance was the main question involved in the suit, although, it was not expressly prayed for in plaint. Therefore, in substance, when the main question involved for adjudication in this case relates to declaration of right or title then suit would lie in revenue court and not in civil court. Therefore, in such matter the jurisdiction of civil court is barred under Section 331 of UPZA & LR Act. This provision of Section 331 is attracted when in substance main question to be determined for resolving dispute between parties relates to declaration of rights or title of agricultural land.…."
(Emphasis Supplied)

73. This Court finds from a perusal of the pleading on record in both the writ petitions that the pith and substance of the dispute between the parties is the ownership of agricultural land and the point regarding the authority to execute a valid Sale Deed becomes an ancillary matter. Since the main dispute relates to the title of agricultural land, which is within the jurisdiction of the Revenue Court, therefore, the ancillary dispute relating to Sale Deed of such land would also come within the jurisdiction of the Revenue Court.

74. Smt. Uma Mukharjee is not recorded as tenure holder on the aforesaid plot of land in the revenue

records i.e. Plot No.254/2 admeasuring 3.57 hectare and 2/3rd of the plot in question is lying vacant and has not yet been declared under Section 143 of the Act of 1950 as being used for Abadi. The land in question is capable of being put to agricultural use. The land in question has not yet been acquired under any housing scheme under the Land Acquisition Act.

75. Till such time that Competent Authority did not make a declaration under Section 143 of the Act of 1950 for the land in question, changing its nature from agricultural to land used for other purposes, the jurisdiction to hear the Partition Suit would remain with the Revenue Courts. Since in the revenue records, Plot No.254/2 was still recorded as agricultural land and was also being used for agricultural purposes and the name of Smt. Uma Mukharjee was not recorded as co-tenure holder in the Khatauni, she could not be heard in the Partition Suit and the only course open to her was to first get a declaration of her rights before the Revenue Courts. Smt. Uma Mukharjee had failed to show any right, title or interest on the property in question nor could she prove that the land in question was being used for residential/Abadi land.

76. The objection dated 23.7.2005 filed by Smt. Uma Mukharjee was rejected and the order dated 20.10.2004 passed earlier by the Sub Divisional Magistrate was found to suffer from no infirmity so as to require its modification by the First Appellate Court and Second Appellate Court. The finding as recorded by the Sub Divisional Magistrate is quoted as follows:-

"... spasht hai ki vivadit bhoomi krishi yogya bhoomi hai jiska upyog aavasiya roop mein nahin kiya jaa raha hai. aisi sthiti mein prashngat vaad rajasva nyayalay ko sunane ka poorna adhikaar prapt hai. Yah bhi spasht hai ki vivadit bhoomi ka do tihaai bhang vartaman mein rikt pada hai. Jab tak vivadit bhoomi Dhara 143 ke antargat aavasiya bhoomi saksham adhikaari dwaara nahin kar di jaati hai athva saksham adhikaari dwaara bhoomi ka swaroop parivartan nahin kar diya jaata hai tab tak prashn gat vaad ko sunane ka adhikaar is nyayalay ko prapt hai. Chunki vivadit bhoomi vartaman samay mein bhi intakhab khatauni 1410 se 1412 Fasli Gram Kamta ke Khata Sankhya 62 par sankramaniye bhumidhar ke roop mein ankit hai jisse spasht hota hai ki vivadit bhoomi abhi bhi krishi bhoomi ke roop mein prayog mein layi jaa rahi hai jisse tay karne ka adhikaar is nyayalay ko prapt hai...."
(Emphasis Supplied)

77. The Additional Commissioner in his order dated 10.4.2007 while dealing with the Appeal, has mentioned in the first few pages of his order, the facts relating to the history of litigation between the parties.

78. In the revenue records, the name of Smt. Uma Mukharjee was missing. The land in question was recorded in the name of the erstwhile Bhumidhar Ajay Kumar Mukharjee and thereafter his dependents i.e. his widow Reena Mukharjee and son Raja Ajay Mukharjee. Five bighas of land was bought on 19.7.2000 and 5 bighas of land was again bought on 19.7.2001 and the contesting respondents thus became co-tenure holders. For partition of its share, a Partition Suit was filed by M/s New Hassan Sahkari Awas Samiti, in which a preliminary Decree, determining the

shares between the co-tenure holders was passed on 3.1.2003. This order was not challenged. When the final Decree, partitioning the land in question by metes and bounds was issued on 31.5.2003, the same was challenged and the matter was remanded.

It is not relevant for the purposes of determining the nature of land that a notification dated 5.2.1987 was issued for expanding the municipal limits of the city of Lucknow and agricultural land would not become urban land only because of such notification. Even if Master Plan was issued under the Regulation of Building Operation Act or the Urban Planning and Development Act, it would only mean that the area in question would now be governed by the Lucknow Nagar Nigam in so far as taxes and other civic amenities were concerned.

A Partition Suit is filed between the co-sharers of a property and not for declaration of share of strangers. Smt. Uma Mukharjee not being recorded tenure holder was a stranger to the property. In case she wanted to be declared as co-tenure holder with 1/3rd share on the property, then a Suit for Declaration under Section 229-B of the Act of 1950 ought to have been filed, where the State Government and the Gram Sabha would have been impleaded as parties. In a Suit for Partition under Section 176 of the Act of 1950, the State Government and the Gram Sabha are not necessary parties, hence no fresh rights of strangers can be declared on the land in dispute.

An agricultural land would continue to remain an agricultural land till such time as a notification/declaration under Section 143 of the Act of 1950 is not issued. Since no declaration under Section 143 of the Act of 1950 had been issued, Smt. Uma Mukharjee had no right to object on the basis of personal law. Moreover, the initial Sale Deed was executed on 19.7.2000, and the Regular Suit No.320 of 2000 was filed later on and an ex-parte ad-interim injunction only with respect to maintenance of status quo on 1/3rd part of Plot No.254/2 had been granted. The Temporary Injunction was operative only on 1/3rd of the land in question. Also, in the Regular Suit No.320 of 2000, an application under Order VII Rule 11 of C.P.C. had been filed, as the Suit was barred by Section 331 of the Act of 1950. The ex-parte temporary injunction had been passed on misrepresentation by the plaintiff Smt. Uma Mukharjee that the land in question was Abadi land, not covered under the bar of Section 331 of the Act of 1950.

79. Since the land in question was agricultural land and the Civil Court had no jurisdiction to decide the suit in question, the jurisdiction to declare rights in agricultural land lay exclusively with the Revenue Court and the Notification dated 3.2.1987, expanding the municipal limits of the city of Lucknow would not mean that the Act of 1950 would stop being applicable to the area. As long as no resumption of land is made under Section 117 of the Act of 1950 by the Government/Competent Authority, the land in question would continue to remain agricultural and be governed by the definition under Section 3(14) of the Act of 1950. If the State Government deems it proper, it can transfer by way of notification under Section 117 the land belonging to a Gaon Sabha to some other local authority, namely, Lucknow Nagar

Nigam, but even after such transfer of land, the nature of land would not change. The Gaon Sabha would be replaced by the local authority viz. Nagar Panchayat or Nagar Palika or Nagar Nigam. The nature of land which is agricultural under the Act of 1950 would remain the same as it has been held by this Court time and again that once the land comes under the operation of the Act of 1950, it shall remain to be so till a specific notification is issued by the State Government making the Act inapplicable. If the Act of 1950 becomes applicable on a particular piece of land and such land later on comes within the expanded limits of a municipality, still the Act of 1950 would continue to apply on the same land.

80. With Regard to the procedure followed and the decision arrived at by the Sub Divisional Magistrate, the Additional Commissioner after perusal of record of the case, came to the conclusion that the Sub Divisional Magistrate had summoned a report from the Tehsildar concerned, which report was based on the spot inspection, therefore, there was no procedural impropriety found in the order impugned. The notification of the Master Plan only meant that the area in question was now to be controlled by the Regulations relating to construction being raised by the owners of the land. It did not affect the jurisdiction of the Revenue Courts. The Revenue Courts' and the Civil Courts' jurisdiction is determined by the relevant Statutes.

In the land in question, crops were being sown, although it may have been shown to be included within the municipal limits of Lucknow. The Additional Commissioner observed that the question of jurisdiction of Revenue Courts to decide the Partition Suit was based upon the issue whether the land in question was Abadi land or agricultural land and when the issue would be decided either ways, it would govern the fate of the Partition Suit. For the decision of the issue, a finding had been recorded by Sub Divisional Magistrate under Section 331-A of the Act of 1950. This Court does not find the order of the Appellate Court as suffering from any infirmity.

81. In the order dated 6.9.2005, the Sub Divisional Magistrate has considered the report of the Tehsildar dated 5.9.2005 by which, he had informed that in Village Kamta, Plot No.254/2 was recorded in the Khatauni of 1410 to 1412 Fasli as agricultural land. In the Khata No.62, the name of M/s. New Hassan Sahkari Awas Samiti through Secretary Mohd. Khaliq was recorded on 2.530 hectares of land and in Khatauni, Khata No.128 Ajay Kumar Mukarjee son of Anil Dev Mukharjee and Reena Ajay Mukharjee wife of Ajay Kumar Mukharjee were recorded on 1.427 hectare as Bhumidhar with transferable rights.

82. This Court finds that the Sub Divisional Magistrate's order does not suffer from any infirmity in the facts of the case. If indeed Kamta was included in Municipal limits, then consolidation operations would not have been carried out in the area, but admittedly consolidation did take place and the land purchased by Anil Dev Mukarjee for his son was given a new Chak number.

83. Section 143 occurs in chapter VIII of the Act of 1950, which consists

of several Sections from Section 129 to Section 230 out of these, many relate to Bhumidhar in particular. As per Section 169 read with Sections 171 to 175 dealing with devolution to the holding of a Bhumihar, a declaration under Section 143(1) and sub-section (2) thereof would make a Bhumidhar's succession to be governed by personal law. The declaration under Section 143(1) is envisaged in respect of a holding of a Bhumidhar where it is used for the purpose not connected with agriculture and allied activities. The declaration can be sought by a Bhumidhar by making an application. This would become necessary or otherwise the provisions of chapter VIII of the Act of 1950 would be applicable to it. It is implicit in the request of a Bhumidhar for a declaration under Section 143(1) that the land would not be used for purposes of agriculture.

84. Admittedly, the Suit of the contesting respondents was for partition under Section 176 of the Act of 1950, which related to agricultural holding and that jurisdiction of the Civil Court is specifically barred under the provisions of Section 331(1) of the Act of 1950, which provides that no Court other than the Court mentioned in Column-4 of Schedule-II, take cognizance of any Suit or proceedings mentioned in Column-3 thereof on a cause of action in respect of which, any relief can be given by such Court. The Proviso to such Section says that where a declaration is made under Section 143 in respect of a holding or a part thereof, the provisions of Schedule-II in so far as they relate to Suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof. Since the contesting respondents had claimed 2/3rd share in the land in question and partition and separation of their share under Section 176 of the Act of 1950, as such, the same could be entertained only by the Revenue Court. The Explanation appended to the said Section really provides that if the cause of action is one in respect of which, relief may be granted by the Revenue Court, it would be immaterial that the relief asked for from the Civil Court may not be identical to that, which the Revenue Court may have granted.

85. In the instant case, the plaintiff while filing the Suit before the Civil Court had claimed 1/3rd share over the property in dispute. This question could incidentally be gone into by the Revenue Court in the Partition Suit, as objection was filed by the plaintiff Smt. Uma Mukharjee and she had been given the right to be heard by the Appellate and Revisional Court.

86. It has been submitted that the report prepared by the Area Lekhpal was without jurisdiction and could not have been relied upon by the Sub Divisional Magistrate.

This Court has perused the orders passed by the Sub Divisional Magistrate, Sadar, Lucknow. Initially, a report was submitted without actual physical inspection of the property, but perhaps a clarification was sought and in the second report dated 5.9.2005, there is a mention of spot inspection and it is also mentioned that 2/3rd of the plot in question was lying vacant, but was capable of being put to agricultural use and was being used for agricultural purposes earlier, but because of pending litigation, it is now lying vacant. This finding of the learned Court below is a finding of fact that has been reiterated by the First Appellate Court and the Second

Appellate Court. There is no dispute that the land in question is still lying vacant. The vacant land not actually being used for residential or industrial purposes would still be land covered under Section 3(14) of the Act of 1950. This has been held to be so by this Court as well as the Supreme Court. Therefore, merely because the Area Lekhpal and not the Tehsildar had carried out the spot inspection, it could not be said that the ultimate conclusion of land lying vacant was in anyway perverse and against the facts on record.

87. This Court, in view of the observations made hereinabove, finds no infirmity in the orders impugned in both the writ petitions. Consequently, both the writ petitions are ***dismissed***.

(2020)08ILR A440
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 7163 of 2020

Rais Ahmad & Ors. ...Petitioner
Versus
Moharram Ali & Ors. ...Respondent

Counsel for the Petitioner:
Yogesh Chandra Srivastava

Counsel for the Respondent:
C.S.C.

A. Civil Law - U.P. Revenue Code,2006 - Section 210 - maintainability of-revision barred by limitation by more than three and a half years-Revisional Court condoned the inordinate delay without recording its satisfaction-order condoning the delay is set aside.(Para 1 to 12)

B. It is a well settled legal proposition that whenever, the court exercises its discretion, the same must be by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. Even after sufficient cause has been shown by a party is not entitled to the condemnation of delay in question as a matter of right.(Para 6 to 9)

The petition is allowed. (E-6)

List of Cases Cited:-

1. Ramlal Vs Rewa Coalfields Ltd., AIR (1962) SC 361

2. P.K. Ramchandran Vs St. Of Kerala,(1997) 7 SCC 556

3. D. Gopinathan Pillai Vs St. Of Kerala, (2007) 2 SCC 322

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Notice on behalf of respondent nos. 2 and 3 has been accepted by the office of the learned Chief Standing Counsel. In view of the nature of controversy involved and the order proposed to be passed, no useful purpose would be served by keeping the petition pending and as such notice to Moharram Ali, the private respondent is dispensed with and the matter is being disposed of at the admission stage itself.

2. The suit for partition and separate possession of their shares, filed by the petitioners herein, which came to be registered as Suit No. 144/14-15, was decreed by the Sub Divisional Officer, Nawabganj Barabanki vide judgment

dated 28.12.2015. The Court held the petitioners to be the absolute owners of Gata No. 1487, whereas respondent no. 1 was held to be the absolute owner of Gata No. 1483 and 1484 and with respect to the other gatas, the petitioners and Moharram Ali - respondent no. 1 were held to be equal share holders.

3. On 12.9.2019, the respondent no. 1, filed a Revision No. 01469/2019 under Section 210 of the U.P. Revenue Code, 2006 (for short "the Code') against the said decree before the Additional Commissioner, Ayodhya Mandal, Ayodhya. The revision was barred by more than three and a half years.

4. Without any notice to the petitioners, by the impugned order dated 18.09.2019, the delay was condoned and the revision was admitted. The impugned order reads as under:

"पत्रावली पेश हुई। निगरानीकर्ता के विद्वान अधिवक्ता की बहस निगरानी की ग्राह्यता के बिन्दु पर सुनी गयी। यह निगरानी मोहर्रम अली की ओर से उपजिलाधिकारी नवाबगंज, बाराबंकी द्वारा पारित आदेश दिनांक 28.12.2015 के विरुद्ध योजित की गयी है। *निगरानीकर्ता के अधिवक्ता द्वारा मियाद अधिनियम की धारा 5 का लाभ प्राप्त करने हेतु प्रार्थना पत्र प्रस्तुत किया गया है। अतः मियाद अधिनियम का लाभ प्रदान करते हुये निगरानी सुनवाई हेतु ग्राह्य की जाती है। अवर न्यायालय की पत्रावली तलब की जाए। विपक्षीगण को नोटिस जारी की जाए।* पत्रावली सुनवाई हेतु दिनांक 09.01.2020 को पेश हो।"

(emphasis supplied)

5. Sri Yogesh Chandra Srivastava, learned counsel for the petitioners, has contended that without issuing notice to the petitioners, the delay could not have been condoned. He has further submitted that neither there was any application for condonation of delay nor any sufficient cause was shown for the inordinate delay in filing the revision, and in this view of the matter also, the delay in filing the revision could not have been condoned. Even otherwise, the counsel submits, the order, being a nonspeaking order, cannot be sustained.

6. Section 210 and 214 of the U.P. Revenue Code and Section 5 of the Limitation Act, 1963 read as under:

210. Power to call for the records.- (1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any subordinate revenue Court in which no appeal lies, or where an appeal lies but has not been preferred, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding; and if such subordinate Court appeals to have -

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity, the Board, or the Commissioner, as the case may be, may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

(3) No application under this section shall be entertained after the expiry of a period of third days from the date of the order sought to be revised or

from the date of commencement of this Code, whichever is later.

* * *

214. Applicability of Code of Civil Procedure, 1908 and Limitation Act, 1963. - Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceeding under this Code.

* * *

5. Extension of prescribed period in certain cases.--Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.--The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

7. Under Sub-section (3) of Section 210 of the Code, the limitation for filing a revision before the Board or the Commissioner is 30 days from the date of the order against which the application is directed. However, Section 214 of the Code read with Section 5 of the Limitation Act empowers the Board or the Commissioner, as the case may be, to condone the delay in filing the revision under Section 210 of the Code, provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.

8. The power to condone the delay under section 5 of the Act is discretionary and even where sufficient cause is shown by a party it cannot claim condonation of delay as a matter or right. In ***Ramlal v. Rewa Coalfields Ltd., AIR 1962 SC 361***, the Apex Court has held as under:

"12. It is, however, necessary to emphasise that *even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right*. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. *If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay*." (emphasis supplied)

9. The Revisional Court, thus, had the discretion to condone the delay and entertain the revision after the expiry of the period of limitation, if it was satisfied on the facts and in the circumstances of the case that the delay had been properly explained and that it was necessary to do so in the interest of justice. The discretion conferred on the court has to be exercised judicially and on well recognised principles. It is a well settled legal position that whenever, the court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice.

10. In ***P.K. Ramachandran v. State of Kerala, (1997) 7 SCC 556***, the Apex Court has held as under:

"3. It would be noticed from a perusal of the impugned order that *the court has not recorded any satisfaction that the explanation for the delay was either reasonable or satisfactory, which is an essential prerequisite to condonation of delay."*
(emphasis supplied)

11. In ***D. Gopinathan Pillai v. State of Kerala, (2007) 2 SCC 322***, the Apex Court reiterated what was said in *Ramchandran's* case. Paragraph 5 of the said report is reproduced below:

"5. We are unable to countenance the finding rendered by the Sub-Judge and also the view taken by the High Court. There is no dispute in regard to the delay of 3320 days in filing the petition for setting aside the award. When a mandatory provision is not complied with and when the delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay, only on the sympathetic ground. The orders passed by the learned Sub-Judge and also by the High Court are far from satisfactory. *No reason whatsoever has been given to condone the inordinate delay of 3320 days. It is well-considered principle of law that the delay cannot be condoned without assigning any reasonable, satisfactory, sufficient and proper reason.* Both the courts have miserably failed to comply and follow the principle laid down by this Court in a catena of cases. We, therefore, have no other option except to set aside the order passed by the Sub-Judge and as affirmed by the High Court. We accordingly set aside both the orders and allow this appeal."(emphasis supplied)

12. In the case at hand, the revision filed by the respondent no. 1 was, on the face of it, barred by limitation by more than three and a half years. By the impugned order, the Revisional Court has condoned the inordinate delay by a cryptic order without recording its satisfaction that the delay was either reasonable or satisfactory. The Revisional Court has, thus, committed a serious error in condoning the delay and admitting the revision. In this view of the matter alone, the impugned order condoning the delay cannot be sustained and is liable to be set aside.

13. The petition is allowed. The order condoning the delay is set aside and the matter is remanded to the Revisional Court to pass a fresh order in accordance with law.

14. The petitioners are granted liberty to file their objections with regard to the maintainability of the revision taking all the pleas available to them including the plea of limitation before the Revisional Court and the Revisional Court while passing a fresh order shall take into consideration the objections, if any, filed by the petitioners.

(2020)08ILR A443
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2020

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Misc. Bench No. 7787 of 2008

M/S Godwin Construction Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dipak Seth, I.P. Singh

Counsel for the Respondents:
C.S.C., Ram Raj

A. Civil Law - U.P. Urban Planning and Development Act (Act 11 of 1973) - Section15(2A), Section 59(1)(c) -The U.P. (Regulations of Building Operations) Act, 1958 - Development fees - Levy of - Authority entitled to levy development fees in such manner & at such rate as may be prescribed - rules are required to frame by State Government u/s 55 as contemplated u/s 15(2)(A) - however, even without there being rules framed development fee can be demanded by the Development Authority as per the directions issued under 1958 Act by virtue of Section 59 (1) (c) of 1973 Act (Para 57)

B. Civil Law - U.P. Urban Planning and Development Act - Section 15(2a), Section 59(1)(c) - Constitution of India, Art.226 - Development fees - Levy of - Challenge in writ petition - a litigant, who approaches Court is bound to state all the relevant facts & produce all the documents which are relevant to the litigation without any reservation even if they are against him - cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose & to suppress or not to disclose other facts (Para 62)

Petitioner challenged levy of external development charges - on ground that that in absence of any prescribed Rules, Regulations - Authority cannot impose any development fees & also no development carried out by Development Authority - so Authority not entitled to charge extra development charges – *Held* - petitioner suppressed the fact that Development Authority sent letter to the State Government seeking approval of levy of Rs.400/- per square meter towards development charges & State Government approved the same - petitioner guilty of concealing the fact that he had already deposited 40 % of the external development charges at the enhanced rate - Writ petition, dismissed (Para 58, 59, 61)

Dismissed. (E-5)

List of cases cited:-

1. Virendra Kumar Tyagi Vs GDA (2006) 62 A.L.R. 106

2. Calcutta Municipal Corporation Vs Shrey Mercantile (2005) 4 SCC 245

3. K.D. Sharma Vs Steel Authority of India & ors. (2008) 12 SCC 481

4. St. of U.P. & ors. Vs Malti Kaul (Smt.) & anr. (1996) 10 SCC 425

5. Smt. Nisha Kumari Vs St. of U.P. & ors. 2014 (6) ADJ 20 (DB)

6. Bhaskar Laxman Jadhav & ors. Vs Karamveer Kakasaheb Wagh Education Society & ors. (2013) 11 SCC 531

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. By way of the present petition, the petitioner seeks quashing of the impugned order of recovery dated 19th July, 2008 passed by respondent No.2, whereby the respondent No.2 directed the petitioner to deposit external development charges amounting to Rs.2,61,84,771.00/- till 31st July, 2008 at the rate of Rs.400/- per square meter. The petitioner also seeks quashing of the order dated 30th September, 2007 and Resolution dated 3rd June, 2006; and for a direction to the respondents to approve the project Talpat Manchitra of Greenwood City ignoring the Resolution dated 3rd June, 2006.

2. Briefly, the facts as stated in the petition are that the petitioner preferred an application under Section 14 of the Uttar Pradesh Urban Planning and

Development Act, 1973 (hereinafter referred to as 'the said Act') regarding approval of their project, namely, Talpat Manchitra of Greenwood City situated at By-pass Chauraha, Bagpat Road, Meerut. The respondent No.2 informed the petitioner that Talpat Manchitra/ Maps relating to the plots of Greenwood City had been approved with certain conditions as mentioned in their letter dated 26th September, 2007.

3. It is stated that before 1997, there was no provision under the said Act for the imposition of any development fee and only provision for collection and levy cess under the said Act was Section 33, under which the Authority has to provide an amenity and carry out development, and thereafter to recover the cost of the same from the owner. It is also stated that Section 35 of the said Act provides that if under the opinion of the Authority as a consequence to any development scheme having been executed by the Authority in any development area, the value of any property in that area, which has been benefited by the development has increased or will increase, the Authority was entitled to levy upon the owner of the property a betterment charge in respect of increase of the value of the property resulting from the execution of the development.

4. It is further stated that in the year 1997 vide U.P. Act No.3 of 1997, the said Act, was amended by inserting new Section as 2 (ggg), 15 (2A) and proviso 3 to Section 15 (3). Section 2 (ggg) defines the term 'Development fee'. While referring to Section 15 (2A) of the said Act which has been inserted by U.P. Act No.3 of 1997, as Section 3, providing that the Authority shall be entitled to levy development fees, mutation charges, staking fees, and water fees in such manner and at such rates as may be prescribed, it is stated that in the absence of any prescribed Rules, Regulations or bye laws the Authority cannot impose any development fees. Since no Rules, Regulations or bye laws have been framed by the State Government or the Meerut Development Authority, Meerut (hereinafter referred to as 'MDA') till date, therefore, the levy of development fees is illegal.

5. It is further stated that the State Government exercises the power of supervision and control over the Authority under the provisions of Section 41 of the said Act, 1973. Therefore, the power to prescribe development fees can only be exercised by the State Government through its rule making power and not by the Development Authority by its Regulation of bye laws making power and if the above interpretation is not agreed to them it will result in a serious abuse and misuse of powers and perpetuation of fraud on statute.

6. Relying on the decision of the Division Bench of this Court in the case of **'Virendra Kumar Tyagi vs. GDA'**, reported in 2006 (62) A.L.R. 106, wherein while interpreting the provisions of Section 15 (2A), Section 41, Section 57 of the Uttar Pradesh Urban Planning and Development Act read with Section 4 (33a) of the U.P. General Clauses Act, 1904, this Court has come to the conclusion that the word 'Prescribed' means prescribed by the rules under the Act and if no such rules have been framed no charge under Section 15(2A)

can be levied, learned counsel for the petitioner contended that in the present case also since no rules have been framed for charging development fees; therefore, any charge and development fees by respondent No.2, i.e., the MDA is illegal.

7. It is also stated that Section 2(ggg) of the said Act, 1973 clearly shows that the development fees can only be imposed by the construction of five things i.e., (i) road, (ii) drainage, (iii) sewer line, (iv) electric supply and (v) water supply lines. It is contended that exercising the powers under Section 41(1) of the said Act, 1973, the State Government vide Government Order No.3157/9-Aa-1-1998 dated 19th August, 1998 directed all the Development Authorities that fee received from the lay out plan shall be used for the development to be done in the same colony for the services like drainage, road, sewer line, electric and water supply for the development area outside the scheme of Development Authority.

8. It is further stated that a perusal of the aforesaid Government Order No.3157/9-Aa-1-1998 dated 19th August, 1998 clearly shows that the development fees can be recovered only for the purpose of the colony for which the development fees has been recovered and not for any other colony or any other place. It is contended that the development charges can be claimed only as a fees for the services rendered and not as a tax, and therefore, for the said development charges the Development Authority is bound to provide services to the same colony or the plot for which the development charges are being taken and if the said colony or the plot alone is not benefited by the said development charges received from them then it shall become a tax which is not permissible under the eyes of law.

9. It is also stated that up to the month of June, 2006, the respondent No.2, was charging development fees at a flat rate of Rs.125/- per square meter of the plotted area of a particular colony which was also arbitrary in as much as the fee cannot be charged on ad valorem basis. On 03rd June, 2006, the Vice Chairman of MDA wrote a note to the Chairman, MDA/ Commissioner Meerut Divison, Meerut informing him that the development fees of Rs.125/- per square meter for residential plots and Rs.150/- per square meter for commercial plots, which was fixed by the MDA in its meeting dated 26th March, 2003 vide Resolution No.7 was not sufficient. According to the Vice Chairman in the 74th meeting of the MDA in item No.4 it was proposed that the development fees be taken at the rate of Rs.400/- per square meter for whole area of the land, but the proceedings of the said minutes are not available and, therefore, sought approval to impose Rs.400/- per square meter for whole of the plan area as the external development charges. On the same day, the Chairman, MDA signed the proposal and since then the MDA has illegally and in an unauthorized manner started claiming external development charges on the whole land area of the colony at the rate of Rs.400/- per square meter.

10. It is further stated by the petitioner that whenever a development submits a lay out plan for approval of the colony then almost 50 percent area of the land on which he intends to develop a

colony, is utilized for the purpose of road, parks, community service areas and other amenities and only 50 percent of the land area is used for the purpose of plotting or construction of the houses. As such the effect of the said noting of the Vice Chairman and its approval by respondent No.3 means to almost 6½ time increase in the extra development charges since the extra development charges of the colony if calculated at the rate of Rs.400/- per square meter for whole area of the land shall come out to be almost Rs.800/- per square meter of the plotted area.

11. The petitioner further stated that the aforesaid proposal was kept in the board meeting dated 29th June, 2006 of the MDA as item No.13 but the same was not approved by the MDA. Therefore, the increase in the extra development charges could not be given effect in any manner. As per Section 2 (dd) of the said Act, the Chairman and Vice Chairman of the Development Authority are only the officers of the Development Authority, while the Development Authority has been defined under Section 4 of the said Act, 1973. Section 4(1) of the said Act, 1973 provides that the State Government may, by notification in the gazette, constitute for the purposes of the said Act and Authority to be called the 'Development Authority' for any development area. Section 4(2) of the said Act, 1973 provides that the said Development Authority shall be body corporate by the name having perpetual succession and common seal with power to acquire, hold and dispose of property, and to contract and shall by the said name sue and sued. As per Section 4(3) of the said Act, 1973 the Development Authority consists of 15 members including Chairman and Vice Chairman of the Development Authority concerned.

12. It is also stated on behalf of the petitioner that Section 4 of the said Act, 1973 clearly shows that the Chairman and Vice Chairman of the Development Authority have no right or Authority to impose any such fees, such as development fees or to change the rate of development fees without the approval of the Development Authority and that to on a rational basis. The basis of said Rs.400/- per square meter of the plotted area has been taken from a letter dated 29th December, 2005 wherein the State Government has informed all the Development Authorities that for the purpose of issuing licences to the developers, and allotment of land, after its acquisition by the Development Authority to the developers and for the development of the said land by the Development Authority, the development fees can be levied at the rate of Rs.385/- per square meter of the land area which has to be rounded as Rs.400/- per square meter of the land area, which had been calculated on the basis of data of Lucknow and has to be amended by the individual Development Authorities as per then dates. The said letter dated 29th December, 2005 applies where the development of the roads, drainage, electric supply and water supply is undertaken by the Development Authority itself, after its acquisition by the Development Authority and not by the builder and the builder has only to carve out the colony and to sell off the plots or houses of the said colony to the intending buyers..

13. The petitioner further stated that in the case of the private developers who are not taking any land from the Development Authority and who have

their own land and/ or purchasing the land from the existing land holders then all the development in the colony, including roads, drainage, electric supply and water supply lines are undertaken by the developers itself and not by the Development Authority and only on this condition that all these amenities and development shall be provided by the developer, the plan of the developer is passed.

14. Vide letter dated 22nd September, 2007, respondent No.2 directed the petitioner to deposit an amount of Rs.6,57,14,000.00/- as external development charge at the rate of Rs.400/- per square meter for the Talpat Area measuring 1,64,285/- square meter. It is stated that respondent No.2, has not provided the land after its acquisition and development. Therefore, no order based on letter dated 29th December, 2005 could be passed by the respondents.

15. The petitioner further stated that at the earlier existing rates of the external development charges i.e., Rs.125/- per square meter, it has deposited an amount of Rs.75,00,000.00/- on 31.01.2008. However, vide impugned order dated 19th July, 2008, respondent No.2 directed to deposit the external development charges amounting to Rs.2,61,84,771.00/- till 31.07.2008 at the rate of Rs.400/- per square meter otherwise respondent No.2 will proceed for further action.

16. It is argued on behalf of the petitioner that as per Government Order dated 19th August, 1998, no amount has been spent for the development of said colony from the external development charges collected by the MDA and whole of the said amount is surplus amount with the MDA. The counsel for the petitioner, therefore, submitted that the external development fees of Rs.400/- per square meter as imposed by respondent No.2 is absolutely illegal and against the provisions of the said Act. Therefore, the same is liable to be struck down to meet the ends of justice.

17. It is further argued on behalf of the petitioner that respondents No.2 and 3, in an illegal, arbitrary, irrational and whimsical manner passed the impugned Resolution dated 03rd June, 2006, whereby they raised the amount of external development fees from Rs.125/- per square meter to Rs.400/- per square meter against the provisions of law, which is based on extraneous considerations, and bereft of the material on record. Moreover, said Resolution dated 03rd June, 2006 had not been approved by the Development Authority itself, but they are adamant to impose an amount of amount of Rs.400/- per square meter as external development fees against petitioner. Therefore, the said Resolution dated 03rd June, 2006 passed by respondents No.2 and 3 is liable to be set aside.

18. Learned counsel for the petitioner contended that the act of the opposite parties are out rightly illegal, arbitrary and unlawful and same is not tenable in the eye of law and justice. The impugned action of the respondents fails the test of judiciousness and does not avoid arbitrary and capricious actions and the impugned acts of the opposite parties cannot be allowed to operate.

19. It is further argued that the action on the part of opposite parties are

hitting the statutory provisions, arbitrary, unreasonable and illegal, and in violation of Articles 14 and 19(1)(g) of the Constitution of India, hence the impugned Resolution dated 03.06.2006, and order dated 19th July, 2008 passed by respondents No.2 and 3 are liable to be set aside.

20. Learned counsel for the petitioner argued that a fee is levied essentially for services rendered and as such there is an element of quid-pro-quo between a person to pay fee and the public authority which imposes it. However, in the instant case, the MDA, in fact, provided no services. There is no bye laws, rule and regulation or law under the provision of the said Act, 1973 for imposition or realizing any development fee/betterment fee on ad valorem basis. It is further contended that the imposition of development fee/betterment fee amounts to tax for which no rules or regulations have been framed so far.

21. Learned counsel for the petitioner further contended that while prescribing fee the respondents have levied fees on ad valorem basis which is a circumstance to show that the impugned levy is in the nature of tax and not in the nature of fee. Moreover, the quantum of levy indicates that it is is a tax and not a fee. Further, the quantum of fee is disproportionate to the so called services which is one more circumstance showing arbitrariness in the levy of such imposition. Hence, the levy of fee is irrational, arbitrary, and discriminatory as the classification is not based on intelligible differentia and the differentia has no reasonable nexus with the object of legislation.

22. It is argued on behalf of the petitioner that the respondents were charging development charges at the rate of Rs.125/- prior to 30.09.2007 which has not been denied by the respondent/MDA. However, through the impugned order dated 19.07.2008 the respondent/MDA is trying to charge Rs.400/- per square meter as development fee whereas the Government Order dated 30.09.2007 prescribes the external development fee of Rs.288/- per square meter is chargeable. It is further contended that the MDA has tried to impress that the rate of external development charges is Rs.400/- where as the said Government Order dated 29.12.2005 is for integrated township wherein the minimum area of the land should not be less than 50 acres i.e., 2,02,343/- square meters. Whereas the land of the petitioner for development is only 1,64,285/- square meter.

23. It is further argued on behalf of the petitioner that the Government Order dated 30.09.2007 prescribing development fee of Rs.288/- came almost two years after Government Order/integrated township policy dated 29.12.2005, hence even if rate of Rs.125/- is unacceptable, it cannot be more than Rs.288/- as external development charge and there arises no question of Rs.400/- as the external development charge.

24. Learned counsel further stated that the concept of quid-pro-quo is fully acceptable in the present case which means that the fee paid by the petitioner should only be utilized against the services rendered by the respondent/MDA and once the fee was deposited it was MDA's obligation to

have developed the external area for the purpose of the petitioner colony as prescribed under Section 2(ggg) of the said Act. Reliance is placed by the petitioner heavily on the judgment in the case of **'Calcutta Municipal Corporation vs. Shrey Mercantile'**, (2005) 4 SCC 245.

25. The petition is strongly opposed by the respondents. It is stated that the petitioner has concealed material facts and played a fraud in approaching this Court; consequently, the petitioner is not entitled for grant of any equitable relief under Article 226 of the Constitution of India.

26. It is stated by the respondents that it is a fundamental principle of law that a person invoking the extraordinary jurisdiction of this Court must come with clean hands and must make a full and complete disclosure of facts to this Court. The petitioner has suppressed the foundational facts from this Court which are required to be pleaded enabling this Court to scrutinize the nature and the content of the right alleged to have been violated by the respondents.

27. It is further stated that the petitioner with *mala fide* intentions and with ulterior motives, suppressed the material facts from this Court that prior to filing of the aforesaid with petition, the petitioner had agreed to pay development charges at the rate of Rs.400/- per square meter. A material fact of execution of the agreement deed dated 25.09.2007 has also been suppressed from this Hon'ble Court. The petitioner also suppressed the material fact that on 26.09.2007 at the time of issuing the sanctioned plan submitted by the petitioner under Section 15of the said Act, the petitioner had paid 40 percent of the total development charges, at the rate of Rs.400/- per square meter, to the answering respondents.

28. The petitioner further did not disclose the fact that after it had deposited Rs.2,62,85,600.00/-, that is, 40 percent of the development charges at the rate of Rs.400/- per square meter, the rest 60 percent of the development charges were required to be deposited by the petitioner as per the letter dated 31.10.2007 that too in three installments. However, the petitioner did not comply the aforementioned letter dated 31.10.2007 and did not deposit the agreed and admitted development charges at the rate of Rs.400/- per square meter. It is stated that on 31.01.2008 the petitioner deposited only Rs.75,00,000.00/- (Rupees Seventy Five Lacs only), and thereafter, did not deposit any amount and has approached this Court by filing the aforesaid writ petition, suppressing the material facts which are imperative fr the purposes of the aforesaid writ petition. The writ jurisdiction has been invoked by the petitioner after it had committed default. The petitioner in order to overcome his own shortcoming has filed the aforesaid writ petition, in effect seeking amendment of a concluded contract.

29. While relying on the judgment of the Supreme Court in the case of **'K.D. Sharma vs. Steel Authority of India and others'**, reported in (2008) 12 SCC 481 wherein it was held that if there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim,

learned counsel for the respondents contended that the petitioner has not only played fraud upon this Hon'ble Court by suppressing material facts from the Court but has also tried to mislead this Court.

30. It is further stated that 'Development Fee' means the fee levied upon a person or body under Section 15 of the Act for construction of road, drain, sewer line, electric supply and water supply lines in the development area by the Development Authority. The 'Development Area' means any area declared to be development area under Section 3 of the Act. It is therefore, clear that the development of the area is not confined to the particular place or area but development as a whole of the development area.

31. It is pointed out by learned counsel for the respondents that the Vice Chairman, MDA had sent a letter dated 30.06.2006 to the State Government requesting therein that levy of Rs.400/- per square meter towards development charges may be approved. In fact Rs.434/- per square meter was calculated on the basis of Meerut database. The State Government vide its order dated 17.07.2006 had approved the development charges, as requested. It is further stated that the Government Order dated 19.08.1998 is nothing but a clarification of para-5 Kha of the office order dated 15.01.1998. The said Government Order is applicable to the urban area outside the scheme area of the development area. The said Government Order is, therefore, not applicable and available to the case of the petitioner.

32. Learned counsel for the respondents contended that the proposal to increase development charges from Rs.125/- per square meter to Rs.400/- per square meter was made in accordance with said Act and the same was kept in the MDA Board's meeting dated 04.08.2007. The Board had taken decision to increase the development charges and the same was accordingly resolved as per Resolution No.11.

33. Parameters for charging development fee have been laid down by the State Government and the various heads under which the amount is calculated has also been determined by the Sate Government. In general, costing of the development charges, the State Government had after adding the expenditure incurred in laying of roads, sewer, electricity, flyovers and other amenities, laid down Rs.400/- per square meter as development charges even while the respondents under the same headings incur expenditure of Rs.434/- per square meter, sanction of the same was not given by the State Government and the answering respondents have been directed to charge Rs.400/- only per square meter which not only the petitioner be it an individual body or firm is paying to the Development Authority. The decision taken by the State Government to charge Rs.400/- per square meter towards development charges and adopted by the answering respondents is a policy decision and is not amenable to writ jurisdiction under Article 226 of the Constitution of India. It is further stated that the estimated project cost of the development area which was duly advertised at the time of inviting applications for development of lands and which includes flyovers, bus terminal, metro rail and the like.

34. The respondents further stated that they are required to develop entire

development area as covered under Section 3 of the Act and the insistence of he petitioner to develop around and adjoining the petitioner's land is *per se*, untenable and does not merit consideration. By filing of the writ petition under Article 226 of the Constitution of India the petitioner cannot seek amendment in the terms of the agreement entered into between the petitioner and the answering respondents.

35. It was also pointed out by the respondents that Ghaziabad Development Authority, Ghaziabad is charging Rs.1,947/- per square meter towards development charges. Similarly, Lucknow Development Authority, Lucknow is charging Rs.830/- per square meter towards development charges. Moradabad Development Authority, Moradabad is charging Rs.400/- per square meter towards development charges. Kanpur Development Authority, Kanpur is charging Rs.746/- per square meter towards development charges. It is further stated that none of the ground taken by the petitioner are tenable in the eyes of law and the writ petition deserves dismissal.

36. We have heard Sri Dipak Seth, learned counsel for the petitioner along with Sri Ratnesh Chandra, Advocate and Sri V.P. Nag, learned Standing Counsel for respondent No.1 as well as Sri Ram Raj, learned counsel for respondent No.3 and perused the pleadings and the documents on record.

37. The grievance of the petitioner is with regard to the charging of external development charges at the enhanced rate of Rs.400/- per square meter by the Meerut Development Authority without there being any rules framed with the approval of the State Government. The petitioner has challenged the said external charges as unlawful, arbitrary being contrary to the Government Order dated 19th August, 1998 as well as the Uttar Pradesh Urban Planning and Development Act, 1973.

38. The Meerut Development Authority (MDA) has been constituted by the State Government under Section 4 of the said Act. It has been enjoined to undertake the development of the development area including providing amenities or carrying out engineering operations or providing means of access as envisaged under the Act or other amenities that may be specified by a notification issued by the State Government as part of development plans undertaking under the Act.

39. Before we proceed to deal with the matter, it is appropriate to refer to and extract some of the relevant provisions of the Uttar Pradesh Planning and Development Act, 1973. Section 2(ggg) of the said Act talks about development fee. The said Section reads as under:-

"2(ggg): 'development fee' means the fee levied upon a person of body under Section 15 for construction of road, crain, sewer line, electric supply, and water supply lines in the development area by the Development Authority"

40. Section 15(2A) of the said Act provides for levy of development fee etc. by the Authority. The said Section is reproduced as under:-

"15 (2A) The Authority shall be entitled to levy development fees,

mutation charges, stacking fees, and water fees in such manner and at such rates as may be prescribed."

41. The proviso 3 to the Section 15(3) of the Act provides that before granting permission, referred to in Section 14, the Vice Chairman may get the fees and charges levied under Sub-Section 2A deposited.

42. Under the provisions of Section 35 of the Act, the State Government is empowered to make rules for carrying out the purposes of the aforesaid Act, for all or any of the following matters:-

(a) The levy of fee on a memorandum of appeal under Sub-Section (5) of Section 15 or under Sub-Section (2) of Section 27.

(b) The procedure to be followed by the Chairman in determination of betterment charges, and the powers that it shall have for the purpose.

(c) Any other matter which has to be or may be prescribed by the rules.

43. Sections 56 and 57 of the Act empower an Authority to make regulation and bye-laws for the administration of the affairs of the authority, with the previous approval of the State Government. The general power is available under Section 56 for the Authority to make regulations for the administration of the affairs of the Authority.

44. The word 'Prescribed' under Section 15 (2A) of the Act only refers to prescribe by rules. This is also clear from Section 4 (33A) of the U.P. General Clauses Act, 1904, which states as under:-

"'Prescribed' shall mean prescribed by rules under the Act in which the work occur."

The word 'Prescribed' under Section 15 (2A) of the Act only refers to prescribe by rules. It is also clear from the interpretation of Section 55 (2) of the Act which prescribes that even the fee to be levied on the memorandum of appeal, as well as procedure to be followed by the Chairman in determination of betterment charges, and the powers that it shall have for the purpose shall be prescribed by rules only, which will be framed by the State Government.

45. In terms of Section 14 of the Act, after the declaration of any area as development area under Section 3, no development of land shall be undertaken or carried out constituted in the area by any person or body unless permission for such development has been obtained in writing from the concerned Development Authority in accordance with the provisions of the Act. Therefore, before any person or a body undertakes development in accordance with the plan, he is enjoined to obtain in writing from the Vice Chairman sanction for development in accordance with the provisions of the Act.

46. Section 15 of the Act provides provision for application for permission to develop the area. Sub-Section 2-A of Section 15 of the Act provides that the Development Authority shall be entitled to levy development fees, mutation charges, staking fees and water fees in such manner and at such rate as may be prescribed. The proviso to Sub-Section 3 of Section 15 of the Act provides that before granting permission to develop, referred in Section 14 of the Act, the

Vice Chairman may get the fees and the charges levied under Sub-Section 2-A deposited.

47. Section 41 of the Act provides control by State Government and the said Section is reproduced hereunder:-

"41. Control by State Government:-

(1) The (Authority), the Chairman or the (Vice Chairman) shall carry out such directions as may be issued to it from time to time by the Sate Government for the efficient administration of this Act.....…"

48. The petitioner duly accepted the terms sent by the Authority vide letter dated 22.09.2007 thereafter the Authority sanctioned the Talpat Manchitra project of the petitioner on 26.09.2007.

49. Section 38-A of the Act provides for levy of development charges on private developer. The said Section reads as under:-

"38-A. Power of Authority to levy and use conversion charges and city development charge:-

(1) …..

(2) Where in any development area a licence has been granted to private developer for assembly and development of land, the Authority shall be entitled to levy city development charge on the private developer of such land and in such manner and at such rates as may be prescribed."

50. The State Government on 21.05.2005 directed the development authorities to follow the Government Order dated 29.12.2005 in respect of realization of development charges wherein policy of realization of development charge/fee was categorically mentioned as Rs.400/- per square meter. A letter dated 30.06.2006 was sent by the Authority to the State Government seeking direction for realizing external development charges at the rate of Rs.400/- per square meter. The said letter was replied to the Authority by the State Government on 17.07.2006 informing that the development charges be realized as per Government Policy dated 29.12.2005. It is further noticed that a large number of developers/institutions situated in the petitioner's vicinity were paying regularly development charges at the rate of Rs.400/- per square meter.

51. It is also not disputed by the petitioner that it has deposited 40 percent of the total external development charges with the MDA at the rate of Rs.400/- per square meter. The petitioner thereafter questioned the rate of development charges and also the power of the Authority to charge such development charges.

52. The Supreme Court in the matter of **'State of U.P. and others vs. Malti Kaul (Smt.) and another'**, reported as (1996) 10 SCC 425 has held that Development Authority as a condition for sanction of plan for a development area can levy development charges/fee. The Supreme Court in this case while considering the various provisions of the Act has held as under:-

"11. A reading of these provisions would clearly indicate that in a development area when an owner or body or a department of the government undertakes to develop the land, two options are open to the development authority, namely, either it may itself undertake to provide amenities or other

means of access, engineering corporations as provided under the Act or as a condition to grant sanction, it can call upon the person who undertakes development or the body of the developers who undertake development to deposit the amount required for such development or providing amenities etc.

12. In the light of direction (vii) of the directions issued in the regulations the owner or the body or the developer is enjoined either to deposit the amount demanded or give bank guarantee or mortgage the property in favour of the development authority so that it could secure sufficient security in advance for overseeing the development including providing amenities as a scheme of the development as per the sanction. It is settled law that levy of fee is a compulsory exaction for services rendered as quid Pro quo. It is seen that the development authority is enjoined under the Act to undertake planned development of the development area in accordance with the provisions of the Act. When it undertakes such a development it carries out the development as per the plan either itself or through any person or body which undertakes to develop the land in accordance with the sanction plan in which case necessary conditions to safeguard providing the amenities are required to be secured.

13. Thus considered, we hold that the Act specifically gives such a power. It is true that under Article 265 of the Constitution no tax can be levied without any authority of law. There is no quarrel on the proposition of law. In this case, from a reading of the aforesaid provisions it clear that the statute, instead of prescribing the rate of developmental charges itself, has given power to the rule-making authority to regulate the collection of and payment for development fee. It is seen that under the direction which is not inconsistent with the provisions of the Act, it indicate the method and the manner in which the collection is to be secured so as to see that the area is developed in a planned manner as per the sanctions given by the competent authority. The High Court, therefore, was clearly in error in holding that there is no provision under the Act or the Rules to levy the development fee."

53. The aforesaid decision of he Supreme court was also relied upon by a Division Bench of this Court in the case of '**Smt. Nisha Kumari vs. State of U.P. and others**', reported as 2014 (6) ADJ 20 (DB).

54. We have perused the judgment relied upon by the petitioner in the case of **Calcutta Municipal Corporation's case (supra)**, and we are of the view that this judgment is of no help to the petitioner and is not applicable to the facts and circumstances of the present case. In that case the issue before the Supreme Court was whether the imposition for the process of change of the name of the owner in the assessment of the Corporation was in the nature of "a fee" or "tax". While dismissing the petition of the Municipal Corporation, the Supreme Court held that the entire Part IV of the Calcutta Municipal Corporation Act deals not only with the levy of taxes, it also deals with assessments, valuation, collection and recovery of taxes. The entire machinery for filing of returns, objections and inspection of records and properties comes under the part which deals with the taxation. The maintenance of

assessment books, annual report, valuation reports, etc. all come under the part which deals with taxation. Section 183 which deals with notice of transfer also comes under the same part. It is true that under Section 183 (5), fees are payable for mutation as may be prescribed under the regulations, still the primary object of such a charge is to augment the revenue and the levy of such a charge cannot be treated to be a part of the regulatory measure. The Supreme Court further held that under the Regulations, the Corporation while prescribing fees has levied fees on ad valorem basis which is one more circumstance to show that the impugned levy is in the nature of tax and not in the nature of a fee. Moreover, the quantum of levy indicates that it is a tax and not a fee. The analysis of the various provisions of the Act and the impugned Regulations shows that the impugned levy is in exercise of power of taxation under the said Act to augment the revenues primarily and not as a part of regulatory measure. However, in the case in hand the petitioner is a developer who had submitted an application under Section 14 of the Uttar Pradesh Urban Planning and Development Act, 1973 regarding approval of their project, namely, Talpat Manchitra of Greenwood City situated at By-pass Chauraha, Baghpat Road, Meerut. Vide letter dated 26th September, 2007, the petitioner was informed by the Authority (MDA) that Talpat Manchitra/Maps relating to the plots of Greenwood City had been approved with certain conditions as mentioned in the said letter. The Supreme Court in the case of **Malti Kaul's case (supra)** has clearly held that the development fee can be levied by the Development Authority as a condition for sanction of plan in a development area when an owner or body or a department of Government undertakes to develop the area. Levy of such fee is a compulsory exaction for services rendered as quid prop quo for which Authority of Law provided under he Act. It was further held that though express mention is not made either in Section 33 or Section 41; but when Section 14 and Section 56 (2) are read together, it gives right and power to the sanctioning authority to impose a condition to the grant of sanction for execution of the plan in a development area by imposing the condition of either payment in advance towards the cost of the amenities or means of access etc. or give bank guarantee or mortgage the plot which is to be developed etc.

55. A Division Bench of this Court in the case of **Smt. Nisha Kumari (supra)** has, *inter alia*, considered the following issues:-

"(i) Whether for levying the development fee and other fees as provided for in Section 15 (2-A) of 1973 Act, the rules are required to be framed by the State Government under Section 55 of the Act and without there being rules framed, no fee as mentioned in Section 15 (2-A) can be levied?

(ii) Whether the Development Authorities can charge development fee under the direction issued under U.P. (Regulation of Building Operation) Act, 1958 as held by Apex Court in State of U.P. v. Malti Kaul 1996 (10) SCC 425?

(iii) Whether for levying development fee, the development authorities have to carry out the development as contemplated under Section 2(ggg) of 1973 Act before hand."

56. While deciding the above issues, the Division Bench of this Court considered the relevant provisions of the Act and held as under:-

"30. The first issue is as to whether the Development Authorities are entitled to charge development fee without framing Rules under Section 55 of 1973 Act. The submission, which has been emphasized by the learned counsel for the petitioners, is that no development charge can be levied in an area, which is already developed, or in an area where development authority is not carrying out any development activity.

31. For appreciating the above issue, it is necessary to note the relevant legislation governing the field. Prior to the enforcement of Uttar Pradesh Urban Planning and Development Act, 1973 (hereinafter referred to as the 1973 Act), there was another enactment, namely, the U.P. (Regulations of Building Operations) Act, 1958 (hereinafter referred to as the 1958 Act), which Act was enacted to provide for the regulation of building operations in Uttar Pradesh. Section 2 of 1958 Act contains various definitions. It is relevant to note that the definition of development as now under 1973 Act is the same as was in 1958 Act. Section 2(e) of 1958 Act was as follows:-

"2(e). 'development' with its grammatical variations and cognate expression, means the carrying out of building, engineering, mining or other operations, in, on, over or under land or the making or any material change in any building or land;"

32. Under Section 3 of 1958 Act, the State Government was authorized to declare an area as regulated area with a view to prevent bad laying out of land, haphazard erection of buildings or growth of sub-standard colonies or with a view to carry out development and expansion of that area according to the proper planning. Section 4 defined the Controlling Authority. Section 5 provided for power to the State Government to issue directions in respect of regulated area by notification in Official Gazette. Section 5 (a) provided for master plan for the regulated area and Section 6 provided that no person shall undertake or carry out the development on any site in any regulated area except in accordance with the permission of the Prescribed Authority which provision is akin to Section 14 of 1973 Act. Section 7 provided for application for permission which provision is akin to Section 15 of 1973 Act. Section 19 provided for the power of the State Government to make Rules to carry out the purpose of the Act. In exercise of power under Section 14 of 1958 Act, the Government has issued directions for all regulated area, namely, the U.P. (Regulation of Building Operation) Directions, 1960. Direction no. 8 related to sanctioning of plans and statement. Direction no. 8 (vii) is relevant for the present case which reads as follows:-

"The applicant has entered into an agreement with the local body concerned for the development of the land and for provision of other amenities and has either deposited the full estimated cost of the development and provision of other amenities with that local body in advance or has given to it a bank guarantee equivalent to such cost; or has entered into an agreement with that local body, providing that the full cost thereof may be realised by it out of the sale-proceeds of the plots that may be sold by the applicant:"

33. From the provision as noted above, it is clear that the Prescribed Authority before sanctioning the plan could have directed the applicant to deposit full estimated cost of development or give a bank guarantee equivalent to such cost. Thus, the power to deposit the cost for carrying out development could have been taken from the applicant praying for sanction of the plan as per the statutory scheme of 1958.

34. U.P. Urban Planning and Development Act, 1973 as enacted provided for development of certain area of land of Uttar Pradesh according to plan and for matters ancillary thereto. The definition clause in Section 2 has already been noted. Section 15 (2) provides that every application as provided in Section 15 (1) shall be accompanied by such fee as may be prescribed by such rules.

35. By the Uttar Pradesh Urban Planning and Development (Amendment) Act, 1997 (U.P. Act No. 3 of 1997) after clause (gg), clause (ggg) has been inserted defining development fee. In section 15, after sub-section (2), sub-section (2-A) has been inserted providing that the Authority shall be entitled to levy development fees, mutation charges, stacking fees and water fees in such manner and at such rate as may be prescribed. In sub-section (3), a proviso was added to the following effect:

"Provided also that before granting permission, referred to in Section 14 the Vice-Chairman may get the fees and the charges levied under Sub-section (2-A) deposited."

Thus, prior to U.P. Act No. 3 of 1997 the Act did not contain any provision for a development fee, the mutation charges, stacking fees and water fees. No rules were framed by the State providing for charging of development fee etc.

36. The writ petitions were filed in this Court challenging the levy of development fee, malva fee, water charges by Development Authorities constituted under the 1973 Act. Before the Division bench of this Court, in Malti Kaul and another v. Allahabad Development Authority and another, 1996 All LJ 1, it was contended that the Development Authorities are not entitled to charge development fee and other fees. The Government Order dated 12.8.1986 by which Government authorised to charge of development fee was also under challenge. The Division Bench of this Court after considering Sections 14, 15, 33, 35 & 41 held that the Development Authority could not charge any development fee. For protecting the Government Order dated 12.8.1986, learned counsel for the petitioners in the said case relied on Section 41 which argument was repelled by the Division Bench by following observations in paragraph 7-A and 8 which are quoted below.

"7A. Learned counsel for the Development Authorities have, however, tried to justify the levy of development fee on the basis of the Government order dated 12.8.1986, copy of which has been filed as Annexure I to the supplementary-affidavit filed on behalf of the respondents. Although there is no provision under the Act, authorising the Government to direct the Development Authorities to impose such a fee; but the order has been defended by the learned counsel on two grounds, namely, (i) executive power of the State; and (ii) Section 41(1) of the Act. These contentions cannot be accepted.

Although, executive power of the State is coextensive with its legislative powers; but Article 265 of the Constitution prohibits the levy of tax, which includes the fee, except by authority of law. Law means legislative enactment and sub-ordinate legislation. The State in exercise of its executive power cannot impose any tax or fee in the absence of specific statutory provision authorising such a charge. In this connection, reference may be made to Harivansh Lal Mehra v. State of Maharashtra, AIR 1971 SC 1130, Bimal Chandra Banerjee Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla, AIR 1992 SC 2038 (supra).

8. Section 41 of the Act does not confer any such power on the Government to issue direction to the Development Authorities for imposing development fee. Under this Section Government can issue direction "for the efficient administration of this Act" and such directions are to be carried out by the Development Authority, its Chairman and Vice-Chairman. By this section the Government is authorised to issue directions of administrative nature to the Development Authorities. The Government cannot derive any power from Section 41 for directing the Authorities to levy the development fee. Supreme Court in Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla, AIR 1992 SC 2038 (supra), wherein the levy of development fee was challenged has laid down that in the absence of any express statutory provision, it is not open to any authority to impose any such fee. The plea of implied power to levy such a charge was also rejected. The imposition of development fee as such is without authority of law and, therefore, cannot be sustained."

37. The writ petitions were allowed by the Division Bench of this Court. The levy of development fee and Government Order dated 12.8.1986, so far it has authorised the Development Authority to impose and collect development fee were quashed. Paragraph 13 of the Judgement of the Division Bench is reproduced hereunder:-

"These writ petitions are partly allowed. The levy of development fee and the Government order dated 12-8-1986, so far as it has authorised the Development Authority to impose and collect development fee are quashed. The levy of Malva fee and water charges are also quashed. The respondents, Development Authorities are directed to determine the imposition of Malva fee and water charges afresh after giving a reasonable opportunity of being heard to the petitioners. As regards the composition fee, the writ petitions are dismissed. In view of the facts and circumstances of the case, there shall be no order as to costs."

38. State of U.P. And Development Authority filed special leave petition in Apex Court challenging the aforesaid Judgment of the Division Bench dated 21.4.1995 in Malti Kaul's case (supra). The Apex Court, vide its Judgment 21.8.1996 in State of U.P. And others v. Malti Kaul (Smt) and another, 1996 (10) SCC 425, had allowed the said appeal. The Apex Court held that the Authority granting sanction of execution of plan in a developed area may impose a condition for payment towards the cost of amenities. After noticing the scheme of 1973 Act and Section 59 of 1973 Act and 1958 Act the Apex Court held that the Development Authority can demand amount for carrying out development and

view taken by the High Court was not correct. It is useful to quote paragraph 10, 11, 12 and 13, which are as under:-

"10. By operation of Section 59, any orders issued under the predecessor Acts which are not inconsistent with the provisions of the Act shall continue to be in operation. Under Section 14 of the Uttar Pradesh (Regulation of Building Operations) Act, 1958 (predecessor Act) which is pari materia with Section 14 of the Act, regulations have been made which are not inconsistent with that of Section 8 and in that behalf provides for sanction of plans and statements. Direction (vii) provides that the applicant has entered into an agreement with the local body concerned for the development of the land and for provision of other amenities and has either deposited the full estimated cost of the development and provision of other amenities with that local body in advance or has given to it a bank guarantee equivalent to such cost, or has entered into an agreement with the local body, providing that the full cost thereof may be realised by it out of the sale proceeds of the plots that may be sold by the applicant; provided that any such agreement between the applicant and the local body may provide for any part of the development and provision of other amenities being carried out by the applicant himself; however, that in respect of any such part he shall give adequate security to the local body to secure that he shall carry out such part of the development and provide other amenities in accordance with the approved standards and specifications to the satisfaction of the controlling authority. Under the second proviso also, power has been given to secure mortgage of the entire land to be developed in favour of the local authority as a condition for granting sanction with an agreement for providing the amenities and if the plots are to be released for sale by the mortgagor then the amount has to be paid as prescribed thereunder, the details of which are not material for the purpose of this case.

11. A reading of these provisions would clearly indicate that in a development area when an owner or body or a department of the Government undertakes to develop the land, two options are open to the development authority, namely, either it may itself undertake to provide amenities or other means of access, engineering corporations as provided under the Act or as a condition to grant sanction, it can call upon the person who undertakes development or the body of the developers who undertake development to deposit the amount required for such development or providing amenities etc.

12. In the light of direction (vii) of the directions issued in the regulations the owner or the body or the developer is enjoined either to deposit the amount demanded or give bank guarantee or mortgage the property in favour of the development authority so that it could secure sufficient security in advance for overseeing the development including providing amenities as a scheme of the development as per the sanction. It is settled law that levy of fee is a compulsory exaction for services rendered as quid pro quo. It is seen that the development authority is enjoined under the Act to undertake planned development of the development area in accordance with the provisions of the Act. When it undertakes such a development it carries out the development as per the plan either itself

or through any person or body which undertakes to develop the land in accordance with the sanction plan in which case necessary conditions to safeguard providing the amenities are required to be secured.

13. Thus considered, we hold that the Act specifically gives such a power. It is true that under Article 265 of the Constitution no tax can be levied without any authority of law. There is no quarrel on the proposition of law. In this case, from a reading of the aforesaid provisions it is clear that the statute, instead of prescribing the rate of developmental charges itself, has given power to the rule-making authority to regulate the collection of and payment of development fee. It is seen that under the direction which is not inconsistent with the provisions of the Act, it indicates the method and the manner in which the collection is to be secured so as to see that the area is developed in a planned manner as per the sanctions given by the competent authority. The High Court, therefore, was clearly in error in holding that there is no provision under the Act or the Rules to levy the development fee."

Thus, in view of the pronouncement of the Apex Court in State of U.P. And Malti Kaul (supra,) the Development Authority was entitled to levy the development fee.

The Apex Court has noted Section 59 of the 1973 Act, which is relevant for the present case Section 59 (1) (c) is quoted as under:

"59(1)(c). without prejudice to the generality of the provisions of clauses (a) and (b), and bye laws, directions or regulations under the U.P. Municipalities Act, 1916 or the Uttar Pradesh (Regulation of Building Operations) Act, 1958 or the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, as the case may be, and in force on the date immediately before the date of commencement of this Act, shall in so far as they are not inconsistent with the provisions of this Act, continue in force, until altered, repealed or amended by any competent authority under this Act."

39. In view of Section 59(1)(c) the provisions of 1958, which was in force on the date immediately before the commencement 1973 Act, insofar as they are not in consistent with the provisions of 1973 Act, shall continue in force until altered, repealed or amended by any competent authority under this Act. The provisions of 1958 Act are thus to continue, which are not inconsistent with the provision of Act 1973 till they are altered repealed or amended.

40. As noted above, the amendment in 1973 Act was made by U.P. Act No. 3 of 1997 by which Section 2(ggg) defining development fee and Section 15(2-A) was inserted. Two Division Bench Judgments have been cited before us in which this Court, after noticing Section 15(2-A), has held that till Rules are not framed under Section 55 as per Section 15(2-A), development fee cannot be charged. In Virendra Kumar Tyagi v. Ghaziabad Development Authority (supra), the Division Bench of this Court held that since Section 15 (2-A) provides that the Authority shall be entitled to levy development fee, mutation charges, stacking fees and water fees in such manner and at such rate as may be prescribed, and word 'prescribed' having been defined in Section 4(33-A) of U.P. General Clauses Act, 1904, which provides that the word 'prescribed', shall mean prescribed by Rules made under the Act in which the word occurs, the development fee cannot be charged unless the same is prescribed by Rules.

41. Learned counsel for the petitioner has further placed reliance upon a Judgment rendered in the case of Dr. Umesh Chandra Maheshwari v. Mathura Vrindavan Development Authority, 2010(4) ADJ 368, in which case also the Division Bench referring to Section 15(2-A) held that till rules are framed by the State under Section 55, the development fee cannot be realised. In the said case, on an application submitted by the petitioners for sanction of plan, demand was made of betterment charges. Following was laid down in paragraph 16 of the Division Bench Judgment:

"Even under Section 57 of the Act the authority has power to make bye-laws. Therefore, it is crystal clear that either in the case of development fees or in the case of betterment charges the Rules, Regulations and Bye-laws have to be framed to attract the same. A decision by the Board without sanction of the authority to claim the external development charge is without any sanction of law. More particularly, there are no words available in the Act by the name of external development charges. The words external development charges are either synonyms or as far as closer to betterment fees since it relates to the area external to the building concerned, which has been developed on the basis of the sanctioned plan upon payment of charges, being development charges amongst others. If such betterment charge is being claimed then the authority has to satisfy that there is a betterment of the locality in compliance with Sections 35 and 36 of the Act. But if no such development is done to claim the betterment charges and no rules, no regulations and no bye-laws are framed to that extent, obviously the claim in the name of external development happens to be external to the law and a claim to enrich the authority unjustly, therefore, such claim cannot be held to be sustainable. Hence, the notices/orders impugned in this writ petition are liable to be quashed and are quashed. Thus, the writ petition is allowed, however, without imposing any cost."

