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(2020)07ILR A1
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.06.2020

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 529 of 2020

Vinod Kumar Chaudhary ...Applicant
Versus
C.B.I., S.C.B., Lucknow ...Opposite Party

Counsel for the Applicant:
Pranjal Krishna, Shivam Pandey

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

Criminal Law - delay in trial - Howsoever grave may be the offence but if the charge sheet is submitted and there is a delay in proceeding with the trial unreasonably resulting into incarceration of the accused, in such circumstances the accused may be fit for grant of bail for the time being. (Para 34)

Despite the submission of charge-sheet in the Court trial has not begun and even charge is not framed against the accused persons. From the grant of bail, it appeared to the Court that the co-accused are within the reach of the court ans subject to it's process, then also the trial is not proceeded. (Para 33)

Where many accused serving in public service, involved in offence of fraud and misappropriation of huge amount of government money, every accused is similarly situated, should not be proceeded separately. In a case of present nature the applicant on the basis of doctrine of parity should be considered for grant or refusal of bail having regard to the bail granted to the other co-accused either by Special Court, C.B.I. o r by this Court also.
(Para 34)

Bail Application allowed. (E-10)

List of cases cited: -

1. Dataram Singh Vs St. of U.P. (2018) 3 SCC 22

2. Bhagirath Singh Jadeja Vs St. of Gujarat AIR 1984 SC 372

3. Nimmagadda Prasad Vs C.B.I. (2013) 7 SCC 466

4. Gudikanti Narsimhulu Vs Public Prosecutor (1978) 1 SCC 240

5. Deepak Subhash Chandra Mehta Vs C.B.I. and anr. (2012) 4 SCC 134 *(followed)*

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present bail application is of Vinod Kumar Chaudhary who is a co-accused in Criminal Case No.1426 of 2017 [C.B.I. Vs. Indrajeet Tiwari & Ors], Crime No.RC0532014A0006 of P.S. C.B.I./SCB/Lucknow under Sections 120-B read with 201, 204, 409, 420, 467, 468, 471 and 477(A) I.P.C. and Section 13(2) read with 13(1)(c) & (d) P.C. Act, Section 66 of the Information Technology Act, 2000 pending in the Court of learned Special Judge, C.B.I., Court No.6, Lucknow.

2. This first bail application is moved on 14.01.2020 by learned counsel Sri Pranjal Krishna, Advocate who is in assistance with learned Senior Designated Sri Nandit Srivastav, Advocate. Copy of the bail application has already been provided in the office of Additional Solicitor General pursuant thereto learned A.S.G, Senior Designated Sri S.B. Pandey, Advocate in assistance with learned counsel for the Central Government Sri Kazim Ibrahim, Advocate has put in appearance to protest the bail plea.

3. On 27.01.2020, a counter affidavit is filed by learned counsel Sri Kazim

Ibrahim sworn by Sri Vinay Kumar Chaturvedi, Inspector, C.B.I, Special Crime Branch Office Complex. Thereafter, a rejoinder affidavit is filed on behalf of the accused-applicant on 06.03.2020.

4. The bail application was listed severally but the same could not be heard, meanwhile due to Pandemic of Covid-19, the State of U.P. including District Lucknow gone under complete lockdown and physical hearing in the courts was suspended. The urgent hearing after sometime was permitted through video conferencing and at that stage on the ground, the applicant is suffering from Chronic Hapatitis-B, mention was made before Hon'ble the Senior Judge on 06.05.2020 through e-mail on the prescribed website of the Court, the case was then nominated by Hon'ble the Senior Judge vide order dated 11.05.2020 to this Court.

5. Heard learned counsel Sri Pranjal Krishna, Advocate assisting his Senior designated Sri Nandit Srivastav, Advocate and learned A.S.G. Senior designated Sri