42. It is noticed that in the said Division Bench, the Judgement of the Apex Court in State of U.P. v. Malti Kaul (Smt.) and another (supra) was noticed but in the discussions, the said case escaped notice of the Court. Whereas the Judgement in Virendra Kumar Tyagi (supra) was delivered by the Division Bench of this Court prior to pronouncement of Supreme Court in State of U.P. v. Malti Kaul (supra).

43. Learned counsel for Development Authorities have submitted that against Division Bench Judgement in Dr. Umesh Chandra Maheshwari (supra), a Special Leave to Appeal (Civil) No. 16615 of 2010 has been filed by Development Authority in the Apex Court in which the Apex Court on 12.11.2010 has issued notices.

44. Special leave petition filed against the Division Bench Judgment in Virendra Kumar Tyagi has been dismissed.

45. Learned counsel for the petitioners have also brought to the notice of the Court that State has published draft rules namely Uttar Pradesh Urban Planning and Development Authority (Assessment of Levy and Collection of Development Fees), Rules, 2013, which are in process of finalisation.

46. The statutory scheme as delineated by Section 15(2-A) and the view taken in the aforesaid two

Judgments by Division Bench in Virendra Kumar Tyagi and Umesh Chandra Maheshwari that rules are required to be framed under Section 55, need no quarrel. However, the statutory provisions under 1958 Act, which were in force on the date of enforcement of 1973 Act, were entitled to continue by virtue of Section 59, sub-section (1) (c) of 1973 Act. In the aforesaid Judgments, there is no discussion or any finding that provisions of 1958 Act including 1960 directions are inconsistent with any provision of 1973 Act. As noted above, the Judgment of the Apex Court in State of U.P. v. Malti Kaul (supra) has held that the Development authorities are entitled to charge development fee on strength of 1958 Act and the direction issued therein by virtue of Section 59 of 1973 Act. The view of the Division Bench Judgment of this Court in Malti Kaul v. State of U.P. (supra) was disapproved where the High Court held that the Development Authorities has no right to charge any development fee. Normally, we had to have made a reference to the Larger Bench for reconsideration of the Division Bench Judgment in Virendra Kumar Tyagi and Dr. Umesh Maheshwari but in view of the binding Judgment of the Apex Court under Article 141 of the Constitution of India in State of U.P. and others v. Malti Kaul (Smt.) and another, 1996 (10) SCC 425, we feel ourselves bound to follow the Judgment of the Supreme Court by which Judgement the Apex Court has held that Development Authorities are entitled to charge development fee.

47. One more submission, which has been pressed by the learned counsel for the petitioner is that in developed localities when an application is submitted for sanction of plan, the Development Authority is not entitled to charge any development fee since the area has already been developed. It is further submitted that Development Authorities are obliged to carry on development in developed area but no development is being carried out by it although huge development fee is demanded by the Development Authorities.

48. Section 2(ggg) as quoted above defines development fee as the fee which is levied upon a person for construction of road, drainage, sewer-line, electric supply and water supply lines in the developed area by the Development Authority. Construction of road, drainage, sewer-line, electric supply and water supply is a continuous process requiring huge funds. The definition of development fee as above cannot be read to mean that development fee can be charged only when Development Authority has already constructed the road, drain, sewer-line, electric supply and water supply. The development fee is charged for carrying out the above development activities by the development authority which it is obliged to do.

49. In supplementary counter-affidavit filed by Allahabad Development Authority dated 1.8.2011 sworn by Baij Nath, Joint Secretary, Allahabad Development Authority wherein details of certain work, which has been carried out and incurred expenses have been given. The scope of this writ petition is not to scrutinize the works carried out by the Development Authority towards development in the developed area of Allahabad or in developed area of other cities nor to scrutinize as to whether the fund realised by the Development Authorities are being utilized for

carrying out the development activities or not. The issue which has come up for consideration is as to whether the development authority has any jurisdiction to charge development fee or not.

50. Even after amendment in 1973 Act by U.P. Act No. 3 of 1997, we do not find anything inconsistent in 1973 Act with the Directions 1960 as relied by the Apex Court in State of U.P. v. Malti Kaul (supra) so as to make the said direction authorizing the Development Authority to ask the applicant to deposit the development cost inoperative. As noted above, the process of framing of the Draft Rules 2013 has begun by the State Government and, of course, when the Rules are framed under Section 55 providing for rate, manner and mechanism for realising the development fee, the directions as contained in 1958 Act shall automatically come to an end but till the Rules are framed, it cannot be said that development authorities are having no statutory power to demand development fee from a applicant, who has applied for sanction of plant."

51. Learned counsel for the petitioners have also placed reliance on Judgment of the Apex Court in Consumer Online Foundation and others v. Union of India and others, 2011 (5) SCC 360. In the said case, the Apex Court had the occasion to consider various provisions of Airport Authority of India Act, 1994. Section 12A thereof provided that Airport Authority may make a lease of premises of an airport to carry out some of its functions under Section 12 as the Airport Authority may deem fit. Section 22-A of 1994 Act provides that with the approval of the Central Government, the Airport authority may levy and collect from the embarking passengers at a airport the development fee at the rate as may be prescribed. Section 22-A of 1994 Act was amended by the Airport Regulating Authority of India Act, 2008. Relevant facts have been noted in paragraphs 4, 5 and 6 of the Judgment, which are quoted as below:

"4. Section 22-A of the 1994 Act was amended by the Airports Economic Regulatory Authority of India Act, 2008 (for short "the 2008 Act") and the amended Section 22-A provided for determination of the rate of development fees for the major airports under clause (b) of sub-section (1) of Section 13 of the 2008 Act by the Airports Economic Regulatory Authority (for short "the Regulatory Authority"). The amended Section 22-A was to take effect on and from the date of the establishment of the Regulatory Authority.

5. The Government of India, Ministry of Civil Aviation, sent a Letter dated 9-2-2009 to DIAL conveying the approval of the Central Government under Section 22-A of the 1994 Act for levy of development fees by DIAL at the Delhi Airport at the rate of Rs.200 per departing domestic passenger and at the rate of Rs.1300 per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 36 months with effect from 1-3-2009. Similarly, the Government of India, Ministry of Civil Aviation, sent another Letter dated 27-2-2009 to MIAL conveying the approval of the Central Government under Section 22-A of the 1994 Act for levy of development fees by MIAL at the Mumbai Airport at the rate of Rs. 100 per departing domestic passenger and at the rate of Rs.600 per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 48 months with effect from 1-4-2009.

6. The levy of development fees by DIAL as the lessee of the Delhi Airport was challenged in Writ Petition No. 8918 of 2009 by the Resources of Aviation Redressal Association. The levy of development fees by DIAL and MIAL as lessees of the Delhi and Mumbai Airports were challenged in Writ Petition No.9316 of 2009 and Writ Petition No. 9307 of 2009 by Consumer Online Foundation. The writ petitioners contended inter alia that such levy of development fees under Section 22-A of the 1994 Act can only be made by the Airports Authority and not by the lessee and that until the rate of such levy is either prescribed by the Rules made under the 1994 Act or determined by the Regulatory Authority under the 2008 Act as provided in Section 22-A of the Act before and after its amendment by the 2008 Act, the levy and collection of development fees are ultra vires the 1994 Act. The Division Bench of the High Court, after hearing, held that there was no illegality attached to the imposition of development fees by the two lessees with the prior approval of the Central Government and dismissed the writ petitions by the impugned Judgment and order."

52. The High Court held that lessee was also entitled to levy and collect development fee. the matter was taken to the Apex Court and after considering the rival submissions, the Apex Court held that lessee is not entitled for charging development fee. Following was laid down in paragraph 16 and 24 of the said Judgment:

"16. To enable the Airports Authority to perform its statutory function of establishing a new airport or to assist in the establishment of private airports, the legislature has thought it fit to empower the Airports Authority to levy and collect development fees as will be clear from clauses (b) and (c) of Section 22-A of the 1994 Act. Such development fees levied and collected under Section 22-A can also be utilised for funding and financing the costs of upgradation, expansion and development of an existing airport at which the fees is collected as provided in clause (a) of Section 22-A of the Act and in case the lease of the premises of an existing airport (including buildings and structures thereon and appertaining thereto) has been made to a lessee under Section 12-A of the Act, the Airports Authority may meet the costs of upgradation expansion and development of such leased-out airport to a lessee, but this can be done only if the rules provide for such payment to the lessee of an airport because Section 22-A says that the development fees are to be regulated and utilised in the manner prescribed by the rules.

24. As observed by this Court in Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla, it has been consistently held by this Court that whenever there is compulsory exaction of money, there should be specific provision for the same and there is no room for intendment and nothing is to be read or nothing is to be implied and one should look fairly to the language used. Looking strictly at the plain language of Section 22-A of the 1994 Act before its amendment by the 2008 Act, the development fees were to be levied on and collected from the embarking passengers "at the rate as may be prescribed". Since the rules have not prescribed the rate at which the development fees could be levied and collected from the embarking passengers,

levy and collection of development fees from the embarking passengers was without the authority of law."

53. There cannot be any quarrel to the propositions of law as laid down by the Apex Court in the aforesaid case. Section 22-A before its amendment in 2008 provided that development fee were to be levied and collected from the embarking passengers 'at the rate as may be prescribed' and since Rules were not framed, collection and levy was held to be without any authority.

54. As observed above, there cannot be any exception taken to the new legislative scheme as indicated and delineated by inserting Section 15(2-A) of 1973 Act. The manner and rate of development fee is to be prescribed by the Rules but, in the event, no rules have been framed Development Authorities can rightfully utilise Section 59 (1)(c) of the 1958 Act for locating their power for demanding development fee. As soon as the Rules as contemplated 15(2-A) are framed, the earlier statutory provisions of 1958 Act shall come to an end. Since manner and rate or relevant fees has not been prescribed by the Rules framed under Section 55 of the 1973 Act, to hold that the authority shall be denuded with its power to demand development fee, would not advance the object and purpose of the Act. The object and purpose of the Act is to entrust the Development Authority to carry out various development work.

55. In view of the foregoing discussion, we following the Judgment of the Apex Court in State of U.P. v. Malti Kaul (supra), hold that the Development Authorities have still the power to demand development charges as per law declared by the Apex Court in State of U.P. v. Malti Kaul till the statutory scheme governing the filed at present is replaced by the Rules framed by the State under Section 55 of 1973 Act.

56. For the above reasons, we answer issue nos. 1, 2 and 3 in following manner.

(I) The rules are required to frame by State Government under Section 55 as contemplated by Section 15(2)(A) of 19732 Act, however, even without there being rules framed the development fee can be demanded by the development authority as per the directions issued under 1958 Act by virtue of Section 59 (1) (c) of 1973 Act.

(II) Issue no. 2 is answered in affirmative.

(iii) Issue No. 3 is answered in negative."

57. Thus, it has been held by this Court as well as by the Supreme Court that the rules are required to frame by State Government under Section 55 as contemplated by Section 15(2)(A) of 1973 Act, however, even without there being rules framed the development fee can be demanded by the Development Authority as per the directions issued under 1958 Act by virtue of Section 59(1)(c) of 1973 Act.

58. According to the petitioner, the respondents have not carried out any development and, therefore, they are not entitled to charge extra development charges. The respondents in their supplementary counter affidavit filed on record in paras 3, 4 and 5 have specifically stated as under:-

"3. That the answering opposite parties submit that the external development of the land, which is the subject matter of the aforesaid writ

petition, is complete as per the present requirement. On the front side of the plot there is 76 meter wide Master Plan Road. The north side of the plot is being serviced by 76 meter wide Zonal Road. The Fly Overs, Railway Over Bridges and Bridges are elevated roads and are therefore covered under the general term of "Roads". There are ten locations of fly overs in Meerut City. The answering opposite parties are already bearing proportionate cost/share in the constructions. A photocopy of the master plan of the location is being filed as ANNEXURE NO.A to this counter affidavit.

4. That the area where the land is situated is well electrified with street light poles. The Meerut Development Authority, Meerut/opposite party no.2 has constructed 33 KV electric sub station. The said electric sub-station is functional and electricity feeders are available for the petitioner and other developers/institutions.

5. That the trunk sewer line has been laid and is available and functional for the connectivity to the petitioner's land. As soon as the petitioner shall complete its internal sewerage system and provide Invert Level, the truck sewer line, which is across the road, shall be connected. For the purpose of the sewerage disposal, land for sewerage treatment plant has been identified and earmarked in the Ved Vyas Puri Scheme of the answering opposite parties, which is on the other side of the 76 meter wide master plan road. The said land for sewerage treatment plan has been even acquired by the answering opposite parties and compensation whereof has also been disbursed and the possession of the land is with the answering opposite parties. The said sewerage treatment plants shall be constructed progressively, depending upon the inflow of sewerage."

59. Further, the petitioner is also guilty for concealing and withholding the fact that it had already deposited 40 percent of the external development charges at the enhanced rate of Rs.400/- per sq. ft. The Supreme Court in the case of '**K.D. Sharma vs. Steel Authority of India Limited and others**', reported as (2008) 12 SCC 481, while dealing with the concealment of material facts and misleading the Court, has held as under:-

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.

xxxxx xxxxx

xxxxx xxxxx

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot

be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts"."

60. The Supreme Court in the case of '**Bhaskar Laxman Jadhav and others vs. Karamveer Kakasaheb Wagh Education Society and others**', reported as (2013) 11 Supreme Court Cases 531 held that it is the duty of the litigant to disclose all material facts and a litigant cannot decide which facts are material and which are not. He must come to court with clean hands and disclose all material facts relating to his case. The Supreme court further held as under:-

"Suppression of fact

42. While dealing with the conduct of the parties, we may also notice the submission of the learned counsel for Respondent 1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2-5-2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

43. Learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2-5-2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision-making to the court. True, there is a mention of the order dated 2-5-2003 in the order dated 24-7-2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2-5-2003 was passed or that it has attained finality.

45. We may only refer to two cases on this subject. In Hari Narain v. Badri Das, AIR 1963 SC 1558 stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows: (AIR p.1560, para 9)

"9. .....It is of utmost importance that in making material statements and setting forth grounds in applications for special leave care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case,

special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

46. More recently, in Ramjas Foundation v. Union of India, (2010) 14 SCC 38 the case law on the subject was discussed. It was held that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said: (SCC p.51, para 21)

"21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty-bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

47. A mere reference to the order dated 2-5-2003, en passant, in the order dated 24-7-2006 does not serve the requirement of disclosure. It is not for the court to look into every word of the pleadings, documents and annexures to fish out a fact. It is for the litigant to come upfront and clean with all material facts and then, on the basis of the submissions made by learned counsel, leave it to the court to determine whether or not a particular fact is relevant for arriving at a decision. Unfortunately, the petitioners have not done this and must suffer the consequence thereof."

61. Moreover, the MDA sent a letter dated 30th June 2006 to the State Government seeking approval of levy of Rs.400/- per square meter towards development charges and the State Government approved the same vide letter dated 17th June 2006 (annexure SCA-3 of counter affidavit). The same has not been disclosed by the petitioner.

62. Thus, a litigant, who approaches the Court is bound to state all the relevant facts and produce all the documents which are relevant to the litigation without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress or not to disclose other facts.

63. In view of the foregoing discussion and drawing support from the judgment of the Supreme Court in the case of **'State of U.P. and others vs. Malti Kaul (supra)**, we do not fin any merit in the petition. The same is, accordingly, **dismissed**. No order as to costs.

(2020)08ILR A469
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.06.2020

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Matters Under Article 227 No. 5153 of 2019

Neelesh Agarwal ...Petitioner
Versus
Ishaan Buildtech, Rampur Garden, Bareilly & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Goyal, Ravi Anand Agarwal, Sri Shreya Gupta

Counsel for the Respondents:
Ghanshyam Das Mishra, Sri Ashutosh Srivastava

A. Civil Law - Civil Procedure Code – Limitation Act, 1963 – Ss. 5 and 14 – Condonation of Delay – Liberal Approach – Substantial Justice – There should be a liberal, pragmatic, justice-oriented, nonpedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice – The terms 'sufficient cause' should be understood in their proper spirit, philosophy – Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis. (Para 45)

Petition dismissed (E-1)

Cases relied on :-

1. Baljeet Singh & ors. Vs St. of U.P. and others (2019) 15 SCC 33

2. Balwant Singh Vs Jagdish Singh (2010) 8 SCC 685

3. Jebasundari & ors. Vs S. Tharmar (2018) 6 MLJ 523

4. Popat Bahiru Govardhane Vs Special Land Acquisition Officer & ors. 2013(10) SCC 765

5. P.K. Ramachandran Vs St. of Kerala AIR 1998 SC 2276

6. M/s Auto Oil Company Vs Indian Oil Corporation 2011 (5) ADJ 800

7. Rajendra Prasad Gupta Vs Prakash Chandra Mishra & ors. AIR 2011 SC 1137

8. Syed Wasif Husain Rizvi Vs Hasan Raza Khan & ors. 2016(2) ADJ 571

9. Vidhyadhar Vs Manikrao 1999(3) SCC 573

10. S. Kesari Hanuman Goud Vs Anjum Jehan & ors. 2013(12) SCC 64

11. Sneh Gupta Vs Devi Sarup & ors. (2009) 6 SCC 194

12. Perumon Bhagvathy Devaswom Vs Bhargavi Amma (2008) 8 SCC 321

13. Sunni Central Board Vs Sri Gopal Singh Visharad 2010 ADJ (1) (SFB) LB

14. Bhagmal & ors. Vs Kunwar Lal and others (2010) 12 SCC 159

15. Ram Prakash Agarwal & anr. Vs Gopi Krishan (dead through Lrs) and others (2013) 11 SCC 296

16. N. Balkrishnan Vs M. Krishnamurthy (1998) 7 SCC 123

17. Raisa Sultana Begam & ors. Vs Abdul Qadir and others AIR 1966 All. 318

18. M.K. Prasad Vs P. Arumugam (2001) 6 SCC 176

19. Santi Prasad Gupta Vs D.D.C. Camp at Meerut & ors. (1981) Supp SCC 73

20. Bhagmal Vs M.P. Cooperative Marketing & Consumer Federation Ltd & ors. (2003) 11 SCC 727

21. Mohammad Shafeeq Vs Mirza Mohammad Husain & ors. (2002) 9 SCC 460

22. Kanhiya & ors. v. Mohabata & ors. 1960 SCC OnLine P&H 39 : ILR (1960) 2 P&H 707 : AIR 1960 P&H 494

23. Annammal & ors. v. Chellakutti 1962 SCC OnLine Mad 156 : (1963) 76 LW 215 : (1963) 1 Mad LJ 154 : AIR 1963 Mad 300

24. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & ors. (2013) 12 SCC 649

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

1. This petition seeks setting aside the order dated 26.04.2019 passed by the Civil Judge (Senior Division), Bareilly in Misc. Case No.59 of 2017. By that order, the application Paper no.4C filed by the defendant-respondents under Section 5 of the Limitation Act for condoning the delay in filing an application Paper No.5C

under Order 9 Rule 13 of the Code of Civil Procedure, 19081, was allowed on payment of cost of Rs.30,000/-. By the same order a subsequent date was fixed for disposal of the application paper no.5C filed for setting aside the *ex-parte* decree dated 22.12.2003 passed in Original Suit No.158 of 2000.

2. It appears from the petition that the petitioner filed Original Suit No.158 of 20002 for a decree of mandatory prohibitory injunction in respect of Gata Nos.324 and 325 and Plot No.14A for restraining the 21 defendants from causing any interference in the peaceful possession of the plaintiff over Gata Nos.324 and 325 (southern half), Udaipur Khas, Bareilly by forcibly entering into an unlawful possession or from raising any constructions over any part thereof, unless the defendant no.1 seeks partition by metes and bounds of his share therein. Another relief appears to have been sought in the suit, for declaration of the sale-deeds from serial nos.8 to 15 under Schedule-A to the plaint and the sale-deeds mentioned at serial nos.4 to 10 under Schedule-B in respect of Gata No.325, Udaipur Khas, Bareilly, as void. The sale-deeds pertaining to Plot No.14A in favour of the defendant-respondent nos.4 and 5 on 17.12.1999 was mentioned at serial no.4 of Schedule-B to the plaint.

3. On 17.04.2000, an *ex-parte* interim order was granted by the court below restraining the defendants from raising any constructions over the suit property. The defendant-respondent nos.4 and 5, who were arrayed as defendant nos.15 and 14 respectively in the suit of 2000, filed an objection against the temporary injunction.

4. On 19.09.2001, an application being paper no.205-C, signed jointly by the plaintiff-petitioner and the defendant-respondent no.5, was filed before the court below stating that after consideration of the record, the plaintiff-petitioner has found that the sale-deed in favour of Manoj Gupta, the defendant-respondent no.5, was lawful and, therefore, he is entitled to raise constructions over the property so purchased by him. It was, accordingly, prayed in that application that the ad-interim injunction against the defendant-respondent no.5 (defendant-respondent no.14 in the suit of 2000) be vacated and recalled and the plaintiff-petitioner has no objection to it. On 19.09.2001 itself, the court below modified the interim order dated 17.04.2000 as far as the defendant-respondent no.5 was concerned. It is stated in the petition that though at the stage of contest of the application for temporary injunction, a limited settlement took place to permit the defendant-respondent no.5 to continue with the constructions being raised by him but thereafter no final settlement took place between the parties and no compromise in terms of Order 23 Rule 3 of the CPC was filed nor any compromise was ever rendered by the trial court. It is further stated that the plaintiff-petitioner also never abandoned his claim against any of the defendants. It is stated that the defendant-respondents were fully conscious of the said fact and that they continued to appear in the suit even after filing of the application 205-C. It is stated that the defendant-respondent no.5 got filed a vakalatnama of another counsel on his behalf on 03.07.2002. The suit was finally decreed vide judgment and order dated 22.12.2003 injuncting all the defendants permanently from raising any constructions over the suit property as well as interfering in the possession of

the plaintiff-petitioner over the suit property.

5. It is stated that thereafter, the respondent nos.1, 2 and 3 alongwith the defendant-respondent nos.4 and 5 filed a Original Suit No.153 of 20163 seeking permanent injunction against the plaintiff-petitioner (of suit of 2000) from interfering in the constructions raised subsequent to the passing of the order dated 19.09.2001 in the suit of 2000. The issue no.3 framed by the trail court in the suit of 2016 was that 'whether in the facts and circumstances, the plaint was liable to be rejected under Order 7 Rule 11 CPC'. This issue was decided in favour of the plaintiff-petitioner and the plaint was rejected by means of the order dated 29.08.2017. This was challenged in First Appeal No.667 of 2017 before this Court, which was dismissed on 04.10.2017 with the observation that the remedy against the *ex-parte* decree passed in the suit of 2000 is by way of appeal/application. It is stated that then the defendant-respondents moved an application under Order 9 Rule 13 read with Section 151 CPC for setting aside the *ex-parte* decree dated 22.12.2003 passed in the suit of 2000. This application was accompanied with a delay condonation application under Section 5 read with Section 14 of the of the Limitation Act. Both these applications were dated 28.10.2017 which came to be registered as Misc. Case No.59 of 2017. By the order impugned, the delay condonation application under Section 5 of the Limitation Act has been allowed.

6. An amendment application was filed in the present petition which was allowed. It has been stated therein that the power of attorney executed in favour of the respondent no.3 on 02.09.2014 by the defendant-respondent nos.4 and 5 stood exhausted inasmuch as the plot no.14A came in the ownership of respondent nos.1 and 2 through two distinct sale-deeds and the respondent no.3 happens to be one of the partners in each of the firms, namely, the respondent nos.1 and 2. The respondent nos.1, 2 and 3 were complete strangers to the suit proceedings and application under Section 5 of the Limitation Act alongwith the application under Order 9 Rule 13 CPC could not have been filed at their behest. It is stated that the court below has acted erroneously in excess of jurisdiction by carving out a case not pleaded by the parties while allowing the delay condonation application under Section 5 of the Limitation Act. It is stated that the paper no.205-C filed before the court below was not signed by Sunita Maheshwari, the defendant-respondent no.4, who was the joint holder of plot no.14A alongwith Manoj Kumar Gupta and there is no independent authority given by Sunita Maheshwari in favour of Manoj Kumar Gupta. It is also stated that the modification of the interim order dated 17.04.2000 is of no consequence as the recital in the paper no.205-C is with respect to holding of Manoj Kumar Gupta alone. Hence, there is no concealment and modification of the interim order or an order passed on paper no.205-C is of no consequence as it cannot have the consequence of altering the rights in favour of the petitioner in terms of the decree dated 22.12.2003.

It is stated that a Special Leave Petition was filed by the respondent nos.1, 2 and 3 before the Supreme Court against the judgment and order dated 04.10.2017 passed by this Court in First

Appeal No.667 of 2017 which is pending before the Supreme Court. It is stated that once the matter is engaging the attention of the Supreme Court, the respondents cannot be allowed to approbate and reprobate and avail two remedies for the same cause of action and the same is an abuse of the process of the Court.

7. A counter affidavit has been filed by the defendant-respondent no.3 in which it has been stated that the plaintiff and the defendant No.1 of the suit of 2000 had a common ancestor who was recorded bhumidhar over the land bearing Gata No. 324 and 325 which is now within the municipal limits of Bareilly. He was survived by Sahu Shanti Kumar, Sahu Ram Kumar. Sahu Ram Kumar was survived by Satya Prakash and Om Prakash. Thereafter, Om Prakash was survived by Neelesh Agarwal (the plaintiff-petitioner) and names of Satya Prakash and Neelesh Agarwal were recorded as co-tenure holders in the revenue records relating to said lands. The suit of 2000 was filed by the plaintiff on 17.4.2000 and by an exparte ad-interim injunction order of the same date, the defendants were restrained from raising construction over the respective plots and summons/notices were issued. It is stated in paragraph no.6 of the counter affidavit that the defendant nos. 8, 9 and 12 appeared in the suit of 2000 and the plaintiff entered into a compromise with them while admitting the sale deeds executed by defendant No.1 in their favour and moved a joint application before the court below and got the exparte interim order dated 17.4.2000 vacated against them and also permitted them to raise construction over the plot under those sale deeds which application was allowed by the court below. It is stated in paragraph no.7 of the counter affidavit that thereafter, the defendant Nos. 10 and 11 also appeared in the suit of 2000 and similar compromise was entered into between them and the plaintiff and pursuant thereto, the exparte interim injunction order dated 17.4.2000 was vacated against them and they also were permitted to raise constructions over the plots under those sale deeds. Thereafter, the defendant nos. 14 and 15 of the suit of 2000 (respondent no. 5 and 4 respectively to this application) appeared in the suit of 2000 and a compromise was entered into between the plaintiff Neelesh Agrawal and Manoj Gupta (respondent No.5) and they filed a joint application for compromise (paper No. 205-C) admitting that plaintiff Neelesh Agarwal was satisfied that the sale deed executed by his uncle Satya Prakash in favour of Manoj Gupta is lawful and Manoj Gupta is entitled to raise constructions over the property purchased by him and prayed for vacation of the injunction order dated 17.4.2000 against Manoj Gupta. The court below by its order dated 19.9.2001 accepted the said application for compromise and vacated the exparte ad interim injunction order dated 17.4.2000 to the extent of defendant No. 14 (Respondent No. 5). It is further stated in paragraph no.13 of the counter affidavit that an Original Suit no.151 of 2014 (Rajan Kumar v. Neelesh Agarwal) was filed in which an application for compromise was filed admitting the plaintiff therein is owner of plot no.14-B vide sale-deed dated 17.12.1999 and the suit was decided accordingly.

8. It is stated in the counter affidavit that since the plaintiff of suit of 2000

admitted the sale deed executed in favour of defendant-respondent and abandoned his claim against them, as such the defendant-respondents were advised by their counsel that they were not required to take part in further proceedings in suit of 2000. It is stated that the defendant No. 14 also got the order passed by the court below on his application (paper No. 205C) confirmed through an advocate Mrs. Abha Agarwal who filed her vakalatnama in the suit of 2000 and after perusing the order dated 19.9.2001 she also advised the defendant No. 14 that now there is no claim against him and he is not required to take part in further proceedings in suit as such, the defendant No. 14 did not take part in further proceedings in suit of 2000. It is stated that thereafter, the plaintiff moved an application for amendment in suit of 2000 to declare the sale deed executed by his uncle Satya Prakash null and void but the copy thereof was not supplied to the counsel for the defendant Nos. 14 and 15 as such, that application was not within the knowledge of defendant nos. 14 and 15. The amendment application was allowed by the court below and the suit was decreed exparte by the court below by its judgment and decree dated 22.12.2003 without going through the records regarding the admission of Neelesh Agarwal (plaintiff) with regard to sale deed executed in favour of several persons including defendant Nos. 14 and 15.

9. It is stated that the defendant nos. 14 and 15 executed a power of attorney on 2.9.2014 in respect of said plot in favour of respondent No.3, Sunil Verma who in turn executed sale deed dated 4.9.2014 and 10.10.2014 in favour of Ishan Buildtech and P.N. Infratech respectively and their names have been recorded in the revenue records relating to the said lands. Ishan Buildtech and others filed the suit of 2016 which was rejected under order 7 Rule 11 CPC. The First Appeal filed against rejection of plaint before this court was dismissed on 4.10.2017 with the direction that "if any remedy is available is to file an appeal/application against exparte decree in suit No. 158 of 2000, the applicant is free to avail the same".

Accordingly, an application under Order 9 Rule 13 C.P.C was moved by the respondent alongwith an application under Section 5 of the Limitation Act for setting aside the exparte decree passed in the suit of 2000.

10. In the rejoinder affidavit filed on behalf of the plaintiff-petitioner, it has been denied that he had abandoned his claim at any stage though at the state of contest of temporary injunction application, the injunction order was modified so as to permit the defendant-respondent No.5 to continue with the construction being raised by him. It has been stated that mutation in the revenue records pertaining to the sale deed executed in favour of Ishan Buildtech and P.N. Infratech by respondent no.3 was challenged by the plaintiff-petitioner before the Additional Commissioner (Judicial) and the effect and operation of the order passed by the Tehsildar was stayed and the proceedings are still pending before the Additional Commissioner. It has been stated that the court below while condoning the delay of more than 15 years, has failed to strike a balance. There was also no assertion in the entire delay condonation application that the defendant-respondents had no

knowledge of the decree rendering the application defective for want of relevant pleadings. The contents of paragraph nos. 6, 7 and 13 of the counter affidavit have not been denied.

Submissions of the learned counsel

11. Shri Manish Goyal, learned Senior Advocate appearing for the petitioner has submitted, while referring to the plaint of suit of 2000, that the dispute with regard to defendant-respondent nos.4 and 5 pertains to Plot No.14-A in respect of which the sale deed was executed on 17.12.1999. It is stated that the joint application being paper no.205-C has not been filed by Sunita Maheshwari but only between the plaintiff-petitioner and the defendant-respondent no.5. However, the *ex-parte* judgment and order dated 22.12.2003 operates against both the defendant-respondent nos.4 and 5. The decree has attained finality. It is contended that after the order dated 19.09.2001 passed by the court below modifying the injunction order dated 17.04.2000, a vakalatnama was filed by one Smt. Abha Agarwal, on behalf of Manoj Kumar Agarwal, the defendant-respondent no.5. It is stated that it cannot be said that the defendant-respondents had no knowledge of the *ex-parte* decree. It is stated that on the date of institution of the suit of 2016, the applicants had knowledge of the *ex-parte* decree dated 22.12.2003. It is further contended that the defendant-respondents misrepresented before the court below that in the First Appeal, the High Court had directed decision of the suit of 2000 on its merits. Learned Senior Advocate contended that the affidavit in support of the application under Section 5 of the Limitation Act and the application Order 9 Rule 13 CPC was filed by the defendant-respondent no.3 claiming himself to be a power of attorney holder of the defendant-respondent nos.4 and 5 and the partner of the defendant-respondent nos.1 and 2 and has testified the contents of the affidavit as true on the basis of his personal knowledge. It is stated that the power of attorney was not filed alongwith the two applications and the affidavit and, therefore, it cannot be taken to be an affidavit on behalf of the defendant-respondent nos.4 and 5 who were actually the defendants in the suit of 2000. Learned Senior Advocate has relied upon a decision of the Full Bench of this Court in the case of **Syed Wasif Husain Rizvi Vs. Hasan Raza Khan and others**4 to contend that the power of attorney holder did not have the authority to file the application and the affidavit because he did not satisfy the conditions laid down by this Court in the said decision. It is contended that on one hand, in the Special Leave Petition before the Supreme Court, the defendant-respondents have challenged and questioned the observations made by the High Court in its judgment dated 4.10.2017 passed in the First Appeal directing the petitioner to avail the remedies to move an application for setting aside the *ex-parte* decree dated 22.12.2003 and, on the other hand, they have filed the applications under Order 9 Rule 13 CPC and under Section 5 of the Limitation act on the basis of the observations made in the judgment of the High Court dated 4.10.2017. It is contended that in the Special Leave Petition, the Supreme Court by its order dated 9.2.2018 had issued notices only to the limited extent to explore the possibility of settlement between the parties.

In support of his contention, learned counsel for the plaintiff-petitioner has cited the following judgements:-

1	Baljeet Singh & Others Vs. State of U.P. and others	(2019) 15 SCC 33
2	Balwant Singh Vs. Jagdish Singh and others	(2010) 8 SCC 685
3	Jebasundari and others Vs. S. Tharmar	(2018) 6 MLJ 523
4	Popat Bahiru Govardhane Vs. Special Land Acquisition Officer and others	2013(10) SCC 765
5	P.K. Ramachandran Vs. State of Kerala	AIR 1998 SC 2276
6	M/s Auto Oil Company Vs. Indian Oil Corporation	2011 (5) ADJ 800
7	Rajendra Prasad Gupta Vs. Prakash Chandra Mishra & ors	AIR 2011 SC 1137
8	Syed Wasif Husain Rizvi Vs. Hasan Raza Khan and others	2016(2) ADJ 571
9	Vidhyadhar Vs. Manikrao	1999(3) SCC 573
10	S. Kesari Hanuman Goud Vs. Anjum Jehan and others	2013(12) SCC 64
11	Sneh Gupta Vs. Devi Sarup and others	(2009) 6 SCC 194

12. On the other hand, Shri Shashi Nandan, learned Senior Advocate for the defendant-respondents has contended that by means of the impugned order, the delay condonation application filed under Section 5 of the Limitation Act has been allowed on payment of cost but the application under Order 9 Rule 13 CPC is yet to be considered. It is contended that relief (b) in the suit of 2000 was incorporated by way of amendment. The validity of the sale deed executed in favour of the defendant-respondent nos.4 and 5 is not in issue. He contended that by means of the order dated 17.04.2000 granting temporary injunction, the court below directed maintenance of status quo with regard to the southern half part of the disputed plot, Khasra No.325. It is contended that on perusal of the joint application (paper no.205-C) dated 19.09.2001 filed both by the plaintiff-petitioner and the defendant-respondent no.5 enclosed as Annexure-5 to the petition, three things appear. Firstly, it is an indication of a prior settlement. Secondly, the plaintiff had abandoned his claim with regard to the sale deed in favour of the defendant no.14 (defendant-respondent no.5). Thirdly, the application was moved by the parties and was given effect to by the court below by means of an order dated 19.09.2001 recalling the order dated 17.04.2000 insofar as the defendant-respondent no.5 is concerned. It is, therefore, contended that it was the duty of the plaintiff-petitioner to have placed this document and the order passed by the court thereon before the court below prior to passing of the *ex-parte* judgment and decree dated 22.12.2003. Hence, the court below was justified in holding that it was a case of fraud on part of the plaintiff-petitioner and that is a ground for condonation of delay. It is stated that in the *ex-parte* judgment and decree dated 22.12.2003,

there is no decree for cancellation of the sale deed. It is, therefore, contended that the plaintiff-petitioner is not entitled to resist the sale deed executed in favour of the defendant-respondent no.5, which is admitted to be valid. It is further contended that in the suit of 2016, the plaintiff nos.4 and 5 were partners. Learned Senior Advocate contends that the defendant-respondents had only to show the admission of the plaintiff-petitioner made in the application, paper no.205-C, and that under such circumstances, non-attendance of the defendant-respondent nos.4 and 5 in the suit of 2000 after recall of the temporary injunction order dated 17.04.2000 in their favour, was quite justifiable and would be sufficient cause for not filing the application under Order 9 Rule 13 CPC within time.

Learned counsel for the respondents has relied upon the following judgements:-

1	Bhagmal and others Vs. Kunwar Lal and others	(2010) 12 SCC 159
2	Ram Prakash Agarwal and another Vs. Gopi Krishan (dead through Lrs) and others	(2013) 11 SCC 296
3	N. Balkrishnan Vs. M. Krishnamurthy	(1998) 7 SCC 123
4	Raisa Sultana Begam and others Vs. Abdul Qadir and others	AIR 1966 All. 318
5	M.K. Prasad Vs. P. Arumugam	2001(6) SCC 176
6	Santi Prasad Gupta Vs. D.D.C. Camp at Meerut and others	1981(Supp) SCC 73
7	Bhagmal Vs. M.P. Cooperative Marketing & Consumer Federation Ltd and others	2003(11) SCC 727
8	Mohammad Shafeeq Vs. Mirza Mohammad Husain and others	2002 (9) SCC 460

13. In rejoinder, Shri Manish Goyal, learned Senior Advocate for the plaintiff-petitioner has contended that there is no application for abandoning the claim or withdrawal of suit against the defendant-respondent no.4. He contended that under the circumstances, the case would not fall within the category of abandonment of suit. It is stated that no specific date has been mentioned in the application under Section 5 of the Limitation Act regarding the date on which the defendant-respondents had knowledge of the *ex-parte* decree dated 22.12.2003. It is contended that after the order dated 19.09.2001 was passed by the court below pursuant to the joint application, paper no.205-C, the defendant-respondent nos.4 and 5 had engaged another lawyer in the

proceedings and did not withdraw their right to contest the proceedings. It is contended that there is no case of fraud as the defendant-respondent nos.4 and 5 have displayed positive conduct by engaging another counsel after 19.09.2001. With reference to the *ex-parte* judgment and decree dated 22.12.2003, it is contended that the entire suit was decreed which included the sale deed, that is, both the reliefs were granted. It is contended that there is no question of any admission being made by the plaintiff-petitioner and the admission made, if any, is saved by Section 52 of the Transfer of Property Act.

Discussion & analysis

14. In the suit of 2000, the application paper No. 4C was filed alongwith another application (paper No. 5C) under Order 9 Rule 13 CPC supported by an affidavit (paper No. 6C). In the application paper No. 4C, condonation of delay was sought on the basis of the averments in the accompanying application Paper no.5C and the affidavit.

15. In paper No. 5C, it was stated that when the plaintiff sought to enforce the exparte decree, the suit of 2016 was filed which was dismissed under the provisions of Order 7 Rule 11 CPC on 29.08.2017 of the ground of existence of the exparte decree. It was stated that the First Appeal of 2017 was filed in the High Court which was disposed of with observation that remedy of applicants is by way of seeking setting aside the exparte decree and not by a separate suit and the High Court allowed the remedy to the applicants for setting aside the decree. It was stated that the applicants had no occasion to doubt the bonafides of the O.P. Earlier to the date of institution of the suit of 2016, time consumed was under bonafide legal advise. That due to oversight, the applicants had moved the application on 18.10.2017 in the court of the Civil Judge (Sr. Division) Bareilly, but on detecting the mistake the present application was being filed and an application has been moved in the court of the Civil Judge (Sr. Division) for withdrawal of the application mistakenly filed.

16. In the affidavit paper No. 6C the reasons for delay have been stated in paragraph nos. 5 to 7 as follows:

"5) That pursuant to disturbance at the instance of O.P. and upon his threat to execute the exparte decree dt. 22.12.2003 passed in O.S. No. 158/2000- Neelesh Agarwal Vs. Satya Prakash and others, the applicants filed suit No. 153/2016- Ishaan Buildtech and others Vs. Neelesh Agarwal in the court of Cl. J(Sr. Dn) Bareilly, which was unfortunately dismissed under the provisions of O. VII, rule 11 CPC and the appeal preferred against order dt. 29.8.2017 passed in O.S. No. 153/2016, their Lordship of Hon'ble High Court of Judicature at Allahabad in Ist Appeal No. 667/2017 observed that remedy of the applicants lie in moving the restoration application in the case (O.S. No. 158/2000) and not by a separate suit and with these observations the said Ist appeal was disposed off, vide order dt. 04.10.2017. The certified copy of the said order could be made available to the deponent on 17.10.2017.

6) That applicants had no occasion to doubt the bonafide of O.P and immediately upon his threat to enforce the exparte decree, the

applicants had filed O.S. No. 153/2016-Ishaan Buildtech & others Vs. Neelesh Agarwal, bonafide believing that exparte decree had been obtained by concealment of matrial facts and by suppression of order passed on application 205/C. The time consumed therein was most bonafide and under legal advise.

7) That there was no negligence or want of due diligence on the part of the applicants and the delay in not moving the restoration application earlier was due to facts and circumstances as stated above and in the accompanying restoration application were most bonafide. For the ends of justice delay deserves to be condoned under the provisions of Sec. 5 read with Sec. 14 Limitation Act and u/s 151 C.P.C.".

17. The court below while considering the application 4C held that under the circumstances, provisions of Section 14 of the Limitation Act are not attracted. Then the court below considered the application on the basis of section 5 of the Limitation Act. The joint application filed in the suit of 2000 bearing paper No. 205C was considered. The court below observed that the order dated 19.9.2001 was passed on that application on the ground that after going through all the record, the plaintiff was satisfied that the sale deed executed in favour of defendant No.14 is correct and that he can made his construction thereon and, therefore, the interim injunction order granted against him be recalled. The interim injunction granted on 17.4.2000 was accordingly modified to the extent that it will not affect the defendant No. 14. The court below observed that in the suit of 2000, though, cancellation of sale deeds were also sought, but the court only passed exparte prohibitory injunction on 22.12.2003. The court below held that on perusal of the aforesaid order dated 19.9.2001 as well as paper No. 205C, it is clear that the plaintiff had admitted the right and possession of applicant No.1(defendant No. 14) in respect of plot No. 14A, but while passing of exparte decree, the plaintiff did not draw the attention of the court to the order dated 19.9.2001. The court below observed that though it is expected of the court that it will peruse the previous orders passed by it, but in the present case, the exparte decree was passed by his predecessor in office by mistake and due to concealment of fact by the plaintiff. The court below further observed that the plaintiff had greater responsibility after passing of the order dated 19.9.2001 by the court that he ought to have placed the correct facts before the court and this demonstrated that the plaintiff had deliberately concealed the fact from the court and fraudulently got the decree dated 22.12.2003 passed. The court below was of the view that under the circumstances, only on the ground of delay, the doors for hearing of the case should not be closed and that on the ground of delay no person can be denied justice. The court below observed that though the applicant nos. 1 and 2 (defendant nos. 14 and 15) were required to be aware of their defense in which they have defaulted, but that can be compensated by damages. While referring to the fact that all the defendants were not parties, the court below referred to the proviso to Order 9 Rule 13 CPC and held that the application would be maintainable. As far as question with regard to applicant nos. 3 to 5 being strangers to the suit, the

court observed that the applicant nos. 1 and 2 were parties in the original suit and as such the application is maintainable, and the applicant nos. 3 to 5 have the option that in case the exparte decree is set aside, they can move an application for being impleaded as party in the original suit under the provisions of order 22 Rule 10 C.P.C. With regard to the power of attorney executed in favour of applicant no. 5 (defendant no. 3), the court below was of the opinion that since the applicant nos. 1 and 2 are parties in the original suit and as such, the application shall not be rendered not maintainable on that ground. Accordingly, the application (paper No. 4C) was allowed with cost of Rs. 30,000/. It was specified that for disposal of application 5C, the case be put up on 8.5.2019. It was also specified that if by the specified date, the cost is not deposited, the order impugned would lose its effect.

18. The only point required to be considered by this Court at this stage is whether the court below has correctly decided that there was sufficient cause for condoning the delay in filing the application under Order 9 Rule 13 CPC.

19. A perusal of the plaint enclosed reveals that the suit of 2000 was filed for the following relief:

(a) that by a decree of mandatory prohibitory injunction the defendants be restrained from causing any interference in the peaceful possession of the plaintiff over Gata Nos. 324, 325 (southern half) Udaipur Khas, Bareilly by forcibly entering into its unlawful possession or from raising any constructions over any part thereof in any manner either by themselves or through their agents, servants etc. unless defendant no. 1 seeks partition by meets and bound of this share therein;

(b) that by the adjudged & declared that the sale deeds mentioned of sl. no. 8 to 15 under schedule and sale deeds mentioned at sl. no. 4 to 10 under schedule B in respect of Gata No. 325 Ujdaipur Khas Bly are void, ineffective & in operative & copy of the order of the Hon'ble Court may be sent to the office of SR Bareilly for proper noting in their records.

(c) Costs of the suit be awarded to the plaintiff against the defendants".

Schedule A and B to the plaint are as follows:

"Details of sale-deeds executed by defendant no.2 under POA dt. 11.11.94 for 2000 Sq.M. Plotted area comes to 1384.97 Sq.M.

Schedule-A

Sl.	*Plot No.*	*Area (Sq.M.)*	*Date of execution*	*Vendee*
1	*255.41*	*04.02.95*		*Kiran Pal Singh*
2	*Plot no.11*	*141.55*	*16.10.95*	*Surendra Khera*
3	*Plot No.5*	*167.22*	*26.10.95*	*Shanti Devi, Jagdish*
4	*Plot No.7*	*203.53*	*30.10.95*	*Radhey Shyam Gupta*
5	*Plot No.23*	*120.00*	*30.10.95*	*Manty Gupta*
6	*Plot No.18*	*171.00*	*4.11.95*	*Urmila Agr,*

				Renu Agr.
7	*Plot No.13*	*181.69*	*4.12.95*	*Krishna Babu, Usha Agr.*
8	*Plot No.12-B*	*177.63*	*4.12.95*	*Sunil Bhasin*
9	*Plot No.S-B*	*84.45*	*6.5.96*	*Ajai Gupta, Pritam*
10	*Plot No.23*	*120.00*	*29.3.97*	*Vijai Johri*
11	*Plot No.3*	*272.56*	*1.5.97*	*Vivendri Devi*
12	*Plot No.22*	*165.00*	*17.7.97*	*Asha Rani Khandiya*
13	*Plot No.45*	*88.00*	*14.8.97*	*Ajai Johri*
14	*Plot No.38, 30, 40, Plot No.11-B*	*93.79*	*24.8.97*	*Jogindra Kaur*
15	*Plot No.46*	*82.50*	*24.8.97*	*Vinod Chand*
		2799.33		

As against permissible limit of 1384.57 Sq.M.

It is again worth to mention here that both the power of attorney dt. 22.7.94 and 11.11.94 relate to Gata Nos.324 and 325 while all the sale-deed(s) so executed under both the attorneys relate back to gata No. 325 alone which again vendees the extent of authority of deftt. Nos. 2 and 4.

Similarly defendant no.2 and 4 have collusively jointly executed saledeeds of plotted area of 2344, 19 Sq. M as against the permissible limit of 2077.46 sq.M. under POA of 3000 Sq. M.

SCHEDULE-B

Details of sale-deeds jointly executed by defendant no.1, 2 and 4

Sl.	*Plot No.*	*Area (Sq.M.)*	*Date of execution*	*Vendee*
1	*12*	*279.00*	*19.11.94*	*Sunil Bhasin Daizy*
2	*6*	*232.84*	*19.11.94*	*Dr. Ajay Gupta, Pratima*
3	*4*	*293.38*	*19.11.94*	*Manoj Gupta, Sushila*
4	*14-A*	*175.55*	*17.12.99*	*Manoj Gupta, Sunita*
5	*14-B*	*92.60*	*17.12.99*	*Rajendra Kumar, Ramesh Kumar*
6	*34, 35-B*	*285.91*	*17.12.99*	*Vinay Pradhan*
7	*15*	*279.00*	*17.12.99*	*Sharad Kumar*
8	*16*	*216.00*	*17.12.99*	*Nathoo Lal Gangaur*
9	*35-A, 36*	*285.91*	*17.12.99*	*Kaushal Pradhan*
10	*41*	*204.00*	*17.12.99*	*Atul Pradhan*

		23441 9.00		

It is worth to mention here that seven forged sale-deed mentioned at Sl. No.4 to 10 above have been brought in existence by calling the SR Bareilly at the house defendant and by impersonation of defendant no.4 as he is absconding sine long. All these seven sale-deeds are altogether fake collusive & without consideration."

20. While passing the interim injunction order dated 17.4.2000, the court below directed as follows:

अतः प्रतिवादीगण को नोटिस दिनांक 01.05.2000 के लिये नियत कर जारी हो। इस बीच पक्षकार विवादित प्लाट खसरा सं 325 के दक्षिणी आधे भाग के सम्बन्ध में यथास्थिति को बनाये रखें चूकि अविभाजित सम्पत्ति के सम्बन्ध में किसी विशिष्ठ भाग पर निर्माण होने से यह भागीदार उसके उपभोग से वंचित हो सकता है। मौके की वास्तविक स्थिति के सम्बन्ध में वादी तुरन्त कमीशन जारी करावे। वादी आदेश 39 नियम 3 का कार्यपालन सुनिश्चित करें।

"Therefore, let notices be issued to the defendants fixing 01.05.2000. In the meanwhile the parties shall maintain status quo with respect to the southern half part of the disputed plot khasra No.325 because with regard to the undivided property, if constructions are made on a specific part thereof, the co-sharer may be deprived of using the same. For ascertaining the factual situation at the site, the plaintiff shall take immediate steps for issuing a commission. The plaintiff shall ensure compliance of Order 39 Rule 3. (English translation by Court)

21. The application bearing paper No. 205C which is a joint application filed by the defendant nos. 14 (defendant-respondent no.5) and the plaintiff reads as follows:-

"Sir,

It is respectfully submitted that an ad-interim injunction order, restraining the defendants from raising any constructions over the property in suit has been passed in the above case.

Now after going through the various documents, the plaintiff is fully satisfied that the sale deed in favour of defendant no. 14 is lawful and he is entitled to raise constructions over property so purchased by him.

It is, therefore, prayed that the operation of ad-interim injunction against defendant no. 14 may kindly be vacated and recalled. The plaintiff has no objection to it".

(Manoj Gupta)
(Neelesh Agarwal)
Defendant no. 14
Plantiff.
19.9.2001.

On that application, the court below passed an order on 19.9.2001 which is as follows:-

19.9.2001 आज वादी अधिवक्ता की ओर से 205ग प्रार्थना पत्र प्राप्त होकर प्रस्तुत किया गया। मय 206ग (illegible) व 207ग वकालतनामा के प्रस्तुंत किया गया। पेश होकर आदेश हुआ कि.

205ग वादी की ओर से इस आधार पर दिया कि सभी प्रपत्र ध्यानपूर्वक देखने से वादी सन्तुश्ट है कि प्रतिवादी नं0 14 के पक्ष में की गयी विक्रय सहीं है वह अपना निर्माण कर सकता है । अतः उसके विरूद्व पारित अस्थायी निषेधाज्ञा आदेश वापिस ले लिया जाए।

सुना। प्रार्थना पत्र के प्रकाश में प्रतिवादी न0 14 के विरूद्व पारित आदेश दिनांक 17.4.2000 वापस लिया जाता है । 6ग पर पारित आदेश इस सीमा तक संशोधित किया जाता है कि उसका प्रभाव प्रतिवादी नं0 14 पर नहीं होगा। पत्रावली नियत तिथि को पेश हो।

19.09.2001 - Today an application 205C was filed and presented on behalf of the counsel for the plaintiff alongwith 206C (illegible) and 207 C vakalatnama. It is ordered that:

205C has been filed on behalf of the plaintiff on the ground that the plaintiff is satisfied, after perusing all documents carefully, that the sale in favour of the defendant no.14 is correct and he can make his constructions. Therefore, the temporary injunction granted against him be recalled.

Heard. In the light of the application, the order dated 17.04.2000 passed against the defendant no.14 is recalled. The order passed on 6C is amended to the extent that it would not have effect against the defendant no.14. Put up the record on the date fixed. (English translation by Court)

22. A photocopy of the exparte judgement and order dated 22.12.2003 has been filed as Annexure no. 9 to the petition. The judgement opens with the sentence that the present civil suit has been lodged by the plaintiff against the defendants for permanent injunction. After stating the contents of the plaint and the cause of action appearing therefrom, it is noted by the trial court that though objections to the injunction application were filed by the defendant nos. 1 to 19 but no written statements were filed by any of the defendants. The documents filed by the plaintiff and the defendants were then mentioned which reveals that merely photocopies of copies of sale-deeds were filed by the plaintiff. As far as the photocopies of documents filed by the plaintiff were concerned, the court below noted that they could not be read as evidence and that oral evidence was filed by means of an affidavit. As far as the documents filed by the defendants were concerned, the court below observed that neither any written statements were filed, nor have the documents been proved, as such they cannot be read as evidence. The court below then noted that it is clear from perusal of the khatauni filed on behalf of the plaintiff, that the plaintiff is the co-sharer along with the defendant of the property in dispute and joint bhumidhar and joint owner, and the contents of the plaint are proved by the documentary evidence and affidavit filed by him.

The operative part of the judgement dated 22.12.2003 states that the suit is decreed exparte against the defendants and the defendants are permanently injuncted from creating any hindrance in the peaceful possession of the plaintiff over the half part on the south side of gata plot no.324, 325.

23. A copy of the decree passed in the suit of 2000 has not been filed. On perusal of the judgement dated 22.12.2003, it is evident that the court held that the photocopies of documents filed by the plaintiff (which included photocopies of the copies of sale-deeds under challenge) were inadmissible in evidence. Relying solely on the khatauni, which has not been filed in the instant petition, the court below has held that the plaintiff and the defendant *(sic)* are the co-sharer, co-bhumidhar and co-owner of the property in dispute. The operative

part of the judgement dated 22.12.2003 relates to only a part of the relief (a) sought in the plaint, and, does not at all refer to the relief (b) by which declaration of the sale-deeds as void was sought.

24. As far as the present petition is concerned, admittedly, the sale-deed dated 17.12.1999 pertaining to plot no.14-A that appears at serial no.4 in the table appearing in Schedule-B of the plaint, is relevant. Admittedly, Schedule-B shows the names of Manoj Gupta and Sunita (defendant-respondent nos. 5 and 4 respectively, who are apparently husband and wife) as the vendees of the sale-deed in respect of plot no. 14-A. Paper no.205C, which is a joint application dated 19.09.2001 by the aforesaid Manoj Gupta and the plaintiff-petitioner, refers to that very sale-deed. Pursuant to this joint application, the temporary injunction granted by the court below on 17.04.2000 was modified on 19.09.2001 and it was ordered that the order (dated 17.04.2000) passed on application 6C would have no effect on the defendant No.14 (defendant-respondent no.5 herein).

25. It is contended by the learned counsel for the respondent that the joint application (paper no.205-C) dated 19.09.2001 filed by the plaintiff-petitioner and the defendant-respondent no.5 is an indication of a prior settlement, and that the plaintiff had abandoned his claim with regard to the sale deed in favour of the defendant no.14 (defendant-respondent no.5).

26. While disposing of the application Paper No.4C, the court below has observed that the plaintiff had admitted the right and possession of applicant No.1(defendant No. 14) in respect of plot No. 14A, but while passing the decree, plaintiff did not draw attention of the court to the order dated 19.9.2001. The court below further observed that the plaintiff had greater responsibility after passing of the order dated 19.9.2001 and he ought to have placed the correct facts before the court. The court below was of the view that under the circumstances, only on the ground of delay, the doors for hearing of the case should not be closed and that on the ground of delay no person can be denied justice.

27. The word 'admission' is defined under Section 17 of the Indian Evidence Act, 1972 which is as follows:-

"17. An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned".

Sections 31 and 58 of the Indian Evidence Act read as follows:

"31. Admissions not conclusive proof, but may estop.- Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained."

"58. Facts admitted need not be proved.- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

28. Prima facie, there appears to have been some understanding or settlement between the plaintiff-petitioner and the defendant no.14 (defendant-respondent no.5) pursuant to which the application paper no.205C was filed. This is a document admitted by the parties. In the present petition, it is admitted that a limited settlement took place. With the temporary injunction being lifted against the defendant no.14, it can be presumed that he would have made and completed the constructions over the land sold by the said sale-deed. Therefore, the situation arising out of the exparte decree dated 22.12.2003 would be, that on the one hand the permanent injunction would operate, and, on the other hand, the sale deed in favour of the defendant no.14, has not been declared void. This is a paradoxical situation.

29. Moreover, it is the contention of the learned counsel for the defendant-respondents that the plaintiff-petitioner had allegedly abandoned his claim with regard to the sale-deed executed in favour of the defendant no.14. Order 23 Rules 1 and 4 CPC pertain to, inter alia, abandonment of suit or a part of his claim by the plaintiff. The concept and scope of abandonment have been elaborately dealt with in two judgements of **Kanhiya & others v. Mohabata & others**5 and **Annammal and others v. Chellakutti**6. However, this aspect of the matter can only be considered should such a plea be raised before the court below.

30. Admittedly, no written statements have been filed by the defendants. Since substantive rights of the defendant-respondents are at stake, findings on the alleged admissions made by the plaintiff and the alleged abandonment of part of the claim by him, would be required from the court below in the interest of substantial justice, in the event such pleadings are raised by the defendants. As observed above, the contents of paragraph nos. 6, 7 and 13 of the counter affidavit, that speak of settlements with other defendants in the suit of 2000 as well as in a separate suit with regard to the the suit property, have not been denied in the rejoinder affidavit. No such settlement finds any mention in the judgement and order dated 22.12.2003 passed in the suit of 2000. The reply to paragraph nos. 6, 7 and 13 of the counter affidavit appears in paragraph no. 5 of the rejoinder affidavit which is as follows:-

"That in reply to the contents of paragraph nos. 6, 7 and 13 of the counter affidavit it is submitted that ex-parte ad-interim injunctions vacated by the Learned Court below with respect to certain other defendants of O.S. No. 158 of 2000 do not have any material bearing to the controversy involved herein. Interim injunction order vacated against each of the defendants was dependent on the peculiar facts and circumstances that existed qua the plaintiff and the respective defendant. Moreover, it is pertinent to note that even though ad-interim injunction orders were vacated as regards several defendants, yet the final decree passed by the Court below operated against all such defendants also."

31. The settlements entered into between the plaintiff-petitioner and several other defendants as mentioned in

paragraph nos. 6, 7 and 13 of the counter affidavit are neither specifically nor impliedly denied, but, the contention of the plaintiff-petitioner is that the final decree operated against them also. It is noteworthy that the averment in paragraph no.13 of the counter affidavit pertains to Suit No.151 of 2014 (Rajan Kumar v. Neelesh Agarwal) in which it was stated that the plaintiff of Suit No.151 of 2014 is the owner of plot no.14-B and the suit was decided in terms of the compromise. Plot no.14-B appears at serial no.5 of Schedule-B of the plaint of the suit of 2000, in respect of the sale deed of which declaration of voidance is being sought. The decision in the above Suit No.151 of 2014, which is based on a compromise, is apparently in stark opposition to the judgement and order dated 22.12.2003 passed in the suit of 2000. There is no material on record to show what were the reliefs sought in Suit No.151 of 2014, that is to say, whether the decree of the suit of 2000 was challenged and whether fraud was pleaded. Even though the decision of the Suit No.151 of 2014 may not have a material bearing for purpose of the present petition, however, it does go to show the intent and conduct of the plaintiff-petitioner.

Judgements relied upon by the petitioner

32. The learned counsel for the petitioner has cited aforementioned cases of **Baljeet Singh, Balwant Singh** and **Jebasundari** in support of his contention that unless sufficient cause is shown, or when the delay is inordinate and vested rights have devolved on the decree holder, the application under Section 5 of the Limitation Act should be rejected. In the case of **Baljeet Singh** (supra), the Supreme Court was considering the inordinate delay of approximately 21 years in preferring the special leave petitions before the Supreme Court. The Supreme Court noticed that in the reference under Section 18 of the Land Acquisition Act, the reference court enhanced the compensation to Rs.30/- per square yard, but in the First Appeal, the High Court reduced the amount of compensation to Rs.22.20/- per square yard. Thereafter, after a period of approximately 21 years, the petitioners preferred those petitions claiming compensation at par with the compensation awarded to the land owners of village Kasna for which notification under Section 4 of the Land Acquisition Act was issued after a gap of four years from the issuance of notification under Section 4 of the Land Acquisition Act in respect of the land in the village of the petitioners. The only explanation given by the petitioners before the Supreme Court was that in December 2006, the claimants of village Kasna got compensation from the Supreme Court which came to be known to the petitioners concerned in the month of January 2017 causing a lot of heartburn but miseries overtook them. It took not only lots of courage in mustering support from the number of affected families but also it took time for the petitioners to collectively file the special leave petition. The Supreme Court observed that there is no explanation whatsoever to explain the huge delay of 21 years. The Supreme Court held that the petitioners had accepted the compensation and no grievance was made by them with regard to inadequacy of the compensation determined by the High Court. Therefore, on the ground of acquiescence, the

petitioners would lose their right to complain. The Supreme Court observed to make out a case for condonation of delay, the applicant has to be make out a sufficient cause/reason which prevented him in initiating the proceedings within the period of limitation. Otherwise, he will be accused of gross negligence. The Supreme Court also considered the adverse impact/affect on the State/acquiring body, after the inordinate delay/laches, if they are directed to pay the enhanced amount of compensation. The Supreme Court observed that after the acquisition, the land was developed, infrastructure and amenities were laid and the developed land was allotted approximately 30 years earlier. Therefore, if the cost of acquisition was increased and the State/acquiring body directed to pay the enhanced compensation, it would be very difficult to recover the difference of amount of compensation from the allottees after decades of allotment.

In the case of **Balwant Singh** (supra), the Supreme Court was considering the delay in filing an application to bring on record the legal representatives of the deceased appellant. There was a delay of 778 days. In that case, the applicants had filed a one page application stating that they were not aware of the pendency of the appeal before the Court and came to know only in March 2010 from their counsel that the case would be listed for final disposal during the vacations in May 2010. Thereafter, the applications were filed on 15.04.2010. The Supreme Court held that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The Supreme Court referred to the principles laid down by it in the case of **Perumon Bhagvathy Devaswom v. Bhargavi Amma**7 and held that they would control the exercise of judicial jurisdiction vested in the Court under the provisions.

In the case of **Jebasundari** (supra), the Madras High Court was considering a revision directed against an order of the District Munsif Court, dismissing the petition filed by the petitioners under Section 5 of the Limitation Act to condone the delay of 2170 days in filing the petition to restore the suit, which was dismissed for default on 12.03.2003. The Madras High Court held that length of delay is no matter and acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. While considering the judgment in **Esha Bhattacharjee** (infra), the principles for condoning the delay were stated and some further guidelines were added. Under the facts of that case, the Madras High Court dismissed the revision holding that the petitioners had failed to explain each and every days' delay and the trial court was absolutely right in dismissing the petition.

All the three aforesaid cases are distinguishable in view of the peculiar facts of the present case.

33. The learned counsel for the petitioner has then referred to the cases of **Popat Bahiru Govardhane** and **P.K. Ramachandran**, in support of his contention that the law of limitation has to be strictly applied and the court has no

power to extend the statutory period of limitation on equitable grounds. In the case of **Popat Bahiru Govardhane** (supra), the challenge before the Supreme Court was of the judgment of the High Court which had upheld the judgment of the Land Acquisition Collector rejecting the application under Section 28A of the Land Acquisition Act on the ground of limitation. The Supreme Court held that the Court had 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.

In the case of **P.K. Ramachandran** (supra), the Supreme Court noted that the High Court had condoned the delay of 565 days in filing an appeal against the judgment and decree of a Sub Court in an arbitration application without recording any satisfaction that the explanation for delay was either reasonable or satisfactory. It was held that the law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds.

The aforesaid two judgements also are of no help to the petitioner as the facts of the present case are different.

34. Learned counsel for the petitioner has referred to a judgment in the case of **Auto Oil Company** (supra) to demonstrate that the case of **Smt. Raisa Sultana Begam** (supra), which has been referred to by the learned counsel for the respondents during the course of his arguments, has been noticed in this judgment as having been overruled by a Special Full Bench of this Court in the case of **Sunni Central Board Vs. Sri Gopal Singh Visharad**8. In the case of **Rajendra Prasad Gupta** (supra), which was referred to for the same reason as **Auto Oil Company** (supra), the Supreme Court held that the rules of procedure are handmaids of justice. It was held that there is no express bar in filing an application for withdrawal of the withdrawal application. However, in the present petition, since the learned counsel for the respondents argued that the petitioner had abandoned the claim against the defendant-respondents, reference to these judgments is of no avail.

35. As far as the reliance placed by the learned counsel for the petitioner on the judgement passed in the matter of **Syed Wasif Husain Rizvi Vs. Hasan Raza Khan and others** (supra) is concerned, the issue which was referred for adjudication to the Full Bench was that "whether a writ petition under Article 226 of the Constitution can be filed by a power of attorney holder." It was held by the Court as follows:-

"24. When a writ petition under Article 226 of the Constitution is instituted through a power of attorney holder, the holder of the power of attorney does not espouse a right or claim personal to him but acts as an agent of the donor of the instrument. The petition which is instituted, is always instituted in the name of the principal who is the donor of the power of attorney and through whom the donee acts as his agent. In other words, the petition which is instituted under Article 226 of the Constitution is not by the power of attorney holder independently for himself

but as an agent acting for and on behalf of the principal in whose name the writ proceedings are instituted before the Court.

25. Having held so, we must, at the same time, emphasize the necessity of observing adequate safeguards where a writ petition is filed through the holder of a power of attorney. These safeguards should necessarily include the following:

(1) The power of attorney by which the donor authorises the donee, must be brought on the record and must be filed together with the petition/application;

(2) The affidavit which is executed by the holder of a power of attorney must contain a statement that the donor is alive and specify the reasons for the inability of the donor to remain present before the Court to swear the affidavit; and

(3) The donee must be confined to those acts which he is authorised by the power of attorney to discharge.

26. For these reasons, we hold and have come to the conclusion that the question referred for adjudication before the Full Bench must be answered in the affirmative and is accordingly answered, subject to due observance of the safeguards which we have indicated above.

The aforesaid judgement in **Syed Wasif Husain Rizvi** was rendered in respect of the question referred and, anyway, it would not inure to the benefit the petitioner. In the suit of 2000, admittedly, the defendant-respondent nos. 4 and 5 were arrayed as defendant nos. 15 and 14 respectively. Names of both these defendants are mentioned in the array of parties in the applications under Section 5 of the Limitation Act and under Order 9 Rule 13 read with Section 151 of the CPC. The applications would, therefore, not be rendered not maintainable. As observed by the court below, the applicant nos. 3 to 5 (arrayed as defendant-respondent nos.1, 2 and 3 in the present petition) have the option that in case the exparte decree is set aside, they can move an application for being impleaded as party in the original suit under the provisions of order 22 Rule 10 C.P.C.

36. In the case of **Vidhyadhar** (supra), the learned counsel has referred to paragraph nos.19 and 20 to contend that a power of attorney holder cannot depose for the principal in respect of a matter for which only the principal and personal knowledge. However, these paragraphs do not reflect any finding by the Supreme Court pertaining to a power of attorney holder. In the next case cited in support of the same proposition, of S. **Kesari Hanuman Goud** (supra), the Supreme Court held that the power of attorney holder cannot depose in place of the principal. The Supreme Court explained that if the power of attorney holder has preferred any "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. This case would not be of assistance to the petitioner given the facts of the instant case.

37. Thereafter, the learned counsel has relied upon a judgment of the

Supreme Court in the case of **Sneh Gupta** (supra) to demonstrate that the ingredients of compromise/withdrawal/abandonment of suit are not made out in the present case, and, mere modification of injunction order does not result in compromise/withdrawal/abandonment of suit. In that case the challenge before the Supreme Court was of a judgment and order passed by the High Court setting aside an order passed by the Additional District Judge by means of which a compromise entered into between some of the parties were declared illegal as also null and void. The Supreme Court observed that a compromise decree is not binding on such defendants who are not party thereto. This case is based on its own facts and, moreover, the issue of abandonment, which has anyway not been considered in the judgement of the Supreme Court, would arise only when an issue is framed by the court below on the basis of pleadings.

Judgements relied upon by the respondents

38. Learned counsel for the defendant-respondents has relied upon the judgment of the Supreme Court in **Bhagmal vs. Kunwar Lal** (supra). In that case before the Supreme Court, the the appellant-defendants allegedly came to know about the decree when the execution proceeding started and moved an application under Order 9 Rule 13read with Section 151 of the CPC for setting aside the *ex-parte* decree. The application was dismissed by the trial court being barred by time. In the Misc. Civil Appeal filed before the District Judge, the appellate Court held that the application deserved to be allowed and, accordingly, allowed the same while directing the trial court to decide the case on merits after hearing the parties. However, in the Civil Revision, the High Court held that the application under Order 9 Rule 13 CPC was barred by time and the appellate court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not. The Supreme Court found that the appellate court's decision was well considered and held that the High Court was not justified in taking a hypertechnical view.The Supreme Court observed that the question of delay was completely interlinked with the merits of the matter. The appellant-defendants had pleaded that they did not earlier come to the Court on account of the factthat they did not know about the order passed by the Court proceeding *ex-parte* and also the *ex-parte* decree which was passed. The Supreme Court held that the averment was a justification for making the application under Order 9 Rule 13 CPC at the time when it was actually made and that was also a valid explanation of the delay. The Supreme Court held that the application under Order 9 Rule 13 CPC itself had all theingredients of the application for condonation of delay in making that application. Procedure is the handmaid of justice. The appellant-defendants believing the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. Under such circumstances, the non-attendance of the appellant-defendants was quite justifiable. The Supreme Court held that it was sufficient when the appellant-defendants ultimately came to know about the decree and moved the application within 30 days.

39. In the case of **Ram Prakash Agarwal** (supra), the Supreme Court was considering the right of a stranger to file an application under Order 9 Rule 13 CPC. The Supreme Court was of the opinion that in exceptional circumstances, the Court may exercise its inherent powers under Section 151 CPC, apart from Order 9 Rule 13 CPC, to set aside an ex-parte decree. The Supreme Court held as follows:

"15. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order 9 CPC to set aside an ex-parte decree. An ex parte decree passed due to the non-appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of mistake of the court. An application under Section 151 CPC will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of Order 9 CPC may not be attracted, and in such a case the court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of court, the injustice so done must be remedied, in accordance with the principles of actus curiae neminem gravabit - an act of the court shall prejudice no person."

As observed in the present case, the application under Order 9 Rule 13 read with Section 151 CPC has also been filed by parties who are defendants in the suit of 2000.

40. In the case of **N. Balakrishnan** (supra), the Supreme Court held as follows:-

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the court in different situations is not because on the expiry of

such time a bad cause would transform into a good cause.

.....

.....

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning delay, the Could should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

41. In the case of **M.K. Prasad** (supra), the Supreme Court held as follows:-

"10.....Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs. ....."

42. In the case of **Shanti Prasad Gupta** (supra), the Supreme Court has held that whether or not there is sufficient cause for condonation of delay, is a question of fact dependent upon the facts and circumstances of a particular case, and the proposition is well-settled that when order has been made under Section 5 of the Limitation Act by the lower court in the exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision, unless the lower court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence.

43. In the case of **Bhagmal vs. M.P. Cooperative Marketing** (supra), the proposition of law enunciated by the Supreme Court in the case of **Shanti Prasad Gupta** (supra) has been restated with respect to exercise of extraordinary jurisdiction under Article 226 or 227 of the Constitution of India.

44. In the case of **Mohammad Shafeeq** (supra), the Supreme Court held as follows:-

"3. In our opinion, the High Court has taken too technical a view of the error committed by the appellant in pursing the remedy available to him

under the law. The appellant had been prosecuting his remedy diligently and there is nothing to doubt his bona fides. These aspects were taken into consideration by the learned Additional District Judge while condoning the delay in filing the revision. In our opinion, the High Court ought not to have interfered with the order of the Additional District Judge, condoning the delay in filing the revision, being an order passed in exercise of discretion vested in the learned Additional District Judge and for that reason, was not open to interference by the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution."

45. Having considered the facts and circumstance of the present case, it would be pertinent, at this stage to refer to the judgment of the Supreme Court in the case of **Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & others**9 which has referred to certain principles applicable to an application for condonation of delay which, inter alia, are that:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

46. It needs notice that just because the defendant-respondent nos. 4 and 5 (defendant nos. 15 and 14 respectively in the suit of 2000) had engaged an advocate subsequent to the modification of the order of temporary injunction, it is not an unrebuttable proof of lack of bonafide on their behalf. It is stated in the counter affidavit that the defendant No. 14 also got the order passed by the court below on his application (paper No. 205C) confirmed through an advocate, Mrs. Abha Agarwal, who filed her vakalatnama in the suit of 2000 and after perusing the order dated 19.9.2001 she also advised the defendant No. 14 that now there is no claim against him and he is not required to take part in further proceedings in suit as such, the defendant No. 14 did not take part in further proceedings in suit of 2000. At this stage, this court is averse to recording any categorical observation regarding the consequence of the joint application Paper no.205C. However, the conduct of the defendant-respondents, in not contesting the suit of 2000, post the order on the application Paper no.205C, appears to be bonafide. Moreover, though the delay in filing the application under Order 9 Rule 13 CPC, after coming to know of the decree which led to the filing of the suit of 2016, has not been specifically explained, it needs mention that heavy cost of Rs.30,000/- has been imposed on the defendant-respondents while allowing the application 4C by means of the impugned order. The impugned order of the court below cannot be faulted.

47. This petition is accordingly, **dismissed**. It is made clear that the observations made in this judgement are only for purpose of decision of this petition under Article 227 of the Constitution of India and shall not be taken by the court below as opinion on the merits of the case.

(2020)08ILR A494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matters Under Article 227 No. 9146 of 2019

Sagar Kumar ...Petitioner
Versus
District Judge, Moradabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Lalit Kumar, Sri Pankaj Tripathi

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri Anil Babu, Sri T.A. Khan, Sri H.K. Yadav

A. Constitution of India – Article 50 – Independence of Judiciary – Complaint against Judicial Officer – Responsibility of Higher Court – The role of the High Court as a guardian of the subordinate judgeships, and the duty of the High Court to protect the judges of the subordinate courts from false complaints – Judicial officers can discharge their judicial functions without fear or favour, affection or ill will only if a conducive environment is built around them. For this it is essential to protect judicial officers, from the menace of false and frivolous complaints by disgruntled litigants or motivated lawyers or interested parties – Such complaints paired with litigation against the officers pose a systemic threat to the independence of the judiciary – Held, the complaints against the judicial officer do not disclose any act of misconduct. Interest of justice would be served by imposing costs quantified at Rs. 10,000/ upon the petitioner. (Para 11, 15, 16 and 17)

Petition dismissed (E-1)

Cases relied on :-

1. Krishna Prasad Verma (D) through L.Rs. Vs St. of Bihar & ors., (2019) 10 SCC 640

2. Ishwar Chand Jain Vs High Court of Punj. & Hary., (1988) 3 SCC 370

3. P.C. Joshi Vs St. of U.P. & ors., (2001) 6 SCC 491

4. Ramesh Chander Singh Vs High Court of Allahabad & anr., (2007) 4 SCC 247

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has sought the following relief in this writ petition:

"(i) Issue writ order or direction to decide the complaint/application dated 30.10.2019 pending for consideration before this Hon'ble High Court and an inquiry at administrative level may be conducted and appropriate action as per law may be taken against Nahid Sultana Civil Judge (Sr. Div./F.T.C.) Moradabad."

2. On 07.12.2019 the following order was passed:

"Sri H.K. Yadav, learned counsel holding brief of Sri Anil Babu, learned Special Counsel appearing for High Court and the District Courts may study the matter and inform the Court as to whether the respondent no.3 had the

jurisdiction to decide the execution application or not.

Learned counsel for the petitioner may may implead the plaintiffs as respondents in this petition during the course of the day.

Place this petition on 9.12.2019 as fresh."

3. Sri Anil Babu, learned counsel for the High Court submits that the Fast Track Court had the jurisdiction to decide the execution application.

4. Heard Sri Pankaj Tripathi, learned counsel holding brief of Sri Lalit Kumar, learned counsel for the petitioner and Sri T.A. Khan, learned counsel for respondent no. 3.

5. The complaint dated 30.10.2019 submitted on behalf of the petitioner through the counsel relates to orders passed by a judicial officer (respondent no. 3) in her judicial capacity. The petitioner has adequate remedies under the law in case he is aggrieved by the aforesaid orders. The complaint does not disclose any act of misconduct so as to warrant interference by this court under Article 227 of the Constitution of India. There is no evidence in the record to support the charge of any misconduct. In the event a complaint does not establish a prima facie act of misconduct, no departmental enquiry can be ordered against a judicial officer. In fact a perusal of the complaint shows that this is a frivolous petition, by a disgruntled litigant against a judge who passed adverse orders against him. The action of the petitioner constitutes an abuse of the process of court.

6. Judges in a democratic polity governed by the rule of law, discharge most critical functions when they implement the laws and dispense justice. Faithful implementation of the law and impartial administration of justice is possible only if those charged with execution of these functions, are free and fearless, independent and unbiased. These virtues of fearless enquiry, independent decision making and rendering impartial judgments, can flourish in the judiciary only if the environment fosters and supports such qualities. Absent these values or an institutional failure to nurture and fortify these values, could seriously undermine the justice delivery system and impair public faith in the judiciary.

7. The qualities of fearless and independent decision making which are the hallmarks of a vibrant judiciary were emphasized by the Hon'ble Supreme Court in **Krishna Prasad Verma (D) through L.Rs. Vs State of Bihar and others**, reported at **2019 (10) SCC 640:**

"1. In a country, which follows the Rule of Law, independence of the judiciary is sacrosanct. There can be no Rule of Law, there can be no democracy unless there is a strong, fearless and independent judiciary. This independence and fearlessness is not only expected at the level of the Superior Courts but also from the District Judiciary.

2. Most litigants only come in contact with the District Judiciary. They cannot afford to come to the High Court or the Supreme Court. For them the last word is the word of the Magistrate or at best the Sessions Judge. Therefore, it is equally important, if not more important, that the judiciary at the District level and at the Taluka level is absolutely honest, fearless and free from any pressure and is able to decide cases only on the basis

of the facts on file, uninfluenced by any pressure from any quarters whatsoever."

8. The importance of the subordinate judiciary created under the Constitution to secure justice to all citizens and thus achieve the foremost goal set out in the Preamble needs no articulation. The subordinate judiciary is the first trier of facts and evidence, and is indispensable to implement the fundamental constitutional vision of the rule of law and dispensation of justice. Most litigants have the first interface with the judicial system at the level of the district judgeship. To retain faith of the citizens in the judiciary, it is imperative that judicial officers are transparent in their functioning and accountable for their conduct. A judge of the subordinate judiciary has to always remain accountable, but can never be made vulnerable. In the former the judicial system will be fortified, while in the latter it will be jeopardised. This court notices that many unscrupulous litigants or lawyers try to pressurize the judges of the district judgeships, with threats of frivolous complaints, and the reality of endless prosecution of such false complaints. Such litigants and counsels seek to create an environment of blackmail and force the judges to toe their line. No threat could be more grave to the independence of the judiciary, than the judges being vulnerable to false complaints triggering endless enquiries. Such complaints impair the functioning of the judge and distract her energies from the job at hand to issues which have no relevance. Harassment and humiliation resulting from false complaints setting off interminable enquiries, deliver a fatal blow to the morale of the judge concerned and does no credit to the judicial system.

9. Complaints which do not disclose a prima facie act of misconduct, cannot cause a departmental enquiry to be conducted against a judicial officer. A roving enquiry into vague allegations against a judicial officer cannot be countenanced in law. Establishing a prima facie act of misconduct by a judicial officer, is the minimum legal threshold to be reached before a prayer for holding a departmental enquiry can be considered.

10. Clearly red lines have to be drawn. The higher courts have a responsibility in this regard and cannot shirk it in any manner. The courts have to quickly distinguish between a genuine complaint by a bonafide complainant from a frivolous complaint by a professional blackmailer. Complaints against judicial officers are not sport of the complainant, and the courts cannot be made their play field. It is equally critical to separate an act of misconduct completely, from a bonafide error of judgment in law or fact in the discharge of judicial functions. This exercise has to be done at the earliest and the nuisance has to be nipped in the bud, before it festers into a sore. Wrong orders can be rectified by the higher courts, but false complaints create a long drawn cycle of harassment of an honest officer, which cannot be compensated in any manner. Independent and unbiased judicial decision making will thrive, once the law firmly sets its face against false and frivolous complaints against judicial officers.

11. The role of the High Court as a guardian of the subordinate judgeships,

and the duty of the High Court to protect the judges of the subordinate courts from false complaints, was thus stated by the Hon'ble Supreme Court in **Krishna Prasad Verma (supra):**

"3. Article 235 of the Constitution of India vests control of the subordinate courts upon the High Courts. The High Courts exercise disciplinary powers over the subordinate courts. In a series of judgments, this Court has held that the High Courts are also the protectors and guardians of the Judges falling within their administrative control. Time and time again, this Court has laid down the criteria on which actions should be taken against judicial officers. Repeatedly, this Court has cautioned the High Courts that action should not be taken against judicial officers only because wrong orders are passed. To err is human and not one of us, who has held judicial office, can claim that we have never passed a wrong order.

4. No doubt, there has to be zero tolerance for corruption and if there are allegations of corruption, misconduct or of acts unbecoming of a judicial officer, these must be dealt with strictly. However, if wrong orders are passed that should not lead to disciplinary action unless there is evidence that the wrong orders have been passed for extraneous reasons and not because of the reasons on the file."

12. Elucidating the importance of insulating judicial officers against false complaints, the Hon'ble Supreme Court in **Ishwar Chand Jain Vs High Court of Punjab & Haryana** reported at **1988 (3) SCC 370** held so:

"14. Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a constitutional obligation to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a sine qua non for rule of law. If judicial officers are under constant threat of complaint and enquiry on trifling matters and if High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore imperative that the High Court should also take steps to protect its honest officers by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants. Having regard to facts and circumstances of the instant case we have no doubt in our mind that the resolution passed by the Bar Association against the appellant was wholly unjustified and the complaints made by Shri Mehlawat and others were motivated which did not deserve any credit. Even the vigilance Judge after holding enquiry did not record any finding that the appellant was guilty of any corrupt motive or that he had not acted judicially. All that was said against him was that he had acted improperly in granting adjournments."

13. A similar view was taken by the Hon'ble Supreme Court in **P.C. Joshi Vs State of U.P. and others** reported at **2001 (6) SCC 491**:

"7. In the present case, though elaborate enquiry has been conducted by the

enquiry officer, there is hardly any material worth the name forthcoming except to scrutinize each one of the orders made by the appellant on the judicial side to arrive at a different conclusion. That there was possibility on a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone. The enquiry officer has not found any other material, which would reflect on his reputation or integrity or good faith or devotion to duty or that he has been actuated by any corrupt motive. At best, he may say that the view taken by the appellant is not proper or correct and not attribute any motive to him which is for extraneous consideration that he had acted in that manner. If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly. Indeed the words of caution are given in K.K. Dhawan case [Union of India v. K.K. Dhawan, (1993) 2 SCC 56 : 1993 SCC (L&S) 325] and A.N. Saxena case [Union of India v. A.N. Saxena, (1992) 3 SCC 124 : 1992 SCC (L&S) 861] that merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer. In spite of such caution, it is unfortunate that the High Court has chosen to initiate disciplinary proceedings against the appellant in this case."

14. The importance of protecting judicial officers from disciplinary action because of wrong judgments passed by them lay at the heart of the concerns of the Hon'ble Supreme Court in **Ramesh Chander Singh Vs High Court of Allahabad and another**, reported at **2007 (4) SCC 247** when it held:

"12. This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, the High Court must take extra care and caution.

17. In Zunjarrao Bhikaji Nagarkar v. Union of India [Zunjarrao Bhikaji Nagarkar v.Union of India, (1999) 7 SCC 409 : 1999 SCC (L&S) 1299] this Court held that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the judicial officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level."

15. Judicial officers can discharge their judicial functions without fear or favour, affection or ill will only if a conducive environment is built around them. For this it is essential to protect judicial officers, from the menace of false and frivolous complaints by disgruntled litigants or motivated lawyers or interested parties. No judicial officer can discharge her judicial functions in accord with her obligations to the constitution and the laws, if she is under constant threat of roving enquiries on the foot of vague allegations. There is a noticeable proclivity to make such vague and frivolous allegations against judicial officers, by litigants and even lawyers who are dissatisfied by adverse verdicts. Irresponsible institution or unfettered prosecution of false and frivolous complaints, impedes the effective functioning of the judicial system, and undermines the administration of justice.

16. Such complaints paired with litigation against the officers pose a systemic threat to the independence of the judiciary. Judicial officers have to be secured against false and malafide complaints by creating a system of deterrence and penalties. To curb this evil of false and frivolous complaints effectively, it is imperative to create a deterrent regime which may include imposition of costs on the complainants. This is apart from other processess known to law, like drawing contempt proceedings. In the absence of such deterrent regime false and frivolous complaints would be made with impunity, the complainants would harbor a sense of immunity and the judges would become perpetually vulnerable.

17. In the facts of this case as found earlier in the preceding part of the judgment, the complaints against the judicial officer do not disclose any act of misconduct. Also as stated earlier, in case he is aggrieved by the orders, the petitioner can take recourse to remedies as per law. Equally the malafide intent of the petitioner who seems to be a disgruntled litigant stands established. The complaint has put the learned judge to untold harassment, which has interfered in the faithful discharge of her judicial duties. Her reputation was sought to be tarnished. She has been forced to privately engage a counsel to defend her reputation. In these facts this court feels that interest of justice would be served by imposing costs quantified at Rs. 10,000/- upon the petitioner. The costs shall be recovered by the Chief Judicial Magistrate, Moradabad as arrears of land revenue and deposited with the High Court Legal Services Committee, Allahabad. A copy of this order shall be provided to the Chief Judicial Magistrate, Moradabad.

18. The petition is dismissed.

(2020)08ILR A499
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

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

Application U/S 378 No. 15 of 2020

Hari Shankar ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri K.C. Tripathi, Sri M.S. Ansari

Counsel for the Opposite Parties:

G.A.

Appeal against acquital order-u/s 395 and 397 IPC - Contradictions in statement of witnesses-as to chronology of events-involvement of accused persons-and presence of witnesses at place of occurrence-if two views possible-High Court should not reverse the order of acquittal-Appeal dismissed.

Held, There are no substantial and compelling reasons to reverse the order of acquittal passed by the trial court. Thus, we find no good ground to interfere in the finding of fact returned by the court below in favour of the accused persons. No case made out for granting special leave to appeal against the order of acquittal. **(para 24)**

Appeal dismissed. (E-9)

List of Cases cited:-

1. St. of Karn. Vs. K. Gopalkrishna reported in (2005) 9 SCC 291

2.Sudershan Kumar V. St. of Himachal reported in (2014) 15 SCC 666

3.Dilawar Singh Vs. St. of Hary., (2015) 1 SCC 737

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Shri M.S.Ansari holding brief of Shri K.C.Tripathi, learned counsel for the applicant on leave to appeal.

2. Present criminal application for special Leave to file Appeal under Section 378(4) Cr.P.C., has been preferred by the present applicant for challenging the judgment and order dated 03.12.2019 passed by the Special Judge, U.P. Dacoity Affected Areas Act/Additional Sessions Judge, Court No. 4, Chitrakoot in Complaint No. 02 of 2016 (Hari Shankar vs. Jhandilal & Others), acquitting all five accused persons (respondents no.2 to 6) of the charges under Sections 395 & 397 IPC.

3. By means of the present application, the applicant is beseeching for special leave to appeal arising out of Complaint No. 02 of 2016 (Hari Shankar vs. Jhandilal & Others) moved by Hari Shankar, complainant/applicant herein, against his brother Jhandilal (respondent no.2) and three nephews namely Anantu s/o Jhandilal (respondent no.3), Mahendra s/o Jhandilal (respondent no.4), Uma Shankar s/o Jhandilal (respondent no.5) and brother's wife namely, Besaniya w/o Jhandilal (respondent no.6) respectively, levelling allegations that his brother is keeping vulture eye over his landed property, money and bank balance and to grab it, often harass him and beaten him up many times by hired goons and intending to kill him. The complainant is aged about 75 years, having two wives and has adopted one Prabhakar as his son.

4. On 26.05.2016 at about 8:00 p.m. while he was inside the house with his wives, all the accused persons have latched the north door of his house and set upon them with lethal arms, with intention to kill them and tried to broke the door with Axe to commit robbery. When his family members raised alarm, their neighbours namely Pappu s/o. Siddha Gopal, Baleshwar s/o. Chunni Lal and other persons came on the spot and saw the incident. The applicant herein along with his family members went to the Police Station to inform about the incident but they did not pay any heed to his grievances. Thereafter, he moved representation, through registered post, to

the Superintendent of Police, Chitrakoot and the District Magistrate, Chitrakoot but no action was taken against the accused persons. Ultimately, he filed complaint before the competent court to ventilate his grievances. After considering the statement of complainant-Hari Shankar under Section 200 Cr.P.C. and his witnesses namely Guddi (PW-1) and Chanda (PW-3) given under Section 202 Cr.P.C., learned court below has taken cognizance of the matter and issued summons against all five accused persons and framed charges against them under Section 395 & 397 IPC.

5. In order to substantiate its accusation, prosecution has examined as many as three witnesses.

6. PW-1, Guddi (w/o complainant), deposed that on 26.05.2016 at about 8:00 p.m. she along with husband and Chanda were present in the house. Accused persons namely Jhandilal, Anantu, Mahendra, Uma Shankar and Besaniya latched the north door of the house and attacked on the house armed with theft gun and other lethal arms, attempted to broke the door of house with intention to kill all family members and to commit dacoity. It is further stated by PW-1 that the accused persons always threatened to kill her family members in the greed of landed property and bank balance. Moreover, they can kill her adopted son at any time. She further stated that the accused persons always intimidated her husband for transferring his entire landed property and bank balance in favour of Jhandilal and to fulfil their greed, they came in the night at around 8:00 p.m. on 26.05.2016 and attempted to kill and caused grievous hurt to her family members.

7. PW-2, Hari Shankar (Complainant) has stated that the incident took place about 3-4 years back. Jhandilal, who wanted to grab everything, along with Anantu, Mahendra, Uma Shankar and Besaniya (w/o Jhandilal) had broke the door and forcibly entered into his house. He further states that Jhandilal was armed with gun and Mahendra was having Axe and Besaniya (w/o Jhandilal) was pelting stones. All the accused persons did such offence to grab his property and became reactionary due to adoption of a son. Accused Jhandilal is the real brother of Hari Shankar (complainant). Previously, Jhandilal had scuffled with the complainant and often beaten him up by hired goons. On raising alarm by his wife, Baleshwar and other person came on the spot. Thereafter, all accused persons fled away. He went to the police station to get the report registered and also moved representation, through registered post to the Senior Superintendent of Police, Chitrakoot but nothing happened. In absence of any action being taken, he moved a complaint before the competent court.

8. PW-3, Chanda (second wife of complainant) has stated that the incident took place three years ago in the night at about 8:00 p.m. Accused persons had broke the door of her house. Jhandilal was armed with gun and Anantu was armed with Tamancha (country made pistol), Uma Shankar was armed with Sabbal, Mahendra was armed with Axe and Besaniya had stones. Besaniya had threatened to cut the family of the complainant into pieces. Anyhow, life of Prabhakar (adopted son) could be saved. At the time of incident, co-villager namely Urmiliya came there but she was threatened by the accused.

9. The accused persons have made their statement under Section 313 Cr.P.C.

showing their innocence and state that they have been falsely implicated in the present case and due to enmity, false statement has been given by the complainant and his family members. Jhandilal stated that he is a teacher in a High School in District-Umaria, M.P. and is residing there. Mahendra and Umashankar have stated that they are crippled and living outside.

10. On behalf of the accused, some documentary evidence have been adduced relating to medical certificate of disability of Mahendra Kumar and Uma Shankar etc.

11. After considering the documentary evidence as well as the surrounding circumstances, the Trial Court had rejected the complaint vide impugned order dated 03.12.2012 acquitting all five accused persons for the offences under Sections 395 and 397 IPC.

12. Learned counsel for appellant had submitted that the Trial Court had not properly weighed the evidences adduced on behalf of complainant and based its judgment and order only on surmises and conjectures. Minor contradictions in the statements of witnesses ought not have led to acquittal of accused persons. He further contended that Trial Court had failed to consider that complainant's younger brother along with his family members had committed the offence with ill-will to grab the property of his elder brother (complainant), who is issueless and had adopted a son. Further submission is that the statements of the prosecution witnesses namely, PWs-1, 2 and 3 are sufficient to hold the accused persons guilty. He further submitted that Jhandilal (younger brother of complainant) is a greedy man and with an intention to grab the property of complainant, he had committed the said offence.

13. We have carefully considered the submissions advanced by learned counsel for appellant and perused the impugned order.

14. As per the complaint version, Jhandilal, younger brother of Hari Shankar (complainant), was keeping vulture eyes over the property of his elder brother (complainant), who is a senior citizen aged about 75 years, and having two wives. The complainant had adopted one son namely, Prabhakar. Accused Jhandilal was not happy with that adoption. With an intention to grab the entire property of Hari Shankar (complainant), while he was present inside the house along with his wives, Jhandilal along with his wife and sons, broke the door and entered the complainant's house, and attacked with an intention to kill them and to perpetrate robbery. On alarm being raised by complainant and his wivesm some neighbours including Pappu and Baleshwar came on the spot and witnessed the said incident.

15. After considering the statements of prosecution witnesses and circumstances of the case, learned Trial Court found no ground to hold the accused guilty and pointed out several discrepancies and contradictions in the statements of witnesses and circumstantial evidences with respect to manner and place of occurrence, presence of witnesses and specific role of

the accused persons, which are being detailed as follows :-

(1) In complaint, it is averred that the accused persons did not enter the house, but in the statement recorded under Section 244 Cr.P.C., complainant had stated that the accused persons forcibly entered into the house and punched him. Apart from that, in the statement recorded under Section 246 Cr.P.C., the complainant had stated that after entering into the house, for half an hour they thrashed the complainant and his wives.

(2) First wife of the complainant namely, Guddi (PW-1) stated that the accused did not enter the house and had not scuffled with her. Same thing has been stated by the complainant's second wife, Chanda (PW-3), in her cross-examination, that the accused did not enter the house and had not scuffled.

(3) With respect to the injuries, it has been stated by PW-2 that he and his both wives had sustained injuries and they were medically treated. PW-1 stated that the complainant had sustained injury while trying to stop a stone, thrown on him, but he did not get any medical treatment. Whereas, PW-3 in her statement supported the version of PW-1, that the complainant (PW-2) had sustained injury while stopping a stone, but he did not get any medical treatment.

(4) PW-3 stated that they were inside the house and the accused persons were outside the house, at the relevant date and time of incident. On the contrary, PW-2 (complainant) stated that the accused broke the door and entered the house and scuffled with them about half an hour. He had identified the accused persons in the electricity light. Apart from that, PW-3 stated that she peeped through the hole of door and identified the accused.

(5) In complaint, it is mentioned that Baleshwar and Pappu have seen the incident, who came on the spot on hearing alarm raised by the complainant's wives. During his cross-examination, the complainant had stated that Baleshwar and Pappu came on the spot, but out of fear they returned back and they came again in the next morning. PW-1 stated that at the time of the incident Baleshwar was not present at the place of occurrence, rather he and Pappu came in the next morning. PW-3 stated that Baleshwar and Pappu were not present at the time of the incident and they had not seen the incident.

(6) PW-1 and 3 stated that several villagers had seen the incident but PW-2 stated that no person of the village had seen the incident.

16. In this view of the matter, learned Trial Court has pointed out several discrepancies in the statements of witnesses with respect to the place of incident, sequence of incident, witnesses of incident and involvement of the accused persons in the incident. After considering the statements of prosecution witnesses and entire fact and circumstances of the case, learned Trial Court has come to a conclusion that no case is made out against the accused persons for commission of the offences under Section 395 and 397 IPC.

17. After carefully scrutinizing the impugned judgment, we express our agreement with the findings of the Trial Court that there are contradictions in the statements of PWs-1, 2 and 3 with respect to the chronology of events,

involvement of accused persons in the offence and presence of witnesses at the place of occurrence. Statements of PW-1 (complainant), recorded at different stages of the proceeding i.e. under Sections 200, 244 and 246 Cr.P.C; respectively, and the complaint version, are self contradictory. As per complaint version, accused persons had tried to break the door with an Axe, which was seen by the witnesses, Pappu and Baleshwar, who came on the spot on hearing alarm raised by the complainant's wives. Meaning thereby, the accused could not enter the house, but on the contrary, in his statement recorded under Section 244 Cr.P.C., the complainant had categorically stated that at the time of occurrence, accused persons had broke the door with an Axe, forcibly entered his house and scuffled with him and his both wives. He further stated that he fell down on being punched by accused Jhandilal. He further stated that while his wives had raised alarm, Baleshwar and another person came inside the house, and thereafter, accused persons fled away. In his statement recorded under Section 246 Cr.P.C., the complainant had stated that Baleshwar and Pappu came on the next morning at 8.00 A.M. In his cross-examination, he stated that Baleshwar was inside the house. There were six more persons, armed with deadly weapons, along with accused Jhandilal and he had identified them in the electricity light. He further stated that he and his family members had sustained injuries and got medical treatment. In his cross-examination, he had further stated that no co-villager had seen the incident, inasmuch as, no one dared to come there due to fear of the accused persons.

18. Testimony of PW-2 is not corroborated by other prosecution witnesses. PW-1 and PW-3 have made contradictory statements to that of PW-2. PW-1 stated that Baleshwar was husband of her sister and he was not present at the time of incident. In her cross-examination, she stated that there has been dispute between two brothers i.e. complainant and accused Jhandilal for the last 10-15 years. At the time of the incident, neither the accused barged into the house nor did assault anyone, or looted the household articles. They had hit the door with an Axe only once. At the time of the incident, the victim party was inside the house and accused persons were outside. She had further stated that Pappu and Baleshwar had opened the door while they came in the next morning. PW-3 Chanda had stated in her cross-examination that the incident did not take place in the presence of Baleshwar and Pappu. During the incident, accused did not barge into the house and there was no scuffle between the parties. Door of the house was not opened rather, there was some scratch on it due to the alleged single hit by an Axe. No one had sustained any injury but at a subsequent stage, she stated that Hari Shankar (complainant) had sustained injury by pelting of a stone on him.

19. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views on appreciation of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the Trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna** reported in **(2005) 9 SCC 291**, the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evnidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

20. In **Sudershan Kumar v. State of Himachal reported in (2014) 15 SCC 666**, the Hon'ble Supreme Court observed thus:-

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under:

*"37. In **Chandrappa v. State of Karnataka reported in (2005) 9 SCC 291**, this Court held:*

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

(1) The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

(2) The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

(3) The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

(4) The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

(5) If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

21. In **Dilawar Singh v State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under:

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record."

22. In this view of the matter, we find that the prosecution had failed to make out the true genesis of the crime. There is inconsistency in the statements of the prosecution witnesses, who had given contradictory statements with respect to the chronology of events relating to the incident. For instance, they were not sure with respect to the place of presence of the accused persons as to whether they were inside the house or outside the house and as to whether both parties were involved in the scuffling or not? There is also some confusion with respect to the presence of witnesses at the place of occurrence on the relevant date and time. PW-1 once stated that on hearing alarm raised by his wives, Pappu and Baleshwar came on the spot, but quite surprisingly at another place, he had stated that Pappu and Baleshwar went back due to fear and they again came back in the next morning. PW-2 and PW-3 have clearly worded that Baleshwar and Pappu were not present on the spot and they came in the next morning and opened the door of their house. Prosecution is also not sure with regard to the presence of co-villagers at the place of occurrence. It is very astonishing and ridiculous that the prosecution had not produced Baleshwar

and Pappu, who have been named as independent eye witnesses of the incident, in the witness box. It is admitted case of the prosecution that Hari Shankar and Jhandilal are real brothers, therefore, possibility of dispute between them with regard to property cannot be ruled out, but in the present matter, genesis of occurrence as created by the prosecution appears to be vague and cloudy. As per prosecution, younger brother Jhandilal was trying to kill his elder brother Hari Shankar (complainant) with a clear intention to grab his property despite the fact that the complainant had already adopted a son namely, Prabhakar, who as per statements of PWs-2 and 3 was the son of Baleshwar. At the time of occurrence, Prabhakar was kept behind the doors in the house to save his life. It is very astonishing that Baleshwar, who is natural father of Prabhakar, did not even bother to come in the witness box to support his own son. Apart from that, Prabhakar, who could have been a very important witness as he was stated to be present at the place of occurrence i.e. house of complainant, on the relevant date and time of incident, had also not been produced in the witness box. No independent witness had been produced to corroborate the statement of PW-2. On the contrary, PW-3 had admitted that the accused persons did not enter into their house and had not looted anything therefrom.

23. After careful consideration of the impugned judgment and entirety of facts and circumstances of the case as available on record, we are of the considered view that the prosecution had failed to discharge its burden to prove its accusation beyond reasonable doubt. There are inconsistencies in the statements of the prosecution witnesses. The deposition of prosecution witnesses are not worthy of credibility and are explicitly unreliable.

24. From the facts and circumstances of the case, it cannot be inferred that the accused persons entered the house of the complainant and perpetrated the crime attempting to cause death and grievous hurt to the complainant and his family members. In such a situation of fact, accused persons i.e. respondents no.2 to 6 are entitled to get benefit of doubt and their innocence could easily be inferred. There are no substantial and compelling reasons to reverse the order of acquittal passed by the trial court. Thus, we find no good ground to interfere in the finding of fact returned by the court below in favour of the accused persons. No case made out for granting special leave to appeal against the order of acquittal.

25. In the light of aforesaid reasons and observations, this application for Leave to Appeal, is hereby refused. In the result, present criminal appeal is **dismissed** in limine.

(2020)08ILR A507
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

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

Application U/S 378 Defective No. 19 of 2020

Smt. Sugara @ Subara ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Sri Dan Bahadur, Sri Vikas Srivastava

Counsel for the Opposite Parties:
G.A.

Criminal Law-Appeal against acquital order-u/s 376D, 452, 323 and 506 IPC - Deposition of prosecutrix/victim-under cloud-cannot be made solitary basis for conviction-admission of criminal case going in between the parties-shows malafide intention -to rope in -Criminal Appeal dismissed.

Held, If the evidence of the prosecutrix is read and considered in totality of facts and circumstances of the instant case, in which the crime is alleged to have been commissioned, we are of the view that the deposition of the prosecution witnesses does not inspire confidence of this Court. Evidence of the prosecutrix is not worthy of credibility and explicitly unreliable. Therefore, in the present matter, statement of the prosecutrix cannot be made the solitary basis for conviction of the accused. There is no substantial and compelling reasons to reverse the order of acquittal passed by the Trial Court. **(para 26)**

Criminal Appeal dismissed. (E-9)

Cases referred:-

1. Narendra Kumar Vs. St. (NCT of Delhi) reported in 2012 AIR SCW 3391

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

3.St. of Karnataka Vs. K. Gopalkrishna reported in (2005) 9 SCC 291

4. Sudershan Kumar Vs. St. of Himachal reported in (2014) 15 SCC 666

5. Dilawar Singh Vs. St. of Har., (2015) 1 SCC 737,

(Delivered by Hon'ble Dinesh Pathak, J.)

Order on Criminal Misc. Delay Condonation Application No. 01 of 2020 :-

1. Heard Shri Vikas Srivastava, learned counsel for the applicant on the application filed for condonation of delay in filing special leave to appeal under Section 378 (4) Cr.P.C. As per the report submitted by the Reporting Section, there is a delay of 18 days in filing of the present leave to appeal.

2. We have gone through the affidavit filed in support of the delay condonation application. Cause shown in the affidavit filed in support of the delay condonation application is found sufficient for condoning the delay.

3. Accordingly, delay in filing the instant leave to appeal is condoned. Delay Condonation Application is **allowed**.

4. Instant application, on board, is treated having been filed within time as prescribed by law.

Order on Appeal :-

1. Heard Sri Vikas Srivastava, learned counsel for the appellant.

2. The present criminal application for special leave to file appeal (under Section 378 (4) Cr.P.C.) has been preferred by the present appellant (prosecutrix) against the judgment and order dated 23.10.2019 passed by Additional District & Sessions Judge/Fast Track Court (Offence against Women), Rampur in Sessions Trial No. 351 of 2015 (State of U.P. vs. Abrar &

Others) acquitting all the three accused persons (respondents no. 2, 3 & 4) under Sections 376-D, 452, 323 and 506 I.P.C.

3. By means of instant application, applicant seeks the indulgence of this Court to grant special leave to appeal which is arising out of Complaint No. 254 of 2014 moved by the prosecutrix under Sections 376, 452, 504 and 506 IPC against Abrar (respondent no. 2), Hidakat Hussain (respondent no. 3) and Gose Azam (respondent no. 4) in the court of Chief Judicial Magistrate, Rampur leveling allegation against them that in the intervening night of 29/30.08.2013 at about 2:00 a.m., while victim was sleeping alone in her house, all the three accused persons, as mentioned above, armed with Tamancha (country made pistol) entered her house with intention to sexually assault her. While entering into the room, they grabbed the victim and subjected her, on the gun point, to rape and molested her taking a turn one by one.

4. It is further alleged that while she protested, accused have beaten her up by the butt of Tamancha and thrashed her resulted in inflicting several injuries. When she raised alarm, Aftab Hussain, Asiya and other persons have entered into the scene and challenged the accused persons but they ran away by brandishing gun and have threatened them to life, in case anyone tried to follow them. Asiya, while seeing the victim in naked condition, dressed her up. The victim approached the Police Station, Tanda to get her report registered but she received negative response. On 31.08.2013, she got herself medically examined in the District Hospital, Rampur and moved representation before the Superintendent of Police, Rampur but it went in vain. Ultimately, on her complaint after considering her statement under Section 200 Cr.P.C. and statement of her witnesses namely Aftab Hussain (victim's son) and Asiya (victim's sister-in-law) under Section 202 Cr.P.C., the court below has taken cognizance under Section 376-D, 452, 323 & 506 IPC and registered a case as Sessions Trial No. 351 of 2015.

5. Learned court below has framed charges on 07.01.2016 against the accused persons under Section 376-D, 452, 323 & 506 I.P.C.

6. In order to substantiate the accusations, prosecution has examined as many as three witnesses.

7. PW-1 (Prosecutrix) has deposed that the incident took place as long as three years back at about 2:00 a.m. and at that time she was sleeping alone in her room. The accused persons namely Abrar, Hidakat Hussain and Gose Azam entered the room armed with Tamancha and put it on her temple. On awakening, she was threatened to life, if she raises alarm, thereafter she had been sexually assaulted by all the three accused persons by taking a turn one by one. Lastly, when she raised alarm, Aftab Hussain (victim's son) and Asiya (victim's sister-in-law), who were sleeping in another room, entered into the scene. The accused had threatened them that they would be shot dead in case they followed them. Thereafter they jumped over the wall and fled away. Asiya dressed up the victim. In the morning the husband of the victim came back and along with him she went to police station. The Police Inspector had scolded her and refused to register

the report. Next day she appeared before the Superintendent of Police, Rampur but he also did not take any action. Same day, she went to the District Hospital, Rampur and got herself medically examined. Ultimately, she engaged a counsel and filed the compliant.

8. PW-2 (Aftab Hussain) stated that the incident took place on 30.08.2013. He was sleeping with her aunt (Phuphi) in a room which is adjacent to her mother's room. While hearing screaming of her mother, he and his aunt came outside the room and saw that Abrar, Hidakat Hussain and Gose Azam, who are the residents of his village, were coming out of the room of his mother, armed with Tamancha, and warned him that in case he move forward, he would be killed. Thereafter, trio jumped over the wall and ran away. His aunt brought her mother out of the room who had narrated the incident that Abrar, Hidakat Hussain and Gose Azam had sexually assaulted her and thrashed her.

9. PW-3 (Asiya) had stated on oath that the incident occurred approximately a quarter to six years back. On the date of the incident, she was at the residence of her brother Rahim Uddin in village Mundia. She came there to know the well being of his brother. She and Aftab Hussain were sleeping in one room whereas her Bhabhi (prosecutrix) was sleeping in the adjoining room. When the victim screamed, she along with her nephew went to the victim's room. Three persons were coming out of the victim's room armed with Tamancha. When they have been asked about their identity, firstly, Abrar then Hidakat Hussain and then Gose Azam brandished their Tamancha and stated that they came here to assassinate and thereafter they jumped over the wall and ran away. When she entered the room, the victim was lying naked on the double bed and on close sight she saw blue marks and injuries on her body. She dressed her up, who became conscious thereafter. She narrated the entire incident to PW-3 as to what had happened to her in the night at about 2:00 p.m.

10. The accused have made their statement under Section 313 Cr.P.C. They pleaded innocence and false implication in the present case. In addition, Abrar Hussain (respondent no. 2) has stated that false implication has been made, in revenge, to create pressure upon him so that he may enter into a compromise in another criminal case. He stated that Rahim Uddin (husband of victim), his two sons namely Askar and Aftab and brother Amin Uddin and Qutub Uddin fired on his uncle Hidakat Hussain. In that incident, his cousin Hamid had also sustained injuries. In the aforesaid incident, FIR was lodged by Sadakat (brother of Hidakat Hussain). Consequently, a case under Section 307 IPC had been registered in the Police Station Tanda, District Rampur, which is still pending. Remaining accused persons namely Hidakat Hussain and Gose Azam (respondents no. 3 & 4) have also stated same version as stated by Abrar Hussain that they have been falsely implicated to create pressure upon them with respect to the case registered under Section 307 IPC. In support of their defence, accused persons have filed a copy of the FIR registered as Case Crime No. 613-A of 2010 under Sections 147, 148, 149 and 307 IPC, Police Station Tanda District Rampur and also filed Charge-Sheet No. 193 of 2010 and 193-A of 2010.

11. After considering the entire evidence, learned Trial Court vide impugned judgment dated 23.10.2019 acquitted the accused persons (respondents no. 2, 3 & 4) by observing that the prosecution has failed to establish its accusation beyond all reasonable doubts. Consequently, all the accused persons were acquitted by the court below.

12. Learned counsel for appellant has submitted that the Trial Court has illegally acquitted the accused persons (respondents no. 2, 3 4) whereas prosecution has successfully proved it's accusation. He has further submitted that the statement of prosecution witnesses has been misled and misinterpreted by the court below whereas commission of crime is fully corroborated by the statement of the prosecution witnesses and surrounding circumstances.

13. We have carefully considered the facts and circumstances of the present case, submissions advanced by the learned counsel for the appellant and perused the impugned judgment.

14. As per complaint version, on the date of occurrence i.e. intervening night dated 30.08.2013 at about 2:00 a.m. while prosecutrix was sleeping alone in her room all three accused persons (respondents no. 2, 3 & 4) entered the room. Each of them armed with Tamancha had sexually assaulted her and subjected her to rape on the gun point, taking a turn one by one. On screaming, her son Aftab Hussain, Asiya (vicitim's sister-in-law) and others reached on the spot and challenged the accused persons who brandished their Tamancha and threatened them to be killed in case they followed them. Thereafter the accused persons jumped over the boundary wall and ran away. Asiya entered the room and dressed up the victim, who was in naked condition and sustained injuries. In compelling circumstances, wherein neither her report was registered by the police personnel nor the Superintendent of Police had paid any heed to her grievances, she moved complaint which has been entertained and cognizance has been taken by the court below to initiate criminal proceedings against the respondents no. 2, 3 & 4.

15. Learned Trial Court has raised doubt over the facts and circumstances of the present case, wherein the prosecutrix was allegedly sexually assaulted by the accused persons. Learned Trial Court had pointed out several discrepancies and contradictions in the statements of the prosecution witnesses and circumstantial evidences and found them enough to acquit the accused persons. Trial Court has discussed the evidences and pointed out that :-

(i) PW-1 deposed that there was no light in the house at the time of incident whereas PW-2 stated that a wick lamp was lighting at that time.

(ii) It is very astonishing and creates suspicion that PW-2 who is student of Intermediate has not stated the occurrence to any of his relatives and neighbours till morning, even not to his father.

(iii) PW-2 stated that Asiya is real sister of his father who came in morning about 6 O' clock, on the date of incident, whereas Asiya (PW-3) deposed that she reached at her brother's house three days prior to the incident. At page '5', while she had been cross-examined

by another counsel, states that she came one day before the incident.

(iv) PW-2 deposed that he was sleeping with his aunty (Phuphii) in a room adjacent to his mother's room. But, on the contrary PW-3 deposed at page '3' that distance between the two rooms is about 20 steps. Later on at page '5' she states that it was dark in the night on the date of incident and she was sleeping in the room where cattle were tethered. Further she deposed that in one room her sister-in-law (victim) was sleeping and in the verandah of another room she and Aftab were sleeping. In this view of the matter, there is a great contradiction with respect to the place of sleeping of important witnesses i.e. PW-2 and PW-3.

(v) PW-3 deposed that she used to come to her brother's house in a year or six months, but later on she stated that she did not come to the house of his brother.

(vi) There is a great contradiction with respect to the time as to when Asiya reached to his brother's house and, when his brother (husband of victim) had left the house along with his remaining children.

(vii) PW-1 stated that his son Aftab and sister-in-law Asiya came into the room, after hearing her screams, and Asiya had dressed her up whereas Asiya (PW-3) deposed that when she entered the room, victim was lying unconscious on the double bed and while she dressed her up, victim regained consciousness.

(viii) PW-1 deposed that at the time of sexual assault white bed-sheet was spread on the bed and it was soaked with spermatozoa of accused persons. Said bed-sheet had never been produced for examination.

(ix) PW-2 stated that after the incident he did not enter the room of his mother. On the contrary, PW-3 stated on page '6' that while she dressed up the victim, Aftab (PW-2) entered the room.

(x) PW-3 Asiya deposed at page '7' that his brother had carried bedsheet and salwaar to the police station but in the statement under Section 200 Cr.P.C. no such version was put forward by the prosecutrix.

(xi) PW-1 stated on page 5 that she reached the hospital at about 2.00 P.M. and narrated the story, with respect to sexual assault, to the doctor concerned, who had examined the injuries of victim. In the injury report dated 31.08.2013, there is no endorsement with respect to the sexual assault on victim. Even doctor had not opined anything in this respect, which evinces that the prosecutrix had narrated anything about sexual assault. In the application dated 31.08.2013 moved before the Medical Officer, District Hospital, Rampur nothing has been averred with respect to the sexual assault. No one had been produced on behalf of the prosecution to prove the injury report.

(xii) PW-1 deposed that she had not seen as to when the accused entered her room. They thrashed her but blood was not oozing out, whereas, on the contrary, PW-2 Aftab Hussain deposed on page 3 that he saw injuries on the body of her mother where-from blood was oozing out. He further stated that because of darkness he was not sure about the seat of injuries. Even he was not sure about the number of injuries. PW-3 Asiya states that blood was oozing out from the injuries.

(xiii) It is admitted to the prosecution witnesses that right hand, above elbow, of accused Abrar was amputated. In light of the said fact, it is hard to believe that a person, having amputated right hand above the elbow

had raped a lady having a Tamancha in his left hand and, thereafter, jumped over the wall and fled away.

16. Prosecution has admitted old enmity and criminal litigation with accused persons and their family members, in which husband and sons of the victim, were roped in as accused. It was vehemently argued by the defence counsel, before the trial court, that present case has been filed with a purpose to create pressure upon the accused and their family members, so that earlier criminal case filed against the husband of victim and her sons, could be compromised. Documents relating to the said criminal case, which is filed against the husband of victim, had been admitted by the prosecution. It is said that the prosecutrix is cousin sister of father of one of the accused Gose Azam meaning thereby victim is Aunty (Bua) of Gose Azam. PW-1 had admitted that Hidaqat is her cousin brother. In this view of the matter, it is hard to believe that cousin brother along with his nephew had committed rape of the prosecutrix.

17. In criminal law, it is imperative that the prosecution proves its case beyond reasonable doubt and there should be evidence on record to hold the accused guilty. In the matter of rape, in the case of **Narendra Kumar vs. State (NCT of Delhi)** reported in **2012 AIR SCW 3391**, Hon'ble Supreme Court had expounded the law in paragraphs 23 and 24 as under :-

"23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is

read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of."

18. It is imperative that to prove the offence of rape committed by accused, testimony of the prosecutrix alone could be made basis for conviction of the accused persons unless there are some compelling reasons for seeking corroboration. In several decisions, Hon'ble Supreme Court has laid emphasis on the testimony of the prosecutrix unless something can be inferred adverse to the conclusion of conviction. In the matter in **State of Punjab vs. Gurmit Singh and Others**, reported in **(1996) 2 SCC 384**, wherein prosecutrix aged about 16 years was abducted and raped, Hon'ble Supreme Court expounded importance of the testimony of the victim in paragraph 8 of the judgment. The relevant portion of paragraph 8 is being reproduced below :

"8. .....The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and

not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In ***State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550)*** *Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:*

"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. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecurtix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

19. Further in the matter of **Mohd. Ali alias Guddu vs. State of U.P.** reported in **(2015) 7 SCC 272**, wherein 14 years age girl was abducted from outside of her house and raped, Hon'ble Supreme Court had given importance to the deposition of prosecutrix. Paragraph 30 of said judgment is being reproduced below :-

"30. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of

both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

20. In the facts and circumstances of the present case, deposition of the prosecutrix/victim itself is under cloud and requires corroboration. Her testimony cannot be made the solitary basis to convict the accused persons for commission of rape. Testimony of the prosecutrix does not inspire confidence and the circumstantial evidence remotely do not lend any support to the same. It cannot be said that the statement of the victim is not irreproachable and, therefore, there is a requirement for such direct or circumstantial evidence which would authenticate the testimony of the prosecutrix. Unfortunately, deposition of PW-1 is neither worthy of credibility nor is corroborated by PWs-2 and 3. After careful examination, the depositions of PWs-2 and 3 are found explicitly unreliable. Admission made by the prosecutrix with regard to the criminal litigation going on between the parties shows mala fide intention of the prosecution to rope in the accused persons in a criminal case so that pressure can be created upon them for compromise.

21. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views on appreciation of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the Trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna** reported in **(2005) 9 SCC 291**, the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

22. In **Sudershan Kumar v. State of Himachal** reported in **(2014) 15 SCC 666**, the Hon'ble Supreme Court observed thus:-

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled

Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under:

"37. In ***Chandrappa v. State of Karnataka reported in (2005) 9 SCC 291,*** *this Court held:*

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para here-under:

"39. The following principles emerge from the cases above:

(1) The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

(2) The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

(3) The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

(4) The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

(5) If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

23. In **Dilawar Singh v State of Haryana**, **(2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under:

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record."

24. After considering the facts and circumstances of present case and perusal of the impugned judgment and the record filed by the appellant, we are of the considered view and reach to a conclusion that by any stretch of imagination it cannot be held that the prosecution was not known to the accused persons, prior to incident, who are in fact in close relation and already indulged in a previous criminal litigation. In fact, it appears that the prosecutrix had tried to frame the accused persons just to create pressure upon them so that criminal litigation going on between two families could be compromised.

25. It cannot be said beyond reasonable doubt that the victim was subjected to sexual assault and accused persons i.e. respondents 2, 3 and 4 are directly involved in the commission of such crime. There is scope of probabilities and the prosecution had failed to discharge its onus to prove its accusation. There is no proper evidence and material on record and the surrounding circumstances to hold the contesting respondents/accused guilty.

26. If the evidence of the prosecutrix is read and considered in totality of facts and circumstances of the instant case, in which the crime is alleged to have been commissioned, we are of the view that the deposition of the prosecution witnesses does not inspire confidence of this Court. Evidence of the prosecutrix is not worthy of credibility and explicitly unreliable. Therefore, in the present matter, statement of the prosecutrix cannot be made the solitary basis for conviction of the accused. There is no substantial and compelling reasons to reverse the order of acquittal passed by the Trial Court.

27. The prosecution has not disclosed the true genesis of crime. In such a situation of fact, accused persons i.e. respondents 2, 3 and 4 are entitled to get benefit of doubt and their innocence could easily be inferred. Thus, we find no good ground to interfere in the findings of fact returned by the Court below in favour of the accused persons and in our opinion, it should be accepted by this Court.

28. As such, in the light of the observations as made above, special leave to appeal, as prayed, is hereby refused. Consequently, present criminal appeal is **dismissed** in limine.

(2020)08ILR A519
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 79 of 1991

Muluwa & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.K.Srivastava, Sri Vijay Bahadur Shivhare.

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

Criminal Law- Indian Penal Code, 1860- Section 307/34.- Appeal against conviction.

Delay in lodging F.I.R.-
Delay in lodging the FIR cannot be ground to doubt the prosecution case.

Relative witness –
Relationship is not a factor to affect the credibility of the witnesses. (Para – 17)

Minor contradiction –
Can be ignored if does not affect the core of prosecution version.

The entire prosecution evidence, the oral evidence of injured witness is not corroborated with medical report. So the evidence adduced by these witnesses are not cogent and reliable and also does not inspire confidence. (Para – 21)

Benefit of doubt-
The witnesses and circumstances considered together raised strong suspicion about the occurrence and involvement of accused. (Para 21)

The appeal is allowed. (E-2)

List of cases cited:-

1. Tara Singh & ors. Vs St. of Punj., AIR 1991 SC 63.

2. Nagappan Vs State (by Inspector of Police, Tamil Nadu), (2014) 3 SCC (Cri) 660.

3. Sheesh Ram & ors. Vs St. of Raj., (2014) 3 SCC 689.

4. Gopal Singh Vs St. of U.P., (1978) 3 SCC 327.

5. Ramesh Harijan Vs St. of U.P., (2012) 5 SCC 777.

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

1. This criminal appeal has been preferred against the judgment and order dated 18.1.1991 passed by IIIrd Additional Sessions Judge, Hamirpur, District Hamirpur in Sessions Trial No. 31 of 1990, convicting the appellants under section 307/34 I.P.C. and sentenced them to 3 years rigorous imprisonment.

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

The complainant / Ghasita, lodged an F.I.R. Ex. Ka-1 alleging that he is resident of village Subasa, Police Station Lalpura, District Hamirpur and on 24.11.1989 at 4.30 P.M. complainant was returning to his home after casting his vote on the way, when he reached near house of Gangadeen Kumhar, accused, Bhagwan Deen s/o Kartarey Singh and Ram Bahadur Singh, having ballam, Shiv Bahadur Singh was holding gun, Raj Bahadur Singh s/o Sri Bhagwan Deen Singh was holding lathi. Buddan Singh, Muluwa and Gopi Chand were also armed with lathi. Since the aforesaid

person consider enmity with complainant on exhortation of accused Bhagwan Deen Singh, Shiv Bahadur Singh opened fire on complainant with intention to kill the complainant, when complainant raised alarm, witness Sughar Singh, Kallu Singh and Nathu Singh rushed towards the spot and rescued Ghasita. Accused persons were fled outside the village. The F.I.R. was registered against Bhagwan Deen, Buddan Singh, Ram Bahadur, Shiv Bahadur Singh, Raj Bahadur Singh, Muluwa and Gopi Chand under section 307/34 I.P.C. at 9.00 P.M. on same day. After registration of F.I.R. investigation of this case was handed over to Sub Inspector K.M. Sinha (PW-4). On 3.12.1989, IO received injury report of injured Ghasita and recorded statement of injured Ghasita and on pointing out of Ghasita prepared site plan which is proved as Ex. Ka-5. After recording evidence of other witnesses charge-sheet filed by Investigating Officer only against accused Muluwa and Gopi Chand under section 307 I.P.C. and other named five co-accused Bhagwan Deen Singh, Ram Bahadur Singh, Shiv Bahadur Singh, Raj Bahadur Singh, Baddan Singh was exonerated by prosecution. Chargesheet was submitted before the Magistrate on 29.1.1990 and Magistrate has taken cognizance and committed the case to sessions court where it is registered as S.T. No. 31 of 1990 and thereafter, it was transferred to IIIrd Additional Sessions Judge, Hamirpur where the appellants face trial.

3. Learned A.S.J. Hamirpur framed charge against the appellants under section 307 I.P.C. read with 34 I.P.C. The charge read over to the appellants and appellants denied the charge and claimed to be tried. In order to substantiate charge levelled against the appellants, prosecution examined PW-1 / Ghasita as complainant and injured witness, who proved F.I.R. as Ex. Ka-1. PW-2 / Km. Ranno, examined as eye-witness of incident. PW-3 / Dr. Satya Prakash, examined the injured witnesses, who proved the injury report of Ghasita as Ex. Ka-2 and injury report of scriber Bhura Singh as Ex. Ka-3. PW-4 / K.M. Sinha, Investigation Officer of this case, who proved site plan as Ex. Ka-5 and charge-sheet as Ex. Ka-6. He also proved by means of secondary evidence Chick F.I.R. as Ex. Ka-7 and G.D. Entry as Ex. Ka-8. PW-5 / Bhura Singh, who is scriber of written report also supported Ex. Ka-1.

4. PW-3, Dr. Satya Prakash examined the injured Ghasita and during examination following injuries were found on the body of injured Ghasita:-

1.Multiple fire arm injury on back of chest, neck and back of skull . Size of each wound 0.2 cm X 0.2 cm. Depth not taken. No blackening no talloing seen.

2. Contusion 2 cm X 3 cm on right thumb.

3. Face is flushed, smell of alcohol present in expesole air. Gout speed normal, orientation of time and place is present.

4. Result:- Injury no. 1 caused by fire arm and injury no. 2 caused by blunt object. Injury no. 1 kept under observation advise X-ray Injury no. 2 is simple in nature.

Duration is fresh. Patient has consumed alcohol at present is not in state of intoxication. He proved injury report of Ghasita as Ex, Ka-2.

He further stated that on 24.11.1989 at 11.30 he also examined injured Bhura Singh and following injuries were found:-

1. Contusion 3X2 cm on back of left fore arm.

2.Abrasion contusion 2X1/2 cm on backside of left fore arm.

3. Linear abrasion 3 cm on back of left arm.

4. Contusion 6 X 2 cm on forehead 2 cm above left eye-brow.

5. Smell of alcohol present in empty air.

Injury no. 1, 2 & 3 are simple in nature and injury no. 4 kept under observation advise X-ray.

Injury no. 1, 2 & 4 caused by blunt object and injury no. 3 caused by friction. Duration fresh.

Patient has consumed alcohol but he is at present conscious. He proved the injury report of Bhura Singh as Ex. Ka-3.

5. This witness also prepared x-ray report and on the basis of x-ray plate, he proved multiple radiopaque shadow of metallic density pellet seen in skull, two radiopaque shadow of metallic density pellet seen in neck and three radiopaque shadow of metallic density pellet seen in chest. This witness proved x-ray report as Ex. Ka-4.

6. I have heard Sri S.K. Srivastava, learned counsel for the appellants and the learned A.G.A.

7. I n this case prosecution produced PW-1 / Ghasita, as an injured witness as well as main star witness of this case. He deposed in his statement that on 3.12.1990 an incident occurred one years ago from today. At that time M.L.A. Elections were going on and after casting his vote he was returning to his village and when he reached near Ganga Deen Kumhar's house, he saw Muluwa and Gopi Chand were sitting near their house having country made pistol and after looking Ghasita both fired at him with country-made pistol. Due to which Ghasita become unconscious and fell down on the ground. On hearing noise Km. Ranno and Dharam Singh reached at the spot and witnesses the occurrence. Thereafter Kallu Singh and Sughar Singh also rushed to the spot and saw the incident and taken Ghasita to the Police Station in unconscious state and a written report scribed by Bhura Singh (PW-5) and PW-1 put his signature on written report. Ghasita further stated that he told Bhura Singh that only name of Gopi Chand and Muluwa be incorporated in the written report but name of other accused were incorporated by scriber Bhura Singh. He only put his signature on the written report, which is proved by him as Ex. Ka-1 and further stated that afterward he filed an affidavit before the court in which he clearly stated that only Muluwa and Gopi Chand were accused in this case. He further stated that there was old enmity regarding construction of his house between the appellants and PW-1.

8. PW-2 / Km. Ranno, an eye-witness, although he is not named in the F.I.R. as an eye-witness, stated in her statement that Ghasita is her cousin and at 4.30 P.M. and she was sitting at her

Chabutra, saw that Gopi Chand and Muluwa were armed with country made pistol open fire upon Ghasita and due to this Ghasita got injury on his back side and chest. This occurrence witnessed by Dhammu Singh.

9. PW-3 / Dr. Satya Prakash, who has medically examined injured Ghasita and Bhura Singh. As per prosecution version Bhura Singh is neither an injured nor an eye-witness in this case and it is also not clear that in what circumstances and how Bhura Singh had got injury on his body. This witness proved injury report of Ghasita as Ex. Ka-2 and injury report of Bhura Singh as Ex. Ka-3 and he also proved X-ray plate Ex. M-1 & M-2 and X-ray plates depicts several metallic pellets in the head, throat and chest of Ghasita and proved as Ex. Ka-4

10. PW-4 / IO / K.N. Sinha, S.O. Police Station Lulpura had investigated this case. He stated in his statement that on 25.11.1989 after registration of case and after making G.D. entry he reached at the spot but complainant was not present there. After getting injury report on 3.12.1989 he recorded statement of injured, Ghasita, and prepared site plan on pointing of Ghasita and same is proved by I.O. as Ex. Ka-5. That on 9.12.1989 after conducting formalities of investigation, I.O. Submitted charge-sheet against Muluwa and Gopi Chand and proved the charge-sheet as Ex. Ka-6. He further stated in his statement that a Chick F.I.R. was lodged by Rajvant Singh, Head Muharrir, who was posted with him at that time, thus, he proved Chick F.I.R. as Ex. Ka-7 and G.D. Entry as Ex. Ka-8.

11. PW-5 / Bhura Singh, who is the inscriber of written report Ex. Ka-1, stated in his statement that after lodging F.I.R. he alongwith Ghasita and Home-guard were going to Hamirpur for examination of injury by tempo then an accident occurred between tempo and jeep in which home-guard as well as he himself sustained injuries. He further stated that name of Bhagwan Deen Singh, Ram Bahadur, Shiv Bahadur, Raj Bahadur and Buddan Singh were incorporated as stated by complainant on his oral dictation but during investigation without assigning any reason police party exonerated the above named accused so statement of PW-5 is of no use.

12. Learned Counsel for the appellants submitted that lower court without appreciating true facts and evidence wrongly convicted the appellants and further submitted that there are several contradictions between the statements of injured. It is also submitted that as per version of F.I.R., Muluwa and Gopi Chand were armed with lathi only but during examination-in-chief, they have completely turned their version and stated that both were armed with gun. Since only gun shot injury was found on the body of inured so it is not clear now in what circumstances he got fire arm injury. He next submitted that at the time of examination of Ghasita, he was under influence of alcohol, so this possibility could not be ruled out that Ghasita have got injury in any manner elsewhere.

13. Learned counsel for the appellants further submitted that as per version of F.I.R. exhortation was done by Bhagwan Deen Singh. But as per statement of Ghasita name of Bhagwan Deen Singh was not disclosed by him regarding exhortation. He further

submitted that Sughar Singh, Kallu and Balram Singh were named witnesses in the F.I.R. but none of them were examined by prosecution but Investigating Officer cited Dharam Singh and Km. Ranno as eye-witnesses of the case. Prosecution examined Km. Ranno as PW-2, who is a child witness and cousin of injured. He further submitted that Km. Ranno is related and tutored witness. Hence, no reliance can be placed on her testimony. It is next contended that as per version of F.I.R. both appellants were armed with lathi but as per statement recorded in the court during trial both the appellants were armed with country made pistol. PW-1 stated in his statement that both of them fired upon him but only one fire arm injury found on the body of PW-1 during medical examination. Injury no. 2 of PW-1 caused by hard and blunt object but prosecution has failed to explain how injured has sustained this injury. PW-1 stated that one side injury inflicted on front side at a distance of 15 pace but on perusal of injury report one gun shot injury found on back side of injured, which shows that injured was not able to see assailant and appellants were wrongly implicated in this case due to enmity.

Learned counsel further submitted that prosecution witness Bhura Singh stated in his statement that there is an old enmity between the Ghasita and the appellants as one case related to set the house on fire and another is breaking of house. It is also submitted that incident was about 4.30 P.M. and F.I.R. was lodged at 9.10 P.M. and there is no explanation regarding delay in lodging the F.I.R. It is also submitted that prosecution has miserably failed to establish place of occurrence. No blood stain lifted by the Investigating Officer from place of occurrence. No independent witness produced by the prosecution. Neither time nor place of occurrence were proved beyond reasonable doubt. So all the evidence adduced by prosecution is not cogent and reliable and also not inspired the confidence so conviction recorded by learned trial court is frivolous and against established principle of law, hence appeal is liable to be allowed.

14. Learned A.G.A. submitted that there is cogent and credible evidence present before the court. Oral evidence of injured is supported with the statement of PW-2, eye-witness, and ocular version of PW-1 is supported to the injury. He further submitted that there is minor contradiction in the statement of injured witness, so the evidence cannot be disbelieved. Minor discrepancies do not corrode the credibility of prosecution case.

15. On perusal of evidence of PW-1 & PW-2 it is clear that statements are not corroborating with each other on material particulars. It appears that Sessions Court has unmindfully given greater importance to evidence of PW-1 & PW-2 without looking into version of their statements. If credence is given to the statement of PW-1, genesis and genuineness of F.I.R. is undoubtedly questionable.

16. One of the argument of learned counsel for appellants is that occurrence has taken place on 24.11.1989 at about 4.30 P.M. and F.I.R. was lodged at about 9.00 P.M. on same day. There are many factors which have to be taken into

consideration while looking into factum of delay in criminal cases. It is true that court has duty to take notice of delay and examined the same in a back draft of a factual score whether there is any expectable explanation offered by the prosecution but when delay is satisfactorily explained no adverse inference is to be drawn. It is to be seen whether there has been possibility of embellishment in the prosecution version on account of such delay.

In this connection it will be useful to take note of the following observation made by Apex Court in ***Tara Singh & Ors. 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. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the Courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

Thus delay in lodging F.I.R. has been very satisfactorily and reasonably explained which has also been discussed by trial court and in this case delay is not at all fatal for prosecution case.

17. So far as the second argument is concerned that PW-2, Km. Ranno is related witness examined by the prosecution. No other independent witness is produced so no reliance can be placed in the statement of interested and related witnesses.

In ***Nagappan v. State (by Inspector of Police, Tamil Nadu) reported in (2014) 3 SCC (Cri) 660*** Hon'ble the Apex Court in paragraph no. 10 has observed as under :-

"10. As regards the first contention about the admissibility of the evidence of PW 1 and PW 2 being closely related to each other and the deceased, first of all, there is no bar in considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and have not supported the case of the prosecution. The prosecution heavily relied on the evidence of PW 1 & PW 2. The trial

court and the High Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without considerable contradiction as claimed by their counsel. This Court, in a series of decisions, has held that where the evidence of "interested witnesses" is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness. " (emphasis added)

In ***Sheesh Ram and others v. State of Rajasthan reported in (2014) 3 SCC 689*** Hon'ble the Apex Court in paragraph no. 10 has observed as under:-

"10. It is submitted that all these witnesses are related and therefore their evidence cannot be relied upon. Assuming they are related to each other and, hence, interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect. It has to be scrutinized with caution and can be accepted if it is found reliable."

Hence, statement of a relative or interested witness could not be thrown out only on the ground that the witness is relative or interested witness, rather, such statement is to be scrutinized with caution.

Hon'ble the Apex Court ***in Gopal Singh Vs. State of U.P. reported in (1978) 3 SCC 327*** has observed in paragraph no. 11 as under:-

"11. True, they were interested witnesses, related to the deceased. Far from undermining the circumstances of the case, it guaranteed the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit. In short, the murder charges had been proved to the hilt against the appellant."

As the law propounded by apex court statement of relatives and interested witnesses could not be thrown out only on the ground that witnesses are relatives. Rather such statement of the witnesses is to be scrutinized with caution. It is made clear that related or interested witnesses will never like to save the real culprit and falsely implicate some other innocent person. In this case alleged occurrence has taken place near the house of the deceased and presence of these witnesses are quite natural. Hence, no adverse inference can be drawn that witnesses are related and interested witnesses. In the backdrop of the legal situation now it is to be seen as to whether the prosecution has been succeed to prove the charges against the accused.

18. On perusal of statement of PW-2 / Km. Ranno is not cited as an eye-witness in the F.I.R. During investigation statement of PW-2 is recorded by Investigating Officer as an eye-witness. She deposed in her testimony that she saw the occurrence and she clearly deposed that both accused/ appellants, Muluwa and Gopi Chand, were armed with gun and both of them inflicted gun shot injury to Ghasita on his head, back and chest. But perusal of medical report shows that only one gun shot injury found on the back of chest and on the back of skull of Ghasita. No such injury

inflicted on the chest of Ghasita. She clearly deposes that no stick injury was found on the body of Ghasita. Entire perusal of evidence of PW-2 is full of contradictions and imbalances and statement of PW-2 did not inspire confidence.

19. So far, the statement of PW-1 / Ghasita, injured witness, is concerned he clearly stated in his chief that both the accused / appellants were armed with country-made pistol and both of them fired upon Ghasita and further stated that only one fire arm injury occurred in his head but during cross-examination PW-1 / Ghasita stated that only single fire was launched by Gopi Chand and other appellant Muluwa did not fire upon Ghasita. So on perusal of cross-examination of PW-1 this is vital contradiction on the deposition of injured witness so in this case section 145 of Evidence Act is applied. PW-1 makes contradictory statement in his earlier statement deposed in his chief-examination. Thus we may say that PW-1, injured, changed his entire version of F.I.R. On perusal of F.I.R. it transpires that gun shot injury inflicted by Shiv Bahadur Singh but he never stated in his statement regarding involvement of Shiv Bahadur Singh.

20. Hon'ble Apex Court in ***Ramesh Harijan Vs. State of U.P. (2012) 5 SCC 777*** held that "If there are no material discrepancies or contradiction in the testimony of the witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, exaggerations, embellishment etc. The distinction between material discrepancies and normal discrepancies are that, minor discrepancies do not corrode the credibility of a party's case but material discrepancies so".

21. On perusal of the entire prosecution evidence, the oral evidence of injured witness is not corroborated with medical report. There are several discrepancies and contradictions which corrodes the credibility of prosecution case. So the evidence adduced by these witnesses are not cogent and reliable and also does not inspire confidence. Thus, this court is of the considered opinion that there is no scope to sustain conviction of the accused / appellants for the offences under section 307/34 I.P.C. The accused / appellants are entitled to benefit of doubt. As the prosecution has not been able to prove its case beyond all shadow of doubts. Resultantly, for the reasons mentioned above, **the appeal stands allowed.**

22. **The impugned judgment, conviction order and sentence passed by learned trial court is hereby quashed and set aside. The accused / appellants are acquitted from all the charges levelled against them.**

23. Appellants are on bail. They need not to surrender.

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

(2020)08ILR A526
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 414 of 1991

Santosh & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ravindra Singh, Sri Akhilesh Singh, Sri Shivam Yadav, Sri Anand Kumar Yadav, Sri Ajay Yadav

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

Criminal Law- Indian Penal Code, 1860- Section 376, 366.- Appeal against conviction.

Testimony of prosecutrix.
When prosecutrix who was abducted or kidnapped and she has ample opportunity to raise protest but neither she protested nor any alarm raised by victim. It cannot be believed that she was abducted and raped against her consent. (Para -22)

Prosecutrix stayed in hotel alongwith the accused persons for a month but in the FIR no time and date is clearly mentioned and she never raised any alarm or protest when she was accompanying forcibly. (Para – 30)

Testimony of the prosecutrix, is not sustainable. Thus, the finding recorded by trial court cannot be affirmed. (Para - 32).

The appeal is allowed. (E-2)

List of cases sited:-

1. Radhu Vs St. of M.P.(2007) 12 SCC 57.

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

1. This criminal appeal has been preferred by the appellants-Santosh and Bhagwan Das against the judgement and order dated 7th March, 1991 passed by the learned Special Judge (Dacoity Affected Area, Mainpuri) in S.T. No. 471 of 1987 whereby the appellants have been convicted under section 376 IPC for 10 years rigorous imprisonment and under Section 366 IPC for 7 years rigorous imprisonment. Both the sentences run concurrently.

2. Brief facts of this case is that PW 1, Ranno Devi lodged the FIR on 28.9.1987 at 11:30 a.m. against the appellants with allegations that one month prior to the FIR when the complainant was going to her paternal home to in-laws house alongwith her husband, due to being late from his parental house it was too dark for him to reach at Jasrana. She stay at the Garden outside of Jasrana bus stand. Victim went to the grooves due to urination where victim was overpowered by three accused persons namely, Baghwan Das, Santosh Badhai and Jogendar Lodha had committed gang rape upon her one by one. When the victim become unconscious, all the accused persons took her away to Aligarh and detained to victim at Aligarh hotel upto 26.9.1987 for about one month and she came back to his mother house at Vangaon District Etah after getting opportunity. It is also alleged in the FIR that the accused persons also taken her payal, kardhani and kundal. When the victim have got an opportunity to escape from the custody of the accused after a lapse of one month, victim was returned back to her parental house at Etah and written report Exhibit Ka 1 typed by victim and submit the written report to S.S.P. Etah and under direction of S.S.P. Etah chik FIR Exhibit Ka-8 was registered against the appellants under Sections 392, 366 and 376 IPC at P.S. Jasrana.

3. Investigation of this case was entrusted to Khem Singh (PW 3), Station

House Officer and during investigation he recorded the statement of victim and on the pointing out of the victim prepared site plan, Exhibit Ka-4. After that victim was medically examined by (PW-4) Dr. Vimla Sharma who prepared medical examination report, Exhibit Ka-7 for determination of the age of the victim. She was referred to radiologist for x-ray. Dr. S.C. Dubey (PW 5) prepared x-ray report, Exhibit Ka-9. After completing the formalities of investigation, Investigating Officer submitted the charge sheet, Exhibit Ka-5 against the appellant Santosh on 9.11.1987 and against Bhagwan Das on 4.12.1987 under Sections 366, 376, 392 IPC. Investigating Officer also filed the charge sheet against co-accused Jugendra as absconder. On the basis of this charge sheet, cognizance was taken by the Magistrate and after committal before the sessions court, this case was transferred to Special Judge. (Dacoity Affected Area), Mainpuri for trial wherein the charges against the appellants-Santosh and Bhagwan Das were framed under Sections 366, 376 and 392 IPC. Charges were read over and explained to the accused in "hindi'. The appellants denied the charges levelled against them and claimed to be tried.

4. During trial following witnesses were examined:-

(PW-1) is the victim-Ranno Devi. (PW-2) is Om Prakash who is reported to be the brother in law and eye-witness (PW-3) is the Investigating Officer Khem Singh and (PW-4) Doctor Vimla Sharma and (PW-5) Doctor S.C. Dubey and (PW-6) is constable Tahir Singh who proved the chik FIR as Exhibit Ka-8.

5. After examination of all the witnesses, statement of accused persons were recorded, in which, appellants denied the charges and submitted that the false evidence adduced by the witnesses and further stated that they have previously used to visit the house of the complainant's father and appellants have been implicated due to suspicion and old enmity.

6. After hearing both the parties learned sessions judge convicted the appellants under Sections 366, 376 IPC and exonerated the appellants under Sections 392 IPC.

7. Being aggrieved with the order of the learned trial court, this appeal has been preferred by the appellants.

8. I have heard the learned counsel for the appellants and learned AGA Sri J.P. Tripathi and perused the record.

9. Learned counsel for the appellants submitted that no time and date has been mentioned in the first information report and it is further submitted that the FIR lodged against the appellants is after one month of the incident. But there is no plausible explanation on behalf of prosecution. As per prosecution, during one month she remained with the appellants but during this period, she never raised any alarm at any place. In this period victim travels from bus and nowhere, she has made the protest against the accused persons whereas she had ample opportunity to raise the alarm against the accused which shows that the victim was consenting party, she was major at the time of incident and she visited several places on her own volition. It is next submitted that this occurrence was happened when husband of the victim-Kunwar Pal left the victim in Jasrana bus stop but neither

Kunwar Pal lodged any FIR regarding kidnapping or abduction nor prosecution did examine Kunwar Pal. It is also submitted by the learned counsel for the appellants that PW 1-victim has also specifically stated in her statement that her cloths i.e. patikot, blouse and dhoti were stained with blood when the alleged incident was taken place. But the same was neither handed over to the Investigating Officer during the course of investigation nor any recovery memo was prepared which shows that the whole concocted and fabricated story was narrated by the victim.

10. Learned counsel or the appellants further contended that PW-2 Om Prakash has stated in his statement that the husband of the victim-Kunwar Pal met him and he clearly stated that his wife has gone elsewhere and he saw all the accused with his wife, so, he should made the protest in query but it is surprising that he did not made any protest, which shows that the PW-2 has not seen the occurrence. It is further submitted that the Investigating Officer PW-3 Khem Singh in his statement stated that husband of the victim-Kunwar Pal has lodged simple NCR under Section 498 regarding the incident which shows that the entire prosecution story is highly doubtful. It is also submitted that the conduct of the victim is highly doubtful which shows that she was voluntarily entered into the relationship with the accused-appellants and when the victim has returned back to her parental house then on the behest of parents she lodged the false and frivolous FIR against the appellants in order to show his innocence. It is also submitted that PW-4 Doctor Vimla Sharma who has medically examined the victim she clearly stated that the victim was pregnant of 12 weeks and she was also found habitual of sexual intercourse. As per statement, it clearly shows that no force or fraud or coercion was used against the victim which shows that prosecution story of rape is absolutely false, frivolous and baseless. It is also submitted that neither the victim nor PW-2 Om Prakash has mentioned in his statement, the date and time of the incident.

11. It is further submitted that prosecution has failed to establish the prosecution story and version of the prosecution is not supported with documentary evidence. It is also submitted that there are material contradictions in the statement of victim. Prosecution has failed to prove the case beyond the shadow of doubt. The version narrated by the victim is highly improbable, false and frivolous. So the appeal of the appellants is liable to be allowed.

12. Learned AGA vehemently opposed the prayer of appellants counsel and submitted that the learned trial court properly appreciated the evidence. Delay of lodging the FIR in rape cases is not unnatural. The victim was sexually harassed by the appellants and the appellants committed gang rape upon the victim without her consent and against her will. Main argument on behalf of the State is that it is matter of committing gang rape and prosecutrix cannot be consenting party to several persons simultaneously.

13. Submission of learned AGA is that absence of injuries on private parts cannot be ground to hold that the appellants cannot be convicted.

14. It is also submitted by the learned AGA that investigating agency not conducting investigation properly or was negligent cannot be mere ground to discredit the testimony of victim.

15. It is also submitted that as per Section 114 of Evidence Act, "where sexual intercourse by the accused/appellant is proved and the question is whether it was without the consent of the woman-victim alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent," so there is irrebuttal presumption against the appellants. Hence, the appeal of the appellants deserves to be dismissed.

16. Having considered the rival submission advanced by learned counsel for the appellants as well as learned AGA, this Court clearly proceed to examine the evidence as adduced by the prosecution.

17. First of all, I discussed the medical examination of the victim. Medical Examination of the victim was conducted by PW-4 Doctor Vimla Sharma at Female Hospital, Shekohabad, Mainpuri. In the external examination, no external injury had been found by P.W.-4 except one contusion on the right thigh of the victim. In internal genital examination, she found hymen membrane absent. No other injury was found on the private part of the victim and besides this, she had also detached 12 weeks pregnancy. On the opinion of this witness that she was usual to intercourse and for determination of age, she had referred the victim for x-ray of the elbow and wrist joint. On the basis of x-ray report Exhibit Ka-9, PW-4 Dr. Vimla Sharma have determined the age of victim about 20-21 years. Thus at the time of alleged incident, victim was major.

18. One of the argument of the learned AGA is that presumption under Section 114 A of the Evidence Act is that the Court shall presume that the victim did not give her consent to commit sexual intercourse. The standard and onus of proof in the case of rape has been changed by insertion of Section 114 A of the Evidence Act. It has only created a presumption qua the consent of victim. Section 114 A provided that in a prosecution for rape under sub Section (2) of Section 376 IPC when there is an allegation of rape, the question whether it was without consent of the victim, the Court shall presume that she did not give her consent, in case of rape where it is established that there has been intercourse and if victim states in her evidence before the Court that she did not consent then the Court shall presume that she did not consent.

19. The Evidence Act nowhere say that the victim's evidence cannot be accepted unless it is corroborated in material particulars. The victim is undoubtedly a competent witness under Section 118 of Indian Evidence Act and her evidence must receive the same weight as attached to an injured witness in case of physical violence. The same degree of care and caution must attached in the evaluation of her evidence as in the case of an injured complainant or witness what is necessary that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of

charge levelled by her. If the Court keep this mind and feels satisfied that it can act on the evidence of the victim there is no Rule of Law or practice incorporated in Evidence Act which it requires it to look for corroboration of evidence. If for some reason, the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

20. Now the following questions arise-

(i) whether the testimony adduced by victim is cogent and credible.

(ii) whether the evidence adduced by victim inspire confidence.

(iii) whether the sexual intercourse done by appellants without her consent.

21. Victim-PW 1 in her statement stated that she reached at Jasrana at about 5:30 in the month of August so there is no question of darkness in the evening of 5:30 pm. As per evidence that the victim reached Jasrana bus stand alongwith her husband but in this case neither the missing report nor the abduction report lodged by husband; only the NCR under section 498 IPC lodged by husband-Kuwarpal against the accused-appellant Santosh. In this case, Kunwarpal-husband of PW-1 (victim) is the star witness but neither the statement of victim was record under Section 161 Cr.P.C. nor Kunwarpal examined during trial by the prosecution.

22. As per testimony of the proseuctrix, she was abducted or kidnapped from Jasrana bus stand afterwards she forcibly taken by the appellants to Aligarh where she was stayed in an hotel near the Aligarh bus stand for about a month. During stay at hotel, she had ample opportunity to raise the protest or alarm but neither the protest nor any alarm raised by the victim so it cannot be attributed that she was abducted and raped against her consent. Her silence in the opinion of this Court, amount to consent on her behalf.

23. This Court is quiet conscious of the legal position that normally the Courts should not discard the version of prosecutrix because she did not gain anything in putting her own honour. Stake by false implication of appellants but at the some time, the Courts should also bear in minds that in changed values of our society, false charges of rape also cannot be ruled out.

24. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case as has been laid down by Hon'ble Apex Court in the case of ***Radhu Vs. Sate of Madhya Pradesh*** reported in ***[(2007) 12 SCC 57.***

25. There are two places where the rape is alleged to have been committed, first is the junri field near Jasrana town bus stop where alleged gang rape committed by the appellants and where she was abducted by appellants and second place of occurrence is the hotel situated near Aligarh bus stand where

victim is said to have been kept for one month and during this period, gang raped by the appellants but no investigation regarding this place has been done by the Investigating Officer. Neither the Investigating Officer visited the hotel in Aligarh nor recorded the statement of said hotel employees. No site plan was prepared regarding second place of occurrence. In this case, Investigating Officer conducted the investigation in a very cursory manner and submitted the charge sheet without proper investigation.

26. Prosecutrix specifically stated in her statement that during alleged gang rape her cloths i.e. patikot, blouse and dhoti were stained with blood when the alleged incident was taken place. But the same was neither handed over to the Investigating Officer during the course of investigation nor any recovery memo was prepared which shows that the prosecution version is not supported by corroborative piece of documentary evidence.

27. In this case PW-2 Om Prakash (Nandoi of the victim) was also examined in his statement and has stated that the husband of the victim-Kunwar Pal met him and has stated that his wife was gone elsewhere. Thereafter, Kunwar Pal thought that his wife was gone alongwith Santosh and other persons and he has also sated that he has seen his wife alongwith three accused persons while going on by bus but PW-2 neither make any resist against the appellants nor victim told to PW 2 that she was abducted by the appellants which shows that eyewitness account of PW-2 is highly doubtful.

28. It has also mentioned that the appellants Santosh and Bhagwan Das were also resident of the same village which was the parental home of prosecutrix and further also she visited the parental house of the victim prior to the incident. So this possibility cannot be led that the appellants falsely and illegally implicated in the present case on account of village enmity and party bandi.

29. In the present case, defence of the appellants through out had been showed that he has been falsely roped by the victim in the present crime. Defence has not adduced any evidence in his defence. In the opinion of this Court the appellants, if not entitled to clear acquittal on charge of kidnapping, abduction as well as gang rape are at least entitled to benefit of doubt considering the nature of evidence adduced by victim. Hence, the contention of the appellants even for offence under Section 366 and 376 (2)(g) cannot be sustained.

30. On perusal of the entire evidence produced by prosecution neither FIR lodged by the victim herself with the allegation that all the accused persons have committed rape upon her while she was going alongwith her husband and reached at bus stop Jasrana while she was attending the natural call near Jasarana bus stop thereafter she has gone Etah by bus alongwith all the accused persons. Subsequently, she went to Aligarh by bus and stayed in hotel alongwith the accused persons for a month but in the FIR no time and date is clearly mentioned and she never raised any alarm or protest when she was accompanying forcibly with the accused persons and travelled in bus. She never made any alarm at the bus stop where the first incident was taken place. It shows that she has visited

several places alongwith the accused persons, according to her own sweet will.

31. Though the whole prosecution story is unreliable, belies logic and the learned trial court misled, itself, in relying upon the prosecution witnesses which are contrary to each other which do not inspire confidence. The complete testimony of the victim being unworthy of credence, unreliable and bundle of lies could not have formed the basis for the conviction of the appellants, on the basis of illegal and inadmissible evidences.

32. Therefore in the facts and circumstances of the case, the conviction of the accused on the basis of solitary testimony of the prosecutrix, is not sustainable for the reasons discussed above. Thus, the finding recorded by trial court cannot be affirmed. Thus, this Court is of considered opinion that there is no scope to sustain the conviction of the accused appellants for commission of offence under Section 376 IPC or under Section 366 IPC and as a result, the accused appellants are entitled to the benefit of doubt as the prosecution has not been able to prove its case, beyond all reasonable doubts. Resultantly, for the reasons mentioned above, the appeal stands ***"allowed".***

33. The impugned judgement and order of conviction and sentence passed by learned trial court is, hereby, ***quashed*** and ***set aside***. The accused appellants is acquitted of the charges levelled against them.

34. Since, the appellants are on bail, they need not to surrender.

35. Office is directed to transmit lower court record to the court below alongwith a copy of this order.

(2020)08ILR A533
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 884 of 1991

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

Counsel for the Appellants:
Sri K.K. Singh, Sri Kaushal Kishore Mishra, Sri Shyam Sunder Mishra, Sri Brij Raj Singh.

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

Criminal Law- Indian Penal Code, 1860- Section 364 304/34, 325/34.- Appeal against conviction.

Delay in lodging F.I.R.-
Neither fatal nor illegal.

Testimony of interested/ relative witnesses –
The prosecution case cannot be rejected only on the ground that witnesses are relatives of deceased but their evidence should be subjected to a close scrutiny. (Para-30)

Delay in lodging F.I.R.-
Delay is not at all fatal for prosecution case. (Para- 29)

Minor contradiction –
Can be ignored if does not affect the core of prosecution version. (Para- 35)

Applicants are very old person and more than 31 years has already elapsed and two named appellants died during pendency of appeal. Conviction upheld sentences reduced to the

period of imprisonment already undergone against the remaining appellants. (Para-36)

Appeal partly allowed. (E-2)

List of cases cited: -

1. Rajendrar Harakchand Bhandari & ors. Vs St. of Maharashtra & anr. (2011) 13 SCC 311.

2. Badal Murmu & ors. Vs St. of W.B. (2014) 3 SCC 366.

3. Pritam Singh Vs St. of Delhi 1995 0 Supreme (Del) 347.

4. Tara Singh & ors. Vs St.of Punj., AIR 1991 SC 63.

5. St.of Punjab Vs Hardam Singh, (2005), S.C.C. (Cr.) 834.

6. Dalbir Kaur Vs St. of Punjab, AIR 1977 SC 472.

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

1. This criminal appeal has been preferred by appellants against the judgment and order dated 27.04.1991, passed by 4th Additional Sessions Judge, Fatehpur, in S.T. No. 439 of 1989 (State Vs. Ram Swaroop and another), in which the appellant was convicted under Section 304/34, each of them sentenced to undergo rigorous imprisonment for five years, 2 years R.I. under section 325/34 IPC. Both the sentence shall run concurrently

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

3. The informant Amar Singh lodged the NCR in P.S. Lalauli, District Fatehpur with the allegation that on 14.06.1989 at about 5.30 p.m. Smt. Sudamiya wife of first informant was sitting along with deceased Shiv Nandan at the door of her house. All the 4 appellants/accused having armed with *lathi* and *danda* reached there and due to some altercation between the appellants and the deceased, the appellants assaulted Shiv Nandan with l*athi* and *danda*. Sudamiya tried to save her brother Shiv Nandan then she was also beaten by the accused appellants. Due to which Smt. Sudamiya and Shiv Nandan received injuries and also stated in NCR that there is litigation between the appellants and first informant regarding some land dispute and due to this reason the appellants assaulted both Smt. Sudamiya and Shiv Nandan. The informant lodged oral report at about 10.30 p.m., it was recorded as NCR No. 44, under sections 323 IPC, which is proved as Ext. Ka 1. Sudamiya and Shiv Nandan, who were medically examined at PHC Bahuwa and Shiv Nandan succumbed due to his injury at PHC Bahuwa on 15.06.1989 at midnight afterward the NCR was converted into under section 302 IPC a cognizable offence by means of GD No. 22 time 14.45 on 15.06.1989 as Ext. Ka-4.

4. Investigation of this case was entrusted to the Investigating Officer.

5. Before the case was converted under section 302 IPC, Sub Inspector M.P. Singh prepared inquest report of the deceased Shiv Nandan and the dead body was sent to District Hospital Fatehpur, for autopsy and the same was done by Dr. M.N. Raizada.

6. Sudamiya was medically examined in PHC Bahuwa. Lower part of the shaft of radius and ulna of injured Sudamiya was found fractured on X-ray. Then one more section 325 IPC was added.

7. Investigation of this case was handed over to Sri Siraj Ahmad, Investigating Officer, and during investigation Siraj Ahmad prepared site plan on pointing out of the first informant, which is proved as Ext. Ka-8 and after recording the evidence of witnesses plain earth and blood stained earth were recovered, which is Ext. Ka-9. After recording the statements of witnesses and completing formalities of the investigation, Investigating Officer has submitted charge-sheet against appellants under section 302/34 and 325 IPC.

8. All the four accused-appellants were charged under sections 302/34, 323/34 and 325/34, which was framed on 22.09.1989 and were read over to accused. They pleaded not guilty and claimed to be tried.

9. In order to substantiate the charge levelled against the appellants, prosecution examined P.W. 1 Amar Singh, complainant/first informant who reported himself to be as eyewitness and proved NCR as Ext. Ka 1. P.W. 2 Ram Prasad, he himself reported to be as eyewitness and P.W. 3 Constable Brajlal Pandey, who proved the GD entry No. 28 10:30 on 14.06.89 regarding lodging of the NCR as Ext. Ka-3. P.W. 3 has also proved the GD Rapat No. 10 time 10:30 on 15.06.1989, the memo sent to PHC Bahuwa regarding death of the deceased Shiv Nandan and proved this GD as Ext. Ka 3 and it was also proved the conversion GD Sl. No. 20 time 14.45 dated 15.06.1989 as Ext. Ka. 5. P.W. 4 is Sudamia injured eyewitness, P.W. 5 Dr. M.H. Khan, who prepared the X-ray report of injured Sudamiya and proved X-ray report as Ext. Ka 5. P.W. 6 Dr. B. Kumar Pateria, who examined the deceased Shiv Nandan in PHC Bahuwa and proved injury report as Ext. Ka-6 and P.W. 7 is the investigating officer, who proved the site plan Ext. Ka 8 and recovery memo of blood stained and simple earth Ext. Ka-9 and charge-sheet Ext. Ka-10. Other papers of the prosecution was admitted by the defence counsel under Section 294 Cr.P.C. Panchayatnama as Ext. Ka-11, letter to CMO Ext. Ka-12, Photo nash Ext. Ka 13, letter of R.I. Ext. Ka-14, report of P.S. Lalauli Ext. Ka 15, Specimen seal Ext. Ka 16, letter of Medical Officer to S.O. Lalauli regarding information of death of Shiv Nandan as Ext. Ka-17, letter of Medical Officer regarding handing over the dead body Ext. Ka-18, Injury report of injured Sudamiya Ext. Ka-19 and supplementary injury report Ext. Ka-20.

10. In this case, the prosecution relied the evidence of P.W. 1 to P.W. 7 and Ext. Ka-1 to Ext. Ka-10. After examination of all the witnesses the accused-appellants were examined under Section 313 Cr.P.C. and stated that their false implication due to enmity. They denied the prosecution evidence.

11. No defence witness has been examined by the defence.

12. After conclusion of trial, learned trial court convicted the appellants as aforesaid. During trial the appellant no 1 Ram Swaroop and appellant no. 4 Chandra Sewak reported to be no more and the **appeal stands abated against appellant nos. 1 and 4.**

13. Heard learned counsel for the appellants, learned A.G.A and perused the record.

14. Learned counsel for the appellants submitted that time of incident is 5.30 p.m. but NCR was lodged at 10.30 p.m. on 14.06.1989. There are five hours delay for lodging the NCR and the delay has not been explained which creates doubt in the prosecution story, it cannot be ruled out that the FIR lodged against the appellants with due deliberation and fabrication.

15. It is also submitted by learned counsel for the appellants that only the interested and related witnesses produced by the prosecution. P.W. 1 is the husband of injured Sudamiya P.W. 3 and brother in-law of the deceased Shiv Nandan. P.W. 2 is the interested witness as the litigation pending between P.W. 2 and appellants and no independent witnesses is produced by the prosecution, so no reliance can be placed on the evidence of interested and relative witnesses.

16. Next submission is that place of occurrence is not intact although blood stained and plain earth were taken by the Investigating Officer, but the same was not sent for Senologist examination, so the prosecution failed to establish the place of occurrence. It is also submitted that the complainant P.W. 1 was examined by the prosecution as eyewitness. If P.W. 1 had seen the occurrence and he was present at the place of occurrence, than naturally he should also suffered injures, so the presence of P.W. 1 at the place of occurrence is highly doubtful. So, no reliance can be placed on the evidence adduced by P.W. 1, hence the evidence led by P.W. 1 is fabricated and manufactured.

17. It is also submitted that injured witness P.W. 4 Sudamiya in her statement clearly stated that apart from convicted accused, two others accused namely Daya Shankar and Rama Shankar have also participated in this crime and beaten the injured, but Daya Shankar and Rama Shankar were not named in the FIR, so the whole prosecution story is doubtful. It is further submitted that deceased Shiv Nandan, when he reached to the police station, he was in conscious position, but there is no dying declaration.

18. Lastly, learned counsel for the appellants submitted that the date of incident was 14.06.1989 and more than 31 years have been elapsed and in such a long time no useful purpose would be served, if the surviving appellants again sent to jail to serve out the sentence. Regarding these, it is requested that quantum of sentence be reduced as period already undergone, learned counsel for the appellants has relied upon the following judgment:-

1. **Rajendrar Harakchand Bhandari and others vs. State of Maharashtra and another (2011) 13 SCC 311**, in which the Hon'ble Apex has held that;

".....The appellants are agriculturists by occupation and have no previous criminal background. There has been reconciliation amongst parties; the relations between the appellants and the victim have become cordial and prior to the appellants' surrender, the parties have been living peacefully in the village. The appellants have already undergone the sentence of more than two-and-a-half years. Having regard to these circumstances, we are satisfied that ends of justice will be met if the substantive sentence awarded to the

appellants is reduced to the period already undergone while maintaining the amount of fine" .

2. **Badal Murmu and others vs. State of West Bengal (2014) 3 SCC 366,** in which Hon'ble Apex Court converted the case from under Section 302 read with section 149 IPC to Section 304 Part II read with Section 149 IPC awarded the sentence of 14 years to meet the ends of justice.

3. **Pritam Singh vs. State of Delhi 1995 0 Supreme (Del) 347** in Delhi High Court "the conviction of the appellant converted from Section 307 IPC to Section 326 IPC. Considering the age of the appellant on the date of occurrence and looking into circumstance in which offence committed and the nature of injury caused to the victim, Delhi High Court sentenced the appellant is reduced to the sentence already undergone.

19. Learned AGA vehemently opposed and submitted that the witnesses produced by the prosecution clearly established the case against the appellants. It is also submitted that P.W. 1 was present on the spot, but he could not save the deceased as well as his wife, P.W. 4. On this basis that P.W. 1 had not received injuries it cannot be said that he was not present on the spot. It is also submitted that there is no delay in lodging the NCR, because first of all, after the incident the injured P.W. 4 Sudamiya and deceased Shiv Nandan were brought to the hospital for treatment. After admitting the injured and deceased to the PHC Bahuwa, the complainant P.W. 1 went to police station for lodging the report, so in this case the delay is clearly explained and no doubt could be raised for delay in lodging the NCR. It is also submitted that oral evidence of P.W. 1 complainant, P.W. 2 Ram Prasad eyewitness and P.W.4 Sudamiya have clearly established the prosecution version and oral evidence of these witnesses have fully corroborated by medical evidence and the prosecution has established the case beyond shadow of doubt against the appellants and as such the appeal is liable to be dismissed.

20. Learned AGA has submitted that so far as the reduction of sentence is concerned in this case, P.W. 4 got grievous injury and the appellants have common intention allegedly commit the murder of Shiv Nandan by means of *lathi* and *danda*, so learned trial court already show the leniency while sentencing the appellants for 5 years rigorous imprisonment under section 304 part II.

21. In these circumstances, there is no occasion to reduce the sentence already undergone by the appellants and case law cited by the appellants is not applicable in present case.

22. In this case, prosecution has examined 7 witnesses the first of all, I discussed the statement of Dr. M.H. Khan, P.W. 5. He has stated in his statement that on 19.06,1989, he was posted in the District Hospital Fatehpur. As per X-ray report of Smt. Sudamiya shaft of radius and ulna bone of lower part was fractured and advised X-ray report, which is proved as Ext. Ka-5. Dr. M.H. Khan opined that injury was grievous in nature. This witness has also proved the autopsy report of the deceased Shiv Nandan as Ext. Ka-6, by adducing

secondary evidence which is prepared by Dr. Raizada, who reported to be no more at the time of examination of P.W. 5.

23. P.W. 6 Dr. B. Kumar Pateria has stated that on 14.06.1989 he was posted as Medical Officer In charge at PHC Bahuwa, at about 9.00 p.m. he examined Shiv Nandan and found the following injury:-

1. Lacerated wound 2cmx 2cm x muscle deep on the right side of forehead.

2. Lacerated wound 6cm x ½ cm. X skin deep on the right side of vertebrae of skull.

3. Lacerated wound 6cm x 1cm x muscle deep on the occipital region of skull.

4. Contusion 7cm x 2- ½ cm. On the right side of chest 7cm below right nipple.

5. Contusion 8cm x 3cm on the lateral side on the middle right forearm.

6. Abrasion 1cm x 1 cm. On the right elbow joi8nt, backside.

7. Contusion 8cm x 3cm on the right upper arm on the outer side.

8. Contusion 7cm x 4cm on the back side of right portion of abdomen.

9. Abrasion 3cm x 2cm on the back side of the right chest.

10. Contusion 6cm x 3cm on the outer side of right thigh.

11. Contusion 3cm x 2- ½ cm. On right side thigh, 9cm above the right knee joint on the front side.

12. Abrasion 3m x 2- ½ cm on the front of left thigh.

Injury nos. 1, 2 and 3 under observation and advised X-ray and rest injury are simple in nature. All the injury were caused by hard and blunt weapon like lathi and danda. Injury report Ext. Ka 9.

24. This witness has further stated that the deceased died about 12.15 midnight.

25. Injury report of P.W. 4 Sudamiya was admitted by appellant counsel during trial under section 294 Cr.P.C. as Ext. Ka-19.

26. So far as the first contention of the appellants is that the occurrence has taken place on 14.06.1989 at about 5.30 p.m. and NCR was lodged on 14.06.1989 at about 10.30 p.m. in P.S. Lalauli, District Fatehpur, so the FIR was lodged against the appellants about 5 hours delay, which is not at all explained by the first informant for delay in lodging the FIR. The delay in lodging the FIR given rise to the fact that the appellants have been falsely implicated in this case.

27. Learned AGA has submitted that the delay in lodging the FIR is clearly explained by the first informant. P.W.1 first informant, is villagers and rustic person and after the incident, first informant manage the conveyance and reached to the hospital for medical treatment to injured Sudamiya and Shiv Nandan and thereafter, he reached to the police station Lalauli for lodging the FIR. There are many factors which have been taken into consideration while looking into the factum of delay in lodging the FIR in police station Lalauli. It is true that court has duty to take notice of delay and examined the same in a backdrop of a factual score whether there is any expectable explanation offered by the prosecution but when delay is satisfactorily explained no adverse

inference is to be drawn. It is to be seen whether there has been possibility of embellishment in the prosecution version on account of such delay.

28. In this connection it will be useful to take note of the following observation made by Apex Court in **Tara Singh & Ors. 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. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the Courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

29. Thus delay in lodging F.I.R. has been very satisfactorily and reasonably explained which has also been discussed by trial court and in this case delay is not at all fatal for prosecution case. It cannot be said that delay in lodging the FIR adversely effected the appellants.

30. One of the argument is that only interested and related witnesses were examined by the prosecution. It is well settled that the evidence of interested witnesses cannot be discarded on the sole ground of interestedness, but their evidence should be subjected to a close scrutiny. Interested witnesses are not necessarily false witnesses. Evidence of interested witnesses cannot be equated with that of a tainted witness. There is no absolute rule that the evidence of an interested witness cannot be accepted without corroboration. There is no proposition in law that relatives are to be treated as untruthful witnesses. In view of the evidence on record, the evidence of PW 1 can not be disbelieved on ground that he is brother in law of the deceased. P.W. 1 is natural witness whose presence on the place of occurrence is fully established. Contention of learned counsel for the appellants is that if, P.W. 1 was present on the spot, he also received injury. P.W. 2 Ram Prasad and P.W. 4 Sudamiya have categorically stated in their statements that P.W. 1 immediately came on the place of occurrence at the time of incident. In case, the circumstances relates that the witness was present and had witnessed the entire episode and his

deposition cannot be discarded merely on the ground of being closely related to the victim and they shield the actual culprit and unlikely to falsely implicate the appellants. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spear the real culprit and falsely implicate an innocent person is alleged and proved.

1. In ***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 mere 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.

2. 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 straight way unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court.

31. On considering the Apex Court law it is clear that presence of P.W. 2 Ram Prasad and P.W. 4 Sudamiya, injured witness, is quite natural and there is no reason to false implication of the appellants in this case and their evidence suffers no infirmity and learned trial court has appreciated the evidence and rightly recorded the finding against the appellants.

32. One of the submission of learned counsel for the appellants is that the place of occurrence is not intact, because the plain earth and blood stained were recovered which is proved by P.W. 7 Investigating Officer, but the same has not been sent for chemical examination by the prosecution.

33. Learned AGA has submitted that the defence counsel has neither controverted the execution of Ext Ka 9 by adducing evidence during trial, nor any suggestion raised on behalf of defence that the place of occurrence is not intact and doubtful, witness of fact P.W 1, P.W. 2 and P.W. 4 have clearly established the place of occurrence.

34. One of the argument of learned counsel for the appellants is that no weapon of offence as lathi and danda has been recovered. it would be relevant to mention that recovery of weapon might have further strengthen the prosecution case but it is not sine qua non for sustaining conviction. In fact it was the duty of the Investigating Officer to recover the weapons used in the incident. If there is any laxity on the part of the investigating officer in this regard, it can not be ground to doubt the testimony of PW 1, PW 2 and P.W. 4 which is clear and cogent. The consistent and reliable testimony of witnesses can not be disbelieved merely on the ground that the recovery of weapons has not been made, particularly when evidence clearly suggests that the injuries sustained by the deceased were caused by the weapons attributed to the accused persons.

35. On perusal of evidence of the witnesses of fact it transpires that the oral evidence is duly corroborated with medical evidence. There is no major contradiction in the statements of the witnesses, prosecution is fully proved his

case beyond shadow of doubt hence the learned trial court has rightly appreciating each aspect of the case so finding of conviction of the appellants under section 304 part II and 325/34 IPC hereby affirmed.

36. Last argument raised by learned counsel for the appellants is that the incident in question took place on a sudden fight without any premeditation and the act of the appellants hitting the deceased was committed in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acting in a cruel or unusual manner and the weapon used was not lethal. It is also not clear that out of four accused, who were responsible to commit fatal injury on the deceased and grievous injury to Sudamiya (P.W.4). Only general role has been assigned against the appellants. It is also submitted that more that 31 years has already been elapsed and two named appellants Ram Swaroop and Chandra Sevak died during pendency of appeal. Presently only appellants Umashankar and Kripashankar are surviving appellants. It has been claimed that appellant Umashankar presently around 67 years old and Kripashankar is about 61 years. Presently both the appellants are well rooted in society, submitted that no useful purpose would be served if the surviving appellants again sent into jail to serve out the remaining part of the sentence.

37. Considering the entire facts and circumstances of the case, appellants presently senior citizen and there is no specific proof that the fatal blow was inflicted by appellants. The sentence so awarded by the trial court under section 304 part II appears to be harsh under these circumstances and the same may be reduced from 5 years rigorous imprisonment to 3 years rigorous imprisonment as that would meet the end of justice.

38. Accordingly appeal against both the appellants on point of conviction is hereby dismissed but partly allowed. Only on point of quantum of sentence, sentence under section 304 part II IPC sentence of 5 years rigorous imprisonment modified to 3 years rigorous imprisonment. Sentence part under section 325/34 IPC shall remain unaltered. Both the sentence shall run concurrently. The period spent by appellants in jail shall be set off from this sentence.

39. The appellants are on bail. Their bail bonds stand cancelled. They are directed to surrender within four weeks to serve out the remaining period of sentence.

40. Consequently, the instant appeal is allowed partly on above term.

41. Let a copy of this order/judgment be certified to the court below for necessary information and ensuring compliance within 2 months under intimation to this Court.

(2020)08ILR A541
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 1085 of 2012

Ram Het & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ghanshyam Das, Sri Hemant Kumar, Sri Jitendra Singh, Sri Satya Prakash Rathor, Seema Shukla, Sri Vinod Kumar, Sri Kamal Krishna, Sri Nitin Mukesh, Sri V.M. Zaidi, Sri Lal Chandra Mishra, Smt. Usha Srivastava, Sri M.J. Akhtar.

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

Criminal Law- Indian Penal Code, 1860- Section 302, 325 and 323 - Appeal against conviction.

Relative witnesses:-
The deposition of the relative witnesses cannot be discarded solely on the ground of relative witnesses. (Para-21)

Variation in the site plan -
The minor variation in the site plan not a ground to discard the prosecution story.

In situation of 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 sec 300 Exception 4 of IPC provided he has not acted cruelly. (Para-35)

Conviction upheld sentences reduced to the period of imprisonment already undergone (Para 40)

Appeal accordingly disposed of. (E-2)

List of cases cited: -

1. Subhash Gangadhar Jadhav Vs St. of Mah., 2018 (4) Crimes (SC) 569: Criminal Appeal No. 1576 of 2018.

2. St. of Punjab Vs Hardam Singh, (2005) S.C.C. (Cr.) 834.

3. Dilip Singh Vs St. of Punj., A.I.R. 1983, S.C. 364.

4. Harbans Kaur Vs St. of Hary., (2005) S.C.C. (Crl.) 1213

5. St. of U.P. Vs Kishan Chandra & ors., (2004) 7, S.C.C. 629.

6. Dalbir Kaur Vs St. of Punjab, AIR 1977 SC 472.

7. St. of Gujrat Vs Naginbhai Dhulabhai Patel, AIR 1983 SC 839.

8. St. of A.P. Vs Rayavararapu Punnayya & anr. reported in (1976) 4 SCC 382,

9. Budhi Singh Vs St.of H. P., (2012) 13 SCC 663.

10. Kikar Singh Vs St. of Rajasthan (1993) 4 SCC 238.

List of cases cited: -

1. Sarija Bano Vs St. through Inspector of Police, (2004) 12 SCC 266.

2. Abdul Rashid Ibrahim Mansuri Vs St. of Guj., (2000) 2 SCC 513.

3. St. of Raj. Vs Jag Raj Singh, (2016) 11 SCC 687.

4. U.O.I. Vs Ramsamujh, (1999) 9 SCC 429.

5. U.O.I. Vs Ratan Malik, (2009) 2 SCC 264.

6. St. of Ker. Vs Rajesh, (2020) SCC Online SC 81.

7. Karnail Singh Vs St. of Har., (2009) 8 SCC 39.

8. Vijay Sinh Chandubha Jadeja Vs St. of Guj. (2011) 1 SCC 609.

9. Mohan Lal Vs St. of Raj., (2015) 6 SCC 222.

10. U.O.I. Vs Ram Samujh & anr., (1999) 9 SCC 429.

11. U.O.I. Vs Shiv Shanker Kesari, (2007) 7 SCC 798.

12. Union of India Vs Rattan Malik @ Habul, (2009) 2 SCC 624.

13. Kerala Vs Rajesh, (2020) SCC OnLine SC 81.

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

1. This criminal appeal has been filed against the judgement and order dated 24.1.2012 passed by Addl. Sessions Judge (Ex. Cadre), Mahoba in S.T. No. 115 of 2010 (Ram Het and

others vs. State of U.P.), under Sections 302, 325 and 323 I.P.C., P.S. Charkhari, district-Mahoba, whereby the accused-appellants have been convicted for the offence under Section 302 IPC and sentenced to life imprisonment with fine Rs. 5,000/- and in default of payment of fine, the appellants have to undergo six months rigorous imprisonment; convicted for the offence u/s 325 IPC and sentenced to undergo three years R.I. with fine of Rs. 1,000/- and in default of payment of fine, the appellants have to undergo one month R.I.; and also convicted for the offence u/s 323 I.P.C. and sentenced to undergo six months rigorous imprisonment.

2. In brief, the case of the prosecution starts from the FIR lodged by complainant Smt. Puniya wife of Kamta, resident of Mohalla-Soharyab, Kasba and police station-Charkhari, district-Mahoba, alleging therein that on 15.10.2010 at about 6:00 p.m. at the doorstep of Nathu Prajapati, her husband Kamta, son Hariram and daughter Jaidevi and she herself were attacked with lathi-danda by Ramhet and Rameshwar sons of Maiyadeen Prajapati, residents of Soharyab, Kasba-Charkhari and two other persons namely son of Balli and son of Jaggu, residents of Village-Salat. It was also mentioned in that report that her husband received injuries in his head and became unconscious and she had brought her injured husband to the police station. The chick report of the FIR was scribed by constable Dashrath Singh, G.D. entries were made. Initially the report was lodged under Sections 308 and 323 I.P.C. as Crime no. 1702 of 2010 and when death of the complainant's husband had taken place, Section 304 I.P.C. was also added. After lodging of the report the investigation started and after completion of investigation, the Investigating Officer had submitted chargesheet against four accused persons namely, Ramhet and Rameshwar sons of Maiyadeen Kumhar, Rajesh and Ramhetu son of Brij Lal. The cognizance was taken by the Magistrate and considering that the case was triable by the Sessions Judge, it was committed to the Court of session. The sessions court charged the accused under Sections 302, 308 and 323 I.P.C. Accused Ramhet son of Brij Lal was declared juvenile and his case was separated and sent to the Juvenile Justice Board and trial of three accused namely herein, Ramhet, Rameshwar and Rajesh commenced.

3. The prosecution, in order to prove its case, examined nine witnesses. PW1 Puniya (informant), PW2 Jai Devi daughter of the complainant, PW3 Hari Ram son of the complainant, PW4 Dashrath Singh, PW5 S.I. Harbansh Singh (Investigating Officer), PW6 D.K. Sullere, PW7 Dr. Devendra Singh Rajpoot, PW8 Anurag Purwar and PW9 Ram Sukh Verma.

4. The prosecution has examined PW1 informant Puniya, wife of deceased Kamta who has deposed that on 15.10.2010 at about 6:00 p.m., her husband Kamta was sitting at the doorstep of Nathu Prajapati. Rameshwar asked Kamta that what was he seeing ('kya dekh rahe ho') and at the very time accused persons namely, Rameshwar, Ram Het sons of Bhaiyadeen, Rajesh and Ram Het sons of Brij Lal ran towards the deceased. They were armed with lathi. Rameshwar assaulted her husband with lathi on his neck, thereafter he hit on his head, as a result of which deceased fell

down on the ground. Ram Het son of Bhaiyadeen and Ram Het son of Brij Mangal also attacked with lathies on the head of deceased. Rajesh attacked on his head with lathi. When the informant along with her daughter Km. Jagdevi and son Hari Ram reached at the spot to save her husband then all the accused persons also assaulted them with lathi-danda, as a result of which PW-1 sustained injuries in her head and also got fractured her both hands. Her daughter Km. Jai Devi and son Hari Ram also sustained injuries. In this incident her husband succumbed to the injuries on the spot. Thereafter she got scribed the report of the incident by Ramesh Pal Singh. When her husband was brought to the hospital, he was declared dead. Thereafter she went to the police station to lodge the first information report, which was registered at about 19:20 hours.

5. In her cross-examination, informant PW-1 Puniya has accepted that before this incident there was no enmity between her deceased husband and the accused persons. Although she has also deposed that her husband Kamta was tried for the murder of Bhaiyadeen father of Rameshwar along with one co-accused Rakesh and was acquitted and that is why the accused appellants were having enmity. She has also deposed that her residence is beside the house of accused persons.

6. PW-2, Jai Devi, daughter of the deceased has deposed that on 15.10.2010 at about 6:00 p.m. her father was sitting at the doorstep of Natthu. She herself was sitting along with her mother, then Rameshwar, Ram Het, Rajesh and another Ram Het, who were having lathi in their hands came and started hurling abuses at her father and asked as to why was he looking at them (*kya dekh rahe ho*). Her father did not reply and then, all the accused persons started assaulting her father. Rameshwar assaulted with lathi on his neck and head, as a result of which her father fell down on the ground. Thereafter, Ram Het had made repeated lathi blows on the head of the deceased causing serious injuries on his person. Rajesh attacked on his head and chest with lathi and another Ram Het also attacked on the neck, head and chest of the deceased. The moment all the accused persons were assaulting her father, she along with her mother and elder brother Hari Ram had reached on the spot. The accused persons also assaulted the PW-2, her mother and brother with lathi-danda, causing serious injuries to them. After Marpeet, the accused persons ran away from the spot. Her father succumbed to injuries on the spot but he was rushed to the hospital where he was declared brought dead. She also reiterated the same facts in her cross-examination. In her cross-examination, PW-2 has accepted and gave a vivid narration of the incident that accused Ram Het had asked his father why was he looking at him *(Meri Taraf Kya Dekh Rahe Ho)* which led to the altercation between Ram Het and her father. In her cross-examination she supported the prosecution case and affirmed that she has given statement before Daroga Ji that Rameshwar and Ram Het sons of Bhaiyadeen had made blows with danda on the head of her father as well as Ram Hetu and Rajesh assaulted with danda on his back and also beaten her mother. She has deposed that due to the assault made by accused persons with lathi upon her father, her father had fallen on the ground but her

mother did not. It has also been stated in her statement that at the time of the quarrel her uncle Kadorey and her father's friend Ramesh Pal Vakeel Sahab came up on the spot. Then, Ramesh Pal took her injured father, her mother and her along with Hari Ram in a Tempo to the government hospital and she came back from the hospital after eight days. She had denied that she was tutored by anyone to give false evidence against the accused persons. She also denied the suggestion that she was not present at the place of incident. She has stated that blood stains of the injuries of her father were seen by her on the Chabutara of Natthu Prajapati. However, she has deposed that she could not count as to how many lathi blows were made by the accused persons on her father as they all were assaulting together. She has also denied that her father had taken liquor on the date of incident or her father used to consume liquor outside. About the time and place of the incident or about the involvement of the accused appellants, her statement remained unshaken in the cross-examination.

7. PW-3 Hari Ram son of the deceased has deposed that at around 6 o'clock in the evening, the incident had taken place in front of the house of Natthu about ten months ago. He was sitting with his father on the platform (chabutra) of Natthu. At that time, Ram Het, Rameshwar, Rajesh and another Ram Het who were carrying lathies in their hands came and asked his father why was he looking at them (kya dekh rahe ho). Thereafter, accused Ram Het, Rameshwar, Ram Hetu and Rajesh started assaulting his father with lathi-danda. All the accused persons had given lathi blows on the head of his father, as a result of which he became unconscious and fell down on the ground and died on the spot. When the accused persons were assaulting his father, he along with his mother and and sister Jai Devi ran to save him. He also stated that this incident was witnessed by his mother and sister. Thereafter, police reached and took his father to the hospital, who had died. He also sustained injuries on his shoulder. The accused persons had also assaulted him with lathis and his sister too sustained injuries. He has also deposed that his mother was also assaulted by the accused persons with lathis on her head. PW-3 in his cross-examination has accepted that the incident had taken place at the spur of moment and the accused appellants were not having any weapons in their hand at the very beginning of the quarrel and they brought the same thereafter, which reads as under:-

"जब हम लोग बैठे थे अभियुक्त रामेश्वर अपने घर से निकलकर नत्थू के चबूतरे से होकर जा रहा था । तब हमारे पिता जी ने कहा कि हमारी तरफ क्या देख रहे हो । तो इस पर वो गली गलौज देने लगा और मेरे पिता ने उसे गली देने से मना किया था और मेरे पिता जी ने गली नहीं दी थी। जब ये बातचीत मेरे पिता से हो रही थी तो रामेश्वर हाथ में कुछ नहीं लिए था। बातचीत के बाद हमारे पिताजी व रामेश्वर में गुत्था गुत्थी नहीं हुई थी । फिर रामेश्वर अपने घर पर वापस चला गया था । फिर तुरंत रामेश्वर लाठी लेकर घर से आया था । फिर कहा कि चारो लोग आ गए थे । जब मुल्जिमानगण चबूतरे पर आये तो मेरी माँ व बहिन जय देवी घर के अंदर थी। फिर हमारे पिता जी को मारा पीटा गया । मेरे पिता जी मारपीट के बाद मर गए थे । और बेहोश नहीं हुए थे । मेरी माँ व बहन जय देवी बचाने दौड़ कर आयी थी । मैं व मेरे पिता जी चिल्लाये

नहीं थे । मेरी माँ व बहन स्वयं घटना देखकर मौके पर आयी थी।"

8. PW-4, Constable Dashrath Singh, has deposed that on 15.10.2010 he was posted as head Constable at police station-Charkari and on that day he prepared the chik FIR on the basis of the complaint filed by one Puniya. He has proved that chik FIR as Ext. Ka-1. He further deposed that on that day he had mentioned the institution of this case at rapat no. 44, which is marked as Ext. Ka-3.

9. PW6 Dr. D.K. Sullere, Medical Officer, had conducted the postmortem of dead body of the deceased Kamta on 16.10.2010. He found the following ante-mortem injuries on the body of the deceased :-

(i) Lacerated wound of 4cm x 2cm x bone deep right parietal region of scalp 5cm above from right ear with fractured underlying bone right parietal.

(ii) Lacerated wound of 4.5cm x 2cmx bone deep at right occipital region of scalp.

(iii) Lacerated wound 6cm x 2cm at middle of scalp 13cm above from left ear.

(iv) Lacerated wound 3cm x 2cm muscle deep at post oricular region at face on right side.

(v) Abraded contusion 4cm x 2cm at back of right shoulder 3cm below from lateral end of right clavicle.

(vi) Contusion 19cm x 3cm at back of chest on right side just below spine of right scapula.

(vii) Contusion 13cm x 3cm at back of chest on right side 3cm below from injury no. 6.

(viii) Contusion 9cm x 3cm at back of chest on right side 4cm below from injury no. 7.

(ix) Contusion 8cm x 3cm at back on right side 5cm below from injury no. 8.

(x) Abrasion 4cm x 3cm at lower part of abdomen just above anterior-superior iliac spine.

(xi) Abraded contusion 4cm x 3cm at left knee just below patella.

(xii) Abraded contusion 5cm x 3cm at left leg 6cm below from injury no. 11.

10. According to the postmortem report, the cause of death of the deceased was heamorrhage and shock due to antemortem injuries.

11. PW-7 Dr. Devendra Singh Rajpoot, Medical Officer, had performed medico-legal examination of injured Puniya on15.10.2010 at about 8:05 p.m. and prepared medico-legal injury report. He found four injuries on the body of Puniya :-

(i) A lacerated wound of 4 x 1 cm x bone deep on left parietal region of scalp 14 cm above from tragus of left ear.

(ii) A contusion of 5 x 2cm on top of right shoulder and upper arm.

(iii) A contusion of 3x2cm on back of right wrist surrounded by swelling in the area of 8x5cm.

(iv) Abraded contusion of 2x2cm on back of left forearm 5cm above from the wrist joint surrounded by swelling of 6x4cm.

12. According to him, all the injuries were caused by hard and blunt object and were fresh in duration. Injury no. 2 is simple in nature. Injury nos. 1,3 and 4 were kept under observation.

13. PW-9, S.I. Ram Sukh Verma, was the Investigating Officer in this case, who had proved the inquest report, spot inspection report and stated in his testimony that he had visited the spot and recorded the statements of witnesses, collected evidences and thereafter, charge sheet was submitted by him, which is marked as Ext. Ka- 21. He had proved documentary evidence like chik FIR etc.

14. The Court after prosecution evidence examined the accused under section 313 Cr.P.C. and the accused submitted that they have been falsely implicated in the present case due to enmity. The accused-appellants have produced two persons namely, Kallu son of Abdul and Dhanpat son of Dhunnu as DW-1 and DW-2.

15. DW-1 Kallu has deposed that the incident had taken place fifteen months ago. It was 2:30 to 3:00 o'clock in the afternoon. At that time he was in his house. Quarrel was going outside the door of Kamta. All the accused persons who were quarreling with Kamta, were outsiders. Kamta was in a drunken state. All the accused persons were demanding wages from Kamta who was a contractor of bricks and all the accused persons were his labourers. Kamta told them that he had no money and he would pay them later whenever he have the money, he would pay. Kamta was abusing them. This quarrel went on for 10-15 minutes. Thereafter, all unknown persons started assaulting Kamta with lathi-danda, as a result of which he sustained injuries. This incident had taken place at the door of Kamta. In the injured condition Kamta ran towards Chabutra of Natthu and fell down there. After committing offence, all unknown persons fled away from the spot. He further deposed that at that time Puniya, wife of Kamta reached behind the house of Natthu Prajapati and after catching the accused persons, asked their names. Accused persons in their defence also assaulted her with lathi-danda. He also deposed that he along with his wife reported the matter to the police, thereafter police reached at the spot. He deposed that at the time of incident, Rameshwar, Ram Het and brother-in-law of Rameshwar were not present there. He also deposed that Rameshwar and others had not committed any offence and they have been falsely implicated.

16. DW-2 Dhanpat has deposed that the houses of Natthu Prajapati, Kamta son of Tiriya, Rameshwar and Ram Het sons of Bhaiyadeen are across the road. He deposed that at about fifteen months ago, Kamta was murdered. At about 2:30 to 3:00 o'clock in the afternoon he saw that 3-4 unknown persons came and they were demanding money from Kamta and Kamta was abusing them in drunken condition and he was not giving them their money. Thereafter, all the persons started assaulting Kamta with lathi-danda in front of his house and after that Kamta ran away in injured condition and fell down on 'chabutra' of Natthu. After hearing the noise, Puniya, wife of Natthu

reached there and caught the assailants and asked their names, then all unknown persons assaulted her too with lathi-danda. After committing the offence, all unknown persons ran away. He also deposed that he had not seen the son and daughter of Kamta at the place of occurrence. He also deposed that Rameshwar, Ram Het and his brother-in-law (saale) were not the assailants.

17. After examining the entire evidence, the trial court convicted the accused-appellants by the impugned judgement of conviction. Aggrieved by the said judgement, the present appeal has been preferred by the accused persons.

18. We have heard Sri Vinod Kumar, learned counsel for the appellants, Sri L.D. Rajbhar and Sri Prem Shankar Mishra, learned A.G.A. for the State.

19. The submissions of learned counsel for the appellants are :-

(i) All the witnesses are family members of the deceased and they are thus interested and partisan witnesses and their evidence is unreliable. No independent witness has been examined by the prosecution to prove its case.

(ii) There is contradiction regarding place of occurrence as the site plan shows different place of incident whereas the witnesses have deposed different place of occurrence in their statements before trial court.

(iii) It is contended that initially the matter was registered under Sections 323 and 304 I.P.C. but the chargesheet was submitted under Sections 304, 308, 325 and 323 I.P.C. but the trial court has framed charge under Section 302 instead of Section 304 I.P.C.

(iv) In any case, there was no intention on the part of the accused persons to kill the deceased and there was no premeditation or preplanning on the part of the appellants. The incident had taken place due to sudden altercation between the deceased and accused at the spur of moment and the accused persons have not acted in a cruel manner.

20. In support of his contentions the learned counsel for appellants has placed reliance upon the judgment of the Apex Court pronounced in the case of ***Subhash Gangadhar Jadhav Vs. State of Maharashtra, 2018 (4) Crimes (SC) 569: Criminal Appeal No. 1576 of 2018.***

21. So far as the argument of the learned counsel for the appellants that the prosecution witnesses are interested witnesses and they are closely related to the deceased, it is well settled that a natural witness may not be levelled as an interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In this case, the circumstances reveal that all the witnesses were naturally present at the place of the occurrence and had witnessed the incident. Their deposition cannot be discarded merely on the ground of being closely related to the deceased. Generally close relations of the victim are unlikely to falsely implicate others in place of real culprits and the mere relationship of the witnesses with the deceased is not sufficient to discredit their evidence.

22. Relationship is not sufficient to discredit a witness unless 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 has hostility to the accused. In the case of **State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834,** it has been held by the 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 such a witness would always try to secure conviction of real culprit. In the case of **Dilip Singh Vs State of Punjab, A.I.R. 1983, S.C. 364,** it was held by the Supreme Court that the ground that the witnesses being close relatives and consequently being the partition witnesses would not be relied upon, has no substance. Similar view has been taken by the Supreme Court in **Harbans Kaur V State of Haryana, 2005, S.C.C. (Crl.) 1213;** and in **State of U.P. vs. Kishan Chandra and others, 2004 (7), S.C.C. 629**. The contention about branding the witnesses as 'interested witness' and credibility of close relationship of witnesses has been examined by the Apex Court in 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 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 straight way 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.

23. In the present case although it is correct that PW-1, Puniya, is wife of the deceased, PW-2, Km. Jai Devi, is daughter of the deceased and PW-3, Hari Ram, is son of the deceased but they appear to be natural witnesses of the incident. The alleged incident has taken place in the broad day light in the evening near their house. In such scenario the presence of these witnesses at the place of occurrence appears to be quite natural and probable. These witnesses have been subjected to cross examination but no such adverse effect has emerged to render the presence of these witnesses at the scene of offence doubtful. The testimony of PW-1 is amply corroborated by the testimony of PW-2 and PW-3 and their oral testimonies are fully in consonance with medical evidence.

24. A close scrutiny of the evidence shows that PW-1 who has reported this matter to the police has specifically deposed in her statement that her husband was attacked by accused persons and she along with her children was also attacked by all the accused persons. Evidence of PW-1 finds corroboration with the evidence of the PW-2, Jai Devi, who has specifically narrated the prosecution version that her father was attacked by the accused persons and she along with her mother and brother was also attacked by them. PW-3, Hari Ram, had also supported the prosecution version and he has specifically said that when he was sitting along with his father at the Chabutara of Natthu, then, accused persons namely Ramhet, Rameshwar, Rajesh and Ramhetu came there carrying lathi-dandas in their hands and said to his father, "what are you looking?" (Kya dekh rahe ho). This witness has also

specifically stated that he also suffered injuries along with his mother and sister. The oral testimony of PW-1, PW-2 and PW-3 is supported by medical evidence.

25. On making a close scrutiny of the oral evidence of the witnesses, it is established beyond reasonable doubt that all the witnesses were present at the place of the occurrence and they have witnessed the incident and their statements are consistent about the narration of the incident, which are also supported by the medical evidence. So the contention of learned counsel for the appellants has no force.

26. Now, we take into consideration the contention of the learned counsel for appellants that the place of incident narrated by the prosecution witnesses is different as shown in the site plan. Regard being had to that aspect of the matter, we have gone through the material available on record and after having given a thoughtful consideration, it reveals that the incident took place on the 'Chabutra' of Natthu, which was in front of the house of Natthu. On the other hand, the Investigating Officer has shown the place of incident at point 'X' marked in the site plan, which is not the 'Chabutra' of Natthu. After considering this aspect and considering the statements of witnesses, it is apparent that the incident had taken place when the deceased was sitting in front of house of Natthu. PW-1 Puniya has specifically stated in her cross-examination that the incident had taken place when her husband was sitting at the 'Chabutra' of Natthu. She further stated in her cross-examination that the entire incident had taken place at the 'Chabutra' of Natthu. The oral testimony of PW-1 regarding place of occurrence finds corroboration from the evidence of PW-2 Jai Devi, who in her cross-examination has stated that the incident had taken place when her father was sitting in front of the house of Natthu. PW-3 Hari Ram has also specifically stated in his evidence that the incident had taken place in front of house of the Natthu when this witness was sitting along with his father at the 'Chabutra' of Natthu and the site plan also shows that 'Chabutra' of Natthu was lying at place 'A'. Deceased became unconscious at the place which is marked as 'A' in the site plan and this place is in front of house of Natthu. Thus if there is slight discrepancy in the site plan but as both the places where the accused first started beating the deceased and where the deceased was lying unconscious are nearby places as per the site plan itself and when the evidence of prosecution witnesses is quite natural and reliable, slight shifting the place of occurrence by the Investigating Officer is of much relevance.

27. After examining the entire evidence, we are of the opinion that statements of witnesses, PW-1, PW-2 and PW-3 have specifically shown the incident to have taken place in front of house of Natthu at the 'Chabutra' of Natthu and the oral evidence is totally consistent and they have not changed the place of incident and if there is minor variation in the site plan about the place of incident, it is not of much relevance and the credibility of the prosecution witnesses cannot be doubted, the argument of learned counsel for the appellant is not tenable, hence rejected.

28. Thereupon, it was vehemently submitted by the learned counsel for the

appellants that if prosecution evidence is accepted as such, at the most, the accused persons can be convicted under Section 304 IPC and they should not have been convicted by the trial court under Section 302 IPC as the incident had taken place suddenly without any premeditation at the spur of the moment. The accused persons had no intention to kill the deceased and they have not acted in a cruel manner.

29. We have given a thoughtful consideration to the said argument and it emerges from the evidence led by the prosecution that the incident had taken place suddenly at the spur of the moment without any preplanning or premeditation beginning with a simple altercation between the deceased and the accused persons. It was just a verbal altercation as when the accused persons were passing by the deceased, the deceased was staring at them and upon asking by the accused persons as to why he was staring at them *(Woh kyoan dekh raha hai)*, no reply was given, the accused persons got irritated and beaten the deceased in the hear of passion.

30. Before proceeding further and determining as to whether the conviction of appellants ought to have been done under Section 304 IPC instead of Section 302 IPC, it

*"**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 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."..*

31. In case of **Surain Singh Vs. State of Punjab**, the Hon'ble Apex Court has held in Para No. 7 as thus:-

*7). **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."*

(emphasis supplied)

32. In furtherance to the above discussion, it is relevant to mention here that while drawing a distinction between Section 302 and Section 304 I.P.C., the Apex Court in **State of A.P. Vs. Rayavararapu Punnayya and Another** reported in **1976 (4) SCC 382,** has held in para - 12 and 21 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."

(emphasis supplied)

33. In **Budhi Singh vs. State of Himachal Pradesh, reported in 2012 (13) SCC 663,** the Apex Court has held in paras 18 and 19 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....."*

(emphasis supplied)

34. In **Kikar Singh vs. State of Rajasthan** reported in **1993 (4) SCC 238,** the Apex Court has held in paras 8 and 9 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...."

35. Regard being had to the above law laid down by the Apex Court and also having gone through the facts and circumstances of the instant case, it is evident from the materials on record that there was hostility between accused and the deceased and criminal litigation had taken place between deceased and the accused. It also emerges from the material evidence on record that the attack on the deceased and his side by the accused persons was not premeditated and preplanned and it happened at the spur of the moment in sudden altercation between deceased and the accused and there was no intention of the accused persons to kill the deceased as they have not used any dangerous weapons in the assault but they have used only lathi-danda, which they normally carry while going out in the villages. Whether the injury inflicted by the accused persons was sufficient in the ordinary course of nature to cause death or not, must be determined on the basis of the facts and circumstances of the case. In the instant case, the injuries caused were the result of blows inflicted with lathi-danda 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 or unusual. It is clear from the material on record that the incident had taken place all of sudden and we are of the opinion that the appellant-accused had not taken any undue advantage or acted in a cruel or unusual 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.

36. Thus, in entirety, considering the factual scenario of the case in hand, the evidence on record and in the background of the legal principles laid down by the Apex Court, the inevitable conclusion is that the attack on the deceased was not preplanned by the appellants-accused and it was not a cruel act in an unusual manner and the accused did not take undue advantage of the deceased. The incident had taken place in the heat of passion and all the requirements under Section 300 Exception 4 of the IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused are entitled to this benefit.

37. Considering the factual background and legal position, we are of the view that the appellants are liable to be convicted under Section 304 Part II of I.P.C. instead of Section 302 of I.P.C. However, their conviction under Sections 323 and 325 IPC is upheld.

38. So far as the sentence part is concerned, it was pointed out that accused appellants are in jail since last about eight years, considering all aspects of the matter, it appears that ends of justice would be served if they are sentenced to the imprisonment of ten years under Section 304 Part-II of I.P.C. with fine of Rs. 500, one year R.I. with a fine of Rs. 500/- under Section 325 I.P.C. and three months R.I. under Section 323 I.P.C. All the sentences shall run concurrently. We order accordingly. In case of non payment of fine, the accused persons shall undergon six months rigorous imprisonment in addition of the maximum period of sentence of 10 years.

39. The appellants are in jail. They be set free after the period of conviction is over, if not required in any other case.

40. The appeal is accordingly disposed of in the above terms.

(2020)08ILR A556
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Appeal No. 1101 of 2011
And
Criminal Appeal No. 1100 of 2011
And
Criminal Appeal No. 1099 of 2011

Chandresh Yadav & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri L.P. Singh, Sri Ghan Shyam Das, Sri Mayank Srivastava, Sri R.B. Maurya, Sri Sudhakar Pandey

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

Delay in lodging F.I.R. - No satisfactory explanation/Reason for not lodging the F.I.R. more than 30 hours that too when the Police Station was barely 10 km. from the place of occurrence.

Several discrepancies and contradictions in the deposition of P.W. 1 and P.W. 2 claiming to be eye witness viz-a-viz the testimonies of doctor, who medically treated the injured persons and prepared the autopsy report.

The presence of Informant on the place of occurrence is highly doubtful.

There is no compatibility or corroboration in testimonies of witnesses with medical opinion.

Appeal Allowed. (E-2)

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

1. A cluster of three connected appeals filed by different set of accused-appellants questioning the legality and validity of common judgement and order of conviction dated 25.01.2011 wherein learned III-Additional Sessions Judge, Ballia while deciding Session Trial No.42 of 2007 (State of U.P. vs. Chandresh Yadav and 7 others) has convicted all the eight accused-appellants. This Court proposes to adjudicate all three above appeals by a common judgement with the assistance of the submissions and learned arguments raised by the counsel for the rival parties.

2. Heard Shri Kamal Krishna, learned Senior Counsel who has spearheaded the battery of seasoned lawyers namely, Shri Ghan Shyam Das, Shri Shashi Bhushan, Shri Sudhakar Pandey and Shri Mayank Srivastava for the appellants and Shri H.M.B. Sinha, learned Additional Government Advocate and Shri Awdhesh Shukla, learned State Law Officer at length.

3. As mentioned above, out of the aforementioned three appeals, we are also adjudicating Appeal No.1101 of 2011 (Chandresh Yadav and others vs. State of U.P.) as

4. The appellants of these appeals are jointly and collectively assailing the judgement of conviction dated 25.01.2011 passed by learned III-Additional Sessions Judge, Ballia in Session Trial No.42 of 2007 In re : State of U.P. vs. Chandresh Yadav and 7 others, convicting all eight appellants under sections 147, 148, 302 I.P.C. read with 149, 504, 506 I.P.C., Police Station-Reoti, District-Ballia. While deciding the above mentioned session trial, learned Sessions Judge after recording the conviction to all the named accused sentenced all of them u/s 302/149 I.P.C. for life imprisonment with a fine of Rs.5000/- and in default of payment of fine, six months additional imprisonment. Similarly under section 147 I.P.C. one year rigorous imprisonment and under section 148 I.P.C. two years rigorous imprisonment was sentenced, acquitting the appellants under sections 504 and 506 I.P.C. All the sentences have been directed to run concurrently.

5. Before touching the merits of the case, it is imperative to have a eagle's eye view to the entire prosecution case for just and proper adjudication of facts of the case and the testimonies of prosecution witnesses in support thereof.

6. **PROSECUTION VERSION IN FIR** :- The present criminal case triggered after lodging the F.I.R. by one

Rajan Yadav s/o Dhaneshwar Yadav on 06.10.2006 at 7.35 A.M. referring to the incident said to have occurred during intervening night of 4/5.10.2006 around 01.00 in the dark hours of midnight. The scribe of this F.I.R. was one Shri Girish Kumar Mishra, member of Kshetra Panchayat Muni Chhapra, District-Ballia. Police Station Reoti was barely ten kilometers far from the place of occurrence (Rampur Masrik). This F.I.R. was registered as Case Crime No.93 of 2006 under sections 147, 148, 149, 304, 308, 324, 323, 504, 506 I.P.C. against as many as eight named persons attributing an omnibus and general role of allegedly assaulting upon Ram Badan Yadav (D-1) and Tarkeshwar Yadav (D-2) initially making them seriously injured, who later on on different occasions took their last breath.

7. From the F.IR., given by Rajan Yadav, it reveals that, he claims that the informant is the permanent resident of Village Rampur Masrik of Police Station-Reoti, District-Ballia. In the north of river Ghaghra, he is having a small cottage ("DERA") where he was engaged in agriculture and also having stock of cattle. During intervening night of 4/5.10.2006 around 01.00 in the dead hours of night, the informant along with his brothers Ram Badan Yadav (D-1) and Tarkeshwar Yadav (D-2) were asleep. During those dead hours of night, he overheard certain exotic cries and immediately thereafter the informant beheld that the named accused persons namely, (i) Parasuram Yadav s/o Dharm Nath Yadav, (ii) Chandresh Yadav s/o Jairam Yadav, (iii) Ram Chandra @ Malik Yadav s/o Parasuram Yadav, (iv) Joginder Yadav s/o Jagdev Yadav, (v) Shriram Yadav s/o Dharm Nath Yadav and (vi) Rajan Yadav s/o Sudama Yadav, all resident of Rampur Masrik along with (vii) Rama Shankar Yadav s/o Radhey Shyam r/o Dataha and (viii) Bira Yadav s/o Sarju Yadav r/o Alakh Diari have jointly, mercilessly and indiscriminately assaulted with their respective weapons of assault, namely, lathi, danda and gandasa upon his brothers named above, resultantly, both the brothers got seriously injured and turned unconscious. Upon hearing screams and cries, number of persons gathered at the place of occurrence. The assailants took to their heels from the site, hurling filthy abuses and extending threats to their lives by opening fires from their Katta (country made pistol). At the stage of unconsciousness, the injured were taken to CHC, Reoti and after providing first aid, they were referred to District Hospital, Ballia. During treatment at District Hospital Ballia, one of the injured, Ram Badan Yadav lost his life on 05.10.2006 itself, however, Tarkeshwar Yadav underwent treatment at District Hospital. This incident was witnessed by Shri Kishun Yadav s/o Jangali Yadav and Ganga Dayal Yadav S/o Chhatthu Yadav. It would not be out of context herein to mention that during the course of treatment Tarkeshwar Yadav (D-2) too, took his last breath on 10.10.2006 without getting recorded any dying declaration.

8. It is borne out from the record of the case that on the basis of written Tehrir (Report) (Ex. Ka-1) submitted by Dr. Girish Kumar Mishra, Member Kshetra Panchayat, Muni Chapra Ballia on behalf of informant Rajan Yadav (P.W.-1), one Constable Rajdeo Yadav (P.W.-4) penned down Chik FIR (Ex. Ka-3) and registered it as Case Crime

No.93/2006, undere sections 147, 148, 149, 304, 308, 324, 323, 504, 506 I.P.C., P.S.-Reoti, District-Ballia vide G.D. No.10 at 7.35 AM dated 06.10.2006.

9. After registering the above F.I.R., Shri Atma Yadav (P.W.-7) S.H.O., P.S.-Reoti, Ballia, himself has started exploring and investigating into the matter. During the investigation he recorded the statements u/s 161 Cr.P.C. of the Constable scribe of First Information Report, the first informant Rajan Yadav, thereafter reached the spot of occurrence with his colleague Constables, prepared site plan (Ex. Ka 12) in his own handwriting and signatures. During course of the investigation, the Investigating Officer of the case prepared recovery memo of blood stained and plain earth (Ex. Ka 13). Besides above, a torch belonging to Shri Kishun and Ganga Dayal Yadav was also recovered and was exhibited as Ex. Ka-2 dated 19.11.2006. On 10.10.2006 the Investigating Officer of the case effected the arrest of the named accused Chandresh Yadav, Ram Chand @ Malik and recorded their statements. After getting information from the informant on 15.10.2006, that his brother Tarkeshwar Yadav took his last breath on 10.10.2006 at District Hospital, Ballia, the Investigating Officer Shri Atma Yadav (P.W.-7) geared up the investigation and arrested Parashuram Yadav on 20.10.2006 from Reoti Bus Stand. During custody, Parashuram Yadav, an accused, confessed his guilt before him and offered the recovery of weapon of assault. Accordingly, the accused Parashuram Yadav, piloted the police party to his residence and from south-west of his *'SAHAN'*, under the heap of straw, two *Lathi-Dandas* were recovered at his pointing out, revealing that the alleged weapon of assault was used by him and his accomplice Chandresh Yadav s/o Jairam. The alleged recovery memo of *Lathi-Danda* having no blood stained over it, was prepared on 20.10.2006 and exhibited as "Ex. Ka-14". Besides this, the site plan of alleged recovery was also prepared and exhibited as "Ex. Ka-15".

Since two persons lost their lives in this transaction of assault, the injury report was prepared by Dr. B. Narayan (P.W.-3) on 05.10.2006. The injury report of Ram Badan Yadav (Ex. Ka-3) and Tarkeshwar Yadav (Ex. Ka-4) are part of the paper book. After the demise of Ram Badan Yadav on 5.10.2006 and on the tip off by Dilip Kumar, the ward boy of District Hospital Ballia, the inquest report (Ex. Ka 18) was prepared on 06.10.2006 at the Hospital itself. The inquest report of Ram Badan Yadav was prepared on 06.10.2006 having five *Panchs*, out of them three claimed themselves to be eye-witnesses of the incident, namely Bachcha Lal Yadav, Dhaneshwar Yadav and Rajan Yadav (Informant) and in their opinion, recorded in the inquest report of Ram Badan Yadav, in the dead hours of intervening night of 4/5.10.2006 while they were asleep in the Dera on the bank of river "SOME UNKNOWN MISCREANTS" brutally assaulted upon the injured persons and during course of treatment Ram Badan Yadav lost his life. Similarly, after the death of another deceased Tarkeshwar Yadav on 10.10.2006, his inquest was also prepared at District Hospital Ballia on 10.10.2006 itself (Ex. Ka-6). After collecting all the materials and recording the statements of as many as 21 witnesses in case-diary, the Investigating Officer prepared his report under section 173(2) Cr.P.C. and submitted charge-sheet

on 01.12.2006 (Ex. Ka-16) against all the named accused persons u/s 147, 148, 149, 308, 304, 325, 504, 506 I.P.C.

10. We have keenly perused the injury reports of the injured/deceased (D-1 and D-2). The injury report was prepared by Dr. B. Narayan (P.W.-3) on 05.10.2006 itself. The injury report of Ram Badan Yadav (D-1) reveals that he was medically examined on 05.10.2006 at 10.30 AM and following injuries were found over his person :

(i) Lacerated wound 3 cm x 1 cm, muscle deep on the right side of head, 7 cm above right eyebrow, margin red and swollen.

(ii) Lacerated wound 3 cm x 0.5 cm muscle deep on left side of head, 4 cm above left eyebrow. The margins were red and swollen.

(iii) Lacerated wound 5 cm x 1 cm, muscle deep, on the middle of the head, 13 cm above right ear.

(iv) Contused swelling 6 cm x 4 cm on the left forearm. 4 cm above the left wrist. This injury was kept under observation and advised x-ray.

(v) Lacerated wound 2 cm x 0.5 cm., muscle deep in between right ring and little finger.

vi) Lacerated wound 6 cm x 1 cm, deep bone on the right leg , 13 cm below the right knee.

According to the opinion of doctor, all the injuries were caused by hard and blunt object. Injury No.(iv) was kept under observation and advised X-ray. Rest of the injuries were simple in nature and about half day duration. Whereas the injury report of Tarkeshwar (D-2) was also prepared on the same day i.e. 5.10.2006 at 10.45 AM and as many as following seven injuries were found over his person :

(i) Lacerated wound 7 cm x 1 cm muscle deep on the right side of head, 10 cm above right eyebrow. Margins were red and swollen. This injury was kept under observation and advised X-ray.

(ii) Lacerated wound 3 cm x 1 cm muscle deep in between left and ring finger. Margins were red and swollen.

(iii) Contused swelling 9 cm x 7 cm on the back of left palm. Margins were red and swollen. This injury was kept under observation and advised X-ray.

(iv) Lacerated wound 2 cm x 1 cm muscle deep on the right leg, 10 cm below the right knee.

(v) Lacerated wound 2 cm x 1 cm in front of left leg, 10 cm above left ankle.

(vi) Contused swelling 6 cm x 4 cm on the back of right foot, reddish in colour. This injury was kept under observation and advised X-ray.

(vii) Lacerated wound 1 cm x 1 cm on top of right 3rd toe.

According to the doctor, all the injuries were caused by hard and blunt object. Except injury nos.(i), (iii) and

(vi), all were found to be simple in nature and could have been caused within the duration of half day.

During cross-examination, Dr. B. Narayan (P.W.-3) states that though the injured persons were brought by Rajan Yadav (Informant-P.W.-1) but he did not disclose anything or provided any clue about the real cause of the injuries, allegedly sustained by his brothers, though he strangely claims to be the eye-witness of the incident.

11. During course of treatment both the injured persons Ram Badan Yadav (D-1) and Tarkeshwar Yadav (D-2) lost their lives. Ram Badan Yadav (D-1) died on 05.10.2006 around 4.55 PM whereas Tarkeshwar Yadav (D-2) died on 10.10.2006 around 3.40 AM. The autopsy report of both the deceased persons were exhibited as "Ex. Ka-5" dated 6.10.2006 and "Ex. Ka-7" dated 10.10.2006 respectively.

(I) Dr. J.P. Pandey (PW-5) prepared the postmortem report of Ram Badan Yadav (D-1) whereas autopsy report of Tarkeshwar (D-2) was prepared by Dr. Pradeep Kumar Singh (PW-8) under their seal and signatures.

The postmortem report of Ram Badan Yadav (D-1) reveals nine ante-mortem injuries as against six injuries shown in the injury report, which are as follows:-

Ante-Mortem Injuries :

(i) Stitched wound (two stitches) on the head, above 7 cm left ear. After opening stitches, 3 cm x 0.2 cm scalp deep. Margins were irregular.

(ii) Abraded contusion 3 cm x 3.5 cm on the left forehead, 2 cm below injury no.(i).

(iii) Stitched wound (three stitches) 4 cm long on the left side of head, 10 cm above left ear. After opening stitches, 4 cm x 0.5 cm deep bone. Margins were irregular.

(iv) Abrasion 2.5 cm x 1.2 cm, above the left spinal cord, 1 cm from the middle of the spinal cord.

(v) 6.5 cm below the nipple on the left chest in an area of 6 x 7 cm. Chest was sunken.

(vi) Stitched wound (one stitch) 2 cm on the left forearm, 8 cm below the elbow. After opening stitch, it was 2 cm x 0.2 cm muscle deep.

(vii) Stitched wound (one stitch) 2 cm to the side of elbow. After opening stitch 2 cm x 0.3 cm bone deep.

(viii) Contusion 6 cm around the forearm. After opening the wound, both bones of below forearm were found fractured.

(ix) Stitched wound 5 cm on the front of right leg, 10 cm below the knee.

Internal Examination : Rear bone of the head was found fractured. Brain and membrane were congested. All the injuries were stitched ones thus no definite opinion could be given regarding weapon of assault, however, injury nos.2, 4, 5 and 8 could be caused by lathi-danda. The cause of death is excessive

bleeding and on account of ante-mortem injuries and hemorrhage.

(II) Dr. Pradeep Kumar Singh (PW-8) penned down the autopsy report of Tarkeshwar Yadav (D-2) which shows that he has sustained five ante-mortem injuries over his person. They are :

Ante-Mortem Injuries :

(i) Stitched wound on the right side of head, 5 cm above the right ear.

(ii) Stitched wound 2 cm long, 21 cm above left knee.

(iii) Abrasion 2 cm x 1 cm on the joint of left ankle.

(iv) Abrasion 1.5 cm x 0.5 cm, 10 cm below the right knee in the middle.

(v) Lacerated wound having abrasion 3.5 cm x 3 cm on left palm of which second metacarpal bone found fractured.

External Examination : An average built body of young man a/a 30 years, having sign of rigor mortis, but no sign of any decaying.

Internal Examination : His Brain and right side of membrane blood was found coagulated in his brain. Right chamber of the heart was found empty. Cause of death was haematoma (injury no.1) resulting coma. Injury No.1 was sufficient to cause death. Rest of all the injuries were caused by hard and blunt object, could be Lathi/Danda.

12. As mentioned above, the Investigating Officer of the case, after holding threadbare investigation into the matter, recording the statements u/s 161 Cr.P.C. of as many as 21 witnesses, arrived at the conclusion that all the named accused persons are prima facie involved for committing the offence under sections 147, 148, 149, 308, 304, 325, 504, 506 I.P.C. and thus on 01.12.2006 the report under section 173(2) Cr.P.C. was submitted before the learned Magistrate concerned. Since the offence is exclusively triable by the court of sessions and as such, the Magistrate committed the matter for consideration before competent sessions court i.e. III-Additional Sessions Judge, Ballia as Session Trial No.42 of 2007 in re : State of U.P. vs Chandresh Yadav and others.

13. Relying upon the material collected by the Investigating Officer during investigation and after hearing the contesting parties on the point of "charge", learned trial Judge on 11.07.2007 framed charge against all the eight accused persons u/s 147, 148, 302 read with 149, 504, 506(2) I.P.C.

Accused persons pleaded not guilty and claimed to be tried.

14. Prosecution in order to establish their case and story against named accused persons, have produced (a) Rajan Yadav (PW-1 informant), (b) Ganga Dayal Yadav (PW-2 eye-witness), (c) Dr. B. Narayan (PW-3 the doctor who treated the injured persons at threshold stage), (e) Constable Rajdeo Yadav (PW-4, prepared Chik FIR), (f) Dr. J.P. Yadav (PW-5-the doctor, who prepared postmortem report of Ram Badan Yadav), (g) Akhilesh Yadav (PW-6, the Sub Inspector prepared the inquest of Tarkeshwar Yadav on 10.10.2006), (h) Shri Atma Yadav (PW-7, the

Investigating Officer of the case), (i) Dr. Pradeep Kumar Singh-the doctor who conducted the postmortem of Tarkeshwar Yadav on 10.10.2006) and (j) Shri Ram Manorath Rai (PW-9-proved the inquest report of Ram Badan Yadav.

15. At the end, all the accused in their respective statements u/s 313 Cr.P.C. have denied the prosecution story, its genesis, supporting documents and witnesses and stated that they were falsely implicated on the ground of previous animosity between them. In no uncertain terms, they have challenged the very presence of both the witnesses of fact and the story spun by them implicating all the named accused. In their respective testimonies, they have seriously challenged the place of occurrence, the way and manner of assault, their own identification by the prosecution and lastly submitted that entire prosecution story is figment of imagination in which all the accused were falsely roped in.

16. Learned Sessions Judge concerned, after scrutinizing all the documents, testimonies of witnesses and hearing the submissions of rival parties, reached to the conclusion that the accused-appellants were guilty for the offence and as such, by impugned judgement he convicted all the named accused persons.

17. Shri Kamal Krishna, learned senior counsel assailed the impugned judgement primarily on two scores namely, (i) unexplained delay in lodging the FIR and (ii) major and material shift and embellishments in the testimonies of PW-1 and PW-2, who are witnesses of fact, resultantly touching the core issue i.e. factum of the assault by the accused persons. Learned senior counsel has tossed number of factual as well as legal issues, questioning the authenticity of the depositions made by prosecution witnesses, especially of the fact, which are allegedly full of material contradictions and embellishments, causing serious dents to prosecution story and the involvement of accused-appellants in the commission of offence.

Let us examine these heads canvassed by learned Senior Counsel one by one :-

18. **DELAY IN FIR** : - It is contended by the learned senior counsel for the appellant that according to the prosecution story unfortunate incident took place during intervening night of 4/5.10.2006 around 1.00 a.m. but its FIR was got registered on 06.10.2006 at 7.35 a.m. at Police Station-Reoti, District-Ballia. From the Chik FIR it is clear that the distance between the place of occurrence and the police station is barely 10 kms. It is argued by the learned senior counsel that no plausible explanation is coming forth explaining this inordinate delay, which puts a great cloud of doubts over the prosecution story.

19. The Court has got an opportunity to assess and examine the testimony of Rajan Yadav (PW-1) and Ganga Dayal Yadav (PW-2), who are "witnesses of fact". In examination-in-chief, P.W.-1 Rajan Yadav stated that he along with his brothers D-1 and D-2 was sleeping in Dera and after hearing certain unusual cries, he saw the named accused persons armed with *lathi, danda, gandasa* and country made pistol, were indiscriminately and mercilessly

assaulting upon his brothers. He further states in his deposition that Rama Shankar Yadav and Bira Yadav were carrying *gandasa*, whereas Yogendra was having *katta* (country made pistol) in his hand and rest of the accused-appellants were carrying lathi-danda, and were assaulting by their respective weapons upon his brothers Ram Badan Yadav (D-1) and Tarkeshwar Yadav (D-2). He claimed to have identified these assailants in the moonlight. In the entire examination-in-chief, there was not a whisper explaining this delay in lodging of the F.I.R. His cross-examination was conducted on 18.9.2008 17.10.2008 and 05.11.2008. In his cross-examination dated 05.11.2008, Rajan Yadav (PW-1) submits that :

"अस्पताल से थाना एक डेढ़ किलोमीटर की दूरी पर है। घायलों की मै थाना रेवती से होते हुए आया था। रेवती थाना पर दरोगा जी मिले थे। दरोगा जी को मैने उसी समय बता दिया था कि मेरे भाइयों को किस–2 ने किन–2 हथियारों से मारा आज खुद कहा कि मैने दरोगा जी को यह बातें दिनांक 06.10.06 को बताया था। दरोगा जी को मेरे भाइयों को किसने–2 मारा घायलों को बलिया लाते समय इसलिए नही बताया कि मै उस समय दियारे मे था। 5.10.06 को मैने 8 बजे सुबह जाकर दरोगा जी को सारी बाते बता दिया था। मैने रिपोर्ट गिरीश लाल मिश्रा से लिखवाया था।"

From the above testimony, it is clear that though he met with the concerned Daroga at the police station on 5.10.2006, still he did not bother to lodge any FIR and it took another 24 hours to weave, cook and narrate the story by means of the FIR.

20. Another prosecution witness of fact is Ganga Dayal Yadav (PW-2), who is the real uncle of the deceased and whose statement u/s 161 Cr.P.C. was recorded after 15 days of the incident, who claims to be an eye-witness of the incident. In his cross-examination dated 20.11.2008, he stated that they are in inimical terms with the accused from earlier point of time. He further states in his cross-examination that :

" तीन घंटे तक मजरूब घटना स्थल पर ही रहे। उसके बाद हम लोग घायलों को लेकर रेवती चले। रेवती हम लोग लगभग 8 बजे दिन में पहुंचे। पहले हम लोग घायल को लकर थाने पर गये। दरोगा जी से हम लोगों की भेंट हुई। दरोगा जी को हम लोगों ने बता दिया था कि राम बदन व तारकेश्वर को किसने–2 मारा। दरोगा जी ने घायलों को देखा। और कहा कि अस्पताल ले जाओ। घायलों से कुछ भी नही पूछा क्योंकि घायल बेहोश थे। घायलों की अस्पताल मे मरहम पट्टी रेवती अस्पताल में हुआ। मैने डाक्टर साहब या किसी को नही बताया कि मुल्जिमान ने घायलों को मारा था। मै वहॉ से अपने घर चला आया। बलिया मैं नही गया था।"

21. On a close and keen analysis of aforesaid cross-examination of P.W.-2, Ganga Dayal Yadav, who is the real uncle of the deceased, his conduct is explicitly clear. He submits in his deposition that they waited with injured till dawn of 5.10.2006. They reached to C.H.C. Reoti at 8 AM via police station, Reoti. He shared all the information with the police and name of assailants but did not bother to lodge a formal F.I.R. It seems to be a clandestine afterthought story at this juncture. He claims to be an eye-witness but has not divulged the name of assailants to the doctor or provided any clue to the doctor about the incident and after providing the first aid to the injured persons at CHC Reoti, he astoundingly returned to his residence calmly. It is strange and surprising that

out of the aforesaid two eye-witnesses, one is the real brother and another is the real uncle of the deceased persons. The conduct of the aforementioned self-claimed eye-witnesses speaks ocean and need not to be explained any further.

22. From the above analysis of testimonies of both aforementioned witnesses, their conduct and action is loud and clear and on that score the possibility of false implication of the accused persons cannot be ruled out. When they admit that they were inimical in terms, then despite having opportunity to lodge prompt FIR, they decided to wait for almost 30 hours to get the FIR registered, the inordinate delay shambles confidence of the Court in the prosecution story, which attributes serious dent to their testimonies.

23. The inordinate delay in lodging the F.I.R. raises serious eyebrows to the authenticity and veracity of the prosecution story. This inordinate and unexplained delay of more than 30 hours is insidiously used by the informant in concocting the false prosecution story after taking assistance of his fellow persons, else there was no occasion or reason not to lodge an FIR promptly, that too, when they themselves were present within the premise of police station along with injured, sharing all the information and the name of the assailants to concerned police personnel. We are at loss to bridge this yawning gap. Both the eye-witnesses, who are in blood relations of the deceased, were present along with the injured, could have lodged the FIR on 5.10.2006 itself but without any plausible justification or reason they exhausted 30 good hours to lodge the F.I.R. and ultimately got it lodged on 06.10.2006 at 7.35 AM.

24. The issue whether the prosecution story can be discarded or disbelieved merely on the ground of there being inordinate delay in lodging the FIR is no longer r*es integra* and stands settled by catena of judgements by Hon'ble Apex Court as well as this Court. It would be, in our view, proper to analyze the case law on this point and issue.

25. Learned senior counsel has contended that in a given circumstances, the inordinate delay in lodging the FIR is fatal and relied upon the judgement of Hon'ble Apex Court in the case of **Thulia Kali vs State of Tamil Nadu, AIR 1973 SC 501**. In para 12 of said judgement Hon'ble Supreme Court has observed thus :

"12. ..... First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the stand point of the accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first in- formation report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of

deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. ..... The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it."

26. Similarly in the case of **Apren Joseph alias Current Kunjukunju and others v. State of Kerala, AIR 1973 SC 1,** the Hon'ble Apex Court has observed as hereinunder :-

"Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in lodging of the first information report should be satisfactorily explained."

27. Further, similarly relevant extract of the judgement delivered by Hon'ble Apex Court in the case of **Ravinder Kumar and another vs State of Punjab, 2001 (43) ACC 755 (SC)** is reproduced herein below :

"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 lodged 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. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquillity of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such

information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident.

We are not providing an exhausting catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary. In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR. [Vide Zahoor vs. State of UP; Tara Singh vs. State of Punjab; Jamna vs. State of U.P. In Tara Singh (Supra) the Court made the following observations:

"It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report."

28. The Hon'ble Apex Court in **Tara Singh and others vs. State of Punjab, 1991 (28) ACC 93 (SC)** has held as under :

"4. It is well-settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case. In the instant case there are three eye-witnesses. They have consistently deposed that the two appellants inflicted injuries on the neck with kirpans. The medical evidence amply supports the same. In these circumstances we are unable to agree with the learned Counsel that the entire case should be thrown out on the mere ground there was some delay in the FIR reaching

the local Magistrate. In the report given by P.W.2 to the police all the necessary details are mentioned. It is particularly mentioned that these two appellants inflicted injuries with kirpans on the neck of the deceased. This report according to the prosecution, was given at about 8.45 P.M. and on the basis of the report the Investigating Officer prepared copies of the FIR and despatched the same to all the concerned officers including the local Magistrate who received the same at about 2.45 A.M. Therefore we are unable to say that there was inordinate and unexplained delay. There is no ground to doubt the presence of the eye-witnesses at the scene of occurrence. We have perused their evidence and they have withstood the cross- examination. There are no material contradictions or omissions which in any manner throw a doubt on their varasity. The High Court by way of an abundant caution gave the benefit of doubt to the other three accused since the allegation against them is an omnibus one. Though we are unable to fully agree with this finding but since there is no appeal against their acquittal we need not further proceed to consider the legality or propriety of the findings of the High Court in acquitting them. So far as the appellants are concerned, the evidence against them is cogent and convincing and specific over tacts arc attributed to them as mentioned above. Therefore we see absolutely no grounds to interfere. The appeal is, therefore, dismissed."

29. In the case of **Himanchal Pradesh vs. Gian Chand, 2001 (43) ACC 200 (SC)** the Hon'ble Apex Court has reiterated as under :

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution.

However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

30. Last but not the least, the principles of law laid down in the case of **State of Andhra Pradesh vs. M. Madhusudhan Rao, 2008 (15) SCC 582**, are worth to be considered wherein the Hon'ble Apex Court has observed as under :-

"30. Time and again, the object and importance of prompt lodging of the First Information Report has been highlighted. Delay in lodging the First Information Report, more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained."

31. As mentioned above that at no stage either of the prosecution witnesses

have ever tried to give any plausible or satisfactory reason for not lodging the FIR for more than 30 hours that too when the police station was barely 10 kms. far from the place of occurrence. Top of it, as per the testimony of P.W.-2, when they themselves passed through the concerned police station, they have more reasons to explain their astonishing conduct for not lodging the FIR when they themselves are inside the police station. In a recent judgement in the case of **P. Rajagopal vs State of Tamil Nadu, 2019 (V) SCC 403,** Hon'ble Apex Court has made the following observation :

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely."

32. Thus, weighing the facts of the present case where the FIR is delayed by more than 30 hours without any plausible justification in the light of above judgements/observations of Hon'ble Apex Court in this regard, we are of the considered opinion that it is highly risky to rely upon the prosecution story and the alleged involvement of named accused. The Court has to take the prosecution story with a pinch of salt and assess the other attending circumstances floated by the prosecution. Now, let us examine those legal issues one by one.

33. In addition to the above assertions, Mr. Kamal Krishna, learned Senior Counsel, while fortifying his arguments, has floated another issue for our consideration. Learned counsel for the appellants has tried to impress upon the Court that Rajan Yadav (Informant-PW 1) was a total stranger to the incident. He has not witnessed the incident, as asserted by him in his deposition, therefore, his presence over the place of occurrence at the relevant point of time, is highly doubtful. In order to hammer his point, learned counsel for the appellants has brought to the notice of the Court certain yawing discrepancies, embellishments and contradictions in the depositions of P.W.-1 and P.W.-2, who claimed themselves as witnesses of fact, viz-a-viz the testimonies of doctor, who medically treated the injured persons and thereafter prepared their autopsy report. We have carefully perused the record of the appeals and it was indeed interesting to appreciate the argument advanced by learned counsel in this regard.

34. To start with the text of FIR Shri Rajan Yadav (PW-1 Informant) in the FIR has not even whispered that he witnessed the incident by his own ocular senses. He states that he was sleeping in the DERA with his brothers (deceased persons) on the fateful night, though, he allegedly claims to have identified the assailants in the moonlight. All the named assailants, armed with lathi, danda and Gandasa, assaulted by their respective weapons upon his brothers and made them seriously injured/

unconscious. It is indeed strange and amusing that these assailants left the informant unscratched, to become informant and sole ocular witness of the entire transaction, if at all his claim/presence over the site is acceptable.

35. Sensing this blunder, the PW-1 Rajan Yadav in his examination-in-chief categorically stated that he along with his brothers (deceased) was sleeping in DERA at the relevant time and place of occurrence but as mentioned above as he was unscratched in this transaction, then in his cross-examination dated 5.11.2008 changed his place of sleeping to that of scaffolding (MACHAN) in the piegonpea (Arhar) field. He again twisted his version by stating that he witnessed the entire incident, while hiding himself in piegonpea field, plants of which were six feet tall. Though the Investigating Officer of the case, examined as PW-7, has not shown any scaffolding in the site plan prepared by him during investigation. Not only this, the Investigating Officer Shri Atma Yadav (PW-7) in his deposition stated that only the deceased were sleeping over cots. In his deposition the said officer has categorically discounted the presence of informant Rajan Yadav from the place of occurrence i.e. the encampment (DERA). Thus, from the above worthy discussions, it is abundantly and explicitly clear that the presence of informant Rajan Yadav (PW-1) over the place of occurrence is highly doubtful.

36. In addition to the above, it is also pointed out by learned counsel that during investigation and after the demise of Ram Badan Yadav (D-1) on 5.10.2006, his inquest was prepared on 6.10.2006 at 11.00 A.M. Shri R. N. Pandey, prepared the inquest report after collecting five persons, namely, Chandreshwar Yadav, Heera Lal Yadav, Bachcha Lal Yadav, Dhaneshwar Yadav and Rajan Yadav. Out of these five persons, three of them claimed to be eye-witnesses of the incident. But in the opinion column of the inquest report it has been mentioned that all the witnesses in no uncertain terms stated "THAT DURING INTERVENING NIGHT OF 4/5.10.2006 AT THE BANK OF RIVER WHILE SLEEPING, SOME UNKNOWN MISCREANTS ARRIVED AND BRUTALLY ASSAULTED AND MADE THEM SERIOUSLY INJURED. ON ACCOUNT OF THOSE INJURIES, RAM BADAN LOST HIS LIFE." Interestingly, this is the unequivocal opinion of the three eye-witnesses including Rajan Yadav, informant, Dhaneshwar Yadav and Bachcha Lal Yadav to the police as 'PANCHS' but on the same day the said Rajan Yadav (informant) in the FIR spelled out the names of all the eight accused persons with all the material particulars and weapon used by them. This conduct on the part of first informant Rajan Yadav casts serious doubt about the authenticity and genuineness of prosecution story and under the circumstances possibility of fake implication of the named accused persons cannot be ruled out.

37. In the FIR, the informant stated that all the named accused were armed with lathi-danda and gandasa and assaulted by their respective weapons of assault over his brothers (deceased persons), consequently his brothers sustained serious and grievous injuries and became unconscious. In the first version i.e. FIR there was no

specification as to which assailant was carrying which weapon? For the first time in his testimony, the first informant Rajan Yadav has disclosed that in the moonlight he witnessed that Chandresh Yadav, Ram Chandra @ Malik Yadav, Parasuram Yadav, Shriram Yadav, Joginder Yadav, Rama Shankar Yadav Rajan Yadav and Bira were carrying lathi-danda and gandasa and out of them Rama Shankar and Bira were carrying gandasa, Joginder was carrying Katta and rest of the accused were carrying lathi-danda in their hands. All of them in furtherance of common object assaulted by their respective weapons upon the deceased. PW-2 Ganga Dayal Yadav, the real uncle of the deceased, claims himself to be an eye-witness in his examination-in-chief and states that after hearing the screams and noises reached on spot with his torch along with Shri Kishun Yadav and seen, that Chandresh Yadav, Shriram, Parashuram and Rajan were assaulting by lathi on Ram Badan Yadav and Tarkeshwar while Rama Shankar and Bira were assaulting them by gandasa, however, Joginder was standing with his Katta (country-made pistol). While fleeing away, Joginder fired by his Katta causing injury to none. Thus, there is specific case of the prosecution that all of the accused persons assaulted by lathi-danda and accused Rama Shankar and Bira assaulted by gandasa.

38. It was pointed out by learned Senior Counsel that the prosecution case as made by P.W.-1 and P.W.-2 reduced to semblance, if their respective testimonies pitted against the depositions made by Dr. B. Narayan (PW-3), Dr. J.P. Pandey (PW-5) and Dr. Pradip Kumar Singh (PW-8), all these doctors have categorically opined in their respective testimonies that none of the deceased had received any gandasa blow over their persons, thus, there is no parallel or compatibility or corroboration in testimonies of witnesses with the medical opinion given by the doctors.

39. Per contra, Shri H.M.B. Sinha, learned Additional Government Advocate has vehemently refuted the arguments advanced by Shri Kamal Krishna, learned Senior counsel, and has submitted that the impugned order passed by learned trial judge does not suffer from any illegality, infirmity or perversity warranting any interference by the Court. He further submits that the prosecution version stood proved beyond all reasonable doubts on the basis of testimonies of witnesses of fact produced by the prosecution during the trial proving the charge framed against the appellants. The delay in lodging the FIR has been satisfactorily explained by the witnesses of fact in their respective testimonies and there is no force in the arguments advanced by learned senior counsel. The medical evidence on record fully corroborates the ocular testimonies, and despite embellishments and deviations is not going to change the texture of prosecution case. The recorded conviction of the appellants is based upon cogent evidence and the sentence of imprisonment for life awarded to them is also supported by relevant considerations. Hence, no interference in the impugned judgement and order is warranted.

40. To sum up the entire discussion made above, it is crystal clear that there is an inordinate and unexplained delay of more than 30 hours in lodging of the FIR by Rajay Yadav, brother of the deceased

persons. He used this time in meeting and have active consultation to implicate the accused-appellants with whom they have inimical in terms. Else, there is no other reason for this delay, as they themselves admit that they had gone to C.H.C. Reoti, via police station and had an opportunity to lodge FORMAL FIR within reasonable time after the incident.

There is marked deviation and incompatibility in the testimonies of both the prosecution witnesses, though they claim to be an eye-witness to the incident. Not only this, it is impossible to draw any parallel between the testimonies of these prosecution witnesses qua the depositions made by the doctors as PW-3, PW-5 and PW-8. Every witness either of fact or formal going its own way and do not generate requisite confidence in the Court. Prosecution story and its supporting testimonies are going to haywire leading to utter stage of confusion.

41. For the reasons narrated hereinabove and critical analysis of them, we are of the considered opinion that recorded conviction of appellants and sentence of life imprisonment awarded to them by learned III-Additional Sessions Judge, Ballia while passing impugned judgement and order dated 25.01.2011 in Session Trial No.42 of 2007 In re : State of U.P. vs. Chandresh Yadav and 7 others, u/s 147, 148, 302 I.P.C. read with Sections 149, 504, 506 I.P.C., Police Station-Reoti, District-Ballia, is well short of required reasons and standard of proof and thus is liable to be set aside.

42. The appellants who are languishing in jail since 25.01.2011 shall be released forthwith, if not wanted any other case.

43. All the appeals succeed and are allowed.

(2020)08ILR A572
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Appeal No. 2907 of 2013

Ramjan Shah & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Hari Om Khare, Sri Akash Khare, Sri Abhay Raj Singh, Sri Jitendra Singh, Sri Mohd. Naseer Ahmad, Sri Nazrul Islam Jafri, Sri R.N. Shukla

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

Evidence Law- Indian Evidence Act, 1872- Section 32- Dying Declaration- No requirement of the person (deceased) to be admitted in a hospital -For the purposes of recording of dying declaration, it is not a condition precedent that the patient must be admitted in the hospital. Nor any particular mode is prescribed to record the dying declaration. In an emergent condition the required bookish formalities may be dispensed with and would not reflect upon the authenticity and genuineness of the dying declaration. Mere absence of any documentary proof regarding her admission in the hospital would not negate the authenticity of the dying declaration.

For the purpose of recording a dying declaration it is not necessary that the person (Deceased) should be admitted in a hospital.

Non availability of hospital admission/ bed head ticket will not vitiate the dying declaration.

Evidence Law- Indian Evidence Act, 1872- Section 32- Dying Declaration – No further corroboration required if the Court is satisfied with the genuineness of the Dying Declaration- **The doctrine of dying declaration is enshrined in the legal maxim *"Nemo moriturus praesumitur mentire" which means a man will not meet his maker with a lie in his mouth.* If the court is satisfied with the dying declaration and made voluntarily by the deceased, conviction can be made solely on it, without any further corroboration. The doctor, PW-7, categorically observed while certifying the mental orientation of the patient (now deceased) that she was focused, fully conscious and in a fit state of mind to give her statement and for recording the impugned dying declaration, half an hour time was consumed and during the relevant time she remained well oriented. Thus from the aforesaid, the authenticity and veracity of the dying declaration is well established and sufficient recording a conviction order.**

If the Court is satisfied that the dying declaration is voluntary and has been made in a fit mental state, then without the need for any further corroboration, the same would be sufficient for recording the conviction of the accused.

Criminal law - Code of Criminal Procedure, 1973- Section 154, 155(1)- Defective Investigation- The defect in the investigation by itself cannot be ground of acquittal, the investigation is not a solitary area for the judicial scrutiny in the criminal trial, where there has been negligence on the part of the investigating agency on the omission etc. which has resulted in a defective investigation- There is an obligation on the part of the Court to examine the evidence de-hors of such lapses carefully and find out whether the said evidence is reliable or not and to what extent, it is reliable and whether such lapses affect the objects of finding out the truth. In a case of defective investigation, the Court has binding duty to be circuminspect in evaluating the evidence but it would not be right in acquitting the accused persons solely on the ground of defect, to do so, would tantamount playing into the hands of the Investigating Officer, if the investigation is decidedly defective. The accused cannot get any benefit out of a defective investigation and therefore they cannot be aquitted solely on the grounds of latches and lapses of the investigating officer.

Criminal law - Indian Penal Code, 1860- Section 304 Part II - Absence of premeditation- Death after twenty four days- No incriminating material collected- Lack of corroborative medical evidence- Evident that there is marked shift in the prosecution case as mentioned in the FIR and in her dying declaration. There is no evidence that there was a pre-meditation on the part of the appellants though she was dragged to kitchen of the nuptial house and set on fire by the joint misadventure of the accused persons. It is a concrete case that cane of kerosene oil was poured upon and she was set ablaze but aghastly no incriminating material was collected by the police. There was odor of kerosene oil over her body. The post mortem report too is of no help indicating the seriousness and the gravity of the injuries sustained by her, she remained alive for almost 24 days and all of sudden she died - Fit case for modifying the sentence and the appellants ought to have been convicted under Section 304 Part II of the IPC instead of Section 302/34 IPC.

Absence of premeditation on part of the accused and lack of incriminating material, absence of corroboration from the medical evidence and death after twenty four days of the occurrence, which may be due to other factors, would bring the present case within the ambit of Section 304 Part II of the IPC instead of Section 302 IPC.

Criminal Appeal partly allowed. (E-3)

Case Law relied upon/ Discussed:-

1. Jagbir Singh Vs St. (NCT of Delhi) in Criminal Appeal No. 967 of 2015 decided on 4th September 2019

2. Sham Shankar Kankaria Vs St. of Maha. (2006) 13 SCC 165

3. Panneerselvem Vs St. of T.N, (2008) 17 SCC 1

4. Gulzari Lal Vs St. of Har. (2016) 2 SCC Crl.325

5. Ramesh Kumar Vs St. of Bih. & ors. AIR 1993 SC 2317

6. Public Prosecutor High Court Vs Shaik Meera Valli , 1993 CrLJ 3320

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

1. While going through the arguments of the learned counsel for the rival parties and scanning the entire material of the instant case, this Court felt that every dark and dreaded night has tryst to see a golden morning one day and present case is incandescenting this Court to that ultimate path.

2. Heard Sri N.I.Jafri, learned senior counsel assisted by Sri Naseer Ahmad, learned counsel for the appellants, Sri H.M.B.Sinha, learned AGA for the State and perused the available paper book on record of the appeal.

3. The instant appeal under Section 374(2) Cr.P.C. was preferred by three appellants, namely, appellant no.1 Ramjan Shah son of Ghasitay Shah, appellant no.2 Km. Shabbo, daughter of Ghasitay Shah and Mrs. Rashida Begam wife of Ahmad, daughter of Ghasitay Shah, who are facing incarceration, pursuant to the judgment and order of conviction dated 06.06.2013 by Ist-Additional Sessions Judge, Fatehpur while deciding the Sessions Trial No. 398 of 2009 in-re Ramjan Shah and others vs. State of U.P. Fact of the matter is that appellant no.1 Ramjan Shah (husband) is behind the bars, since very inception of the case i.e. 26.05.2009, whereas rest of the accused, namely, Km. Shabbo and Mrs. Rashida Begum were on bail during trial but are in jail from the date of judgment i.e. 06.06.2013.

4. It is also borne out from the judgment that Ghasitay Shah, a charge sheeted accused died on 22.04.2010 at pre-trial stage and the police in its report has confirmed this fact, accordingly, the trial against Ghasitay Shah stood abated, whereas, another accused Jamile Shah was acquitted from the charges under sections 498A, 304B along with the alternative charge under Sections 302 IPC and 3/4 of the Dowry Prohibition Act. Rest of the convicted accused persons have preferred the present appeal.

5. After recording the conviction under Sections 302/34 and 498A IPC, learned Sessions Judge has convicted all the three appellants named above, sentencing all of them for imprisonment for life and a fine of Rs. 3000/- each and in case of default of payment of fine, an year's additional rigorious imprisonment to the defaulter was also awarded. Besides above, the appellant no.1 Ramjan Shah (husband) was also convicted under Section 498A IPC and was saddled with an imprisonment for a period of three years rigorous

imprisonment and a fine of Rs. 1500/- and in case of default of payment of fine six months additional rigorous imprisonment was awarded to him. However, all the sentence would run concurrently. Aggrieved and dissatisfied by the aforesaid judgment and order, the present appeal has been preferred before us.

6. Before coming to the merit of the case, it is imperative to have an eagle's eye view to the prosecution case which was unfolded in the FIR :-

7. The genesis of the case, ignites after giving a written report (Ex.Ka-1) by Sartaj Shah (PW-1) father of deceased, addressed to Station House Officer, P.S. Chandpur, Fatehpur dated 26.05.2009, which was eventually registered as case crime no. 171 of 2009, under Section 498A, 307, 323, 504 IPC and Section 3/4 Dowry Prohibition Act for the incident alleged to have been taken place a day prior i.e. 25.05.2009 at deceased's nuptial house at village Awazipur, District Fatehpur. PW-1 Sartaj Shah has lodged the FIR against as many as five persons, namely, (i) Ramjan Shah (husband), s/o Ghasitay Shah, (ii) Ghasitay Shah (father-in-law), s/o Gani Shah, (iii) Smt. Rashida Begam (elder married sister-in-law "Nanad"), d/o Ghasitay Shah, (iv) Km. Shabbo (younger unmarried sister-in-law "Nanad"), d/o Ghasitay Shah and (v) Jamile Shah, s/o of Gani Shah. In a nutshell, the prosecution story reveals that Sartaj Shah, PW-1 resident of village Piprodar, P.S. Pailani, District Banda solemnized the marriage of his daughter Mst. Ajimunnisha (22 years) (now deceased) with Ramjan Shah-appellant no.1, s/o Ghasitay Shah village Awajipur, P.S. Chandpur, Fatehpur according to Muslim rites and rituals. After the marriage, the daughter of PW-1 joined the in-laws' place at Fatehpur. It is borne out from the FIR that within no time of her marriage, Km. Shabbo, her sister-in-law was set to marry, wherein the valuable items, utensils, ornaments of the newly wed Mst. Ajimunnish was proposed to be siphoned by her in-laws to her sister-in-law (Km. Shabbo). When the deceased Ajimunnisha seriously objected to this, the infuriated parents-in-law and her husband started roughhousing her by misbehaving, torturing and harassing and eventually, they demanded Rs. 30,000/- as additional dowry for establishing the business of her husband, else she was threatened to be ousted from her nuptial home. Their constant inhuman behaviour qua her, virtually uprooted her from nuptial house within a short span of time. After coming from her in-laws place Ajimunnisha, shared the woos and sorrows of her maltreatment committed by the inmates of her nuptial house with her parent. In the month of June 2009 on account of intervention of certain elders/friends of the family, better sense prevailed between the parties and her in-laws agreed to resile from their earlier decision and accepted her back. But ironically, again she was roughhoused by her husband and in-laws. There was, in fact, no change in their behaviour and temperament qua her and eventually on 25.05.2009 around 12.00 in noon, the informant received a phone call from one of the acquaintances, resident of Awazipur, District Fatehpur informing that the in-laws have set her daughter Mst. Ajimunnish, ablaze after pouring kerosene oil over her and now she is in precarious condition. after hearing this unfortunate saddening news, the

informant along with his wife Mst. Shamshun Nisha (PW-2) on the motorcycle of one Mazeed Bhai rushed to village Awazipur, where they saw her daughter in a worsened semi-unconscious condition. The informant with the help and assistance of neighbourhood, the patient was taken to the District Hospital, Fatehpur, from where she was referred to Kanpur and therein she underwent medical treatment. The statement of the informant's daughter has already been recorded and his wife was taking care of her at the Kanpur hospital at the relevant point of time. The scribe of this written report was one Raja Miyan.

8. From the text of the FIR, it is unambiguously and explicitly clear that she was soft target in the hands of her husband and other in-laws just to satisfy their lust and greed in the shape of additional dowry. The bunch of merciless husband & in-laws have committed this heinous offence by killing her after pouring kerosene oil and setting her ablaze within short span of time of her marriage. As mentioned in the FIR, without wasting time at Fatehpur father Sartaj Shah PW-1 along with his wife PW-2 and injured daughter has shifted to Kanpur and got her admitted in some private nursing home. Though there is no documentary proof or bed head ticket of the said nursing home is available on record. Thereafter getting her admitted and medically treated in Kanpur for some time they on their own wisdom shifted the patient/ injured daughter to District Hospital, Banda. During the medical treatment at Banda she eventually took her last breath on 18.06.2009 at District Hospital, Banda i.e. almost after 24 days of the incident. Though no documentary proof/ bed head ticket regarding admission of the patient at Banda District Hospital was produced by the prosecution. After her sad and untimely demise, autopsy report was prepared on 19.06.2009 by Dr. Pranav Kumar, PW-4. This is a long and short of prosecution case as available on record.

9. The prosecution in order to establish its case has produced as many as nine prosecution witnesses, namely, :-

(i) PW-1- Sartaj Shah (father-in-law), (ii) PW-2- Shamshun Nisha (mother of the deceased), (iii) PW-3- Sri J.P.Pandey, Naib Tehsildar, Banda (Officer before whom inquest was prepared), (iv) PW-4- Dr. Pranav Kumar, who has prepared post mortem report of the deceased, (v) PW-5- CP 118 Babulal Maurya, who prepared the chick report no. 52 of 2009, case crime no. 171 of 2009 against Ramjan Shah and four others,(vi) PW-6- Dinesh Kumar Mishra, Naib Tehsildar, Sadar, Fatehpur, who has recorded the dying declaration of the deceased, (vii) PW-7- Dr. Vinod Kumar Chauhan, E.M.O., District Hospital, Fatehpur, who certified the mental and physical state of the deceased before/after recording her dying declaration, (viii) PW-8- S.I.- Ashok Kumar Yadav, the first Investigating Officer of the case and (ix) PW-9- Ms. Neeta Chandra, second Investigating Officer of the case, the then Circle Officer, Jafarganj, Fatehpur, who took the investigation of the case after addition of Section 304B IPC from earlier Investigating Officer Ashok Kumar Yadav.

10. It is worthwhile to mention here that on the basis of written report, given by Sartaj Shah dated 26.05.2009, Ex.Ka-

1, the FIR was lodged, which is exhibited as Ex.Ka-9. Since the deceased Ajimunnisha was in a precarious condition and was taken to District Hospital, Fatehpur, where her dying declaration was recorded by Dinesh Kumar Mishra-PW-6 after getting medical clearance from Dr. Vinod Kumar Chauhan, E.M.O., District Hospital, Fatehpur, on the same day i.e. during the midnight 25/26.05.2009, her statement was recorded and proved by the PW-6, which is exhibited as paper no. (Ex.Ka-11) and lastly post mortem report was prepared by Dr. Pranav Kumar PW-4 on 19.06.2009, which is exhibited as Ex.Ka-8. During the course of investigation, the police prepared a site plan with index, which is exhibited as Ex.Ka-12 by the Investigating Officer of the case, were produced for the prosecution. In response to the above mentioned prosecution, witnesses and the documents in support thereof, learned Sessions Judge during course of the trial has summoned Ranjeet Singh, CW-1 to depose the factum of death of Ghasitey Shah, a charge sheeted accused, who died before the trial. Thereafter the statements under Section 313 Cr.P.C. were recorded of all the accused persons with a view to provide reasonable opportunity to defend them was also offered to them; in which they have categorically denied the prosecution case and stated that they have falsely been implicated. In addition to above, the defence has also produced Mohd. Sayeed-DW-1, the person (Maulavi), who performed the Nikah, Ramjan Shah-DW-2,Shabbir Husain-DW-3 and Anees-DW-4 to establish their innocence and pits and pores in the prosecution story.

11. After the demise of Ms. Ajimunnisha,on 18.06.2009 at District Hospital, Banda Section 304B was added in place of Section 307 IPC. Since Section 304B IPC and other allied sections of the Indian Penal Code are triable by the court of Sessions and the concerned police submitted a report under Section 173(2) Cr.P.C. and case was committed to the court of Sessions for trial.

12. Learned Sessions Judge, on 19.07.2011 framed charges against all the four accused persons, namely, Ramjan Shah, Ghasitay Shah, Km. Shabbo and Smt. Rashida Begam. Initially charges were framed on 01.05.2010 against all the four named accused persons under Sections, 498A, 304B IPC and Section 3/4 D.P. Act but none of the accused persons has accepted their guilt and claimed trial. During testimony of Sartaj Shah, PW-1, learned Sessions Judge, Fatehpur in exercise of his own legal wisdom has framed alternative charge against aforementioned accused persons under Section 302/34 IPC. The alternative charges on 19.07.2011 were read and explained to the accused persons which they too have denied and claimed tried.

13. We have carefully heard the submissions of the counsel representing the rival parties and discreetly perused the paper book along with the impugned judgment of learned Sessions Judge.

14. Sri N.I.Jafri, Senior Advocate, floated lengthy arguments while assailing the impugned judgment dated 06.06.2013. After having patient hearing, his argument could be segregated into two parts for the sake of brevity viz:-

(I) The alleged dying declaration of the deceased dated

26.05.2009 is a forged document which has seen light of day much after the incident on following score :-

(a) The deceased Ajimunnisha though living in Awazipur, District Fatehpur did not receive any burn injury in her nuptial house but she received injuries at her parents place at village Piprodar, District Banda where she breathed her last on 18.06.2009 at District Hospital, Banda, during her treatment. Thus, dying declaration cannot not be recorded at District Hospital Fatehpur, as alleged.

(b) The post mortem report belies the dying declaration, wherein the deceased states that she is a pregnant about five months but no such indication was found in her post mortem report, therefore the veracity of the dying declaration drowns in the ocean of doubt.

(c) In fact, the deceased Ajimunnisha was never admitted in District Hospital, Fatehpur on 25.05.2009 as no documentary evidence was produced by the prosecution to unfold their claim that she was ever admitted to the District Hospital Fatehpur, therefore, in the absence of any such document, the theory of dying declaration at District Hospital, Fatehpur goes haywire. It was also contended by senior counsel that prosecution has miserably failed to produce and documentary proof/bed head ticket of the deceased indicating the fact that the deceased was initially admitted to some private nursing home and Kanpur and thereafter she was shifted to District Hospital, Banda where she was allegedly died. The vital unit of the chain is completely missing, which is essential to complete the entire chain.

15. Thus, the dying declaration dated 26.05.2009 is a manufactured document and was not recorded by PW-6, as claimed to be prepared and proved by him, after getting the medical clearance from Dr. Vinod Kumar Chauhan, PW-7.

16. The second limb of the argument of Sri Jafri was mounted as such:

(II) The investigation made by the I.Os. is fallicious, porous to the core, which shakes & belies the prosecution case including dying declaration.

(a) Though the dying declaration was recorded on 26.05.2009 by Dinesh Kumar PW-6 but strangely it was neither filed in the court concerned immediately after recording it nor communicated to the police. For the first time Sartaj Shah the informant disclosed the existence of dying declaration to the second Investigating Officer of the case namely; Ms. Neeta Chandra, PW-9 on 07.08.2009 i.e. about after 40 days of its recording.

(b) As per the statements of PW-1 and PW-2 there are stark contradictions in recording the very presence of Ramjan Shah at the date and time of place of incident.

(c) The time and place of incident is doubtful on account of the fact that the police has not recovered any gallon/container of kerosene oil or inflammable/burning material from the kitchen.

17. Thus, theory of setting her ablaze in kitchen, is reduced to shambles.

18. Let us examine and test the submissions of Mr. Jafri, Senior learned Advocate, one by one.

19. The first and foremost plank of Sri N.I. Jafri, learned Senior counsel assailing the legality and validity of dying declaration dated 26.05.2009 (Ex.Ka-11), is that it is suspicious and manipulated document, which was not recorded by Sri Dinesh Kumar Misra, PW-6 at District Hospital Fatehpur on the date and time mentioned above.

20. To buttress his contention, it has been argued that since the deceased was not admitted in District Hospital, Fatehpur on 25.05.2009 or 26.05.2009 and, therefore, there was no occasion or reason to record her statement. Besides this, he further submits that the alleged dying declaration was neither filed in the court concerned immediately after recording the same nor communicated to the police and its existence came into picture after forty days of the alleged incident, when first informant Sartaj Shah disclosed this fact to Ms. Neeta Chandra-PW-9 on 07.08.2009. Learned senior counsel has further assailed that after getting orders from the Sub Divisional Magistrate, Fatehpur Dinesh Kumar Misra, Naib Tehsildar, Sadar Fatehpur rushed to the site but said communication of the Sub Divisional Magistrate concerned, was never made part of the investigation, which turns turtle the entire prosecution story and make the same seriously doubtful.

21. These are the aforementioned features by which Sri Jafri, Senior Advocate has tried to shake the credibility of the said dying declaration.

22. From the testimony of PW-1(Sartaj Shah), it is abundantly clear that the marriage of the deceased with Ramjan Shah was solemnized on 26.04.2006, wherein he has given dowry and gift much above to his financial capacity. Even then, dissatisfied with given amount of dowry, jewellery etc., she was subject matter of constant torture and harassment repeatedly by her in-laws and the husband. She was virtually uprooted, harassed and thrashed from her marital place on account of demand of additional dowry but somehow she managed to reach safely to her parents place. As per prevailing practice in the society, the parent of the deceased organized a "Panchayat" to pacify the situation and in January 2009 she was again sent by the parents to join the company of her in-laws with the hope, that a fresh rejoicing chapter in the life of Mst. Ajimunnisha will open in the company of her husband and in-laws at her nuptial home. But such a dream and hope got shattered and doomed, when the poor young lady i.e. Mst. Ajimunnisha came across the reality of her nupital home and once again was bound to experience that there was no change in the attitude and the behavior of her husband and in-laws qua her and she was again subject matter of torture and physical harassment.

23. On 25.05.2009, the fateful day, PW-1 Sartaj Shah received the information from one Kamrunnisha that her daughter was burnt to death after pouring kerosene oil upon her. PW-1 along with his wife immediately rushed to the place of the incident where they realized that the condition of her daughter was in precarious shape, as she was restless and in fidgeted physical condition. She narrated parent that inmates of her nuptial home have

reduced her to that poor physical condition. Her father Sartaj Shah with the assistance of others took her to the nearest District Hospital, Fatehpur. In cross examination of PW-1, it has been candidly stated that after reaching District Hospital, Fatehpur, the attending doctors saw the sinking condition of the patient and advised to take the patient to Kanpur for specialized and advanced medical treatment. Though she was at that relevant time, mentally alert and thus her dying declaration was recorded by PW-6, Dinesh Kumar Mishra, Naib Tehsildar, Sadar, Fatehpur.

24. Her dying declaration/statement, which was signed by her, is self revealing. She has unequivocally attributed the pivotal role of setting her ablaze to the husband Ramjan Shah (Appellant no.1). She further stated that she was put to fire at her marital place at Awazipur, Fatehpur. She next submitted therein that her two sisters-in-law, namely, Smt. Rashida Begam and Km. Shabbo virtually dragged her to the kitchen, where Km. Shabbo handed over a gallon of kerosene oil to Ramjan Shah, who poured the kerosene oil upon her and Mst. Rashida Begum threw a burning matchstick upon her. She started screaming and crying for help. Her relatives and neighbourhood rushed at the place of occurrence and tried their best to rescue her. She further stated in the very dying declaration that her husband did not like her and used to physically assault her on every petty, insignificant and trivial issue/matter. Smt. Rashid Begam is a married woman but on the date of incident, she was present at the place of incident. Km. Shabbo is unmarried girl. She further stated, that her husband is with her for last ten months. The mother-in-law of Ajimunnisha is physically ill. Her father-in-law has gone out of station and arrived only after hearing the incident. Ramjan Shah (husband) carries business of garment at Goa but from last ten months, he is with her.

25. The aforesaid dying declaration concluded within half an hour at 2.05 a.m. in the night of 26.05.2009, whereby the doctor certified that during recording of statement/dying declaration she was conscious and mentally oriented. The dying declaration was self revealing wherein she attributed active role of setting her on fire to her husband and her both sister-in-laws (Nanads) by categorically stating that all the threes, mercilessly and brutally put on fire after pouring kerosene oil upon her.

26. In the light of the aforesaid facts, it is imperative to meet the arguments of Sri Jafri, Senior Advocate mentioning above as submitted by him that the deceased was never admitted to District Hospital, Fatehpur on 25/26.05.2009 nor the prosecution had lead any evidence of her admission in the hospital. Dr. Vinod Kumar Chauhan, PW-7 in his testimony submits that he was on duty as Emergency Medical Officer (E.M.O.), who issued the certificate of her mental condition and during his duty hours the injured was brought to the hospital. For the purposes of recording of dying declaration, it is not a condition precedent that the patient must be admitted in the hospital. Nor any particular mode is prescribed to record the dying declaration. In a an emergent condition the required bookish formalities may be dispensed with and would not reflect upon the authenticity

and genuineness of the dying declaration, as mentioned in the depositions of the concerned doctor that her condition was serious, precarious and speedily deteriorating. She was in the need of immediate medical attention, which could only be given to her at Kanpur. The poor distressed father beyond his ways and means took the daughter to a private nursing home at Kanpur and got her admitted therein.

This Court is conscious of the fact to the extent that the story mentioned in the FIR and a dying declaration of Ajimunnisha are poles apart and in a stark contrast to each other. In a dying declaration there is not even a whisper with regard to the alleged demand of additional dowry and on account of which she was harassed and maltreated or assaulted by her husband and in-laws. She stated in her dying declaration that her husband does not like her, thus there is no parallel or compatibility in the story set up in the FIR visa-a-vis a dying declaration. It seems that might be the reason that the learned trial judge framed the alternative charge under Section 302/34 IPC against the appellants.

27. This Court from the aforesaid discussions, finds that there is no abnormality or illegality on this score. The depositions of Dinesh Kumar Misra PW-6 and Dr. Vinod Kumar Chauhan PW-7 clearly establishes the fact that dying declaration of the deceased was recorded at District Hospital, Fatehpur. Mere absence of any documentary proof regarding her admission in the hospital would not negate the authenticity of the dying declaration. The dying declaration, the deceased in an unambiguous term attributed the active role to the appellants for reducing her to this pathetic stage, when she was at Awazipur Fatehpur at her nuptial home.

28. The doctrine of dying declaration is enshrined in the legal maxim ***"Nemo moriturus praesumitur mentire" which means a man will not meet his maker with a lie in his mouth.***

29. The doctrine of dying declaration contains Section 32 of the Indian Evidence Act. The exception to the general rules containing Section 60 of the Evidence Act provides that oral evidence in all cases must be direct i.e. it must be evidence of witness, who says he saw it. The dying declaration is, in fact, the statement of a person, which cannot be called as witness and, therefore, cannot be cross-examined and such statements themselves are relevant and essential facts in certain cases. Different courts of law considered time and again the relevance/probative value of the dying declaration recorded under different situation. The required law on the aforesaid issue candidly underlines that if the court is satisfied with the dying declaration and made voluntarily by the deceased, conviction can be made solely on it, without any further corroboration.

30. Hon'ble the Supreme Court has opined that when court draws a conclusion that dying declaration is true and reliable and has been recorded by the person at the time when the deceased was in physically fit and mentally oriented to make such declaration and has not been under any tutoring/duress or without any prompting, it can be the sole basis of recording the conviction.

31. Recently in the case of **Jagbir Singh Vs. State (NCT of Delhi)** in

Criminal Appeal No. 967 of 2015 decided on 4th September 2019, the Hon'ble Apex Court lucidly analyzed the true import of Section 35 of the Indian Evidence Act. A distinction exists between English Law and Indian Law with regard to the dying declaration.

"18. Now we proceed to examine the principle of evaluation of any dying declaration. There is a distinction between the evaluation of a dying declaration under the English law and that under the Indian law. Under the English law, credence and the relevancy of a dying declaration is only when a person making such a statement is in a hopeless condition and expecting an imminent death.

So under the English law, for its admissibility, the declarant should have been in actual danger of death at the time when they are made, and that he should have had a full apprehension of this danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits. Under the English law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath.

19. But when a declaration is made, either oral or in writing, by a person whose death is imminent, the principle attributed to Mathew Arnold that truth sits upon the lips of a dying man and no man will go to meet his maker with falsehood in his mouth will come into play."

32. In the case of **Sham Shankar Kankaria Vs. State of Maharashtra** reported in **2006(13)SCC 165**, relevant extract of the judgement is quoted herein-below:-

"Para-8- At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short Evidence Act') which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the

obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful Sham Shankar Kankaria vs State Of Maharashtra on 1 September, 2006 Indian Kanoon - http: // indiankanoon.org / doc /1144121 / 3considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Lyre LCR in R. v. Wood Cock (1789) 1 Leach 500. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain: -

"Have I met hideous death within my view,

Retaining but a quantity of life,

Which bleeds away even as a form of wax,

Resolveth from his figure 'gainst the fire?

What is the world should make me now deceive,

Since I must lose the use of all deceit?

Why should I then be false since it is true

That I must die here and live hence by truth?"

(See King John, Act V, Scene iv)

Para-10- This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

Para-11-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, or 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 assailant. 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 as

indicated in ***Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817):***

"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. ***[See Munnu Raja & Anr. v. The State of Madhya Pradesh (1976) 2 SCR 764)]***

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. ***[See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. (AIR 1985 SC Sham Shankar Kankaria vs State Of Maharashtra on 1 September, 2006 and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]***

The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. ***[See Rasheed Beg v. State 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. ***[See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]***

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. ***[See Ram Manorath and Ors. v. State of U.P. (1981 (2) SCC 654)***

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

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

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. ***[See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)].***

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. ***[See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].***

(xi) 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 declaration could be held to be trustworthy and reliable, it has to be accepted. ***[See Mohanlal Gangaram Gehani v.State of Maharashtra (AIR 1982 SC 839)]."***

33. Toeing the chain of aforesaid proposition, Hon'ble Apex Court in the case of **Panneerselvem Vs. State of Tamil Nadu** reported in 2008 (17) SCC 190. Paragraph 8 of the judgment reiterating the same proposition of law, reads thus-

"**8.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 nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or 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 assailant. 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.**"

34. Now, if we evaluate and test the submission of learned Senior Advocate on the aforesaid parameters, we are at loss to appreciate the same perspective in which it has been argued. On the same day of the incident in the dead hours of the intervening night of 25/26.05.2009, when she was in a bad physical shape, her parent stole the chance for any tutoring or impress upon her to give any false statement in the stage of turmoil. She has given a vivid and self explanatory description about the incident in which she has unequivocally and in no uncertain terms made her husband and his two sisters-in-law responsible for this unfortunate scene. In the wee hours of the night and PW-6 D.K.Misra, after obtaining certificate from the concerned E.M.O. Recorded the same at the end she herself has affixed her signature over the dying declaration, just because she was not admitted in the hospital, there is no bed head tickets to this effect. On her post mortem report, it do not reveal about her pregnancy. The genuineness and truthfulness of her dying declaration cannot be discarded.

35. While dealing with the dying declaration, learned Sessions Judge on page 53 of his judgment has lucidely analyzed that PW-6 D.K.Mishra in his cross examination mentioned that on the fateful day Home Guard came to him with a letter of Sub Divisional Magistrate. He was informed by the police that deceased is in critical and sinking position, therefore he rushed to the hospital and recorded her statement only after getting fitness certificate from the concerned E.M.O. of District Hospital Fatehpur. The dying declaration, per-se, is prompt and independent one and free from any doubt or influence over her. As mentioned above, admission in the hospital is not a condition precedent and gravity of authenticity of particular dying declaration. We have already dealt with the aforesaid proposition in the earlier part of the judgment.

36. No doubt, the relevant dying declaration ought to have been procured by Ashok Kumar Yadav (PW-8) Investigating Officer did not receive the impugned dying declaration during investigation. He did not bother even to collect the same from the court during investigation. It is evident from the testimony of PW-9 Neeta Chandra that when first informant Sartaj Shah informed her on 17.08.2009 about the dying declaration, then only she procured the same and incorporated it in the case diary. There is an apparent callous carelessness on the part of the Investigating Officer which he shamelessly admits in his cross examination. Dr. Vinod Kumar Chauhan, PW-7 categorically observed while certifying the mental orientation of the patient (now deceased) that she was focused, fully conscious and in a fit state of mind to give her statement and for recording the impugned dying declaration, half an hour time was consumed and during the relevant time she remained well oriented. Thus from the aforesaid, the authenticity and veracity of the dying declaration is well established and sufficient recording a conviction order and utter carelessness on the part of the Investigating Officers would not adversely effect the authenticity and genuineness of the dying declaration of the deceased Ajimunnisha.

37. Now coming to the second part of the argument which relates to the fallacious and porous investigation by two different Investigating Officers, namely, Ashok Kumar Yadav, PW-8 and Neeta Chandra, PW-9. It is canvassed by learned Senior Counsel that the tainted investigation by these Investigating Officers has shaken and belies the prosecution story including the alleged dying declaration of Ajimunnisha. To buttress his contention, learned senior counsel has invited the attention of the Court to the following circumstances :-

(a) Alleged dying declaration dated 26.05.2009, Ex.Ka-11, which is neither filed in the court by the earlier Investigating Officer and the second Investigating Officer Neeta Chandra on 07.08.2009 i.e. after 40 days of the incident collected the same and mentioned it in the Case Dirary (CD) Parcha No. 23. The second Investigating Officer copied the dying declaration in the CD after taking permission from the court. On 17.08.2009, for the first time, she got the occasion to peruse the dying declaration.

(b) The spot inspection of the incident was made by the police and no evidence of burnt clothes, matchstick were found by the Investigating officer nor has indicated the actual place of incident in his site plan.

38. The Court has occasioned to peruse the testimony of PW-8 Sri Ashok Kumar Yadav, the first Investigating Officer and PW-9, Ms. Neeta Chandra, the then C.O., Jafarganj, Fatehpur, the subsequent Investigating Officer. Sri Ashok Kumar Yadav, PW-8 in his testimony indicated that he was the first Investigating Officer of the case and on the communication by Sartaj Shah, the informant, he had prepared the site plan under his own signature, which was exhibited as Ex.Ka-12. In his examination-in-chief, he mentioned the dates on which he had recorded the statements of various witnesses. He stated therein that on 16.07.2009, the

informant Sartaz Shah in his Mazeed Bayan disclosed the fact with regard to the recording of the statement of the deceased. The cross examination of Ashok Kumar Yadav is self explanatory, exposing his callous and careless attitude in carrying out the investigation. Naturally, Sartaj Shah, the informant was busy at Kanpur in the treatment of her ailing daughter and he was not in a position to help and aid to the Investigating Officer. It is bounding duty of the concerned Investigating Officer to carry out the extensive investigation in this heinous offence but in his cross-examination, he himself admits that prior to his visit to the place, S.H.O. of the police station reached to the spot and had taken away all necessary articles, namely, kerosene oil gallon, matchstick, half burnt clothes of the deceased and all other incriminating material. He, too, visited the spot in the evening on 26.05.2009. No article was collected mentioned above, nor any report of recovery was prepared. He has not even bothered to show the place of incident in his site plan. After conducting the investigation (so-called), he came to know that the injured was carried to the District Hospital, Fatehpur. He did not even care to collect any such certificate or record the statement of doctors, nurse or any other medical personnel of the hospital. On his negligence, he has furnished lame and casual excuse that on account of his pre-occupation, he has not received the dying declaration of the deceased and therefore he could not incorporate the same in his case diary.

39. Undoubtedly, these are the serious fallacies on the part of the Investigating Officer. The defect in the investigation by itself cannot be ground of acquittal, the investigation is not a solitary area for the judicial scrutiny in the criminal trial, where there has been negligence on the part of the investigating agency on the omission etc. which has resulted in a defective investigation, there is an obligation on the part of the Court to examine the evidence de-hors of such lapses carefully and find out whether the said evidence is reliable or not and to what extent, it is reliable and whether such lapses affect the objects of finding out the truth. The conclusion of trial in the case cannot allow depending solely upon the probity of investigation. There could be highly defective investigation in a case, however, it is to be examined whether there is any lapse by the Investigating Officer and whether due to such lapse any benefit should be given to the accused? In a case of defective investigation, the Court has binding duty to be circuminspect in evaluating the evidence but it would not be right in acquitting the accused persons solely on the ground of defect, to do so, would tantamount playing into the hands of the Investigating Officer, if the investigation is decidedly defective.

40. Ms. Neeta Chandra, the subsequent Investigating Officer, PW-9 when put to cross examination mentioned that the deceased died on 18.06.2009 at District Hospital, Banda and incorporated the same as report no. 9 at 6.30 in the evening on 16.07.2009. The post mortem report is Ex.Ka-13. There is a delay of one month in giving the information. The post mortem report was prepared by Dr.Pranav Kumar, PW-4. Dr. Pranav Kumar, PW-4, who prepared the autopsy report on 19.06.2009 in his testimony states that there was no burn injury over

her right hand and palm, and the cause of death is shock due to ante mortem extensive burn injury. There were carbon particles in her wind pipe, suggestive of the fact that due to inhaling the carbon particles, they were present in wind pipe.

41. Ms. Neeta Chandra, PW-9, the subsequent Investigating Officer, in her cross examination has not tried to rectify the fallacies committed by her predecessor. She never tried to collect any letter of SDM empowering the Naib Tehsildar to record the dying declaration of the deceased. As mentioned, there are porous, fallacies and loop holes in the investigation and it is not expected from the Investigating Officer but fact remains that there would be a grave miscarriage of justice, if the Court would delve upon these fallacies. The ultimate causality would be of justice where the deceased is crying hoarse, indicating the offenders, who were actively participated in reducing her to this condition. It would be improper and unjust that in the name of fallacies, any liberty would be granted in favour of the appellants.

42. In the case of **Gulzari Lal Vs. State of Harayana** reported in **2016 (2) SCC Crl.325**, in which it has been held that the prosecution case regarding murder of deceased and injuries to his son is proved by dying declaration of the deceased, the statement of witnesses and the injured witness, the question raised by the appellants that no blood stained earth was recovered from the place of crime is not relevant. The relevant extract of the judgment is quoted hereinbelow:-

"The question raised by the appellant on the issue that no blood stained earth was recovered from the place of crime is not relevant. On this count, the High Court has also noted the laxity on the part of the police and rightfully concluded that the conviction was valid in light of the statements made by the deceased and the witnesses. Further, reliance was placed on the case of Ram Avtar Rai HYPERLINK "https://indiankanoon.org/doc/1362557/ "&HYPERLINK "https://indiankanoon.org/doc/1362557/ " Ors. v. State Of Uttar Pradesh[5], wherein the Division Bench of this court held as under:

"10. We agree with the High Court that the occurrence had taken place about 15 paces away from the house of the deceased and P.W. 1. It is true that blood-stained earth has not been recovered from the scene of occurrence by the investigating officer though as stated earlier, the deceased had sustained as many as 5 lacerated injuries besides a number of contusions and abrasion. From the failure of the investigating officer to recover blood stained earth from the scene of occurrence, it is not possible to infer that the occurrence had not taken place in front of the house of the deceased and P.W. 1. The evidence of P.Ws. 2 and 3 could not, therefore, be rejected as unreliable as has been done by the learned Sessions Judge. We agree with the High Court that as the occurrence had taken place in front of the house of the deceased P.Ws. 2 and 3 who are members of the family of the deceased and P.W. 1 are natural witnesses who would have come out of the house on hearing the alarm of the deceased who had received as many as 34 injuries... "

43. Sri N.I.Jafri, Senior Counsel lastly invited our attention to the autopsy report of late Ajimunnisha dated

19.06.2009 at 5.30 p.m. (Ex. Ka-8) authored by Dr. Pranav Kumar, PW-4 of District Hospital, Banda, in which it has been mentioned that she might have died a day prior. After scanning the post mortem report, this Court is of the considered opinion that the post mortem report of the deceased is, too, sketchy and perfunctory.

44. The concerned doctor did not mention percentage of the total burnt area of the cadaver. The post mortem report unveils that the deceased was having superficial to deep burn injury except her forehead B/L palm and fingers, B/L foot and sole, 2/3 anterior part of the right leg and 1/3 of anterior part of left leg. In the column of cause of death, it has been mentioned, that it might have been caused because of shock due to ante mortem extensive burn injury.

45. In his testimony Dr. Pranav Kumar as PW-4, stated that he conducted the post mortem of the deceased. Her lungs and interior membrane were congested. In the cross-examination, he admitted that he has not written about the nature of injury as to whether it was fresh or old. There was no odor or smell of kerosene oil from body of the deceased. Though, it is a settled case of the prosecution, which finds support from the dying declaration, whereas it has been categorically stated that one of the accused appellants poured the kerosene oil upon her and thereafter she was put on fire by co-accused persons.

46. The Court is at loss to bridge this time gap i.e. date of incident dated 25.05.2009 at village Awazipur, Fatehpur and the date of her ultimate demise i.e. 18.06.2009 at District Hospital, Banda. The time period of almost 24 days, she was allegedly under the treatment in various hospitals and lastly, as mentioned above, admitted on unknown date at District Hospital, Banda. Neither the post mortem report nor the testimony of the doctor ever tried to bridge this period of 24 days from the date of incident. Even if, we assume to be true on its face value, that she was under treatment at different places (though there is no documentary proof/bed head tickets of the same), this Court is unable to swallow this time interval. The burn injuries cannot be a singular factor for her demise, there could be numerous factors and circumstances viz septicemia or improper treatment/ medication, which might have resulted to her sad demise.

47. At this juncture, the Court has occasion to peruse Section 299 of the IPC and Section 304 IPC which reads thus:-

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

Explanation 1.--A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.--Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death,

although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.--The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."

"304. Punishment for culpable homicide not amounting to murder.--Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

48. After analyzing and marshaling the above, it is evident that there is marked shift in the prosecution case as mentioned in the FIR and in her dying declaration. There is no evidence that there was a pre-meditation on the part of the appellants though she was dragged to kitchen of the nuptial house and set on fire by the joint misadventure of the accused persons. It is a concrete case that cane of kerosene oil was poured upon and she was set ablaze but aghastly no incriminating material was collected by the police. There was odor of kerosene oil over her body. The post mortem report too is of no help indicating the seriousness and the gravity of the injuries sustained by her, she remained alive for almost 24 days and all of sudden she died.

49. In an identical case where the accused poured the kerosene oil upon the body of the deceased and set her on fire, the dying declaration was corroborated by the accident registered maintained in Govt. Hospital and other documentary evidence on record, it was held that burn injury which resulted into death of the accused after 17 days of the incident were caused by the accused, his case would fall under Section 299 Expl. 2, accordingly the accused was convicted under Section 304 Part II and Section 324 IPC **(Ramesh Kumar Vs. State of Bihar and others reported in AIR 1993 SC 2317)** and **(Public Prosecutor High Court Vs. Shaik Meera Valli reported in 1993 CrLJ 3320).** Applying the settled principles of law enumerated above, we are of the view that it is fit case for modifying the sentence and the appellants ought to have been convicted under Section 304 Part II of the IPC instead of Section 302/34 IPC.

50. We, accordingly, while maintaining the conviction of the appellants alter the conviction of appellants from Section 302 IPC to Section 304 Part II IPC and modify the awarded sentence of imprisonment for life to the period of incarceration already undergone by them. The appellantsundergo a rigorous imprisonment and also pay the fine as directed by the trial court.

51. It is given to understand that the appellant no.1 Ramjan Shah is languishing in jail since very date of inception i.e. on 26.05.2009 whereas rest of the accused Km. Shabbo and Mrs. Rashida Begam are facing incarceration from date of judgment i.e. 06.06.2013. Since both of them are in jail for almost 11 years(appellant no.1) and 7 years (appellant nos. 2 and 3) respectively. They are released forthwith, the appeal is partly allowed in the aforesaid terms. The fine amount would be deposited within a month after their release.

52. The instant appeal is, accordingly, allowed **in part.**

(2020)08ILR A591
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAVI NATH TILHARI, J.

Criminal Appeal No. 4426 of 2016

Mahaveer ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Indra Kumar Chaturvedi, Sri Swetashwa Agarwal, Sri Abhishek Triathi, Sri Anshu Singh, Sri Hemandra Pratap Singh, Sri Thakur Azad Singh.

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

Criminal law - Code of Criminal Procedure, 1973- Section 389(1)- Second bail application -The first bail application was rejected by this Court on merits-Short Term Bail Application seeking release on short term bail on medical grounds, was also rejected on merits - Settled law that it is not open to the aggrieved person to make successive bail applications even on a ground already rejected by the Courts earlier - No material change in the fact situation in this second bail application. The ground taken is already covered by previous order - The age of the applicant is no ground to release him on bail.

It is not open for the accused to adopt the same grounds in the Second bail application which have been adopted earlier and rejected by the Court. The medical grounds taken in the second bail application, having already been taken in the Short term bail application and rejected by the Court, cannot be pressed again. (E-3)

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Indra Kumar Chaturvedi, learned Senior Advocate assisted by Sri Thakur Azad Singh, learned counsel for the appellant/applicant and learned A.G.A. for the State.

2. This is the second bail application by the appellant/applicant Mahaveer, who is convicted and sentenced in ST No. 368 of 2007, arising out of Case Crime No. 1247 of 2006, under Sections 396, 120B, 412 IPC, Police Station Naugawan Sadat, District J.P. Nagar.

3. The first bail application being Criminal Misc. Bail Application No. 3280 of 2016 was rejected by this Court on merits by order dated 14.9.2016. Thereafter the applicant filed Criminal Misc. Short Term Bail Application No. 4 of 2018 seeking release on short term bail on medical grounds, which was also rejected on merits by this Court by order dated 5.3.2019.

4. Learned counsel for the applicant submits that the present second bail application is being filed on the ground of serious ailment of the applicant who is languishing in jail since 3.11.2015 after conviction. The applicant is having a very weak physic and suffered massive attack (paralyze) in jail and was taken to Sardar Vallabh Bhai Patel Hospital, Meerut, where he was treated on 17.4.2018. Thereafter, the applicant's condition became worse and he was again admitted in the same Hospital on 6.6.2018, after being medically examined by the Medical Board. On 12.6.2018, the applicant was referred to Government Authorized Higher Centre (AIM) G.B. Panth Hospital, New Delhi, and was admitted at Dr. Ram Manohar Lohiya Hospital, New Delhi on 12.6.2018. He was discharged on 13.6.2018 but was again admitted at Pt. Deen Dayal Upadhyaya Combined (Male) Hospital, Moradabad on 15.7.2019 where the applicant remained upto 22.7.2019 and was further referred to higher centre Sardar Vallabh Bhai Patel Associated with LLRN Medical, Meerut on 27.7.2019. Since then, the applicant is continuously admitted in the hospital and is under medical treatment. The applicant is aged about 70 years and in the circumstance of the case, he is entitled for grant of bail on the medical ground of ailment.

5. Per contra, learned A.G.A. submits that so far as the ground of applicant's ailment is concerned, on such consideration, i.e. physical condition and the treatment, looking to the documents annexed by the applicant along with the short term bail application upto 13.6.2018, the applicant's short term bail application was rejected by this Court by order dated 5.3.2019. He submits that on the same facts and ground, as in the short term bail application the second bail application cannot be considered and the applicant is not entitled for bail. Learned A.G.A. submits that from the averments in the affidavit in support of second bail application it is evident that the jail authorities are taking better care of the applicant's health and are providing best available treatment to him in different hospitals. He submits that considering the nature of the offence, nature of injuries and the finding recorded by the trial court the applicant's first bail application was rejected. There is no fresh ground for grant of bail and on the ground of ailment the short term bail was rejected.

6. We have considered the submissions advanced by the learned counsel for the parties and perused the material on record including supplementary affidavit of the applicant.

7. In **Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another (2005) 2 SCC 42**, the Hon'ble Supreme Court has held that it is not open to the aggrieved person to make successive bail applications even on a ground already rejected by the Courts earlier. It has also been held that the findings of a higher court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event the court must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. We consider it appropriate to reproduce paragraphs 18 to 20 of the aforesaid judgment as under:

"18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However. Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so.

19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier including the Apex Court of the country."

8. The first bail application of the applicant was rejected by this Court, after

going through the entire merits of the case. This Court by order dated 14.9.2016 took cognizance of the relevant facts and noting that more than a dozen gun shot entry wounds were found on the body of the deceased in indiscriminate firing in which incident the applicant was armed with fire arm and there was a background of enmity and there were attempts to commit murder in question made earlier. Considering the motive, occular version and the ante mortem injuries received by the deceased, the applicant was refused bail.

9. The applicant's short term bail application was also rejected by order dated 5.3.2019, observing that whatever ailment with which the appellant was suffering was already being taken care of medically and the fact that the applicant was being treated at different hospitals as per the need was not disputed.

10. We do not find any material change in the fact situation in this second bail application. The ground taken is already covered by order dated 5.3.2019. The only thing is that the future physical condition of the applicant w.e.f. 15.7.2019 has further been mentioned, but without disputing that the jail authorities are taking due care medically and are providing treatment in different hospitals.

11. We are further of the view that considering over all facts of the case, the age of the applicant is no ground to release him on bail.

12. Thus considered we are not inclined to grant bail to the applicant. The second bail application of the applicant Mahaveer is hereby rejected.

(2020)08ILR A594
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2020

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 4658 of 2015

Veerpal & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Umesh Chandra Yadav, Sri Awadh Sharma, Sri Rajesh Pathik, Sri Rohan Gupta, Sri Shree Prakash Giri

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

Evidence Act-Indian Evidence Act, 1872- Section 32- Two dying declarations were recorded. The first dying declaration of the deceased was recorded on 20.12.2011 by PW-8 , the first investigating officer of the case in the form of statement under Section 161 Cr.P.C. at Lakshmi Life Line Hospital, Vrindavan, district Mathura and the second dying declaration of the deceased was recorded by PW-4 , the then Additional City Magistrate at 4.20 PM on 22.12.2011 at Ishwar Devi Nurshing Home, Rajpur Chungi, Agra, i.e. two days after the recording of first dying declaration. In the first dying declaration the deceased stated that out of the fear of her father-in-law, she committed suicide and the role assigned to the appellant No. 1 in her dying declaration was only of chasing her for beating and not for burning.When the second dying declaration of the deceased was recorded by PW-4, she has taken a complete somersault and has assigned general role to father-in-law, mother-in-law and Devar to have

burnt her after pouring kerosene over her.The deceased was fully conscious at the time of recording of her both the statements. Even the second dying declaration suffers from infirmity as it was not mentioned therein as to who was the accused caught hold of her, who poured kerosene and who set her on fire. It would not be safe to rely upon the multiple dying declarations of the deceased in the absence of any corroborative evidence. The statement of the deceased was recorded by the Sub-Divisional Magistrate while she was admitted in Lakshmi Life Line Hospital, Vrindavan, but due to the lapse and negligence of PW-8, the first investigating officer, the same could not be made part of case diary. Since, the deceased was also mentally weak, the possibility of her tutoring by the witnesses cannot be ruled out.

Multiple Dying Declarations - Contradictions in dying declarations- Deceased mentally weak- Possibility of tutoring – Third dying declaration concealed by the prosecution- Where there are two or multiple dying declarations and the same are contradictory and the evidence shows that the deceased was mentally weak, then the possibility of the deceased being tutored cannot be ruled out..

Evidence Act-Indian Evidence Act, 1872-Section 32-Dying Declarations-Witnesses of facts namely PW-1, the first informant and father of the deceased, PW-2, the cousin of the deceased, PW-5 and PW-7, brothers of the deceased, have not supported the prosecution case exonerating the appellants- The learned trial court has erred in law in convicting the appellants solely on the basis of dying declaration of the deceased without there being any corroborative evidence on record.

Multiple Dying Declarations-Contradictions- Witnesses of fact hostile- Where the dying declarations are contradictory and there is no corroboration from the ocular and other evidence, then the accused cannot be convicted solely on the basis of the dying declarations.

Criminal Appeal allowed. (Para 49, 51, 52, 53, 54, 62, 64, 70, 73, 74) (E-3)

Case Law relied upon/ Discussed:-

1. Laxman Vs St. of Maha., (2002) 6 SCC 710

2. Paparambaka Rosamma & ors. Vs St. of A.P, (1999) 7 SCC 695

3. Koli Chunilal Savji & anr. Vs St. of Guj., 1999(9) SCC 562

4. Harjeet Kaur Vs St. of Punj. 1999(6) SCC 545

5. Rasheed Beg Vs St. of M.P., (1974) 4 SCC 264

6. Ram Manorath Vs St. of U.P., (1981)2 SCC 654

7. Amol Singh Vs St. of M.P., (2008) 5 SCC 468

8. Heera Lal Vs St. of M.P., (2009) 12 SCC 671

9. St. of A.P Vs P. Khaja Hussain (2009) 15 SCC 120

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

11. Bawa Ram & anr. Vs U.T, Chandigarh (2009) 13 SCC 270

(Delivered by Hon'ble Naheed Ara Moonis, J.)

1. This Criminal appeal has been filed against the judgement and order dated 08.9.2015 passed by the learned Additional Sessions Judge, Mathura in Sessions Trial No. 294 of 2013, arising out of case crime No. 1144 of 2011 under Sections 302 read with Section 34 IPC, police station Vrindavan, district Mathura whereby the learned Judge has convicted and sentenced the appellants to life imprisonment under Section 302/34 IPC and a fine of Rs. 10,000/- each and in case of default in payment thereof, the appellants were further directed to

undergo six months' additional imprisonment.

2. The facts as unfolded by the prosecution in short compass are that a written report was handed over by the first informant Bangali Babu, son of Shri Murli Singh, resident of village Jhorian Ka Pura, police station Pinahat, district Agra on 20.12.2011 at the police station Kotwali Vrindavan, district Mathura that on 20.12.2011 (today) at about 2.30 PM he received an information from his grand-daughter (Natni) Radha that her mother has been burnt. At that time, he was in the school and after arranging vehicle, he came to Vrindavan and talked to her daughter in the hospital. At that time S.D.M. was recording her statement. The report further indicates that when he requested the SDM to provide him a copy of the statement, he directed him to obtain the same from the Court of Chief Judicial Magistrate, Mathura. The SDM has also directed him to go to the police station Kotwali and lodge the report. His daughter has told him that "her father-in-law Veerpal, son of Babu Ram and mother-in-law Smt Maya, wife of Veerpal have demanded money from her by saying that your father had given money to you. On her refusal to give money, they indulged in Marpeet with her and by sprinkling kerosene over her, threw a burning matchstick and burnt her. Mahesh, son of Veerpal is also involved in this conspiracy." The report also indicates that Smt. Mithlesh is badly burnt and is admitted in Lakshmi Life Line Hospital, Vrindavan.

3. On the basis of the aforesaid report, which was scribed by Udai Bhan Singh, son of Layak Singh, village Pura Jhorian, police station Pinahat, district Agra (Ext. Ka-1), a case was registered against Veer Pal, Smt. Maya, wife of Veer Pal and Mahesh on 20.12.2011 at 11.30 PM as Case Crime No. 1144 of 2011, under Section 326 IPC, police station Vrindavan, district Mathura (Ext. Ka-4).

4. After the registration of the FIR, the criminal law was set in motion and the investigation of the case was entrusted to PW-8, SI Shambhu Nath Singh, who has divulged that on 20.12.2011 he was posted at police out post Bihari Ji Mandir, police station Vrindavan. On that date on the basis of the report of the first informant, he has lodged the case as case crime No. 1144 of 2011, under Section 326 IPC, the investigation whereof was entrusted to him. First of all, he copied the contents of the Chik FIR in the case diary and recorded the statement of the scribe of the FIR and also of the first informant. Thereafter, he recorded the statement of the victim, Smt. Mithlesh. On account of the transfer of PW-8, the Thereafter, investigation of the case was transferred to SI Ved Singh, who has not been examined in this case.

5. After the death of the victim-Smt. Mithlesh on 09.1.2012, (hereinafter referred to as the deceased), the case was converted to under Section 302 IPC. After the case was converted to under Section 302 IPC, the investigation of the case was taken up by PW-9, Inspector Arvind Pratap Singh. On 07.11.2012, he perused the case diary prepared by the earlier investigating officers SI Shambhu Nath Singh and SI Shri Ved Singh and visited the place of occurrence along with SI Ved Singh and inspected the spot, which was in accordance with the site

plan prepared by SI Ved Singh, which he proved as paper No. 4-A/16 as he was acquainted with the writing of SI Ved Singh. On 07.11.2012 he arrested the named accused persons namely Veerpal Singh and Mahesh and after recording their statements, they have been sent to jail. He also stated that on 12.11.2012, he again recorded the statement of the first informant Bangali Babu, who reiterated his statement given to the earlier investigating officer SI Ved Singh. Thereafter, he recorded the statement of PW-5, Rajpath Singh, brother of the deceased, who has stated that he was present at the time of recording of statement of the first informant Bangali Babu and also in the inquest proceeding. Thereafter, he recorded the statement of brothers of the deceased PW-6, Shri Shanker Dayal, PW-7, Satya Prakash and witness PW-2, Hotam Singh , scribe of the FIR and witness of inquest proceeding Shri Udai Bhan Singh and other witnesses of inquest namely Pratap Singh, Munendra Lal and Ashok. He also perused the statement given by the deceased to SI Ved Singh on 06.11.2012, which is a part of case diary. On 29.11.2012, 08.12.2012 and 11.12.2012, he raided the hideouts of the accused-Maya, but she could not be traced out. On 13.12.2012, he recorded the statement of PW-3, Dr. Sanjay Kasi, who was posted at District Women Hospital, Agra and conducted the post-mortem examination on the cadaver. On 14.12.2012, he recorded the statement of earlier investigating officer PW-8, Shambhu Nath Singh and SI Ved Singh. After collecting credible evidence and completing the investigation, he submitted the charge sheet against the accused-appellants Veer Pal Singh and Mahesh, which he proved as Ext. Ka-7.

6. However, the investigation against accused-Maya was pending.

7. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions and the learned Additional Sessions Judge, Court No. 6, Mathura vide order dated 16.8.2013 framed the charges against the accused-appellants Veer Pal and Mahesh under Section 302 read with Section 34 IPC to which accused-appellants pleaded not guilty and claimed to be tried.

8. To bring home guilt of the appellants beyond the hilt, the prosecution has examined as many as ten witnesses. Out of whom PW-1, Bangali Babu, PW-2, Hotam Singh, PW-5, Rajpath, PW-6, Shanker Dayal and PW-7 Satya Prakash were the witnesses of facts and remaining witnesses were formal one.

9. PW-1, Bangali Babu is the first informant of the case and father of the deceased. His statement was recorded on 04.4.1014. In his examination-in-chief, he deposed that his daughter was married to Dilip Kumar. He knows Udai Bhan, son of Layak Singh. He is his nephew (Bhatija). He has mentioned his own mobile number as 8449962362, which is correct, which belongs to his children. On 20.12.2011 at 2.30 PM, he received a telephone call from his grand-daughter (Natni) Radha, informing him that her mother has burnt. At the request of his counsel statement was deferred. Thereafter he was examined on 15.7.2014. PW-1 deposed on oath that when he received telephone call of Radha he was in the school. Radha was also in her school. She received information on phone that her mother has burnt. Radha informed him and thereafter he informed the other family members. They came to

Vrindavan and spoken to his grand-daughter Radha. The deceased-Mithlesh was not unable to speak. He was not allowed to meet her. He (PW-1) further deposed that when he requested the SDM for copy of the statement of the deceased, he asked him to obtain the same from the Court of Chief Judicial Magistrate. He did not speak to the deceased as she was badly burnt and was in unconscious state and was not in a position to speak. The deceased did not tell him that her father-in-law Veer Pal and mother-in-law Maya demanded money and on refusal thereof, they have burnt her. She also did not tell him that in this conspiracy appellant-Mahesh is also involved.

10. At this stage, PW-1, Bangali Babu was declared hostile and the prosecution was permitted to cross-examine him.

11. In his cross-examination, he has admitted that he put his signature on the FIR and marked as Ext. Ka-1. He deposed that it was scribed by Uday Singh as at that time his mental condition was not good. When he was shown the contents of the FIR, he stated that Uday Bhan Singh has mentioned the same on the advise of other and that he did not mention the same in the FIR. He denied that his statement was ever recorded by police. He also denied that he is not deposing correctly as he has compromised with the accused person.

12. PW-2, Hotam Singh, in his examination-in-chief deposed that the informant of this case Bangali Babu is his Tau (father's elder brother). His daughter Mithlesh alias Meena, the deceased was married to Dilip, son of Veer Pal about 16 years prior to her death. On 20.12.2011, they have got an information that Mithlesh-deceased has burnt as her clothes caught fire and is hospitalized. He came to Vrindavan along with the first informant Bangali Babu. Mithlesh-deceased was admitted in Lakshmi Life Line Hospital. He tried to speak to her, but she was not in a position to speak. She did not tell anything to him. Thereafter, she was admitted in Shaheed Nagar Ishwari Devi Hospital in Agra by her father-in-law, accused-Veer Pal on 21.12.2011. On 22.12.2011, she was shifted to Fatehabad branch of the hospital, where she breathed her last on 09.1.2012. Deceased-Mithlesh has not been burnt by accused-Veer Pal, Smt. Maya and Mahesh.

13. At this stage, PW-2, Hotam Singh was declared hostile and the prosecution was permitted to cross-examine him.

14. In his cross-examination, he stated that deceased was mentally weak, due to that reason, she was married to Dilip, who was mentally retarded. He further stated in his cross-examination that after the incident, when he came to Ratan Chhatri (village of the deceased), he was told by the villagers that deceased was not got burnt by her father-in-law Veerpal, mother-in-law Maya Devi and Devar Mahesh, but she burnt while cooking food. She was admitted in the hospital by her in-laws.

15. PW-3. Dr. Sanjay Kasi has conducted post-mortem examination on the cadaver of Mithlesh on 09.1.2012. He found the following ante-mortem injuries on the person of the deceased:

1. Surgical dressing present all over body. Intra cash present on left ankle and left wrist.

2. Superficial to deep burn all over body except front of chest, sides of lower abdomen and back.

3. Redness present.

16. In the opinion of the doctor, the cause of death of the deceased was septicaemic shock as a result of burn injuries, which was caused at about 2.30 PM on 20.12.2011.The post-mortem report proved by PW-3 Sanjay Kasi exhibited as Ext. Ka-2.

17. PW-4, Shri Bal Kishan Agrawal deposed that on 22.12.2011, he was posted as Additional City Magistrate-I, Agra. On the basis of request of Station Officer, police station Sadar, district Agra dated 22.12.2011, for recording the dying declaration of deceased-Mithlesh, wife of Dilip Kumar, aged 36 years, he reached at Ishwar Devi Nursing Home, Rajpur Chungi, Agra at 4.20 PM. The doctor posted at the nursing home took him to the ward where the treatment of injured-Mithlesh was going on. Before recording the statement, doctor has told him and also recorded in writing that she is fit to give her statement and also conscious. Thereafter, he was also satisfied that deceased-Mithlesh was fully conscious to give her statement and was understanding the question. In her statement she deposed that on 20.12.2011 at 11.00 AM due to the feud over demanding money, his Dever, Mahesh, son of Veerpal, father-in-law Veer Pal, son of Babu Lal and mother-in-law Smt. Maya, wife of Veer Pal, resident of Ratan Chhatri, Purani Kali Dah, police station Vrindavan, district Mathura have burnt her after pouring kerosene over her. She further stated that her condition is critical.

18. He (PW-4) further deposed that after recording the statement, he has read over the contents of the statement to the deceased-Mithlesh, who has put her left hand thumb impression over it, which he proved as Ext. Ka-3. After recording the statement, the doctor has recorded in writing that injured-Mithlesh was fully conscious during and after giving her statement. He also deposed that after recording the statement, in the hospital itself, he sealed the same and after coming to his office, he sent the sealed envelop by post to the Chief Judicial Magistrate, Mathura. He further deposed that along with the dying declaration of the deceased-Mithlesh, he also sent the copy of the police information and carbon copy of GD to the Chief Judicial Magistrate, Mathura, which have annexed at the time of recording of his statement in Court.

19. PW-5, Rajpath in his examination-in-chief deposed that deceased-Mithlesh was his real younger sister. She was married to Dilip, son of Veer Pal, about 12-13 years ago. She had four children, three daughters and one son. As the mental condition of his brother-in-law was not good, the responsibility of running the house was of his sister. He received a call from her niece stating that her mother has been burnt. She did not tell him as to who has burnt her. On information, he along with 10-11 persons including my father rushed to Vrindavan. By that time her sister was admitted in the hospital by her in-laws in Lakshmi Life Line Hospital, Mathura. He did not speak to her sister in the hospital. His father has spoken to her. He (PW-5) further deposed that his sister did not tell him that on 20.12.2011 at about 11 AM, her father-in-law Veer Pal, mother-in-law

Maya have demanded any money from her by saying that your father has given money to you.

20. At this stage, this witness has been declared hostile and the prosecution was permitted to cross-examine him.

21. In his cross-examination, PW-5, Rajpath deposed that he has not given any statement under Section 161 Cr.P.C. He further deposed that he visited several times to the matrimonial house of the deceased. She never made any complaint about her in-law. Mithlesh-deceased was mentally weak and due to this reason, she was married to Dilip, who was also mentally weak. He came to know that deceased was not burnt by her in-laws, who received burn injuries while cooking. Her in-laws admitted her in the hospital and had bear the expenses.

22. PW-6, Shanker Dayal in his examination-in-chief has deposed that deceased-Mithlesh was his sister, who was married to Dilip, son of Veer Pal about 15 years ago. His brother-in-law was doing agricultural work and was mentally retarded. Her sister had four children, one son and three daughters, son was youngest one. They were looked after by the deceased-Mithlesh. She resided separately from her in-laws. Her mother-in-law Smt. Maya, father-in-law Veer Pal and Devar Mahesh Chandra demanded money from her sister, but she did not give money to them. He further deposed that Smt. Mithlesh poured kerosene over her sister, while Veer Pal caught hold of her and Mahesh burnt her by igniting matchstick. There was dispute between the deceased and her in-law over partition of agricultural land. Deceased's in-laws have not given her share of land due to which they (her parents)used to help the deceased financially. His niece has informed his younger brother that Mithlesh has burnt. Thereafter, he stated that Mithlesh has been burnt. On this information, he along with his father Bangali Babu, brother Rajpath Singh and Satya Prakash and Sudhir came to Vrindavan. By that time father-in-law and Devar of Mithlesh have admitted her in the hospital. Mithlesh has told him about the incident. Thereafter, he got the Mithlesh admitted in Mohaniya hospital, Agra and thereafter she was shifted to Ishwari Devi Nursing Home, Fatehabad. He further deposed that her sister was alive for about 20-22 days and thereafter, she breathed her last in the hospital. Inquest and post-mortem on the cadaver was conducted at Agra. In his cross-examination, he deposed that his father Bangali Babu, brother Raj Path Singh and his uncle's cons Hotam Singh have not supported the prosecution case. He further denied that he is deposing against the accused persons to blackmail them to extort money.

23. PW-7, Satya Prakash in his examination-in-chief deposed that deceased-Mithlesh was his younger sister, who was married to Dilip, son of accused-Veer Pal about 12 years ago. She had four children. She was living in her in-laws house. She had no dispute with her in-laws. About three years ago on the date of occurrence, while she was preparing food, her cloth caught fire and was severally burnt. Her mother-in-law Smt. Maya Devi, father-in-law Veer Pal and Devar Mahesh had not burnt her. On 20.12.2011 his niece, Radha had telephoned that her mother has burnt as her clothes caught fire while she was preparing food and she was admitted in hospital for treatment.

24. At this stage, this witness has been declared hostile and the prosecution was permitted to cross-examine him.

25. In his cross-examination, he deposed that that his statement under Section 161 Cr.P.C. was not recorded by the investigating officer. Deceased-Mithlesh was his real sister. She never made complaint of her in-laws. She told that her father-in-law Veer Pal, mother-in-law Maya and Devar Mahesh used to keep her very well and they never quarrelled with her. Deceased-Mithlesh was mentally weak and that is why she was married to Dilip, who was also mentally weak. He also deposed that his niece Radha has telephonically informed him that her mother (deceased) has burnt while cooking. She was never in a fit condition to speak till her death.

26. PW-8, SI Shambhu Nath Singh was the first investigating officer of the case, who had recorded the statement of the complainant, scribe of FIR and injured-Mithlesh and PW-9, Inspector Arvind Pratap Singh was the third investigating officer of the case, who on completion of the investigation, submitted charge sheet. Their evidence in detail has already been discussed above.

27. PW-10, SI Kamal Singh, who was posted as HCP at Police Station Fatehabad, has got the inquest on the cadaver of deceased-Mithlesh done on 09.1.2012 at 8.55 AM. In his examination-in-chief, he deposed that on 09.01.2012 he was posted has HCP at police station Fatehabad, district Agra. On that day on the basis of information of family members of the deceased-Mithlesh, he reached at Ishwari Devi Nursing Home, Fatehabad, Agra along with Constables Daya Ram and Radhey Shyam where cadaver of deceased-Mithlesh was lying on the bed of mortuary and her family members were sitting besides her. There were sign of burning all over her body and there were bandage on several places. He appointed Panch and conducted the inquest. In the opinion of Panch, she died during treatment due to burn. Inquest proceeding was completed at 11.00 AM, which he proved as Ext. Ka-8. He (PW-10) also prepared documents relating inquest proceeding, which he proved and marked as Exts. Ka-9-12.

28. After the closure of prosecution evidence, the statements of the accused-appellants were recorded under Section 313 Cr.P.C, who denied the charges. They further stated that deceased was not in a position to speak and that in collusion with the family members of the deceased, false and fabricated statements have been recorded to extract money from them. They pleaded their innocence.

29. Learned Additional Sessions Judge, Mathura after hearing the learned counsel for the parties, evaluating and assessing the evidence on record, convicted and sentenced the appellants as indicated herein above in the opening paragraph of the judgement.

30. Hence, this appeal.

31. Heard Mr. Shree Prakash Giri, learned counsel for the appellants and Shri Ashwani Prakash Tripathi, Learned Additional Government Advocate representing the State.

32. Learned counsel for the appellants has hammered the impugned

judgement of conviction and order of sentence on the ground that there are serious contradiction in both the dying declaration of the deceased, which negate the prosecution story. Learned counsel for the appellants states that in the first dying declaration the deceased has stated that in order to commit suicide, she herself poured kerosene over herself and set ablaze, whereas in other dying declaration she has stated that her Devar Mahesh, father-in-law Veer Pal (the present appellants) and her mother-in-law Maya Devi set her ablaze after pouring kerosene over her.

33. Learned counsel for the appellants has further argued that in fact, in addition to the aforesaid two dying declarations, one more dying declaration of the deceased was recorded by the Sub-Divisional Magistrate, but as the same was not favourable to the prosecution, it was not made part of the case diary.

34. Placing reliance upon the decision of Hon'ble Supreme Court in Bawa Ram and another Vs. Union Territory, Chandigarh (2009) 13 SCC 270, it is argued by the learned counsel for the appellants that since all the prosecution witnesses, who are father and brothers of the deceased, have not supported the prosecution case, hence the prosecution of the appellants cannot be sustained and the learned trial court on misappreciation of evidence brought on record, convicted and sentenced the appellants and as such the impugned judgement and order are liable to be quashed.

35. On the other hand Shri Ashwani Prakash Tripathi, learned Additional Government Advocate has vehemently opposed the submissions made by the learned counsel for the appellants by contending that all the appellants with common intention to kill, had poured kerosene over the deceased and burnt her. He further submits that as the prosecution was successful in bring home the guilt of the appellants, the impugned judgement and order do not call for any interference by this Court.

36. Before adverting to the arguments advanced by the learned counsel for the parties, it would be useful to quote the both the dying declarations of the deceased:

37. The first dying declaration of the deceased-Smt Mithlesh, which was recorded by PW-8, SI Shambhu Nath Singh in the form of statement under Section 161 Cr.P.C. on 20.12.2011, reads as under:

"मेरे ससुर वीरपाल सिंह पुत्र बाबू राम मुझसे रोजाना पैसे मांगता है और कहता है मुझ पर दुसरों का कर्ज है उसे चुकाना है। मैंने उससे कहा कि मेरे पास तीन लड़की व एक लड़का है, मैं उनका पालन पोषण कैसे करूँगी, मेरा पति तो मानसिक रुप से पागल है। दिनांक 20.12.2011 को मेरे ससुर ने मुझसे फिर पैसे मांगे मैंने मना कर दिया तो मेरा ससुर डंडा लेकर मेरे पीछे मारने के लिए भागे। मैंने कमरे में घुसकर किवाड बंद कर लिए, यह सोचकर कि मेरे ससुर मुझे मारेंगे और मैंन गुस्से में आकर कमरे में रखी मिटटी के तेल की बोतल अपने ऊपर डालकर माचिस से आग लगा ली। मेरी सास माया देवी भी मुझसे झगड़ती रहती है। मुझे अपने पति से कोई शिकायत नहीं है।"

38. The second dying declaration of the deceased, which was recorded by PW-4, Bal Kishan Agarwal on 22.12.2011 at 4.20 PM at Ishwari Devi Nursing Home, Agra, reads as under:

"उसे दिनांक 20.12.2011 को दोपहर 11.00 बजे पैसे मांगने के विवाद पर उसके देवर महेश पुत्र वीरपाल, ससुर वीरपाल पुत्र बाबुलाल तथा सास माया पत्नी वीरपाल निवासी उपरोक्त ने मिटटी का तेल डालकर जला दिया हैं। मेरी हालत बहुत खराब है।"

39. The maxim "Nemo moriturus praesumitur mentire" is the basis for "dying declaration", which means, " a man will not meet his maker with a lie in his mouth". A dying declaration is called as "Laterm Mortem" which means "word said before death.

40. Recording of dying declaration is very important task and utmost care is to be taken while recording a dying declaration. If a dying declaration is recorded carefully by a proper person, keeping in mind the essential ingredients of the dying declaration, such declaration retains it full value.

41. Law on the subject is very clear after the decision of five Judges Bench of the Supreme Court in **Laxman Vs. State of Maharashtra, (2002) 6 SCC 710.** Prior to this judgement, there were conflicting decisions of three Judges Benches of Hon'ble Supreme Court, i.e**. Poparambaka Rosamma and others Vs. State of Andhra Pradesh**, 1999 (7) SCC 695 and **Koli Chunilal Savji and another Vs. State of Gujarat**, 1999 (9) SCC 562.

42. In **Paparambaka Rosamma and others Vs. State of Andhra Pradesh, 1999 (7) SCC 695** the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that on the basis of answers elicited from the declarant to the questions put, he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. Doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the court also had found serious lacunae and ultimately did not accept the dying declaration recorded by the magistrate.

43. In **Koli Chunilal Savji and another Vs. State of Gujarat, 1999(9) SCC 562** it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The court relied upon the earlier decision in Ravi Chander Vs. State of Punjab, 1998 (9) SCC 303 wherein it had been observed that for not examining by the doctor the dying declaration recorded by the executive magistrate and the dying declaration orally made need not be doubted. The Magistrate being a disinterested witness and is a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.

44. The court also in the aforesaid case relied upon the decision of this court in **Harjeet Kaur VS. State of Punjab**

1999(6) SCC 545 case wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner.

45. The Supreme Court in **Laxman Vs. State of Maharashtra (Supra)**, while affirming the law laid down in **Koli Chunilal Savji and another Vs. State of Gujarat,** 1999(9) SCC 562 has laid down the principle to the following effect:

"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 death bed 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 court 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 to always 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 look 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 in 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 is 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."

(emphasis supplied)

46. It is no doubt true that conviction of a person can be made solely on the basis of dying declaration, which inspires confidence and if there is nothing suspicious about it.

47. Now, this Court will proceed to scrutinize as to whether, the statement/dying declaration of the deceased inspires confidence of the Court or it was suspicious and the 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.

48. The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying person because a persons on the verge of death is not likely to meet his maker with a lie in his mouth by implicating innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring.

49. Admittedly in this case, two dying declarations were recorded. The first dying declaration of the deceased was recorded on 20.12.2011 by PW-8 Shambhu Nath Singh, the first investigating officer of the case in the form of statement under Section 161 Cr.P.C. at Lakshmi Life Line Hospital, Vrindavan, district Mathura and the second dying declaration of the deceased was recorded by PW-4 Bal Kishan Agrawal, the then Additional City Magistrate at 4.20 PM on 22.12.2011 at Ishwar Devi Nurshing Home, Rajpur Chungi, Agra, i.e. two days after the recording of first dying declaration.

50. Admittedly, the deceased was admitted in the hospital by accused-appellant Veer Pal on 20.12.2011 in Lakshmi Life Line Hospital, Vrindavan, district Mathura, where her statement was recorded by PW-8, SI Shambhu Nath Singh, the first investigating officer of the case. In her statement, the deceased has stated that her father-in-law used to demand money from her every day by saying that he had to repay the debt, which he had taken from others. She refused to give money to him by saying that she has three daughters and a son and she has to foster them. Moreover, her husband is mentally ill. On the fateful day, i.e. 20.12.2011, her father-in-law (Veer Pal, appellant No. 1) has chased her for beating. However, she managed to escape and bolted the door from inside. By thinking that her father-in-law will beat her, she poured kerosene

over herself and set her ablaze. She further stated that her mother-in-law also used to quarrel her. She does not have any grievance with her husband.

51. Perusal of the aforesaid statement of the victim goes to suggest that out of the fear of her father-in-law, she committed suicide and the role assigned to Veer Pal (the appellant No. 1) in her dying declaration was only of chasing her for beating and not for burning. The role of only quarrel has been assigned to Maya Devi (non-appellant) against whom investigation was pending, when the charge sheet in the instant case was submitted, who later on met her maker. In her statement the deceased has not assigned any role to appellant No. 2, Mahesh, the Devar. When statement was recorded she was fully conscious as stated by PW-8, the first investigation officer of the case in his cross-examination that when he has recorded the statement of the deceased she was fully conscious and has given her statement independently. Perusal of the first information report, which was lodged by PW-1, Veer Pal, in which he has mentioned that when he visited the hospital and talked to her daughter, "she told him about the incident", goes to suggest that the victim was fully conscious when her statement was recorded.

52. However, when the second dying declaration of the deceased was recorded by PW-4, Bal Kishan Agarwal, she has taken a complete somersault and has assigned general role to Veer Pal, father-in-law, Smt. Maya, mother-in-law and Mahesh-Devar to have burnt her after pouring kerosene over her. Before and after recording the second dying declaration, in-charge of Ishwar Devi Nursing Home, Agra certified that deceased was fully conscious to give her statement. Meaning thereby the deceased was fully conscious at the time of recording of her both the statements.

53. The first statement of the deceased was recorded on 20.12.2011, whereas the second statement of the deceased was recorded on 22.12.2011 at 4.35 PM in Ishwari Devi Nursing Home, Agra, i.e. two days after the first statement. Admittedly, the deceased was admitted in the hospital by the accused-Veerpal. When the first statement of the deceased was recorded, the witnesses had not reached the hospital and PW-8, Shambhu Nath Singh, investigating officer of the case has recorded the statement of the deceased independently. Thereafter, the witnesses arrived there and shifted the deceased to Mohaniya Hospital and thereafter to Ishwari Devi Nursing Home at Agra and in the meantime, they managed and tutored the deceased and got the second dying declaration recorded by PW-4, Bal Kishan Agrawal, who in his evidence has deposed that he reached Ishwari Devi Nursing Home, Agra to record the dying declaration of the deceased at the request of the Station Officer, police station Sadar, district Agra. This Court failed to understand that when the case had already been registered at police station Vrindavan, district Mathura and the investigation was going on and the dying declaration was already recorded by the PW-8, Shambhu Nath Singh, what was the occasion for the Station Officer, police station Sadar, district Agra to make a request to the ACM, Agra to record the dying declaration of the deceased. Moreover, there was also a

lapse on the part of the PW-8, Shambhu Nath Singh for not taking steps for recording the dying declaration of the deceased by a competent Magistrate. Even the second dying declaration suffers from infirmity as it was not mentioned therein as to who was the accused caught hold of her, who poured kerosene and who set her on fire.

54. Moreover, there is evidence on record to show that the deceased was mentally weak. PW-1, Bengali Babu, who is the father of the deceased has stated in his evidence that his son-in-law was mentally retarded and his daughter was also mentally weak. PW-2, Hotam, who is the cousin of the deceased has stated that deceased was mentally weak. PW-5, Rajpath and PW-7 Satya Prakash, both real brother of the deceased have stated in their evidence that their sister was mentally weak. Since, the deceased was also mentally weak, the possibility of her tutoring by the witnesses cannot be ruled out.

55. In **Rasheed Beg Vs. State of M.P.,** (1974) 4 SCC 264, two dying declarations of the deceased were recorded. Hon'ble Apex Court while discarding both the dying declarations held that where dying declaration is suspicious, it should not be acted upon without corroborative evidence. The court further held as under:

" We are reluctant to approve of this mechanical test of the greatest common measure in the two dying declaration to fasten guilt on the appellants for there are certain suspicious circumstances which should require dependable evidence in corroboration of the dying declaration. As there is no corroborative evidence in support of the two dying declarations, we think that it will not be safe to maintain the conviction of the appellants."

56. In ***Ram Manorath Vs. State of U.P.,*** (1981)2 SCC 654, Hon'ble Supreme Court has held that where the dying declaration suffers from the infirmity, that cannot form the basis of conviction.

57. In ***Amol Singh Vs. State of M.P.,*** (2008) 5 SCC 468, the matter before the High Court was in respect of acceptability of the dying declaration. The High Court rejected the plea and held that though there were more than one dying declaration, the extent of variance between the two was insignificant. It was noted that the dying declarations were consistent in substance as to the complexity of the accused persons causing burn injury to the person of the deceased and, therefore, there was no infirmity in the judgment of the trial court to warrant interference.

58. However, Hon'ble Supreme Court did not concur with the finding of the High Court and while reversing the judgement of the High Court, the Court held as under:

"Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent

throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

It is to be noted that the High Court had itself observed that the dying declaration (Exh.P11) scribed by the Executive Officer, (PW9) at about 0435 hours in the same night was not in conformity with the FIR and the earlier dying declaration (Exh.P3) scribed by ASI Balram (PW 8) in so far as different motives have been described. That is not the only variation. Several other discrepancies, even as regards the manner in which she is supposed to have been sprinkled with kerosene and thereafter set on fire.

Therefore, the discrepancies, make the last declaration doubtful. The nature of the inconsistencies is such that there are certainly material. That being so, it would be unsafe to convict the appellant."

59. In **Heera Lal Vs. State of M.P.,** (2009) 12 SCC 671, two dying declarations were recorded. In the first dying declaration recorded by the Tehsildar, the deceased had clearly stated that she tried to set herself ablaze by pouring kerosene over herself, but in the subsequent declaration, recorded by the another Nayab Tehsildar, a contrary statement was made. In addition to the aforesaid two dying declarations, it appears that earlier one dying declaration was made before the doctor. Hon'ble Supreme Court while allowing the appeal and setting aside the conviction of the appellant, held thus:

"The trial court and the High Court came to abrupt conclusions on the purported possibility that the relatives of the accused may have compelled the deceased to give a false dying declaration. No material was brought on record to justify such a conclusion. The evidence of the Nayab Tehsildar who recorded Ext. D-5 was examined as PW-8. His statement was clear to the effect that no body else was present when he was recording the statement. That being so, in view of the apparent discrepancies in the two dying declarations, it would be unsafe to convict the appellant."

60. In **State of Andhra Pradesh Vs. P. Khaja Hussain** (2009) 15 SCC 120, two dying declarations were recorded. First dying declaration was recorded by the Magistrate on 02.8.1999 at 11.30 AM, whereas the second dying declaration was recorded by the Head Constable after about one hour of the first dying declaration. The High Court noticed that there was variation between the two dying declarations about the manner in which the deceased was set on fire. In fact the two dying declarations can be reconciled with each other and since no other evidence was available to connect accused with crime the conviction as recorded, the High Court set aside the conviction of the appellant. Hon'ble Supreme Court while dismissing the appeal filed against the acquittal of the appellant, held as under:

" There is no explanation as to why the second dying declaration was recorded by the Head Constable of Police shortly after the dying declaration has already been recorded by the Magistrate. It is not a case where the variation between the two dying declarations is of trivial in nature. The scenario was described in substantially different manner. The High Court noted that the improvements were made to rationalise with the injuries sustained by the deceased. Conclusions of the High Court do not have any infirmity which warrant any interference"

61. In a recent judgement in **Jagbir Singh Vs. State (NCT of Delhi),** (2019)8 SCC 779, Hon'ble Supreme Court has held that when there are multiple dying declarations, and in the earlier dying declaration, accused is not sought to be roped in, but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case and the Court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of different dying declarations.

62. In view of the above noted discussions and the case laws, it would not be safe to rely upon the multiple dying declarations of the deceased in the absence of any corroborative evidence.

63. So far as the next submission of the learned counsel for the appellants that in fact, in addition to the aforesaid two dying declaration, one more dying declaration of the deceased was recorded by the Sub-Divisional Magistrate, but as the same was not favourable to the prosecution, it was not made part of the case diary, has some substance.

64. The first information report was lodged by Bangali Babu, the father of the deceased. In the FIR, he has mentioned that when he heard about the incident, he was in the school and after arranging vehicle, he rushed to Vrindavan and talked to her daughter in the hospital. At that time S.D.M. was recording her statement. The report further indicates that when he requested the SDM to provide him a copy of the statement, he asked him to obtain the same from the Court of Chief Judicial Magistrate, Mathura. The SDM has also directed him to go to the police station Kotwali and lodge the report. PW-8, SI Shambhu Nath Singh in his cross-examination has admitted that he came to know that Sub-Divisional Magistrate has recorded the statement of the deceased, but as the investigation has been transferred from him, he could neither perused the said statement nor could make the same as part of case diary. PW-9, Inspector Arvind Pratap Singh, in his cross examination has also admitted that the Sub-Divisional Magistrate has recorded the statement of the victim at Lakshmi Life Line Hospital, but as the same was not made part of the previous proceeding conducted by the earlier investigating officer, he could not tell as to where is that statement.

65. From the perusal of the afore-mentioned statements of PW-1, Bangali Babu, the first informant and father of the deceased, PW-8, SI Shambhu Nath Singh and PW-9, Inspector Arvind Pratap Singh, it goes to show that the statement of the deceased was recorded by the Sub-Divisional Magistrate while she was

admitted in Lakshmi Life Line Hospital, Vrindavan, but due to the lapse and negligence of PW-8, Shambhu Nath Singh, the first investigating officer, the same could not be made part of case diary.

66. So far as the last contention of learned counsel for the appellants that not a single witness of fact has supported the prosecution case, is concerned, it is to be noted that in this case PW-1, Bangali Babu, who is the first informant and father of the deceased, PW-2, Hotam Singh, cousin of the deceased, PW-5, Rajpath, PW-6 and PW-7, Satya Prakash, real brothers of the deceased have been examined as witnesses of fact. Out of the aforesaid witnesses, PW-1, Bangali Babu, PW-2, Hotam Singh, PW-5, Raj Path and PW-7, Satya Prakash have not supported the prosecution case and they have been declared hostile.

67. In **Bawa Ram and another Vs. Union Territory, Chandigarh** (2009) 13 SCC 270, Hon'ble Supreme Court held as under:

"In support of the appeal, it is submitted that the so called dying declarations have to be tested on the background of what the father, mother and the brother of the deceased deposed. They categorically stated that the deceased was mentally unsound and was having suicidal tendency and it was natural that he himself tried to commit suicide by pouring kerosene oil on himself.

Learned counsel for the respondent, on the other hand, submitted that the dying declarations were reliable and on the basis of dying declarations the conviction as recorded can be sustained.

It is true that the dying declaration can be the basis of conviction even when the eye witnesses do not support the prosecution case.

In the peculiar facts of the case where the father, mother and other relatives and even a person who claimed to have sustained injuries resiled from the statements made during investigation and deposed to the effect that the deceased was of unsound mind and had a suicidal tendency the effect thereof cannot be lost sight of. The statement of a person with unsound mind has to be considered in that background. In the peculiar facts of the case we are of the view that it would not be safe to sustain the conviction on the basis of the dying declarations. The appellants are therefore, acquitted of the charges. The appellants shall be released from custody forthwith unless required to be detained in connection with any other case."

68. Only PW-6, Shanker Dayal, who is also brother of the deceased has supported the prosecution case.

69. Now, we will proceed to examine whether the evidence of PW-6, Shanker Dayal is reliable. In his examination-in-chief, PW-6, Shanker Dayal, though he was not an eyewitness of the case, yet he has given a vivid description of the occurrence to the effect that Smt. Maya poured kerosene over her sister, while Veer Pal caught hold of her and Mahesh burnt her. He further deposed that the information was given by his niece to his younger brother that deceased-Mithlesh has burnt. Thereafter,

he stated that deceased-Mithlesh has been burnt. On this information, he along with his father Bangali Babu, brother Rajpath Singh and Satya Prakash and Sudhir came to Vrindavan. By that time deceased's father-in-law and Devar have admitted her in the hospital. Deceased has told him about the incident. In his cross-examination, PW-6, Shanker Dayal has stated that when he reached the hospital, the deceased was extensively burnt, there was swelling on her lips, eyes were closed, her hair from front side was partially burnt, her chest and lower parts were badly burnt. He also deposed that incident did not take place in his presence.

70. Admittedly not a single witness, who have been examined in this case was present at the time of incident and they came to know about the incident as told to them by the daughter of the deceased. Now, the question for determination before this Court is when the incident did not taken place before this witness (PW-6), how he has given a vivid description of the case that Smt. Maya poured kerosene over her sister, while Veer Pal caught hold of her and Mahesh burnt her. Moreover, in his cross-examination, he has stated that Mithlesh, the deceased has not told him about the incident. Radha, the deceased's daughter has told his brother about the incident from whom he has gathered information and on the basis whereof he has given his evidence in Court.

71. From the perusal of the statement of PW-6, Shanker Dayal, it can safely be hold that he was not a reliable witness and his evidence is shaky and full of contradiction. He has made his deposition only on the basis of conjecture and surmise.

72. Another important circumstance in this case is that even though according to the evidence led by the prosecution, the deceased was fully conscious in the hospital and had met with her father, brothers and cousin, but she did not make any statement to any of the person nor did any of them try to question the deceased about the occurrence when the deceased was alive for about 20 days. The prosecution evidence is silent in this regard.

73. From the evidence discussed above, we are of the view that both the dying declarations of the deceased do not inspire confidence of the Court in its truthfulness and correctness and suffer from serious infirmity. Moreover, in addition to the aforesaid two dying declarations, one more dying declaration, which was recorded by the SDM as alleged by the first informant in the FIR and admitted by PW-8, Shambhu Nath Singh, the first investigating officer of the case and PW-9, Arvind Pratap Singh, the second investigating officer of the case in their evidence, but the same has not been made part of the case diary. Further witnesses of facts namely PW-1, Bangali Babu, the first informant and father of the deceased, PW-2, Hotam Singh, the cousin of the deceased, PW-5 Raj Path and PW-7, Satya Prakash, brothers of the deceased, have not supported the prosecution case exonerating the appellants.

74. In view of the above prolix and verbose discussion, we are of the view that the learned trial court has erred in law in convicting the appellants solely on the basis of dying declaration of the deceased without there being any corroborative evidence on record. Thus,

prosecution has failed to bring home the guilt of the appellants beyond reasonable doubt.

75. Accordingly, the judgement and order dated 08.9.2015 passed by the learned Additional Sessions Judge, Mathura in Sessions Trial No. 294 of 2013, arising out of case crime No. 1144 of 2011 under Sections 302 read with Section 34 IPC, police station Vrindavan, district Mathura are hereby set aside.

76. The appeal is accordingly allowed.

77. Appellants Veerpal and Mahesh are in jail. They shall be released forthwith unless wanted in any other case. However, they are directed to comply with the provisions of Section 437A of Code of Criminal Procedure.

78. Office is directed to transmit a copy of this order to the court concerned for compliance.

(2020)08ILR A612
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

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

Criminal Appeal No. 4812 of 2012

Zulfiqar @ Zillu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajeev Sisodia, Sri Manoj Tripathi, Sri Pawan Singh Pundir, Sri Shashank Kumar, Sri Vinod Tripahi, Sri Vishu Kumar

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

Civil Law- The Juvenile Justice (Care and Protection of Children) Act, 2015- To determine the age of child being a victim or otherwise, there is no specific legal provision except the provision as embodied under the Juvenile Justice (Care and Protection of Children) Act and the Rules framed thereunder. The procedure for determination of age of a person to provide him the protection of the Act "being a child" is by making an inquiry in accordance with the provision of Section 94 of the Act. The said inquiry, by conducting an ossification test or any other medical age determination test, in absence of birth certificate or school certificate is contemplated in the aforesaid provision (Section 94) of the Act. The ossification test is, thus, an approved method of inquiry for determination of age of a person.

Rape victim- Determination of age- In absence of any other legal provision the age of the victim can only be determined under the provisions of the Juvenile Justice (Care and Protection of Children) Act and the procedure provided under Rule 94, which also provides for an ossification test for the determination of age.

Criminal Law- Indian Penal Code, 1860- Section 376- Rape victim- Age as per ossification test 17 years- Addition of two years to the upper-age limit- No such rule - Inclusion of two additional years to the age determined by doctor, is not possible as a matter of course or in a routine manner- In ossification test, the concerned doctor had opined the age of victim to be 17 years .There is no such rule for adding two additional years to the age determined by the doctor.

There is no rule for the addition of two years on the upper age limit of the victim so as to make her a major**.**

Criminal Law- Indian Penal Code, 1860- Section 375- Section 90- Consent- Injuries on body of the victim-Evidence as a whole indicates that there was resistance by the victim and there is no sign of voluntary participation of victim for alleged sexual act. Said incident cannot be construed as a consented sexual act. All the circumstances and evidences available on record clearly indicate towards the fact that the victim/prosecutrix had never produced her body voluntarily, instead she had resisted to the best of her ability. Even while resisting the conduct of the accused she had sustained several injuries, which is evident from the Medical Report. Thus, she freely exercised choice between resistance and assent, and she had raised alarm against the offence committed by the accused persons. Even otherwise, if she had been a consented party to the offence, the injuries caused on her body would not have been occurred at all.

The injuries on the body of the prosecutrix , which are established by the Medical Report, as well as other circumstances demonstrate that the prosecutrix was raped and it was not a case of consensual sex.

Criminal Law- Indian Penal Code, 1860- Section 375/ 376- Conviction on solitary testimony- Found to be reliable and unimpeachable- Testimony of the prosecutrix is sufficient in itself and can be made the solitary basis for conviction of the accused persons. In fact, her statement is unimpeachable and beyond reproach. Even otherwise, version of the prosecution is fully corroborated by the statement of other witness of fact as well as Medical Certificates.

It is settled law that where the solitary testimony of the prosecutrix is credit worthy , unimpeachable and corroborated by medical and other evidence, then the conviction of the accused can be secured on the basis of the said solitary testimony.

Criminal Law- Code of Criminal Procedure, 1973- Section 313 - Failure of accused to furnish explanation- Adverse inference- Accused has failed to discharge his onus of proof that the victim was involved with him in consensual sex. In cross-examination of the prosecution witnesses and in the statement of the accused under Section 313 Cr.P.C., nothing has been emerged fortifying the defence of consensual sex.

Failure of the accused to provide an explanation for the accusation he is charged with, in his statement u/s 313 Cr.Pc, would lead the Court to take an adverse inference against him.

Criminal Appeal rejected. (Para 31,32, 35, 41, 46,48, 49, 54) (E-3)

Case law relied upon/ Cited:-

1. Jarnail Singh Vs St. of Har., (2013) 3 Crimes (SC) 278

2. St. of U.P. Vs Chhoteylal, AIR 2011 SC 697

3. St. of Kar. Vs Bantara Sudhakar @ Sudha & Ors., (2008) 111 SCC 38

4. Kaini Rajan Vs St. of Ker., (2003) 9 SCC 113

5. Pramod Suryabhan Pawar Vs St. of Maha. & anr, (2019) 9 SCC 608

6. Uday Vs St. of Kar. (2003) 4 SCC 46

7. Naushad Vs St. of U.P., 2007 (5) ADJ 60 (DB)

8. Punj. Vs Gurmit Singh & ors., (1996) 2 SCC 384

9. Mohd. Ali alias Guddu Vs St. of U.P. (2015) 7 SCC 272

10. St. of Raj. Vs Biram Lal , (2005)10 SCC 714

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Pawan Singh Pundir, learned counsel for the appellant and Sri L. D. Rajbhar, Advocate assisted by Sri Prem Shanker Mishra, learned Additional Government Advocate for the State-respondent.

2. The instant criminal appeal has been preferred by appellant Zulfiqar alias Zillu against the judgment and order dated 03.11.2012 passed by the Additional Sessions Judge (Court No.2), Bijnor in Sessions Trial No.655 of 2011 (Zulfiqar @ Zillu vs. State of U.P.), convicting him under Sections 376 (2) G and 506 IPC. He has been sentenced under Section 376(2) G IPC to undergo life imprisonment along with fine to the tune of Rs.10,000/- and in default thereof, he shall undergo additional imprisonment for six month. He was also sentenced under Section 506 IPC to undergo 5 years rigorous imprisonment (in short 'R.I.') with fine amounting Rs.500/- and in default thereof, he shall undergo additional imprisonment for two months.

3. The allegations in the First Information Report (hereinafter referred to as 'FIR') are that the prosecutrix, (PW-2) had been continuously subjected to sexual assault under threat to her life and coercion for the last one month on blackmailing by the accused-appellant Zulfiqar @ Zillu, who had taken photographs of prosecutrix/victim in his mobile and threatened her to distribute her pictures amongst the villagers, in case, she leaks anything about the incident to anyone. On 18.05.2011 at about 11.00 A.M., when the prosecutrix aged about 16 years went to collect fodder for the cattle from the forest, accused Zulfiqar @ Zillu along with his friend Faizaan caught hold of her and sexually assaulted her by taking turn one by one. She was threatened by the accused to not to disclose the incident to anyone otherwise they will make her photographs public among the villagers and she would be killed. On hearing her screams, one Atiq-ur-Rehman s/o Hajib-ur-Rehman and Gaffar son of Mohd. Hanif reached at the place of incident but by that time, accused Zulfiqar @ Zillu and Faizaan had fled away from the spot. After returning from the forest i.e. place of incident, the prosecutrix/victim narrated the incident to her mother Smt. Naseema (PW-1), who took her to Police Station-Sherkot, but her complaint was not registered. Consequently, she took her daughter to the Government Hospital, Dhampur and got her medically examined. Thereafter, she made representations dated 19.05.2011 and 21.05.2011 with respect to the incident in question to the Superintendent of Police, Bijnor, but no action was taken. Ultimately, she moved an application under Section 156 (3) Cr.P.C. and in pursuance thereof, FIR was ordered to be lodged in Police Station-Sherkot.

4. In this backdrop, FIR dated 27.06.2011 (Exhibit Ka-6) was lodged against Zulfiqar @ Zillu (appellant) and Faizaan under Sections 363, 376 G and 506 IPC, which was registered as Case Crime No.107 of 2011, Police Station-Sherkot, District-Bijnor.

5. Initially, victim/prosecutrix was medically examined on 18.05.2011 at about 4.00 P.M. at the Primary Health Centre, Dhampur, Bijnor (hereinafter referred to as "PHC") by Dr. Pramod Kumar Gupta (PW-4). Six wounds have been mentioned in the Medical Report

dated 18.05.2011 (Exhibit Ka-5) signed by Dr. Gupta (PW-4), which are being noted herein below :

(i) Abraded contusion red in colour on left side 5 cm outer to left angle of mouth.

(ii) Abraded contusion red in colour front of left side chest. Just above left nipple.

(iii) Abraded contusion, red in colour, 4.5 cm x 3 cm on front of right side chest, 3 cm outer to left nipple at about 9 O' Clock position.

(iv) Abrasion red in colour 6 cm x 4 cm on back of left side chest on scapular region.

(v) Abrasion red in colour 6 cm x 4.5 cm on back of right side chest on scapular region.

(vi) Contusion red in colour 4.5 cm x 3 cm on front of right forearm just above right wrist joint.

6. After registration of the FIR, prosecutrix/victim was again medically examined on 30.06.2011 at 4.00 P.M. by Dr. Saroj Arora (PW-3), who was a Medical Officer at the District Women Hospital, Bijnor. Dr. Arora (PW-3) had submitted Medical Report dated 30.06.2011 (Exhibit Ka-3) signed by her and mentioned following details in it :

On external examination :

No injury seen on the body. Height : 150 cm, Weight :37 kg, Teeth :14/21, Breasts developed.

Examination of private parts :

No injury seen on the private parts. Hymen old torn. Vagina admits two fingers easily. Vaginal smear taken for examination of sperms and sent to Pathology, District Hospital, Bijnor. Regarding age advised X-ray. Right elbow joint, Right knee joint and right wrist joint.

Supplementary report pending till pathology 2 X-ray reports.

7. In pursuance of advice given by Dr. Arora (PW-3), Ossification Test and Swab Test of vagina was conducted on 02.07.2011 and its supplementary report (Exhibit Ka-4) was prepared and signed by Dr. Arora (PW-3) herself with following observations :

Pathology Report- VS 72/DH/11 on dated 01.07.2011 at District Hospital, Bijnor reported by Dr. S. K. Sharma, Senior Pathologist, District Hospital, Bijnor. On examination, spermatazoa not seen.

X Ray report :

X-ray plate No.7383-7385/MLPC on dated 01.07.2011 at District Hospital, Bijnor reported by Dr. D. K. Jain, Senior Radiologist, District Hospital, Bijnor.

X-ray right elbow joint - Epiphysis around right elbow joint are fused.

X-ray right knee joint - Epiphysis around right knee joint are almost fused.

X-ray right wrist joint - Epiphysis around the right joint are not fused completely.

Opinion : Her age is around 17 years. No definite opinion regarding rape can be given.

8. In Ossification Test Report, the estimated age of victim/prosecutrix is opined to be 17 years. Santosh Kumar Tyagi (PW-7), Investigating Officer (hereinafter referred to as "I.O.") had conducted investigation of the case. He had prepared the Site Map (Exhibit Ka-8) and submitted Charge Sheet dated 10.07.2011 (Exhibit Ka-9) against accused-appellant Zulfiqar @ Zillu and Faizaan under Sections 376 (2) G and 506 IPC.

9. It is pertinent to mention here that present Sessions Trial No.655 of 2011 is conducted against appellant Zulfiqar @ Zillu whereas case of co-accused Faizaan was separated and tried as a juvenile. Therefore, present appeal arising of Sessions Trial No.655 of 2011 is concerned only with respect to accused-appellant Zulfiqar @ Zillu.

10. Vide order dated 25.08.2011, Trial Court framed charges against the accused-appellant for the offences under Sections 376 (2) G and 506 IPC.

11. In order to establish the charges levelled against accused-appellant, prosecution has examined as many as seven witnesses.

12. PW-1, Naseema, w/o Sharafat, mother of victim/prosecutrix had proved application dated 23.05.2011 filed under Section 156 (3) Cr.P.C. as Exhibit Ka-1 and affidavit filed in its support as Exhibit Ka-2. She had corroborated statement of victim/prosecutrix proving the incident in question. She clearly stated that her daughter (i.e. prosecutrix, PW-2) has told about the entire incident that she had been raped by accused persons, who had threatened her for life and to make her pictures viral all over the village if she disclosed anything about the incident. The prosecutrix also told her that she was being victimised for rape for the last one month. She had further stated that she approached concerned police station and moved an application before the concerned Police Officer, but no action was taken. She, ultimately, moved an application under Section 156 (3) Cr.P.C.

13. PW-2, prosecutrix/victim (daughter of Sharafat and Naseema), aged about 16 years, has categorically stated that she had been raped in the forest, while she went to collect fodder, by Zulfiqar @ Zillu and his friend Faizaan, who had threatened her that her photographs would be made viral all over the village, in case she discloses anything about the incident to any person. She had elaborately narrated the incident which took place on 18.05.2011 as to how she had been forcefully raped by accused-persons. She had also stated that she was mauled by accused persons as a result of which she sustained injuries. She further deposed that during incident while she screamed, Atiq-ur-Rehman and Gaffar had reached on the spot. Consequently, both accused persons fled away.

14. PW-3 Dr. Saroj Arora, Senior Consultant, District Women Hospital, Bijnor had proved Medical Report dated 30.06.2011 as Exhibit Ka-3 and Supplementary Medical Report dated 02.07.2011 with respect to the Vaginal Test and Ossification Test as Exhibit Ka-4. Dr. Arora had clearly stated that probability of commission of rape cannot be denied.

15. PW-4, Dr. Pramod Kumar Gupta had proved first Medical Report

dated 18.05.2011 as Exhibit Ka-5, who had medically examined victim, at the initial stage, and mentioned six injuries over body of the victim in the report.

16. PW-5, Atiq-ur-Rehman is an independent witness of fact and he had categorically narrated the incident that while reaching on the spot, upon hearing screams of the victim/prosecutrix, he saw that Faizaan was holding her hand and Zulfiqar @ Zillu was committing rape.

17. PW-6, Vinod Kumar, Constable Clerk in Police Station-Sherkot, Bijnor had proved FIR as Exhibit Ka-6 and its entry in the General Diary as Exhibit Ka-7.

18. PW-7, Santosh Kumar Tyagi, I.O. had proved the Site Map as Exhibit Ka-8 and Charge Sheet dated 10.07.2011 as Exhibit Ka-9. He had investigated the matter and deposed the process of investigation.

19. Accused-appellant denied his involvement in the crime in question in his statement recorded under Section 313 Cr.P.C. and pleaded his innocence and claimed to be tried on merits.

20. Trial Court had found accused-appellant guilty of committing rape upon the victim and had convicted and sentenced him vide its judgment and order dated 03.11.2012 in the manner as mentioned above.

21. Learned counsel for appellant submitted that victim was a consenting party, therefore, incident which took place, cannot be treated as commission of rape. Medical report and statement of witnesses are not corroborating the statement of victim/prosecutrix (PW-2). No recovery of video or clothes had been made to prove the incident in question. He further contended that mother of victim had already admitted relationship of victim and Faizaan. Further submission is that there is contradiction between two medical report, first dated 18.05.2011, conducted at PHC, Dhampur and second report dated 30.06.2011 prepared and submitted by Dr. Saroj Arora (PW-3) a doctor in the District Women Hospital, Bijnor and in subsequent medical report, no injury was found in medical examination on body of victim/prosecutrix. Present appellant has been falsely implicated in the instant case to protect co-accused Faizaan, who is known to victim/prosecutrix.

22. Per contra, learned Additional Government Advocate appearing for the State-respondent had supported the impugned judgment and order passed by Trial Court and submitted that the statement of victim/prosecutrix, PW-2 is fully corroborated with statements of PW-1 and PW-5. Difference between two medical reports with respect to the injuries on the body of victim is possible in the present case owing to gap occurred between preparation of two reports which is indisputably of about 1 and ½ months. Victim was never a consenting party to the offence and even otherwise, her consent is of no value in the eyes of law, inasmuch as, she was less than 18 years on the date of the incident as per Medical Report (Exhibit Ka-4) submitted by Dr. Saroj Arora (PW-3) and intercourse with her, whether with or without her consent, would amount to commission of rape. The prosecution has successfully established its accusation beyond all reasonable doubts.

23. We have carefully considered the chronological events of present case, rival submissions advanced on behalf of counsel for the parties as well as evidences available on record.

24. In the matter at hands, moot question to be decided is as to whether prosecutrix is victimised for rape committed by accused-appellant or she was a consenting party to such sexual act.

25. On the date of occurrence i.e. 18.05.2011 at about 11:00 a.m. when the prosecutrix, aged about 16 years, (as mentioned in the FIR) went to the forest to collect fodder for cattle. Present appellant with his accomplice Faizaan caught hold of her in the field and forcibly sexually assaulted her against her will. During the incident while the victim raised alarm, two persons namely Atiq-ur-Rehman and Gaffar reached on spot but by that time accused persons ran away from the scene.

26. Offence of rape generally refers to non consensual sexual intercourse that is committed by applying physical force, threat of injury to body, reputation etc, or other duress. Under common law it is defined as unlawful intercourse by a man against a woman, who is not his wife, by force or threat and against her will.

27. Definition of rape is codified in Section 375 of IPC wherein rape has been defined as a certain sexual acts when committed on a victim falling under any of the seven descriptions ***FIRST***-- Against her will; ***SECOND***-- Without her consent; ***THIRD***-- With her consent, when her consent has been obtained under fear of death or of hurt; ***FOURTH***--Where consent is given by the victim in wrong belief that the man is her husband; ***FIFTH***--When consent is given when she is of unsound mind or intoxicated and unable to understand the nature of consequences of that to which she is consenting; ***SIXTH***-- With or without her consent, when she is under eighteen years of age; ***SEVENTH***-When she is not in a position to communicate the consent.

28. Learned counsel for appellant had emphasized his argument on the consent of victim on the ground that co-accused Faizaan was known to her and the consensual sex was conducted with the victim who was major at that time.

29. Before considering the consent of victim, her age for consent is required to be discussed. Before Act No. 13 of 2013, description no. sixthly to Section 375 IPC was mentioned as "With or without her consent, when she is under 16 years of age"; but subsequently the aforesaid section was amended via Act No. 13 of 2013 w.e.f. 03.02.2013 and the age of girl was enhanced from 16 years to 18 years. FIR version evinces that on the date of incident victim was aged about 16 years. After conducting Ossification Test in the supplementary medical report dated 02.07.2011 (Exhibit Ka-4), doctor had opined her age to be 17 years.

30. PW-1 Naseema (mother of victim) in her deposition has failed to give correct date of birth of victim and told the age of her daughter approximately 16 years. PW-2 victim, in her deposition, has also admitted her age to be 16 years. Learned counsel for the appellant has submitted that in ossification test, the concerned doctor

had opined the age of victim to be 17 years and after including 2 additional years, it could be 19 years. Therefore, she was major at that time and was in a position to indulge herself in consensual sex.

31. In our opinion, inclusion of two additional years to the age determined by doctor, is not possible as a matter of course or in a routine manner. To determine the age of child being a victim or otherwise, there is no specific legal provision except the provision as embodied under the Juvenile Justice (Care and Protection of Children) Act and the Rules framed thereunder. The Hon'ble Supreme Court in the case of **Jarnail Singh vs. State of Haryana** reported in **(2013) 3 Crimes (SC) 278** has expounded that even though the Rules framed under the Juvenile Justice Act only provides procedure to determine the age of child in conflict with law, but the statutory provision could be made the basis for determining the age, even of a child who is a victim of crime. It has been further explained that there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict of law, and a child who is victim of crime. In the aforesaid matter, a girl child was subjected to rape and in determining her age, the Hon'ble Supreme Court has thought it just and proper to apply the provisions as embodied under the Juvenile Justice Act. It is relevant to mention here that the Juvenile Justice (Care and Protection of Children) Act, 2000 is repealed and in its place new Act came into force known as the Juvenile Justice (Care and Protection of Children) Act, 2015 which has been enacted with an object to act in the interest of children in need of care and protection by not only catering to their basic needs through proper care, protection but by disposal of matters in the best interest of children. The definition of '"child in need of care and protection" includes a child who has been abused, tortured or exploited for the purpose of sexual abuseor illegal acts. The "child" as defined in the Act is a person who has not completed eighteen years of age. The procedure for determination of age of a person to provide him the protection of the Act "being a child" is by making an inquiry in accordance with the provision of Section 94 of the Act. The said inquiry, by conducting an ossification test or any other medical age determination test, in absence of birth certificate or school certificate is contemplated in the aforesaid provision (Section 94) of the Act. The ossification test is, thus, an approved method of inquiry for determination of age of a person.

32. As far as the submission of learned counsel for the appellant that 2 years be added in the estimated age of the victim and that would make her major, we may note that the Supreme Court expounded in **State of U.P. vs. Chhoteylal** reported in **AIR 2011 SC 697**, after considering the Full Bench decision of its Court in the case of **State of Karnataka vs. Bantara Sudhakar @ Sudha & Others** reported in **(2008) 111 SCC 38**, that there is no such rule for adding two additional years to the age determined by the doctor. In the said case victim was shown to be 13 years of age at the time of incident dated 19.09.1980 and doctor has opined that victim is aged about 17 years. Learned Trial Court has convicted the accused treating the girl minor under 16 years. Hon'ble High

Court has given 2 years additional benefit and presumed the age of prosecutrix to be 19 years. Relevant paragraph no. 11 of the judgment is quoted below :-

"11. We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW-5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a 3-Judge Bench decision of this Court in State of Karnataka v. Bantara Sudhakara @ Sudha and Another, wherein this Court at page 41 of the Report stated as under :

"Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation."

33. Be that as it may, in our opinion, description no.Sixth of Section 375 IPC is not attracted in the present facts and circumstances of the case because the prosecutrix was found to be above 16 years of age, although below 18 years of age as the incident had occurred prior to the amendment for raising the age of consent for sexual acts by a girl.

34. Now the question would be as to whether she was a consenting party in the sexual act with the accused. From the statement of prosecutrix, it has clearly emerged that she had been forcibly subjected to sexual intercourse by two accused persons without her consent. In this factual background too, question of the age of prosecutrix would pale into insignificance. In the facts and circumstances of present case, the case of consent cannot be inferred by any prudent person. Statements of witnesses and chronology of events clearly indicate towards victimization of prosecutrix under threat of blackmailing and, thereafter, subjecting her to sexual intercourse.

35. The term "consent" had not been defined in Section 375 of IPC, rather Section 90 of IPC denotes that which incidents are not to be treated as consent of victim. Inference with respect to consent could only be drawn on the basis of evidences and attendant circumstances of the instant case. In the case at hands, the evidences very clearly establish that on the date of incident i.e. 18.05.2011, the prosecutrix had been grabbed by accused persons and forcefully subjected to sexual intercourse. Aforesaid incident was witnessed by one Atiq-ur-Rehman (PW-5), who is an independent witness and had corroborated the version of the prosecutrix regarding date, time and the manner in which the incident took place.

36. In the matter of **Kaini Rajan vs. State of Kerala** reported in **(2003) 9 SCC 113**, Hon'ble Supreme Court has expounded definition of rape and consent in paragraph 12, which is being quoted below :-

"12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and

second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

37. In a recent decision in the case of **Pramod Suryabhan Pawar vs State of Maharashtra and another,** reported in **2019 (9) SCC 608** in paragraph 12, Hon'ble Supreme court has concised the concept of consent. Paragraphs 12 is being reproduced below :-

12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In ***Dhruvaram Sonar*** *which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:*

"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in ***Kaini Rajan v State of Kerala, (2013) 9 SCC 113:***

"12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and asset. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

38. Hon'ble Supreme Court has further held in paragraph 18 of the aforesaid judgment as under :

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a

"misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

39. Learned counsel for appellant has relied upon **Uday vs. State of Karnataka** reported in **(2003) 4 SCC 46** and Naushad vs. State of U.P. reported in 2007 (5) ADJ 60 (DB) to define the term "consent" and tried to defend the offence under the garb of consensual sex, but aforesaid cited cases are of no help to the accused in defending his case.

40. In the case of **Uday (Supra)**, the Hon'ble Supreme Court had observed that there is no straight jacket formula for determining whether consent given by the prosecutrix for sexual intercourse is voluntary or whether it is given under misconception of fact. In the ultimate analysis the test laid down by the Courts provided at best guidance to the judicial mind while considering the question of consent but the Court must, in each case, consider the evidence and the surrounding circumstances, before arriving at the conclusion because each case has its own peculiar facts which may have bearing on the question whether the consent was voluntary or was given under the misconception of fact. Hon'ble Apex Court further observed that Court must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

41. Moreover, question of consent is the defence taken by the accused in the instant case and it was incumbent upon him to place adequate material on record to show that the consent was given by the prosecutrix. At this juncture, it is significant to note that during cross-examination of the prosecution witnesses and recording of statement of the accused-appellant under Section 313 Cr.P.C., plea of consent was neither taken nor suggested by the accused-appellant. In fact, in the statement under Section 313 Cr.P.C., the accused had taken the plea of complete denial and false implication. Nothing emerged in the cross-examinations of PW-1 and PW-2 as well as in the testimony of PW-5 (an independent witness), about the consent of victim at the time of incident or prior to the incident. Vague denial made by the accused in their statement under Section 313 Cr.P.C. cannot be inferred for the consent of the victim who had been threatened and subjected to sexual intercourse against her will.

42. Further, to prove the offence of rape committed by the accused, testimony of the prosecutrix alone could be made basis for conviction of the accused persons unless there are some compelling reasons for seeking corroboration. In several decisions, Hon'ble Supreme Court has laid emphasis on the testimony of prosecutrix unless something infers adverse to the conclusion of conviction. In the matter of State of **Punjab vs. Gurmit Singh and others,** reported in **(1996) 2 SCC 384**, wherein the prosecutrix aged about 16 years was abducted and raped, Hon'ble Supreme Court expounded importance of testimony of the victim in paragraph 8 of

the judgment. The relevant portion of paragraph 8 is being reproduced below :

"8. .....The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In ***State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550)*** *Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:*

"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. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person

who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecurtix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

43. Further in the matter of **Mohd. Ali alias Guddu vs. State of U.P.** reported in **(2015) 7 SCC 272**, wherein 14 years aged girl was abducted from outside of her house and raped by the accused persons, Hon'ble Supreme Court had given importance to deposition of the prosecutrix. Paragraph 30 of said judgment is being reproduced below :-

"30. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

44. In the matter of **State of Rajasthan vs. Biram Lal** reported in **(2005)10 SCC 714**, Hon'ble Supreme Court had expounded that the testimony of prosecutrix is not required to be corroborated by independent evidence on record, in case quality of evidence of the prosecutrix is truthful. Paragraph 15 of aforesaid judgment is being reproduced below :-

"15. We, therefore, find it difficult to sustain the order of acquittal passed by the High Court in respect of the offence under Section 376 IPC. It is not the law that in every case version of the prosecutrix must be corroborated in material particulars by independent evidence on record. It all depends on the quality of the evidence of the prosecutrix. If the Court is satisfied that the evidence of prosecutrix is free from blemish and is implicitly reliable, then on the sole testimony of the prosecutrix, the

conviction can be recorded. In appropriate cases, the court may look for corroboration from independent source or from the circumstances of the case before recording an order of conviction. In the instant case, we find that the evidence of the prosecutrix is worthy of credit and implicity reliable. The other evidence adduced by the prosecution, in fact, provides the necessary corroboration, even if that was considered necessary. The High Court on a clear misreading of the evidence on record, acquitted the respondent of the charge under Section 376 IPC while upholding his conviction under Section 450 IPC."

45. Hon'ble Supreme Court has given much importance to the testimony of prosecutrix in the matter of **State of U.P. vs. Chhoteylal (supra)**. The relevant paragraph 19 is being quoted below :

"19.....But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations."

46. Statement of PW-2 (i.e. prosecutrix) evinces the chronology of event and she had clearly articulated as to how the crime of rape was committed against her. She had clearly worded about the insertion of male organ into her private part. She had been continuously blackmailed for about one month prior to date of incident and throughout subjected to forceful sexual intercourse under the threat that if she disclosed anything about the incident to any person, her photographs would be distributed all over the village. On the ill fated day i.e. 18.05.2011 while she had gone to forest to collect fodder for the cattle, she had been subjected to forceful sexual intercourse by the accused-appellant with one accomplice Faizaan who took turn one by one.

47. PW-5 Atiq-ur-Rehman had clearly stated that he and Gaffar, after hearing the screaming of girl, immediately rushed towards the place of incident and saw that Faizaan was holding hand of the prosecutrix and Zulfiqar @ Zillu (appellant) was lying over the victim and committing rape. By the time they reached at the spot both accused persons fled away from the scene. Atiq-ur-Rehman (PW-5) is an independent witness of the incident and had clearly stated and affirmed that the crime was committed by accused persons. Nothing has been emerged in his cross-examination to create doubt in his testimony. There is throughout consistency in the statements of PW-1, PW-2 and PW-5 who had categorically narrated the commission of offence of rape.

48. Evidence as a whole indicates that there was resistance by the victim and there is no sign of voluntary participation of victim for alleged sexual

act. She had been subjected to forceful sexual intercourse under threat to her life and coercion. On the date of incident she had been pinned down on the field and subjected to rape. Said incident cannot be construed as a consented sexual act. All the circumstances and evidences available on record clearly indicate towards the fact that the victim/prosecutrix had never produced her body voluntarily, instead she had resisted to the best of her ability. Even while resisting the conduct of the accused she had sustained several injuries, which is evident from the Medical Report dated 18.05.2011 (i.e. Exhibit Ka-5) which had been duly proved by Dr. Pramod Kumar Gupta (PW-4). Thus, she freely exercised choice between resistance and assent, and she had raised alarm against the offence committed by the accused persons. Even otherwise, if she had been a consented party to the offence, the injuries caused on her body would not have been occurred at all.

49. In the present matter, testimony of the prosecutrix is sufficient in itself and can be made the solitary basis for conviction of the accused persons. In fact, her statement is unimpeachable and beyond reproach. Even otherwise, version of the prosecution is fully corroborated by the statement of other witness of fact as well as Medical Certificates i.e. Exhibits Ka-3, 4 and 5.

50. Learned counsel for appellant had raised doubt on the correctness and genuineness of two medical reports. First was prepared on the date of the incident i.e. 18.05.2011 (Exhibit Ka-5) whereas subsequent reports were prepared on 30.06.2011 (Exhibit Ka-3) and its supplementary report on 02.07.2011 (Exhibit Ka-4), which were prepared after lodging FIR. It is submitted by the learned counsel for the appellant that in the subsequent reports no sign of injury had been shown and condition of prosecutrix's vagina had been shown to admit two fingers easily and there was also absence of spermatozoa.

51. Aforesaid submission made by the learned counsel for the appellant is unfounded, inasmuch as, subsequent medical examination of the victim was conducted at a very delayed stage, after 42 days from the date of the incident. First report was prepared and signed on the date of the incident i.e. 18.05.2011 by Dr. Pramod Kumar Gupta (PW-4) and second medical examination was conducted by Dr. Saroj Arora (PW-3), who had submitted the report (Exhibit Ka-3) and on the instructions of Dr. Arora, Ossification Test and Swab Test of vagina was conducted to ascertain age of victim which she opined to be 17 years in the supplementary medical report dated 02.07.2011 (Exhibit Ka-4). After lapse of sufficient time that is about 42 days, absence of spermatozoa is quite possible and cannot be proved fatal to the prosecution case. So far as the injuries on the body of victim is concerned, that could easily be healed during this period which were simple in nature and appears to have been inflicted due to scuffling between the victim and accused, wherein she had been pinned down on the ground and subjected to forceful sexual intercourse. All injuries as mentioned in the medical report dated 18.05.2011 (Exhibit Ka-5) are very natural which could be caused in such a situation. It is also very natural that those injuries might be healed during the sufficient time lapse of 42 days, when subsequent medical

examination was conducted on 30.06.2011. In her statement, PW-3 Dr. Saroj Arora had clearly stated the age of victim to be 17 years and possibility of rape could not be ruled out. The relevant portion of her statement is being quoted below :-

"इन परीक्षणो के आधार पर मेरी राय में उसकी उम्र लगभग 17 वर्ष थी। बलात्कार के सम्बन्ध मे कोई निश्चित राय नही दी जा सकती। हाइमन पुराना फंटा होने के बाद भी बलात्कार की संभावना से इंकार नही दिया जा सकता। यदि पीडिता के साथ दि 18ण्5ण्11 का बलात्कार हुआ हो तो दिनांक 30ण्6ण्11 तक परिक्षण की तिथि तक स्परमैटीजोआ नही पाये जायेगे। मूल पूरक रिपोर्ट आज पत्रावली पर मेरे सामने मेरे लेख व हस्ताक्षर मे है इस पर एक्ज क 4 डाला गया।"

52. So far as condition of hymen is concerned, in Medical Report dated 30.06.2011 (Exhibit Ka-3), it has been mentioned as "Hymen old torn. Vagina admits two fingers easily." Aforesaid condition of vagina could be caused in the present matter wherein victim had been continuously subjected to forceful sexual intercourse for one month prior to the incident i.e. 18.05.2011. She deposed that she had clearly told the Investigating Officer that she had been subjected to rape in past also. PW-1 (i.e. mother of victim) had also stated that her daughter informed that for about one month prior to the incident she had been continuously subjected to rape.

53. In the aforesaid circumstances, acceptability of two fingers, easily, in vagina and torn hymen, is quite natural. Even otherwise, promiscuity of victim cannot create any impediment in conviction of the present accused-appellant, who can be convicted beyond doubt for offence of rape, which is fully established from the facts and circumstances of present case.

54. After considering the facts and circumstances of present case and appraisal of evidence available on record, we have no hesitation to hold that the present accused-appellant had committed an offence of rape with the victim, who had been forcibly subjected to sexual intercourse against her will. Accused has failed to discharge his onus of proof that the victim was involved with him in consensual sex. In cross-examination of the prosecution witnesses and in the statement of the accused under Section 313 Cr.P.C., nothing has been emerged fortifying the defence of consensual sex. Testimony of the victim is itself sufficient to convict the accused persons, inasmuch as, it is trustworthy, truthful and unimpeachable. Her statement is also fully corroborated by an independent witness (i.e. PW-5), who reached on the spot while accused were committing crime of rape. Facts and circumstances of present case inspire confidence of this Court and no second opinion can be inferred except to hold that accused-appellant Zulfiqar @ Zillu is guilty of committing forceful sexual intercourse with the victim/prosecutrix against her will.

55. Resultantly, this appeal is hereby **dismissed**. Impugned judgment and order dated 03.11.2012 passed in the Sessions Trial No.655 of 2011 (Zulfiqar @ Zillu vs. State of U.P.) convicting and

sentencing the accused-appellant, is hereby affirmed and maintained. The accused-appellant is already in jail. He shall serve out the sentence as awarded by the court below.

56. Let a copy of this judgment along with lower Court's record be transmitted forthwith to concerned Court below for necessary compliance.

(2020)08ILR A628
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Criminal Appeal No. 7617 of 2006

Guddoo @ Nitin Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Jagdish Singh Sengar, Sri B.M. Pandey, Sri Balendra Kumar Singh, Sri D.K. Singh, Sri H.V. Shastri, Ms. Mary Puncha (Sheeb Jose), Sri Mohd. Kalim, Sri Rajiv Lochan Shukla, Sri Santosh Kumr Misra, Sri Sushil Kumar Dwivedi, Sri Sanjeev Singh

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

Criminal Law- Indian Penal Code, 1860- Section 364- Section 364-A IPC- Distinction between- kidnapping for the purpose of ransom – More heinous offence - While kidnapping/abduction; kidnapping/abduction in order to murder; extortion were pre-defined offences with punishment upto ten year imprisonment, by introducing section 364-A the Parliament declared a more heinous offence. The punishment prescribed was life imprisonment or death penalty.

Section 364-A of the IPC makes out a more heinous offence, punishable with imprisonment for life or death penalty, since the said section provides for kidnapping for ransom.

Criminal Law- Indian Penal Code, 1860- Section 364-A – Essential ingredients- For a conviction under Section 364-A IPC to arise or be sustained, in the facts of the instant case, it must be seen to have been established beyond reasonable doubt that the victim had been kidnapped by the appellant; and/or kept under detention upon being kidnapped; under threat or reasonable apprehension of or actual hurt or death caused to the kidnapped child, to fulfill a ransom demand. A simple demand of ransom, even if accompanied with kidnapping, would not complete the ingredients of offence under Section 364-A IPC. The demand of ransom must be proven to have been made under threat or reasonable apprehension or actual hurt or death.

In order to prove the offence under Section 364- A of the IPC the prosecution, inter-alia, has to prove the ingredient of kidnapping for the purpose of ransom made under the threat or reasonable apprehension of causing actual hurt or death.

Criminal Law- Indian Penal Code, 1860 - Section 364-A - Section 365- Absence of necessary ingredients of the offence under section 364-A of the IPC - More than reasonable doubts exist as to the third ingredient of offence under Section 364-A IPC- The prosecution has failed to establish that there was any threat to cause death or hurt or any reasonable apprehension of death or hurt being caused to the victim to compel payment of a ransom. Ingredients of offence under Section 365 IPC was made out, inasmuch as the victim, who was a minor child, is found

to have been kidnapped and wrongfully confined by the appellant. In absence of the third/further ingredient of the offence under Section 364-A IPC, we find the present to be a fit case to modify the charge and, therefore, the conviction and sentence awarded to the appellant to one under Section 365 IPC in place of Section 364-A IPC.

Where the prosecution has failed to prove the third ingredient required to make out the offence u/s 364-A, viz. that there was any threat to cause death or hurt or any reasonable apprehension of death or hurt being caused to the victim to compel payment of a ransom, but other ingredients making out the offence u/s 365 IPC are proved, then the accused can only be convicted u/s 365 of the IPC.

Criminal Appeal partly allowed. (Para 11, 15, 17, 19, 21) (E-3)

Case law relied upon/ Discussed: -

1. Malleshi Vs St. of Kar., (2004) 8 SCC 95

2. Suman Sood @ Kamal Jeet Kaur Vs St. of Raj., (2007) 5 SCC 634

3. Anil alias Raju Namdev Patil Vs Admin. of Daman & Diu & anr., (2006) 13 SCC 36

4. Shyam Babu & ors. Vs St. of Har., (2008) 15 SCC 418

5. Vikram Singh alias Vicky & anr. Vs U.O.I & ors., (2015) 9 SCC 502

6. St. of U.P. Vs Ram Chandra Trivedi (1976) 4 SCC 52

(Delivered by Hon'ble Saunitra Dayal Singh, J.)

1. This Criminal Appeal arises from the judgment dated 01.12.2006 passed by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur. The learned court below has recorded conviction of the accused appellant-Guddoo @ Nitin Singh for offence punishable under Section 364-A IPC. and sentenced him to undergo imprisonment for life. The learned court has also imposed fine of Rs. 10,000/- and in default thereof, provided the appellant would undergo additional rigorous imprisonment for one year. The appellant-Guddoo @ Nitin Singh is disclosed to be in jail since 09.06.2005, i.e. for last fifteen years.

2. The prosecution case is - on 02.04.2005, a missing person report was lodged by Suresh Kumar Sahu, PW-1 (paternal uncle of the victim) at the Police Station Khakhreru, District Fatehpur, reporting that his nephew Aman, aged about nine years, had gone missing while the latter had been riding a bicycle, in the village. His abandoned bicycle was found near Medipur village. More than two months after the said report had been lodged, the said Suresh Kumar (PW-1) made another written report at P.S. Khakhreru, on 09.06.2005. In that report, he made further allegations against still unknown miscreants - of demand of ransom. Personal clothes & slippers of the victim and, a ransom note were disclosed to have been received from unknown miscreants. The same were stated to be available with Rajesh Kumar (PW-3), father of the victim. On 09.06.2005 itself, the appellant-Guddoo @ Nitin Singh and another accused-Lala @ Digvijai Singh @ Rahul are said to have been arrested by the police of P.S. Dhoomanganj, District-Allahabad (now Prayagraj) and the victim recovered from their illegal custody, at a place described as jungle near the Military Farms, on the eastern side of Devprayagam Colony, in District Allahabad. The third accused Munna Singh is also claimed to have been named by the victim and also the

accused persons Guddoo and Lala (upon their arrest), as being the third person involved in the kidnapping.

3. Upon completion of the investigation, appellant-Guddoo @ Nitin Singh, co-accused Lala @ Digvijai Singh @ Rahul and Munna Singh were charged for offence under Section 364-A IPC. They pleaded not guilty and were hence tried.

4. At the trial, four written notes demanding ransom were made exhibits. These were sought to be proved by the first informant Suresh Kumar (PW-1). Also, the said Suresh Kumar as also the victim child Aman (PW-2) were examined for ocular evidence alongwith Rajesh Kumar, the father of the victim who was also examined as PW-3. All three witnesses generally supported the prosecution story. PW-1 and PW-2 were put through extensive cross-examination, wherein it came out that neither any of the ransom notes were received by either of them directly nor they had received any phone call on their personal phones/mobile phones demanding any ransom amount, nor they had received such demand directly, from any of the accused persons, through any other mode. On the contrary, Suresh Kumar (P.W.-1) stated that certain personal clothes, slippers and the first ransom note were received by a relative of PW-1, namely Shiv Mangal Sahu, on 19.04.2005 from two unknown persons. The second ransom note was again claimed to have been received by the said Shiv Mangal Sahu being a letter dated 13.05.2005 received through registered post, on 19.05.2005. A third ransom note dated 06.06.2005 is also stated to have been received through Shiv Mangal Sahu. A ransom demand is also stated to have been made during certain telephonic conversation on the mobile phone of the village 'Pradhan' Narpat Singh. Further, according to the prosecution, yet another ransom note was received by the family of the victim child through one Budul Yadav, inside a wedding invitation card. However, none of the aforesaid three persons was examined as a prosecution witness. Suresh Kumar (PW-1) also clarified that the ransom notes were first produced before the police authorities on 9.06.2005, after the victim child had been recovered and that Narpat Singh had informed him about the phone call received on his mobile phone, to demand ransom prior to 09.06.2005. Then, of his own, he appears to have added that an information had been received on the mobile phone of Narpat Singh regarding demand of ransom and that he (PW-1) had spoken to the abductors on the mobile phone of Narpat Singh.

5. At the same time, Rajesh Kumar (PW-3), who is father of the victim, stated that he was informed on 08.06.2005, that the victim child had been recovered. He reached P.S. Dhoomanganj, Allahabad on 09.06.2005 in the morning and stayed back at Allahabad on 09.06.2005 and gained custody of the victim child on 10.07.2005. He also specifically stated that he was very familiar with the voice of the present appellant-Guddoo @ Nitin Singh, and the co-accused-Lala @ Digvijai Singh @ Rahul as they were known to him from before the incident, yet, during his cross-examination, he had clarified that during his telephonic conversations with the abductors, he could recognise only the voice of his son but not of the abductors. Also, during

cross-examination, he specifically stated that the victim child was 'chanchal' and that when the child could not be found, he (PW-1) had stated before the police inspector that he believed that the child had probably gone to some relative (without informing him).

6. Insofar as the recovery of victim is concerned, the testimony of police personnel is consistent and categorical, that the present appellant had been apprehended by the police personnel of P.S. Dhoomanganj, District Allahabad on 09.06.2005, on a tip off received from certain local children - of a child being held in captivity at a place described as the jungle adjoining the Military Farms, near Devprayagam - a residential colony, in Allahabad. It was also sought to be established that the demand of ransom of about Rs. 5 lacs was made, of which Rs. 70,000/- had been paid in cash, a part of which is claimed to have been recovered from the appellant at the time of his arrest.

7. In defence, the appellant doubted the prosecution story on every aspect and it was claimed that he had been falsely made accused on account of certain pre-existing disputes between the families of appellant-Guddoo @ Nitin Singh and the village *'Pradhan'* Narpat Singh, with whom the family of the victim was close inasmuch as PW-3 Rajesh Kumar (father of the victim) admitted to have helped the said Narpat Singh during his election as the village '*Pradhan'*. Also, it was suggested (during the cross examination of PW-1), that the appellant's family held a very large agricultural holding exceeding 100 bighas, whereas the agricultural holdings of the family of victim was very small in comparison being about 4 - 4.5 bighas (during the cross examination of PW-3). Therefore, the allegation of abduction for ransom was suggested to be wholly concocted and inherently improbable. It has also been stated that the appellant had been arrested from the house of his relative/brother-in-law and illegally detained without formal arrest being shown and that his brother-in-law had been forced to withdraw Rs. 10,000/- from his bank account at Allahabad Kshetriya Gramin Bank, on 09.06.2005 for payment of bribe to the police party that had arrested him. The police had upon receipt of that money shown its false recovery as part of the ransom received. A defence witness Vijay Singh (DW-1), the real brother-in-law of the accused persons Guddoo and Lala was examined. He testified that those accused persons had been staying with him, in Allahabad for last few months before their arrest and that the police personnel of Dhoomanganj police had picked them up on 07.06.2005 and that he had withdrawn money from his bank account at the Allahabad Kshetriya Gramin Bank from which alleged bribe was paid to the police personnel to obtain release of the accused Guddoo and Lala.

8. Upon consideration of the entire evidence, the learned court below has convicted the present appellant for the offence under Section 364-A IPC and sentenced him to undergo life term imprisonment together with fine of Rs. 10,000/-. Inter alia, the trial court relied heavily on the evidence of PW-1, PW-2 and PW-3 with respect to allegation of kidnapping and demand of ransom and on the testimony of police personnel with respect to his recovery. The defence evidence with respect to appellant having

been picked up by the police, a few days before the recovery of the victim child, was disbelieved.

9. Heard Sri Sanjeev Singh, learned Senior Advocate, assisted by Ms. Mary Puncha for the appellant and Sri Jai Narayan Singh, learned Additional Government Advocate for the State and perused the record.

10. Earlier, a two judge bench of the Supreme Court in ***Malleshi Vs. State of Karnataka, (2004) 8 SCC 95,*** laid down three ingredients required to complete an offence under Section 364-A IPC. In para 12 of the aforesaid report, it has been observed as under:

"12. To attract the provisions of Section 364-A what is required to be proved is: (1) that the accused kidnapped or abducted the person; (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom....."

Similar test was also applied in another two judge bench decision of that Court in **Suman Sood alias Kamal Jeet Kaur Vs. State of Rajasthan, (2007) 5 SCC 634.**

11. However, a different view was taken, in at least two other decisions of the Supreme Court. Therein, a distinction was drawn between ingredients of offence as defined under Sections 364 and other pre-defined offences of kidnapping and extortion, on one hand and, that under the newly added Section 364-A IPC. The newly added section introduced the offence - kidnapping or abduction carried out and/or illegal detention of the victim held under threat of hurt or murder etc. to compel the government or a person etc. to do or not do any act or to compel payment of ransom. Thus, while kidnapping/abduction; kidnapping/abduction in order to murder; extortion were pre-defined offences with punishment upto ten year imprisonment, by introducing section 364-A the Parliament declared a more heinous offence, described above. The punishment prescribed was life imprisonment or death penalty. In **Anil alias Raju Namdev Patil Vs. Administration of Daman & Diu, Daman & Anr., (2006) 13 SCC 36**, it was held:

"The ingredients for commission of offence under Section 364 and 364-A are different. Whereas the intention to kidnap in order that he may be murdered or may be so disposed of as to be put in danger as murder satisfies the requirements of Section 364 of the Penal Code, for obtaining a conviction for commission of an offence under Section 364-A thereof it is necessary to prove that not only such kidnapping or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom."

12. Again, in **Shyam Babu & Ors. Vs. State of Haryana, (2008) 15 SCC**

418, another two judge bench of the Supreme Court interpreted the provision of Section 364-A IPC, thus:

"Shri Kush, learned counsel concentrated on the nature of the offence. According to him, the ingredients of Section 364-A IPC were not proved in this case and at the most, the conviction could be under Section 364. Section 363 deals with the punishment for kidnapping, which offence is defined in Section 359. The punishment is seven years. Section 364 provides for kidnapping or abducting in order to murder, while Section 364-A deals with kidnapping for ransom. The wording is as under:

"364-A. Kidnapping for ransom, etc.-Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

*The wording itself suggests that when kidnapping is done with the threat to cause death or hurt to the kidnapped person or gives a reasonable apprehension that some person may be done to death or hurt or compels any Government, any foreign State or international intergovern*mental organisation or any person to pay a ransom, the offence is complete."

13. While an apparent conflict of opinion exists in the aforesaid decisions of the Supreme Court, all of equal bench strength, yet, that difficulty may not hold us any longer, since a three judge bench of the Supreme Court, in **Vikram Singh alias Vicky & Anr. Vs. Union of India & Ors., (2015) 9 SCC 502 a**lso had the occasion to deal with this issue. Upon elaborate consideration of the textual background and history of legislation, the Supreme Court interpreted the ingredients of Section 364-A IPC thus :-

"The argument though attractive does not stand on closer scrutiny. The reasons are not far to seek. Section 364-A IPC has three distinct components viz. (i) the person concerned kidnaps or abducts or keeps the victim in detention after kidnapping or abduction; (ii) threatens to cause death or hurt or causes apprehension of death or hurt or actually hurts or causes death; and (iii) the kidnapping, abduction or detention and the threats of death or hurt, apprehension for such death or hurt or actual death or hurt is caused to coerce the person concerned or someone else to do something or to forbear from doing something or to pay ransom. These ingredients are, in our opinion, distinctly different from the offence of extortion under Section 383 IPC. The deficiency in the existing legal framework was noticed by the Law Commission and a separate provision in the form of Section 364-A IPC proposed for incorporation to cover the ransom situations embodying the ingredients mentioned above. The argument that kidnapping or abduction for ransom was effectively covered under

the existing provisions of IPC must, therefore, fail."

14. In **State of U.P. Vs. Ram Chandra Trivedi (1976) 4 SCC 52,** such a situation was clearly resolved by providing a simple touchstone to the High Courts - "to try to find out and follow the opinion expressed by the larger benches of the Supreme Court".

15. Thus, upon such authoritative pronouncement made by a larger bench of the Supreme Court, no quarrel can arise or exist as to the true ingredients of an offence under Section 364-A IPC. For that offence to be complete, there must necessarily co-exist the following three ingredients:

(a) kidnapping or abduction OR detention after kidnapping or abduction;

(b) threat to cause death or hurt OR reasonable apprehension as to that OR death or hurt actually caused to the kidnapped person/abductee;

(c) the above acts must have been performed to compel

(i) the Government OR foreign state OR international inter-governmental organisation OR any other person;

(ii) to do or to abstain from doing any act OR to pay a ransom.

Unless all three ingredients are proved to have existed, together i.e. in a single chain or by way of an interlinked transaction, the offence may not be said to have been committed. Thus, for a conviction under Section 364-A IPC to arise or be sustained, in the facts of the instant case, it must be seen to have been established beyond reasonable doubt that the victim Aman had been kidnapped by the appellant-Guddoo @ Nitin Singh; and/or kept under detention upon being kidnapped; under threat or reasonable apprehension of or actual hurt or death caused to the kidnapped child, to fulfill a ransom demand.

16. In the facts of the present case, the requisite proof had to arise in two parts. The prosecution was first burdened to establish that the victim child had been kidnapped and/or detained by the appellant. In that regard, the prosecution story emerges quite consistently, logically and truthfully, inasmuch as, undisputedly the victim child was only nine years of age on the date of his disappearance. Then, on 02.04.2005, PW-1 Suresh Kumar, who is the paternal uncle of the victim, lodged a missing person report alleging that the victim went missing while the bicycle that he was riding, was found lying abandoned near village- Medipur. Then, besides the discrepancy as to the date of recovery of the victim on 09.06.2005 (as claimed by the police) and 08.06.2005 (as claimed by the father of the victim i.e. PW-3), S.I. Narendra Kumar Singh (PW-4), who was Chowki Incharge Rajroopur, P.S. Dhoomanganj at the relevant time and Shail Kumar Singh (PW-6), SHO, P.S. Dhoomanganj, categorically stated that upon a tip off, the appellant and the co-accused Lala @ Digvijai Singh @ Rahul were arrested, while they held illegal custody of the victim child. They were cross-examined at length. No inconsistency or doubt arose during such extensive cross-examination as to the factum of recovery and manner of recovery of the victim claimed by the prosecution. Therefore, there is no reason

to doubt the prosecution allegation that the victim was recovered from the custody of the appellant and the co-accused Lala @ Digvijai Singh @ Rahul, from the spot described as a jungle on the eastern side of the residential colony, Devprayagam, near the Military Farms, at Allahabad. It may further be stated for the purpose of completion of facts that there is no case of appellant having gained custody of the victim minor child with consent of his natural guardian. The victim child also testified as to his kidnapping by the appellant and the other co-accused and of being kept detained by them till his discovery and recovery by the police. Thus, the first part of the burden to prove (that lay on the prosecution), stood discharged beyond any reasonable doubt. Also, there is no doubt that the appellant had illegally detained the victim for almost two months since he was kidnapped. Though, the appellant did state that he had been falsely implicated by the police personnel, he could not lead any positive evidence in support of such claim.

17. However, as noted above, for the offence under Section 364-A IPC to be complete, kidnapping or abduction and illegal detention of the kidnapped/abducted is only a part ingredient. The key ingredient that distinguishes the offence under Section 364-A IPC from that of kidnapping; extortion and; kidnapping for murder, is the demand of a ransom under the threat to cause hurt or death or reasonable apprehension as to that or causing death or hurt - to extract the ransom. It is in this regard that the prosecution story waivers and serious doubts emerge that require consideration. In the first place, it was the own case of the key prosecution witness namely the first informant (PW-1) and the father of the victim (PW-3) that the personal clothes & slippers of the victim as also the ransom notes were not received by them, directly from any of the accused persons. On the contrary, they asserted that such personal belongings of the victim and the ransom notes were received by Shiv Mangal Sahu, and Budul Yadav. Also, it was the prosecution's own case that a ransom demand was also received telephonically on the mobile phone of the village '*Pradhan*', namely Narpat Singh. Rajesh Kumar, PW-3 (father of the victim) further claimed to have spoken to the abductors and the victim on the mobile phone of Narpat Singh. However, for reasons not known to the Court, neither of the three persons, who allegedly received the ransom notes and on whose mobile phone demand for ransom was made, were ever produced as a witness to support that crucial aspect of the prosecution story. It is also not completely free from doubt how PW-1 could have proven the exhibits i.e. ransom notes and, clothes & slippers of the victim, when, according to his own statement, he had not received the same from the abductors/accused persons but the same were disclosed to have been received from Shiv Mangal Sahu and Budul Yadav. No effort whatsoever was made to establish that the ransom notes were in the handwriting of the accused persons. The child witness who was alleged to have been forced to write his name on those ransom notes did not identify his writing.

18. In any case, the prosecution story in that regard, falls flat upon the cross-examination of Rajesh Kumar (PW-3) i.e. father of the victim child who

conceded that he had thought the victim child had gone away to some relative, till he was recovered. If the father of the victim child always believed that the latter was staying with some relative till his recovery on 08/09.06.2005, then the entire story of receipt of ransom notes and threat to life of the victim child is rendered completely unbelievable. It has to be discarded in entirety. It may also be noted, the victim child though supported the prosecution allegation of demand of ransom made over telephone, during the telephonic conversations, yet, during his cross-examination he stated that he did not remember what transpired during those telephonic conversations between the abductors and his parents. Also, though such demands or ransom, are claimed to have been over a period of almost two months from the date of abduction till the date of arrest and recovery, yet, that matter was never reported to the police authorities. Also, according to the first informant and the father of the victim, they had partly complied with the demand of ransom of Rs 5,00,000/-. However, no evidence could be led to establish the payment of Rs. 70,000/- by way of part ransom amount. In any case, that fact would remain very difficult to prove, by its very nature. At the same time, there also exist doubts as to the exact amount of ransom demanded-whether Rs. 2,00,000/- or Rs. 5,00,000/- or Rs. 2,70,000/-, in view of varying statements of different prosecution witnesses, in that regard.

19. Then, as discussed above, a simple demand of ransom, even if accompanied with kidnapping, would not complete the ingredients of offence under Section 364-A IPC. The demand of ransom must be proven to have been made under threat or reasonable apprehension or actual hurt or death. Looked in this light, it is also relevant that there were no injuries or marks of any injury or torture found on the body of victim child, at the time of his recovery on 09.06.2005. He also did not make any statement to that effect. In his entire testimony, he did not bring out any allegation of any attempt made on his life or any threat to life having been made on him at the hands of the appellant or the other co-accused. In fact, he had described, in great detail, his uneventful journeys and stay at various places from 02.04.2005 up to the point of his recovery by the police. Not only this, there is a complete lack of any threat to life or hurt in that narration, in fact, it is completely uneventful except a stray statement that he (PW-2) had once been threatened while at an unspecified railway station. Thus, that narration also does not bring out any allegation of attempt to murder or threat to murder or any bodily injury caused to the victim to demand ransom.

20. Thus, in entirety of the evidence brought forth by the prosecution, we find that more than reasonable doubts exist as to the third ingredient of offence under Section 364-A IPC. To conclude, the prosecution has failed to establish that there was any threat to cause death or hurt or any reasonable apprehension of death or hurt being caused to the victim to compel payment of a ransom. Also, neither the ransom notes were ever proved, nor the victim child proved the demand of ransom. Further, it is doubtful that such ransom notes were ever received or if a conversation demanding ransom ever took place, inasmuch as, the father of the victim (PW-3) always thought, till the recovery of the victim child that the latter had run away to some relative. The kidnapped child was

recovered safe and sound. Thus, for the reasons noted above, the third ingredient of the offence under Section 364-A IPC is found not proved.

21. As a consequence of the above discussion and for the reasons given, we find that ingredients of offence under Section 365 IPC was made out, inasmuch as the victim, who was a minor child, is found to have been kidnapped and wrongfully confined by the appellant. In absence of the third/further ingredient of the offence under Section 364-A IPC, we find the present to be a fit case to modify the charge and, therefore, the conviction and sentence awarded to the appellant-Guddoo @ Nitin Singh, to one under Section 365 IPC in place of Section 364-A IPC.

22. Accordingly, the appeal is **allowed in part**. The conviction of the appellant-Guddoo @ Nitin Singh under Section 364-A IPC is modified to one for offence punishable under Sections 365 IPC. The maximum punishment for such offence is seven years only. The sentence is modified accordingly. The appellant-Guddoo @ Nitin Singh has remained confined for more than 15 years. He is directed to be released forthwith, unless required in any other case. The fine of Rs. 10,000/-, awarded by the learned court below, is set-aside.

(2020)08ILR A637
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.06.2020

BEFORE

THE HON'BLE RAJENDRA KUMAR -IV, J.

Criminal Revision No. 888 of 2018

Rameshwar @ Ramesh ...Revisionist

Versus

State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Satendra Kumar Upadhyay, Smt. A.P. Upadhyay, Sri M.P.S. Chauhan

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

Competent court - can fully rely - on a solitary witness-record conviction - legal system laid emphasis-quality over quantity-no legal or otherwise error in judgment of Court below-Revision partly allowed.

Held, so far as the public witness is concerned, it is well settled that in absence of public witness, prosecution story cannot be disbelieved unless it is otherwise proved. Incident like rape or sexual assault is generally committed in lonely place and it is not possible for prosecution to produce public witness. **(para 16)**

Revision partly allowed. (E-9)

Cases referred: -

1. Dalip Singh Vs. St. of Punjab, AIR,1953, SC 364

2. Dharnidhar Vs. St. of U.P. (2010) 7 SCC 759,

3.Ganga Bhawani Vs. Rayapati Venkat Reddy & ors., 2013(15) SCC 298

4.Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124

5. Sachin Kumar Singhraha Vs. St. of M.P. in Criminal Appeal Nos. 473-474 of 2019

6.Namdeo Vs. St. of Maharashtra (2007) 14 SCC 150

(Delivered by Hon'ble Rajendra Kumar -IV, J.)

1. Heard Sri MPS Chauhan, learned counsel for revisionist, learned AGA for State and perused the material available on record.

2. Impugned order dated 27.01.2018, passed by Additional District and Sessions Judge, Court No.6, Aligarh, in Criminal Appeal No. 284 of 2016 and judgment and order dated 7.11.2016 passed by learned Additional Chief Judicial Magistrate, Court No.4, Aligarh in Criminal Case No. 1401 of 2009, are under challenge in the present revision.

3. Trial Court convicted the accused under Section 377 IPC and sentenced him to undergo 7 years' rigorous imprisonment and fine of Rs. 25000/- with default sentence.

4. Criminal Appeal No. 284 of 2016 filed there-against has also been dismissed by Additional Sessions Judge, Court No. 6, Aligarh, vide order dated 27.01.2018.

5. Brief facts, as per prosecution story, are that on 4.10.2000, at about 5:00 pm, victim boy (name withheld) aged about 5 years, was playing at the roof of the house. Accused called him fondly and took him to the field and molested him in Millet filed. On hearing his scream, Dinesh and other persons reached there. Victim approached his grandmother-Kailashi and narrated the entire incident. PW-1, Mahendra Singh uncle of the victim, submitted written Tehrir, Ex.Ka-1, in respect of incident before the Police Station concerned. On the basis of written Tehrir, Ex.Ka-1, Chick FIR has been registered by Constable Clerk, under Section 377 IPC, against the accused and entry of case was made in the General Diary.

6. PW-3, Dr. S.B. Sharma, medically examined the victim and prepared injury report, Ex.KA-2. Investigating Officer of case commenced investigation, prepared site plan, recorded the statements of witnesses, collected other evidence, found sufficient evidence and submitted charge-sheet against the accused under Section 377 IPC before the Court concerned.

7. Trial Court, on 19.4.2003, framed the charge against the accused, under Section 377 IPC. Accused-revisionist herein denied the charge levlled against him and claimed to be tried.

8. In support of its case, prosecution examined PW-1 Mahendra Singh, PW-2 victim and PW-3 Dr. S B Sharma. Out of whom, PW-1 and 2 are the witnesses of fact and PW-3 is formal witness conducting medical examination.

9. On closure of evidence of prosecution, statement of accused-revisionist was recorded by the Trial Court under Section 313 Cr.P.C. Accused-revisionist denied the prosecution story in toto. He examined DW-1 Sahab Singh in his defence evidence. Statements of witnesses are said to be wrong by him. Trial Court considering the entire evidence, convicted the accused-revisionist and sentenced as stated above.

10. Learned counsel for revisionist advanced the arguments in the following manner :-

There is no public witness in support of prosecution.

There is no motive to accused-revisionist to commit the present crime.

Informant PW-1, is not an eye witness. He reached on the spot on hearing the alarm raised by victim.

There is contradiction in the statements of witnesses. Statement of victim PW-2 is self contradictory.

Medical evidence does not go with the oral testamentary.

Prosecution has failed to prove its case beyond reasonable doubt. Trial Court did not appreciate the evidence on record carefully and convicted the accused-revisionist on the basis of surmises and conjectures.

In case revision fails, accused-revisionist may be sentenced to the the period already under gone.

11. In response thereto, learned AGA for State opposed the revision by arguing that accused-revisionist had carnal intercourse with victim, aged about 5 years, and victim himself is a responsible witness. His statement is duly intact and believable, worthy to credence. Trial Court after full care and caution, appreciated the evidence and rightly convicted and sentenced to the accused-revisionist. Appeal there-against is also well reasoned and has been rightly dismissed. It is an offence against the society and accused-revisionist requires no sympathetic consideration and revision is liable to be dismissed.

12. I have heard learned counsel for accused-revisionist, learned AGA for State at considerable length and perused the record with the assistance of learned counsel for parties.

13. Now I may consider the evidence of prosecution. PW-2 (victim of the present case) deposed that he was playing on the roof of the house; accused-revisionist-Rameshwar took him in the Millet field from there. He committed carnal intercourse in the Millet field with him. At that time, it was 5:00 pm. At the time of intercourse, he cried and on hearing his scream, one Dinesh reached there at the place of occurrence and he rushed to his grand-mother Kailashi and narrated the entire story to her. His anus was bleeding. His uncle took him to Police Station, later on Aligarh Hospital, where he was medically examined. Police inquired him whereupon who told the incident to Police. Victim PW-2 withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve his natural evidence. At the time of incident, victim was aged about 5 years. There was no reason to him to state falsely against the accused-revisionist. His statement appears to be quite natural.

14. PW-3, S.B. Sharma, deposed that on 5.10.2000, he was posted as Emergency Medical Officer (EMO) in Malkhan Singh Hospital, Aligarh. On the very same day, at about 1:50 am, victim, aged about 5 years, was taken by HG Ram Kumar for medical examination. He examined the victim and found local tenderness over his anal region, skin was red in colour, anal swab was taken by him and sent for pathological examination but he did not found any external mark of injury over the body.

15. Thus doctor PW-3 examined the victim supported the prosecution case, medical evidence completely goes with the statement of victim.

16. So far as the public witness is concerned, it is well settled that in

absence of public witness, prosecution story cannot be disbelieved unless it is otherwise proved. Incident like rape or sexual assault is generally committed in lonely place and it is not possible for prosecution to produce public witness.

17. In **Dalip Singh v. State of Punjab, AIR,1953, SC 364**. Court held 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 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."

18. In **Dharnidhar v. State of UP (2010) 7 SCC 759**, Court has observed as follows :-

"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"

19. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298**, Court has 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: **Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).**"*

20. In 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.

21. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124**, the Apex 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.

22. In **Sachin Kumar Singhraha Vs. State of Madhya Pradesh** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019 Hon'ble Supreme Court has observed that the Court will have to evaluate the evidence before it keeping in mind the rustic nature of the 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.

23. 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.

24. Considering the entire evidence and in view of legal proposition of law discussed herein above, I do not find any legal or otherwise error in the judgment rendered by the Courts below, conviction of the accused revisionist under Section 377 IPC is liable to be maintained. It is maintained. Revision is dismissed on the point of conviction under the aforesaid section.

25. So far as the sentence of accused is concerned, it is a matter of discretion to be exercised on the consideration of circumstance aggravating and mitigating in the individual case. It is settled legal position that sentence should be awarded after a giving consideration to the facts and circumstance of each case, nature of offence, and manner in which it was committed. The measure of punishment should be proportionate to the gravity of offence. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistency with the atrocity and brutality.

26. Incident in this case is of 2000. A considerable time has elapsed. Keeping in view the nature of allegation against the accused-revisionist, injury found on the person of victim, age of accused, applying the legal principle and having regard to the totality of facts and circumstance of the case, sentence awarded by the Court below is being modified.

27. Revision is partly allowed confirming the conviction of the accused-revisionist under Section 377 IPC and the

impugned order of sentence is modified. Accused-revisionist shall under go for a period of three years' rigorous imprisonment and he will also pay fine already imposed by trial court concerned and under the condition as imposed by trial Court. Period of detention undergone by accused-revisionist shall be set off against the sentence of imprisonment in accordance with law.

28. Copy of this judgment along with the lower court record be sent back forthwith for information and compliance through District Judge, concerned.

(2020)08ILR A642
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.11.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 1149 of 2004

Chhote Lal & Ors. ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
Sri Sudhakar Pandey, Sri Ajeet Kumar Singh, Sri Surya Pratap Singh Parmar

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

Probation of Offenders Act - Section 4 - Duty of the Court to award proper sentence-regard to nature and manner it was executed-benefit of probation to be given-punishment of Court below upheld - Revisionists however not send to jail-benefit of section 4 - Revision disposed.

Held, In this instant case, the court below has not considered the probation law, although, the revisionists were only convicted for the offence under Sections 323, 324 and 325 read with Section 34 I.P.C. for which the accused-revisionists were convicted for the maximum period of four years. Therefore, the benefit of probation could have been given in view of the law referred above. But, while awarding sentence this aspect was not considered. The learned court below did not even write a single word as to why the benefit of this beneficial legislation was not given to the accused whereas it was mandatory to do so under the provisions of Section 361 Cr.P.C. Moreover, the occurrence relates to the year 1989 and this revision is pending since 2004 and therefore, no purpose of justice will be served if the revisionists are sent to jail to undergo the terms of sentence after lapse of such long time.**(para 12**)

Revision disposed. (E-9)

Cases referred:-

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

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

3.Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

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

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

1. Heard Sri Surya Pratap Singh Parmar, learned counsel appearing on behalf of revisionists no. 1 and 2, Sri Ravi Prakash Singh, learned A.G.A. and perused the record.

2. This court vide order dated 05.01.2019 for securing presence of the

revisionists has issued the bailable warrant against them.

3. In compliance of that warrant, the report of the Chief Judicial Magistrate, Ballia dated 27.05.2019 has been received in which it has been mentioned that the revisionist namely Nand Kishor son of Sri Suga has died, as such, the revision is abated so far as revisionist Nand Kishor is concerned.

4. This revision has been filed by Chhote Lal, Shiv Kumar and Nand Kishor (now dead) against the judgment of conviction and sentence dated 24.08.2000, passed by Additional Chief Judicial Magistrate-II, Ballia, in Criminal Case No. 1346 of 2000, under Sections 323, 324, 325 I.P.C., Police Station Sahatwar, District Ballia by which accused-revisionist Chhote Lal has been convicted for the offence under Sections 323 and 324/34 I.P.C., whereas, the accused-revisionist Shiv Kumar has been convicted for offence under Sections 323, 324 and 325 read with Section 34 I.P.C.

5. Learned counsel for the revisionist has submitted that instead of pressing the revision on merits, he has prayed that considering the facts and circumstances of the case and legal provisions, the conviction may be maintained and the accused-revisionists may be given benefit of probation. Learned counsel for the revisionists has further submitted that both the parties belongs to the same village and on account of a dispute with regard to Abadi Land, in spur of the moment and in sudden quarrel the whole incident took place. Further submission is that one of the accused Chhote Lal was assigned Farsa and he has said to have caused injury by Farsa whereas the other accused namely Shiv Kumar was having Lathi by which the injuries are said to have been caused. So far as the offence under Section 325 I.P.C. is concerned, there is only fracture on wrist joint which is on the non vital part of the body. The case belongs to the year 1989 and also considering that presently the revisionists-accued persons are about 65 years in age, hence, they may be released on probation.

6. Learned A.G.A. has opposed the prayer and has submitted that in the alleged incident, grievous injuries were caused and on the basis of evidence on record, the accused persons have been sentenced appropriately.

7. Against the judgment of the trial court, the appeal was also preferred by the revisionists-accused persons numbered as Criminal Appeal No. 12 of 2000 and the appeal was dismissed by the impugned judgment of the lower appellate court dated 10.03.2004, passed by Additional Sessions Judge, Court No. 1, Ballia, the judgment of the trial court was upheld.

8. So far as conviction under Sections 323, 324 and 325 read with Section 34 I.P.C. are concerned, learned counsel to the revisionists requested that looking to the fact that revision is pending since 2004 and awarded sentence is not more than four years, revisionists may be released on probation for maintaining peace and good behavior for specified period. Learned counsel for the revisionist has further argued that the effect of Sections 3 and 4 of the Probation of Offenders Act, 1958, in the background of what is stated in Section

360 of the Code of Criminal Procedure, 1973, has not been kept in view. Learned counsel for the revisionists has also relied upon the judgment in the case of ***Subhash Chand & others Vs State of UP (2015 Law Suit (All) 1343)*** and the judgment in ***Criminal Revision No. 1319 of 1999 (Hargovind & Others vs. State of U.P.)*** passed by this Court on 11.01.2019.

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

"3. Power of court to release certain offenders after admonition.- When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

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

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

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, 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 such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

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

(3) When an order under sub-section (1) is made, the court may, if it is

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

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

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

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

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

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good 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 where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

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

evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

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

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

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

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

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or 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.

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

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

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

Again, Section 361 reads as below:

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

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

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

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

12. In this instant case, the court below has not considered the probation law, although, the revisionists were only convicted for the offence under Sections 323, 324 and 325 read with Section 34 I.P.C. for which the accused-revisionists were convicted for the maximum period of four years. Therefore, the benefit of probation could have been given in view of the law referred above. But, while awarding sentence this aspect was not considered. The learned court below did not even write a single word as to why the benefit of this beneficial legislation was not given to the accused whereas it was mandatory to do so under the provisions of Section 361 Cr.P.C. Moreover, the occurrence relates to the year 1989 and this revision is pending since 2004 and therefore, no purpose of justice will be served if the revisionists are sent to jail to undergo the terms of sentence after lapse of such long time.

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

30. "It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellante courts. The Registrar

General of this Court is directed to circulate copy of this Judgement to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgement. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

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

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

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

16. In the light of above discussion, I find no illegality, irregularity or impropriety nor there is any jurisdictional error in the impugned Judgment and I am of the considered view that the conviction recorded by the court below under Sections 323, 324 and 325 read with Section 34 I.P.C. and upheld by the learned appellate court below is not required to be disturbed. Consequently, the impugned judgment of conviction and sentence is upheld.

17. However, instead of sending the revisinists namely Chhote Lal and Shiv Kumar to jail, they shall get the benefit of Section 4 of the Probation of Offenders Act. Consequently, the revisionists shall file two sureties to the tune of Rs.25,000/- coupled with personal bonds to the effect that they

shall not commit any offence and shall observe good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, they will subject themselves to undergo sentence before the Magistrate. The bonds and sureties aforesaid be filed by the accused persons within two months from the date of the Judgment as per law and Rules.

18. Accordingly, the revision is **disposed of** finally.

19. Let a certified copy of this order be sent to the court concerned for compliance.

(2020)08ILR A649
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.06.2020

BEFORE

THE HON'BLE J.J.MUNIR, J.

Criminal Revision No. 2190 of 2019

Golu ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sunil Kumar Tripathi

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

Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2015-all co-accused-adult-admitted to bail-including prime accused-no justification to refuse bail.

Revision allowed. (E-9)

Cases referred:-

1.Dharmendra (Juvenile) Vs. St. of U.P. & ors., 2018 (7) ADJ 864,

(Delivered by Hon'ble J.J.Munir, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. appearing on behalf of the State.

2. This revision is directed against an order of Ms. Renu Rao, learned Additional Sessions Judge, Hapur dated 29.04.2019 dismissing Criminal Appeal No. 26 of 2019, under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') preferred by the revisionist from an order of the Juvenile Justice Board, Hapur rejecting the revisionist's bail plea in Case Crime No. 283 of 2018, under Sections 307, 323, 504, 506 I.P.C.

3. The FIR giving rise to the crime briefly says that the informant's son was weighing goods at his shop in the evening hours at 8.00 o'clock when Shiva, Kamal, Anand and Golu (revisionist) all sons of Suraj alighted there and battered Vishal. Amongst them Shiva assaulted Vishal with a knife blow to his abdomen, injuring him. The report shows that the victim had been rushed to the hospital for medical aid. The bail plea of the revisionists that came up before the Juvenile Justice Board was rejected going by the Social Investigation Report which shows that there was lack of discipline and control in the family. The revisionist preferred an appeal to the learned Sessions Judge which too has been dismissed by the order impugned.

4. Aggrieved, this revision has been filed.

5. The submission of the learned counsel for the revisionist is that of all

the four offenders, the revisionist is the only one who is a juvenile. The three adult offenders have been admitted to bail. He has called attention of the Court to the bail order dated 23.07.2018 passed by the learned Sessions Judge, Hapur in Bail Application No. 833 of 2018, enlarging Shiva on bail. Likewise, the Court has also been taken through the bail order dated 14.08.2018, also passed by the learned Sessions Judge, Hapur in Bail Application No. 1010 of 2018 granting bail to Kamal and Anand. Learned counsel for the revisionist submits that Shiva is not only an adult offender but the role of assault by knife has also been assigned to him. He submits that once the accused, who has been assigned the role of assault, is granted bail and all the other accused, who are adults are enlarged on bail, there is no justification to detain a juvenile against whom the allegation is one of marginal participation. He submits that the orders impugned are bad inasmuch as the Courts below have proceeded on the reasoning that the revisionist is dis-entitled to bail because the atmosphere in his family is not conducive to well-being of the minor and may, in the event of his release on bail, bring him into association with some known criminal. He submits that the approach of the Courts below is patently flawed and manifestly illegal and that the Court's below have declined bail on irrelevant considerations.

6. This Court has keenly considered the matter. In a case where on merits an accused is entitled to bail, it would indeed be quite irrelevant to judge his case on the basis of the dis-entitling categories under the proviso to sub-Section (1) of Section 12 of the Act, because he happens to be a juvenile. If this construction were to be adopted, a case where an adult offender would be entitled to bail, a juvenile would still be subjected to incarceration. That does not merely appear to be the legislative intent. The Act is a beneficial legislation, designed to protect the interests of a juvenile. The provisions of Section 12 engraft a universal rule of bail to all juveniles, unless their case falls under three categories enumerated in the proviso to sub-Section (1) of Section 12 of the Act. This provision is designed to come to the rescue of a juvenile, where, if he were an adult, he would not be entitled to bail. It is certainly not framed to work in a way that a juvenile who, if an adult would be entitled to bail but being a juvenile have his liberty hedged in and circumscribed by the dis-entitling conditions mentioned in the proviso to Section 12(1) of the Act (supra). If this construction were to be adopted, in the opinion of this Court, it would expose the provision to a challenge about its constitutionality. It is well settled that a provision is to be construed in a manner that saves it from the peril of being ultra vires.

7. I have considered this question in **Dharmendra (Juvenile) vs. State of U.P. and others, Criminal Revision no.4141 of 2017 [2018 (7) ADJ 864]**, where it is held:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be

entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to

take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

8. Here, since all the accused, who are adult, have been admitted to bail, including co-accused, Shiva, who is credited with the role of assault with a knife, there is absolutely no justification for the Court's below to have refused bail to the revisionist on ground that he is likely to come into association with any known criminal. This Court has perused the Social Investigation Report. In the opinion of this Court, there is no positive material on the basis of which it may be inferred that in the event of release on bail, the revisionist would come into association with any known criminal or that would expose him any moral, physical or psychological danger. In the considered opinion of this Court, both the Courts' below have manifestly erred in denying bail to the revisionist.

9. In the result, this revision succeeds and is **allowed.** The impugned order dated 29.04.2019 passed by the Additional Sessions Judge, Hapur in Criminal Appeal No. 26 of 2019 and the order dated 29.03.2019 passed by the Juvenile Justice Board, Hapur in Case Crime No. 283 of 2018, under Sections 307, 323, 504, 506 I.P.C. are hereby set aside and reversed. The bail application of the revisionist stands **allowed.**

10. Let the revisionist, **Golu** through his natural guardian/ mother Smt. Renu w/o Suraj, be released on bail in Case Crime No. 283 of 2018, under Sections 307, 323, 504, 506 P.S. Gadhamukhteshwar, District Hapur upon his mother furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Hapur subject to the following conditions:

(i) that the natural guardian/ mother Smt. Renu will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his mother, Smt. Renu will report to the District Probation Officer on the first

Monday of every calendar month commencing with the first Monday of July, 2020 and if during any calendar month the first Monday falls on a holiday, then on the following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Hapur on such periodical basis as the Juvenile Justice Board may determine.

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

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

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)08ILR A653
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.06.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Revision No. 4498 of 2019

Subham Kumar Malik ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ronak Chaturvedi, Sri Dharmendra Dhar Dubey

Counsel for the Opposite Parties:
A.G.A., Sri Mukhtar Alam

Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12 - Case of Revisionist-at par with adult co-accused-who has been granted bail-nothing in the social investigation report-if released on bail-would defeat the end of justice-Revision allowed.

Held, the conclusion to the contrary drawn by the two courts' below are based on a perverse inference drawn from the material on record. It must also be remarked that the learned Special Judge while writing the impugned order has not carefully considered the Social Investigation Report or referred to it. He has not also referred to the other material on record in order to test the case of the juvenile on the parameters prescribed under the proviso to sub Section (1) of Section 12 of the Act. A reading of his order shows that it carries more of paraphrasing of the statutory requirements than a consideration of the revisionist's case with reference to the facts and evidence on record. The revisionist is entitled to a more careful consideration of his case by the Appellate Court under Section 101 of the Act. The order of the Juvenile Justice Board is also flawed for the reason that it is quite reasonless. It records abrupt conclusions without indicating the basis to reach them. In the opinion of this Court, therefore, the impugned orders are manifestly illegal and cannot be sustained. 13. **(para12)**

Criminal Revision allowed. (E-9)

Cases referred:-

1.Dharmendra (Juvenile) Vs. St. of U.P. & ors., 2018 (7) ADJ 864,

(Delivered by Hon'ble J.J. Munir, J.)

1. Shubham Kumar Malik, a juvenile in conflict with the law, has approached this Court under Section 102

of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the Act'), asking this Court to revise a judgment and order of Shri Om Prakash Verma, Special Judge, POCSO Act, Bijnor dated 06.11.2019, dismissing Criminal Appeal No. 63 of 2019 and affirming an order of the Juvenile Justice Board, Bijnor dated 31.08.2019, refusing bail to the revisionist in Case Crime No. 225 of 2019, under Section 302, 201/34 I.P.C., P.S. Najibabad, District Bijnor.

2. Heard Sri Dharmendra Dhar Dubey, learned Counsel for the revisionist, learned A.G.A. appearing on behalf of the State and Sri Mukhtar Alam, learned Counsel appearing on behalf respondent no.2.

3. The prosecution case disclosed in the FIR is that the informant's son, Dipanshu, aged about 18 years, left home on 19.04.2019 without telling his whereabouts. The informant searched for him but could not locate him. Thereupon, the informant lodged a missing report on 21.04.2019 with P.S. Najibabad. In the meanwhile, the informant kept up search for his missing son. He could not find him. Then, on 23.04.2019, the dead body of the informant's son was found concealed within the Bhareki canal, falling in the local limits of P.S.-Kiratpur, district-Bijnor. It is said that some unknown offenders had done the informant's son to death. Upon receipt of this information, the informant and his relatives proceeded to the site where Dipanshu's body lay for the purpose of identification. It is also mentioned that the police of P.S. Kiratpur sent the body for autopsy. The information requests necessary action against unknown offenders. The prosecution story that unfolds is that two witnesses, to wit, Naseem and Pavan Kumar told the police that they had last seen the deceased in the company of co-accused, Harsh Verma @ Suraj and Ritul on 19.04.2019 at about 4.00 p.m. There are some call detail records which show that co-accused, Harsh Verma @ Suraj, on 19.04.2019 at 5.20 p.m. used the mobile handset of the deceased putting in his own SIM card and browsing the internet. The name of the revisionist and another co-accused, Manish @ Raja surfaced through a confessional statement of Harsh Verma @ Suraj recorded on 28.04.2019. In the said statement, Harsh Verma @ Suraj assigned the role of catching hold to the revisionist and the co-accused, Manish @ Raja whereas the role of inflicting the injuries is attributed to Harsh Verma @ Suraj and Ritul.

4. It is pointed out before this Court that the bail application of Ritul has been rejected by this Court vide order dated 02.12.2019 passed in Criminal Misc. Bail Application No. 52033 of 2019, whereas that of co-accused Manish @ Raja has been allowed vide order dated 21.11.2019 passed in Criminal Misc. Bail Application No. 49465 of 2019. It is argued by Sri Dharmendra Dhar Dubey, learned counsel for the revisionist with much emphasis that the role assigned to the revisionist is absolutely at par with Manish @ Raja. It is different from Ritul and Harsh Verma @ Suraj. Sri Mukhtar Alam, learned counsel appearing for the second opposite party does not dispute the fact that the role assigned to this revisionist is at par with Manish @ Raja and very different from Ritul and Harsh Verma @ Suraj.

5. This Court has also carefully considered the roles assigned to these

various accused and the nature of evidence appearing against them. For one, this case rests on circumstantial evidence about which there is no eye witness. In case of Harsh Verma @ Suraj and Ritul, there is evidence of last seen by two independent witnesses, which those accused have not been able to explain. In addition, against co-accused, Harsh Verma @ Suraj, there is some evidence of the deceased's phone being used on the day when he disappeared after being seen in his company. Also, Harsh Verma @ Suraj and Ritul, on the confession of one of them have been credited with the role of assault whereas the role assigned to the revisionist and the co-accused, Manish @ Raja is of catching hold.

6. It is emphasized by learned counsel for the revisionist that on merits, Manish @ Raja with a role that is identical to the revisionist has been admitted to bail by this Court vide order dated 21.11.2019, details of which are mentioned hereinbefore. This accused, Manish @ Raja, is an adult and has been found entitled to the concession of bail. The submission of the learned counsel for the revisionist is that once on an identical role and evidence, an adult offender is found entitled to bail, it would be not only unfair but discriminatory to hold the juvenile in institutional incarnation. It is the revisionist's submission that it is not the purpose of the proviso to sub Section (1) of Section 12 of the Act that a juvenile's case be tested on the parameters of the three disentitling categories, where an adult circumstanced like him, would be entitled to bail. According to the learned counsel for the revisionist, the revisionist ought to be enlarged on bail once an adult co-accused with a similar role has been extended that indulgence.

7. Learned A.G.A. and Sri Mukhtar Alam, learned counsel appearing on behalf of opposite party no. 2 have opposed the revisionist's prayer.

8. This Court has keenly considered the rival submissions advanced by parties. It is true for a fact that the case of the revisionist is at par with Manish @ Raja and is clearly distinguishable with that of Ritul, who has been denied bail and the other co-accused Harsh Verma @ Suraj.

9. The provisions of Section 12 of the Act that govern bails in case of juveniles are extracted below:

"Section 12- Bail to a person who is apparently a child alleged to be in conflict with law

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or

expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

10. The provisions of Section 12 of the Act are designed to ensure that bail is granted to a juvenile in a case where there is no possibility for an adult to be released on bail. The only fetter on that right to bail for a juvenile are the three exceptions that are carved out in the proviso to sub Section (1) of Section 12. In case, the juvenile is found to fall in one or the other disentitling categories envisaged by the proviso, last mentioned, bail may be denied to him. It cannot possibly be the legislative intent that in a case where an adult offender, identically circumstanced as a juvenile, is found entitled to bail, the juvenile's case has to further pass the test of not falling into one or the other disentitling categories envisaged in the proviso to sub Section (1) of Section 12 of the Act. If this construction were to be accepted, it would lead to the liberty of a juvenile being hedged in with further conditions about bail, over and above those requirements that an adult offender is to satisfy under the law. This construction would possibly expose the provisions of Section 12 to the peril of unconstitutionality on the ground of discrimination.

11. I have considered this question in **Dharmendra (Juvenile) vs. State of U.P. and others, 2018 (7) ADJ 864,** where it is held:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child

in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process

or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

12. In the facts of the present case, this Court has noticed that the case of the revisionist is absolutely at par with co-accused, Manish @ Raja, an adult, who has been admitted to the concession of bail by this Court. This being so, there is no justification to hold the juvenile any further, in institutional incarceration. Even otherwise, this Court is of opinion that there is nothing in the Social Investigation Report that may lead to a legitimate inference that if the juvenile is released on bail he will come into contact or association with any known criminal or be exposed to any moral, physical or psychological danger or that his release would defeat the ends of justice. The conclusion to the contrary drawn by the two courts' below are based on a perverse inference drawn from the material on record. It must also be remarked that the learned Special Judge while writing the impugned order has not carefully considered the Social Investigation Report or referred to it. He has not also referred to the other material on record in order to test the case of the juvenile on the parameters prescribed under the proviso to sub Section (1) of Section 12 of the Act. A reading of his order shows that it carries more of paraphrasing of the statutory requirements than a consideration of the revisionist's case with reference to the facts and evidence on record. The revisionist is entitled to a more careful consideration of his case by the Appellate Court under Section 101 of the Act. The order of the Juvenile Justice Board is also flawed for the reason that it is quite reasonless. It records abrupt conclusions without indicating the basis to reach them. In the opinion of this Court, therefore, the impugned orders are manifestly illegal and cannot be sustained.

13. In the result, this revision succeeds and is **allowed**. The impugned order dated 06.11.2019 passed by the learned Special Judge, POCSO Act,Bijnor in Criminal Appeal No. 63 of 2019 and the impugned order of the Juvenile Justice Board dated 31.08.2019 are hereby **set aside** and **reversed**. The bail application made on behalf of the revisionist before the Board through his father stands allowed.

14. Let the revisionist, Subham Kumar Malik (Juvenile) through his natural guardian/ father Vedpal Singh Malik, be released on bail in Case Crime no.225 of 2019, under Sections 302, 201/34 IPC, P.S. Najibabad, District Bijnor upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice

Board, Bijnor subject to the following conditions:

(i) that the natural guardian/ father Vedpal Singh Malik will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father Vedpal Singh Malik will report to the District Probation Officer on the first Monday of every calendar month commencing with the first Monday of July, 2020 and if during any calendar month the first Monday falls on a holiday, then on the following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Bijnor on such periodical basis as the Juvenile Justice Board may determine.

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

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

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)08ILR A659
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 1697 of 2016

Radhey Shyam Gupta & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amit Saxena, Sri Mushir Khan, Sri Saurabh Singh

Counsel for the Opposite Parties:
A.G.A., Sri Abdul Majid, Ms. Sufia Saba

A. Criminal law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code, 1860 - Sections 147, 148, 149, 406, 329, 386-quashing of-proceedings initiated maliciously with an ulterior motive for wreaking vengeance with a view to spite him due to private and personal grudge-while the grievance of the rival parties has been addressed by the civil court and written statements of the respective defendants have already been submitted then no justifiable reason arises to array the stranger the self-Proclaimed Power of Attorney Holder without any requisite and relavant document to initiate criminal case against the applicant-no medical injury report corroborates the allegations of assault with lathi danda-its simply embellishment just switch over the episode into a serious and grimmer drama-therefore, liable to be quashed.(Para 12 to 37)

The application is allowed. (E-6)

List of cases cited:-

1. I.O.C. Vs NEPC India Ltd. (2006) VI SCC 736

2. Ahmad Ali Quraishi & anr. Vs St. Of U.P. & anr. in CRLA No. 138 of 2020

3. St. Of Haryana & ors. Vs Bhajan Lal & ors,(1992) suppl. 1 SCC 335

4. R K Dalmia Vs Delhi Administration

5. Satish Chandra Ratan Lal Shah Vs St. Of Guj. & anr. in CRLA No. 9 of 2019

6. B.Suresh Yadav Vs Sharifa Bee & anr. (2007) 13 107

7. Md. Allauddin Khan Vs St. of Bih. in CRLA No. 675 of 2019

8. CBI Vs Arvind Khanna in CRLA No. 1420 of 2017

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

1. Heard Sri Saurabh Singh, learned counsel for the applicants, Ms. Sufia Saba, learned counsel for opposite party no. 2 and learned AGA for the State.

2. After exchange of pleadings between the parties, the matter riped up for final arguments.

3. The matter was heard at length and order was reserved to be dictated in Chamber.

4. Considering learned arguments of the rival parties, it is imperative to extract bare skeletonized facts of the case for proper appraisal and adjudication in the matter.

5. The prayer sought by the applicants is for invoking extraordinary jurisdiction of this Court under section 482 Cr.P.C. and to quash proceedings of Criminal Case No. 3302 of 2015 (State v. Radhey Shyam Gupta and others) under sections 147, 148, 149, 406, 329 and 386 IPC, P.S. Barra, District Kanpur Nagar pending in the court of I-Additional Chief Metropolitan Magistrate, Kanpur Nagar.

6. It is pertinent to mention here that by virtue of Court's order dated 22.01.2016 passed by coordinate Bench of this Court, further proceedings of the instant case were stayed and notices were issued to opposite party no. 2.

FACTS OF THE CASE

7. One Munni Devi resident of Kolkata is lease holder of plot no. 1342, Block -W-II, Phase Juhi Kala, Damodar Nagar, Kanpur Nagar admeasuring are 387 Square yards (herein after referred to as "dispute land'). This disputed plot was a lease hold property of Kanpur Development Authority vide lease deed dated 18.01.1978 for a period of 99 years, as she as resident of Kolkata, due to some financial crunch, she had to enter into an agreement to sell the dispute property on 27.10.2010 with one Ms. Mamta Gupta (Applicant no. 2). The covenants of the aforesaid agreements to sell stood as under:

(a) Total amount of sale consideration is 25 lakhs, out of which she acknowledged that she received five post dated cheques of different dates for an amount of Rs. 2 Lakhs (the detail of the aforesaid cheques were quoted on the foot of the instrument.

(b) Ms. Munni Devi assured that she would get the disputed land

freehold within a period of one year and get the sale-deed registered.

(c) The possession of the disputed land has not been handed over till the land is not declared as free hold and would be handed over on the date of the registration of the sale-deed.

8. In paragraph 5 of the petition, it has been alleged by the deponent, Ms. Mamta Gupta that on the same date yet another agreement to sell was executed by way of Joint Notarized Affidavit (Annexure no.3), signed by contesting parties, namely Munni Devi and Mamta Gupta (Applicant no. 2), whereby the terms of the deed were changed upside down and instead agreed sum of Rs. 25 Lakhs, it was mentioned therein that the total consideration of Rs. 35 Lakhs, out of which Munni Devi has received Rs. 25 Lakhs and only 10 Lakhs were left to be paid by applicant no. 2. Not only this, the original lessee, Ms. Munni Devi has handed over the actual physical possession of the disputed property to Mamta Gupta (Applicant No. 2). It was also agreed upon that Munni Devi would get the land in question free hold within a period of one year and get the "sell deed" registered.

9. Perusal of the record reveals that after receiving the actual physical possession, applicant no. 2, Ms. Mamta Gupta has raised two pucca rooms as well as the address. In support of this, the bill of electricity department for the month of July/August, 2015 is annexed as Annexure No. 4 to the petition.

10. Since Munni Devi failed to get land freehold for her requisite inaction and on account of providence whereby the husband of Mamta Gupta went in renal failure, resultantly, she in acute financial duress, she could not file the suit for Specific Performance for executing the actual sale-deed through decree of court.

11. Since the prices of the land were accelerating sky high, Munni Devi has filed a suit against Mamta Gupta (Applicant No. -2) bearing Original Suit No. 1553 of 2015 in the court of the Civil Judge (Senior Division), Kanpur Nagar with the prayer for mandatory injunction against the defendant Mamta Devi (Applicant No. -2) to vacate the disputed property and hand over the possession of the disputed property within the time allowed, along with pendentalite and future damages. No interim relief was granted in favour of plaintiff, Munni Devi in the aforesaid Suit. Contention raised by counsel for applicant that mere filing of the above suit with above prayer clearly establishes and admits that the actual physical possession of "disputed property" was lying with the applicants.

12. Meanwhile, during pendency of suit the original lessee, Munni Devi came to contact with a rank stranger, namely; Kaptan Singh, s/o late Dashrath Singh r/o W-Block , Keshar Nagar, P.S. Naubasta, Kanpur Nagar (the informant of present FIR) and alleged "Power of Attorney Holder" of Mrs. Munni Devi, who has lodged the present FIR of Case Crime No. 645 of 2015 through an application filed an application under section 156(3) Cr.P.C. on 15.09.2015, under sections 147, 148, 149, 406, 329 and 386 IPC against Ms. Mamta Gupta, Radhey Shyam Gupta and three unknown persons. In the aforesaid FIR, opposite party no. 2 Kaptan Singh projected

himself as "Power of Attorney Holder" of Mrs. Munni Devi. Browsing of the FIR indicates that opposite party no. 2 came out of blue in the month of August, 2015. The aforesaid FIR spells out the entire story with addition that out of five cheques, only one cheque of Rs. 2.00 Lakhs was got encashed but future of rest of the cheques were not known, Ms. Mamta Gupta got dispassionate so the sale-deed could not be executed, even after lapse of a year. In the rest of the averments, opposite party no. 2 has painted a story that after receiving Power of Attorney from Mrs. Munni Devi on 05.08.2015, he visited the disputed site on 20.08.2015, where he (opposite party no. 2- Kaptan Singh) was maltreated and hurled with filthy abuses by applicant no. 2 (Ms. Mamta Gupta), her husband-Radhey Shyam Gupta and other accomplices and assaulted by lathis, dandas, kicks and fists. Meanwhile, Ms. Mamta Gupta extended threats to life by whimpering sensation of knife on his chest, got blank paper signed. It was also contended that injured Ram Pratap Singh (an associate of opposite party no. 2) was not medically examined at the relevant time rather he was claimed to be medically examined at Ursala Hospital, Kanpur Nagar on unknown date and time.

13. Thereafter, an FIR was registered by opposite party no. 2 and later on the matter was brought on board before coordinate Bench, whereupon the interest of the applicants, were protected vide interim order dated 28.11.2015 passed in Criminal Misc. Writ Petition No. 27277 of 2015 till submission of report under section 173 (2) Cr.P.C. The police after completion of the investigation in the matter submitted charge sheet against Radhey Shyam Gupta, Smt. Mamta Gupta, Suraj son of Mishrilal Gupta, Ram Bihari Vishwakarma and Mishrilal son of Chhotey Lal under the aforementioned sections of the Penal Code.

14. Since opposite party no. 2 was extending threats for dispossessing, applicant no. 2, Ms. Mamta Gupta filed Original Suit No. 2077 of 2015 in the court of the Civil Judge (Senior Division), Kanpur Nagar whereupon the Civil Judge on 06.10.2015 was pleased to grant temporary injunction in favour of plaintiff, Ms. Mamta Gupta (Applicant No. 2) and the said interim order is still pending and operational (Annexure No. 6 to the petition).

15. It has been argued by the learned counsel for the applicants that the dispute is purely civil in nature and no criminality could be attached to it, and moreover the civil court is seized with the matter and criminal proceedings has been initiated by a rank outsider namely; Kaptan Singh (opposite party no. 2), who has no locus standi, is simply

16. Per contra, counsel for opposite party no. 2, Ms. Sufia Saba in her counter affidavit vehemently refuted the allegations made by the applicants in the application filed under section 482 Cr.P.C. while filing counter affidavit, sworn by opposite party no. 2- Kaptan Singh, wherein she has categorically admitted that there was an "agreement to sell" between the parties on 27.10.2010 but has seriously disputed the veracity of Annexure No. 3 (subsequent drawing notarized affidavit), dated 27.10.2010. It is also alleged that out of five cheques, only one cheque was encashed and rest of the cheques were received unpaid and

no legal action has ever initiated by Mrs. Munni Devi for this default. It has also been brought on record that on account of forged notarized affidavit, dated 27.10.2010, opposite party no. 2- Kaptan Singh lodged yet another FIR against four named accused persons, including Ms. Mamta Gupta (applicant no. 2) and the investigation of the case is still pending. She also disputed that any construction was raised by Ms. Mamta Gupta (applicant no. 2). It is also alleged that it is blatant attempt on the part of applicants to grab the disputed property, without paying the agreed sale consideration or without having any legal right or authority of the aforesaid disputed property.

17. On the aforementioned factual premises, this Court is required to adjudicate into the matter. Having heard the counsels at length and learned A.G.A., the Court is keen to adjudicate the issue in the light of settled legal norms.

18. The first and foremost about the locus of opposite party no. 2- Kaptan Singh to ignite the instant criminal prosecution. It is undisputed that the contesting parties have entered into an agreement to sell on 27.10.2010 and from the FIR, it has been borne out that on 05.08.2015, the alleged Power of Attorney was executed by Mrs. Munni Devi in favour of Kaptan Singh but astoundingly no power of attorney in this regard has been annexed with the record. There are balled averments, conferring this stature of Kaptan Singh (opposite party no. 2), which cannot be accepted on its face value. For all the practical purposes, he is rank outsider and stranger to the "surreptitious' deal, therefore, the criminal prosecution initiated at his behest would lead into nullity. In all fairness, he ought to have annexed the Power of Attorney allegedly executed by Ms. Mamta Devi in his favour with the counter affidavit. On the strength of bald Power of Attorney the opposite party no.2 Kaptan Singh has initiated the criminal case.

19. Section 482 envisages inherent power to the High Courts to pass necessary orders for securing the ends of justice. In the case of **Indian Oil Corporation v. NEPC India Ltd [2006 (VI) SCC 736],** the Division Bench of Hon'ble Apex Court reviewed the precedents on the exercise of jurisdiction under section 482 Cr.P.C., and formulated the guiding principles in the following terms:

"12.....

(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.

20. The jurisdiction of 482 Cr.P.C., is required to examine whether the allegations in the complaint constitute the ingredients, necessary for the alleged offence, under the Penal Code. If the aforementioned averments are taken to be true on its face value, it do not constitute the ingredients necessary for the offence. The criminal proceedings can be quashed for the allegations made in the complaint do not disclose commission of the offence under the Penal Code. The complaint must contain the basic facts necessary for making out offence under the Penal Code.

21. In a recent judgement passed on 30.01.2020 in case of **Ahmad Ali Quraishi and another v. The State of Uttar Pradesh and another in Criminal Appeal No. 138 of 2020,** Honble the Apex Court while critically analysing scope and ambit of Section 482 Cr.P.C. took patronage of the principles of law enunciated in the case of **State of Haryana and others versus Bhajan Lal and others, [1992 suppl. (1) SCC 335,]** wherein seven categories of cases has been identified where power envisaged under Article 226/82 Cr.P.C. can be exercised by the High Courts for quashing criminal proceedings. Relevant portion of the case of Ahmad Ali Quraishi (Supra) wherein reliance upon the principles of law laid down in the case of State of Haryana (Supra) is essential to be extracted herein, which runs as under :

In paragraph 102, this Court enumerated seven categories of cases where power can be exercised under Article 226/Section 482 Cr.P.C. by the High Court for quashing the criminal Proceedings. Paragraph 102 is as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised adn inflexible guidelines or rigid formulae and to give an exhaustive list of myriad

kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where ther 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/o where there is 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 malafide 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."

22. It is alleged that the applicants have committed an offence under sections 147, 148, 149, 406, 329 and 386 IPC. Thus, it would be necessary to examine the ingredients made in the complaint, read on their face value, would attract offence under the Penal Code. In this regard, it is pertinent to re-peruse Section 405 IPC once again, which is referred to herein below:

"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 wilfully suffers any other person so to do, commits 'criminal breach of trust.'"

23. A careful perusal of aforesaid section 405 IPC establishes the aim to

explore as to how the aforesaid section can be divided into four categories, which are as follows:

(a) Criminal Breach Of Trust.
(b) Entrustment
(c) Property
(d) Criminal Misappropriation

24. Now to understand aforesaid four categories embedded in the section in a better way, it is essential to dissect every category in seriatum.

(a) Criminal Breach of Trust: The offence of criminal breach of trust, as defined under this section, is similar to the offence of embezzlement under the English law. A reading of the section suggests that the gist of the offence of criminal breach of trust is 'dishonest misappropriation' or 'conversion to own use' another's property, which is nothing but the offence of criminal misappropriation defined u/s 403. The only difference between the two is that in respect of criminal breach of trust, the accused is entrusted with property or with dominion or control over the property.

(b) Entrustment: As the title to the offence itself suggests, entrustment or property is an essential requirement before any offence under this section takes place. The language of the section is very wide. The words used are 'in any manner entrusted with property'. So, it extends to entrustments of all kinds-whether to clerks, servants, business partners or other persons, provided they are holding a position of trust. "The term "entrusted" found in a 405, IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property"

(c) Property: The definition in a 405 does not restrict the property to movables or immovable alone. In **R K Dalmia vs Delhi Administration,** the Supreme Court held that the word 'property' is used in the Code in a much wider sense than the expression 'movable property'. There is no good reason to restrict the meaning of the word 'property' to movable property only, when it is used without any qualification in Section 405 IPC. Whether the offence defined in a particular section of IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section.

(d) *Misappropriation:* Dishonest misappropriations the essence of this section. Dishonesty is as defined in section 24, IPC, causing wrongful gain or wrongful loss to a person. The meaning of wrongful gain and wrongful loss is defined in section 23, IPC. In order to constitute an offence, it is not enough to establish that the money has not been accounted for or mismanaged. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

25. Thus, the aforesaid discussion emanates that the condition necessary for the Act to constitute an offence under section 405 IPC is that the accused was entrusted for some property or dominion

over the property. It can be easily culled out from the allegations made in the FIR that out of the five post dates cheques, one cheque of Rs. 2.00 Lakhas was encashed by Mrs. Munni Devi.

26. From perusal of paragraph 12 of the recent judgement passed on 3rd January, 2019 by a Division Bench of the Hon'ble Apex Court in Criminal Appeal No. 9 of 2019 ***[Satish Chandra Ratan Lal Shah v. State of Gujarat and another]*** a similar controversy arose wherein for recovery of a certain amount, the respondent had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. Whereupon Hon'ble the Apex Court in the aforesaid matter laid down the principle of law that mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Therefore, mere breach of promise, agreement of contract does not constitute an offence.

27. In the case of **B.Suresh Yadav v. Sharifa Bee and another [2007(13) 107]** Hon'ble the Apex Court in paragaph 12, while adjudicating a similar matter held as under:

"12. While executing the sale deed, the appellant herein did not make any false or misleading representation. There had also not been any dishonest act of inducement on his part to do or omit to do anything which he could not have done or omitted to have done if he were not so deceived. Admittedly, the matter is pending before a competent civil court. A decision of a competent court of law is required to be taken in this behalf. Essentially, the dispute between the parties is a civil dispute. ...."

28. Interesting in the instant case, the contesting parties have filed their civil cases bearing Original Suit No. 1553 of 2015 (Munni Devi v. Mamta Gupta) with a prayer for mandatory injunction against the defendant (Ms. Mamta Gupta) to get the premises in dispute vacated, whereas Ms. Mamta Gupta (applicant no. 2)/plaintiff filed Civil Suit No. 2077 of 2015 in the court of the Civil Judge (Senior Division), Kanpur Nagar with a prayer for permanent injunction against the defendant not of dispossess her possession over the plot in dispute wbereby vide order dated 06.10.2015, the court of the Civil Judge (Senior Division), Kanpur Nagar granted temporary injunction in favour of Ms. Mamta Gupta (applicant no. 2). Aforesaid both the cases are still pending for adjudication in one and the same court I..e. Civil Judge (Senior Division), Kanpur Nagar and it is borne out from the record that written statements have been filed in both the cases and the court is seized with mater. Record also reveals that in both the proceedings, two different stories have been woven. In paragraph 2 of the Original Suit No. 2077 of 2015, it is averred that the total amount agreed upon between the parties is 35 Lakhs, out of which Rs. 25.00 Lakhs have been paid to Mrs. Munni Devi . At this juncture, this Court in exercise of power envisaged under section 482 Cr.P.C. reserve its position to opine upon the joint notarized affidavit signed by Mrs. Munni Devi as well as Ms. Mamta Guta, dated 27.10.2010

(annexure 3 to the petition), veracity and genuineness of which has been seriously disputed by opposite party no. 2- Kaptan Singh in his counter affidavit.

29. Hon'ble the Apex Court in its recent decisions passed in the cases of **Md. Allauddin Khan v. State of Bihar (Criminal Appeal No. 675 of 2019)** as well in **CBI v. Arvind Khanna (Criminal Appeal No. 1420 of 2017)** on 15th April of 2019 and 17th October 2019 respectively. In the case of **Md. Allauddin Khan v. State of Bihar (Supra)** it has opined *"In overview, the High Court has no jurisdiction to appreciate the evidence of the proceeding under section 482 Cr.P.C. , because whether there are contradictions or /and inconsistencies in the statements of witnesses, is essentially an issue relating to appreciation of evidence and same can be gone into by Judicial Magistrate during trial when the entire evidence is adduced by the parties and this is not the stage where the evidence could be appreciated."*

30. Similarly in the case of **CBI v. Arvind Khanna** (Supra), paragraph 22 states that "the correctness of the defence, where such amount was received by the respondent by his father or not, is a serious factual dispute. It is not admitted position as recorded by the High Court. The correctness of the defence of the respondent is to be gone into, only after appreciating the evidence during the trial. "

31. In the instant case, there are two documents, annexed by the applicants. Though both the documents were executed on 27.10.2010 and signed by the contesting parties, this Court is at serious loss to spell out the genuineness of the aforesaid documents either way. Moreover, the civil courts are seized with the mater and they are required to adjudicate the pivotal question by taking evidence at their discussion on the point.

32. This Court in exercise of power envisaged under section 482 Cr.P.C., on the aforementioned guidelines provided by the Hon'ble Apex Court in the referred cases, is not in a position to appreciate the contention raised by Ms. Sufia Safa whereas she claims that document annexure 3 (joint notoriazed), dated 27.10.2010 is forged one, at present juncture.

33. Hence, thrashing the entire material on record, where the parties have entered into a contract according to their own wisdom and advanced certain amount of money, thereafter the applicants are in possession of the disputed property. Visualizing facts and evidence in the matter, the court of Civil Judge (Senior Division), Kanpur Nagar passed interim injunction in favour of Ms. Mamta Gupta (applicant no. 2) in Original Suit No. 2077 of 2015 (Mamta Gupta v. Munni Devi) and at present the competent civil courts are seized with the matter, therefore, engaging a stranger viz; Kaptan Singh and initiating criminal prosecution under his aegis is nothing but twisting of arms of the applicants. Needless to mention here that for the sake of argument if it is assumed that all the covenants of the agreement to sell have not been complied with even then the fact remains that five post dated cheques were handed over to Ms. Munni Devi and the applicants are enjoying the state over the disputed property.

34. The 7th sub clause of Bhajan Lal's case (supra) establishes that where

criminal proceedings attended with malafies and/or where the proceedings are maliciously initiated with an ulterior motive for wreaking vengeance with a view to spite him due to private and personal grudge. It is astpnishing as to when the grievance of the rival parties has properly been addressed by the court concerned and written statements of the respective defendants have already been submitted then no justifiable reason arises to array the stranger named Kaptan Singh as opposite party no. 2, the self-proclaimed Power of Attorney Holder without any requisite and relevant document to initiate criminal case against the appicants by knitting an imaginary story. In the FIR, he alleges that on the date of incident, he along with Ram Pratap Singh visited the disputed site wherein Mamta Devi (applicant no. 2) and her husband hurled filthy abuses upon the and assaulted with the lathi and danda, causing serious injuries over the person of Ram Pratap but astoundingly there no medical injury report to corroborate the allegation, thus, this Court can safely reach to the conclusion that the additions are simply embellishment just switch over the episode into a serious and grimmer drama.

35. Relying upon the aforesaid discussions, made herein above, this Court finds that there is no case against the applicants under section 406 IPC and rest of the allegations are tangent to the main allegation without any corroborating evidence.

36. Hence in the light of a critical, analytical and elaborated confab on the issue, the criminal prosecution initiated against the applicants under sections 147, 148, 149, 406, 329 and 386 IPC have no bones to stand with, therefore, quashed. However, court of Civil Judge (Senior Division), Kanpur Nagar, adjudicating the matter, is expected to speed up the trials of Original Suit No. 1553 of 2015 (Ms Mamta Devi v. Munni Devi) and Original Suit No. 2077 of 2015 (Mamta Devi v. Munni Devi) and dispose of the same as expeditiously as possible, keeping in view that pleadings have been exchanged between the parties.

37. The entire proceedings of Criminal Case No. 3302 of 2015 (State v. Radhey Shyam Gupta and others) under sections 147, 148, 149, 406, 329 and 386 IPC, P.S. Barra, District Kanpur Nagar pending in the court of I-Additional Chief Metropolitan Magistrate, Kanpur Nagar is, hereby, quashed and the present application filed under Section 482 Cr.P.C., is allowed.

38. Certified copy of the judgement be transmitted to the court concerned at the earliest.

(2020)08ILR A669
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.06.2020

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

Application U/S 482 No. 11259 of 2020

Sabir & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Hans Nath Pandey

Counsel for the Opposite Parties:
A.G.A., Sri R.C. Upadhyay

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 & Indian Penal

Code,1860- Sections 323, 504,506,406- quashing of-complaint-compromise between the litigants accepted-dispute/incident occurred 35 years ago-Though,many offences are in the realm of non-compoundable offence, but for the end of justice, exercising the power u/s 482 would justify to defile the matter-the dispute being in the realm of petty dispute, the doctrine of judicial restrain cannot be brought into action in the instant case.(5 to 10)

B. Apex Court laid down guidelines for the exercise of inherent power u/s 482 while quashing criminal proceedings in case of non-compoundable offences-Section 320 Crpc provides for compounding of certain offences-Apex court held that high court must refrain from quashing criminal proceedings if the offence is a serious and heinous or when public interest is involved.where the wrong is personal in nature and the parties have resolved their dispute, the proceeding may be quashed. If possibility of conviction is remote and continuation of criminal cases would cause extreme injustice to the accused, high courts may quash the criminal proceedings.(Para 6,7)

The application is allowed. (E-6)

List of Cases Cited:-

1. Navindra Singh & ors. Vs St. Of Punj.(2014) 6 SCC 466

2. Saifula Vs St. of U.P. (2013) SCC OnLine Ald 5681

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

1. Shri R.C. Upadhyay, learned counsel appearing for respondent No.2, Waheed Khan son of late Shiv Charan has filed his Vakalatnama which is taken on record.

2. Complaint Case No.7339 of 2016 alleges commission of offences under Sections 323, 504, 506 and 406 I.P.C. but now it should not proceed further as the parties have compromised.

3. Looking to the said circumstances of this pandemic, it would not be proper relegate the parties.

4. The complaint is pending since 2016 the revision was also filed. However, during this pendency it appears that the parties entered into a compromise on 29.6.2019. The revisional court unfortunately rejected their applications which order is also challenged.

5. The learned counsel for respondent-complainant has also accepted there is a compromise between the parties. The fact that many of the offences are in the realm of non compoundable offence, but the question is what would be end result of the litigation which is pending since 1985. If this Court does not accept the compromise and relegates the parties to undergo the process of going before the trial court, what would be the end result? It would be that the evidences would be led and at the end of the trial for want of evidence, the accused would be acquitted. It would be resulting into what I would call default acquittal when we are faced with both the pendamic and pendency as there is no element of morality or public damage at large. The Dispute being in the realm of petty dispute, the doctrine of judicial restrain cannot be brought into action here in this case.

6. The recent judgments of the Apex Court and this High Court will permit this Court to quash the proceedings defile the same and direct the court below to defile the proceedings. The reliance placed by the counsel for the petitioners on the decisions of the Apex Court for similar matter under

Sections 149, 147, 452 relied by my brother (Justice Om Prakash VII) would be applicable.

7. The guidelines laid down in ***2014 6 SCC 466, Navindra Singh and others versus State of Punjab*** would apply to the facts of this case. The material on record would go to show that end of the justice would justify exercising the power under Section 482 of Criminal Procedure Code. I am also supported in my view by ***2013 SCC OnLine Ald 5681, Saifula versus State of U.P.***

8. Before C.J.M., Agra the entire proceedings of the Complaint Case No.7339 of 2016 shall be defiled and the parties shall not be summoned or asked to remain present.

9. Order be communicated to the Agra Court by e-mail as expeditiously as possible.

10. This court is thankful to both the counsels Shri Hans Nath Pandey and Shri Shri R.C. Upadhyay for getting their parties to settle the dispute during this pandemic.

(2020)08ILR A671
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 12606 of 2004
& Application U/S 482 No. 12605 of 2004

Mahesh Chandra Maheshwari ..Applicant
Versus
Bhadohi Urban Cooperative Bank Ltd.
...Opposite Partiy

Counsel for the Applicant:
Sri Anil Kumar Bajpai

Counsel for the Opposite Party:
A.G.A., Ajay Shanker Pandey

A. Criminal Law - Code of Criminal Procedure,1973 - Section 482 & Negotiable Instrument Act,1881-Sections 138,142(b)-quashing of-summoning order- challenge to-maintainability of-whether complaint barred by period of limitation prescribed u/s 142(b) of the Act or not-counsel for applicant relied on the overruled judgment of Apex Court while for the purpose of calculating the period of one month, u/s 142(b) of the Act, the period has to be reckoned by excluding the date on which cause of action arose-thus, it cannot be said that the complaint is ex-facie barred by time.(Para 3 to 21) (E-6)

List of Cases Cited:-

1. M/s Sil Import USA Vs M/s Exim Aides Silk Exporters, Banglore (1999) 4 SCC 567

2. K. Bhaskaran Vs Sankaran Vaidhyan Balan & ors. (1999) 7 SCC 510

3. ECON Antri Ltd. Vs Rom Industries Ltd. & ors. (2014) 11 SCC 769

4. Saketh India Ltd. & ors. Vs India Securities Ltd. (1999) 3 SCC 1

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

1. Heard Sri Anil Kumar Bajpai, learned counsel for applicant and learned AGA for State of U.P. None appeared on behalf of complainant despite the case having been called in revise. Since it is an old matter, hence, I proceed to decide this application after hearing aforesaid counsels.

2. Application No. 12606 of 2004 has been filed under Section 482 of Code of Criminal Procedure, 1973 *(hereinafter*

referred to as "Cr.P.C.") by accused-applicant Mahesh Chandra Maheshwari with a prayer to quash summoning order dated 21.11.2000 and another order dated 15.11.2004 whereby objection filed by accused-applicant against order of summoning has been rejected.

3. Facts, in brief, giving rise to the Application No. 12606 of 2004 are that M/s Bhadohi Urban Cooperative Bank Limited (hereinafter referred to as "Cooperative Bank") advanced a loan to applicant for a running medical shop. In discharge of aforesaid loan, applicant issued cheques No. 823486 and 823487 dated 29.03.2007 for Rs.50,000/-, each, in favour of Cooperative Bank drawn on Union Bank of India, Varanasi. Cheques were deposited by Cooperative Bank for collection on 24.08.2000 but Union Bank returned the same vide Memo dated 24.08.2000 with the remark that fund was insufficient in the account of applicant. In substance, both cheques were dishonoured. Notice was given by Cooperative Bank to applicant on 06.09.2000 which was returned on 14.09.2000 as unclaimed. Complaint was filed by Cooperative Bank on 31.10.2000 whereafter Magistrate recorded statements of complainant and witnesses under Sections 200 and 202 Cr.P.C. and summoned accused-applicant for trial for an offence under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as "Act, 1881"). Accused-applicant filed objection to the summoning order dated 21.11.2000 on the ground that he has nothing to do with M/s Hedes Multi Facets since he is not the proprietor of the said firm and as per address given, there existed a firm in the name of Maheshwari & Maheshwari since 1975 which is a joint family business and accused-applicant is not the owner of said firm also. He further said that he had not taken any loan from Cooperative Bank in his name. Loan, in fact was advanced to one Ajita Prasad Pandey son of late Kailash Nath Pandey, resident of village Bhawanipur, Police Station Gopi Ganj, District Ravidas Nagar who has taken loan by forging documents in the name of applicant and, therefore, applicant is not liable to pay any amount. He also raised objection that complaint was not maintainable having been filed by Assistant Manager who was not authorized by any Letter of Authorization or Resolution of Board of Directors of Cooperative Bank. He also contended that proceedings were initiated beyond the period prescribed under Section 138(b) of Act, 1881, inasmuch as, dishonoured cheques were returned to complainant on 24.08.2000, notice was issued on 06.09.2000 which was received back unclaimed on 14.09.2000 but complaint was filed on 31.10.2000, hence, it was barred by period of limitation prescribed under Section 142(b) of Act, 1881.

4. Said objection was rejected by Chief Judicial Magistrate concerned vide order dated 15.10.2004. Sri Bajpai, placed reliance on a Supreme Court's judgement in **M/s Sil Import USA Vs. M/s Exim Aides Silk Exporters, Banglore 1999 (4) SCC 567** in support of his contention that complaint is barred by time.

5. In the connected case i.e. Application No. 12605 of 2004, similar complaint has been filed wherein also summoning order was issued on 21.11.2000 and objection of accused-applicant was rejected on 15.10.2004.

Here, in connected case, cheque no. 823489 dated 30.03.2000 was issued for a sum of Rs.2,60,000/- which was returned by Union Bank of India with the remark that fund was insufficient in the account of applicant vide Memo dated 25.08.2000. Here also, notice was issued by complainant on 06.09.2000 which was returned unclaimed on 14.09.2000 and complaint was filed on 31.10.2000.

6. Sri Anil Kumar Bajpai, learned counsel appearing in both the matters, states that complaints were filed beyond the period prescribed under Section 142(b) of Act, 1881, therefore, are not maintainable. Since both the matters can be considered together and Sri Bajpai, has advanced submissions on this aspect collectively, hence, both are being decided by this common judgement.

7. To consider the question of limitation as argued by learned counsel for applicant, Sections 138 and 142 of Act, 1881, as existed then i.e. on 31.10.2000, are relevant, hence, both are reproduced as under:-

"138 Dishonour of cheque for insufficiency, etc., of funds in the account. --Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that ***nothing contained in this section shall apply unless--***

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes ***a demand for the payment of the said amount of money by giving a notice in writing,*** *to the drawer of the cheque,* ***within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and***

(c) the ***drawer of such cheque fails to make the payment*** *of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque,* ***within fifteen days of the receipt of the said notice.***

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"142 Cognizance of offences -- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable

under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) ***such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138.***

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."
(Emphasis added)

8. As per complaint, following dates are relevant:

Date	Events
24.08.2000	Cheques were submitted for collection by complainant-Cooperative Bank.
24.08.2000	Union Bank of India, Main Branch, Varanasi vide Memo of date informed Bombay Mercantile Cooperative Bank Limited, Nai Sadak, Varanasi that sufficient funds are not available in the account of applicant.
..	M/s Bombay Mercantile Cooperative Bank Limited, Nai Sadak, Varanasi thereafter returned said cheques unpaid to Cooperative Bank.
06.09.2000	Registered notice sent to applicant demanding amount of dishonoured cheque after informing the factum of dishonouring of cheques by Union Bank of India.
14.09.2000	Notice received unclaimed from Postal Department by Cooperative Bank.
15.09.2000	Complainant informed applicant orally also about non-payment of cheque by Bank and demanded money.
31.10.2000	Complaint filed in the Court of Judicial Magistrate Ist, Gyanpur, Bhadohi registered as Criminal Case No. 435 of 2000 and 436 of 2000.

9. Section 138, proviso, Clause (a) of Act, 1881 is apparently satisfied. Cheques were presented to Union Bank within valid period for its collection. Notice required to be issued for demand vide proviso Clause (b) of Section 138 of Act, 1881 within 15 days of receipt of information from Bank regarding return of cheques as unpaid was also given. The date of notice is 06.09.2000. Thus, aforesaid requirement is also satisfied and notice was issued within the period prescribed in Clause (b), proviso to Section 138 of Act, 1881. Now, Clause (c) proviso to Section 138 of Act, 1881 gives 15 days' time from the date of receipt of notice by addressee to make payment.

10. In the present case, notice returned unclaimed and received by complainant on 14.09.2000. If this date is taken to be due service of notice by accused-applicant then 15 days' time would expire on 29.09.2000.

11. In **K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Others 1999 (7) SCC 510,** it was held that if a notice is returned by sender as unclaimed, such date would be commencing date in reckoning the period of 15 days contemplated in Clause (c) to proviso of Section 138 of Act, 1881. Since payment could have been made upto 29.09.2000 but when it is not made, cause of action arose on 30.09.2000.

12. The term "month" has not been defined in Act, 1881 but it is defined in Section 3(35) of General Clauses Act, 1897 *(hereinafter referred to as "Act, 1897")* and reads as under:-

"(35) "month" shall mean a month reckoned ***according to the British calendar."***

(Emphasis added)

13. The definition of "month" in Act, 1897, therefore, talks of a month of British Calendar i.e. January, February etc.

14. There are 12 months in a British Calendar wherein 7 months have 31 days; 4 months have 30 days and one month has 28 days except leap year when it has 29 days. Therefore, number of days in the month varies.

15. Thus, one aspect is "whether it should be number of days or corresponding month irrespective of number of days which has to be taken for the purpose of Section 142(b) of Act, 1881". Secondly, "if it is number of days i.e. 30 or 31 then whether it will include the day when cause of action has arisen". For example, if we take 30 days by including the date of cause of action, it will expire on 29.10.2000 but if we take it 31 days then it will expire on 30.10.2000. However, if the date of cause of action is excluded then period of month will commence from 01.10.2000 and if it goes with the definition of month in Act, 1897 then 31.10.2000 was well within the period of one month as contemplated under Section 142(b) of Act, 1881 but if it is taken to be 30 days, it will be contrary to term "month" since legislature has not mentioned days but it has used the term "month".

16. In this backdrop, I would proceed to consider first "whether for computing period of limitation under Section 142(b), the date when cause of action arose in the present case i.e. 30.09.2000 would be included or not".

17. Counsel for applicant has relied on a Supreme Court's judgement in **M/s Sil Import USA (supra)** which obviously supports his submission but I find that this question was later considered by a Larger Bench in **ECON Antri Ltd. Vs. Rom Industries Ltd. and Others 2014 (11) SCC 769;** Since there was another decision taking contrary view in **Saketh India Limited and Others Vs. India Securities Limited 1999 (3) SCC 1**, therefore, reference was made for considering correctness of aforesaid judgement by a Larger Bench and it was considered by a Bench of three Judges in **ECON Antri Ltd. (supra).**

18. Upholding view taken in **Saketh India Limited and Others (supra)**, Larger Bench said, where a particular time is given from a certain date within which act has to be done, the

day of the date of cause of action is to be excluded.

19. Consequently, Larger Bench held that **M/s Sil Import USA (supra)** does not lay down correct law and upheld view taken in **Saketh India Limited and Others (supra).** Para-25 of **ECON Antri Ltd. (supra)** reads as under:-

"25. Having considered the question of law involved in this case in proper perspective, in light of relevant judgments, ***we are of the opinion that Saketh lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose****. We hold that* ***SIL Import USA does not lay down the correct law.*** *Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly. "*

(Emphasis added)

20. Learned counsel for applicant in the present case has relied on a judgement which has already been overruled by Supreme Court. In my view, this is an attempt to mislead the Court. It was not expected from a counsel of such a long standing that he would cite an overruled judgement.

21. Be that as it may, since complaint in the present case, was filed within one month i.e. October, 2000, after excluding 30.09.2000, the day when cause of action arose, it cannot be said that complaint is ex-facie barred by time provided in Section 142(b) of Act, 1881.

22. No other point has been argued.

23. Accordingly, both the applications are hereby rejected.

24. Interim orders, if any, stand vacated.
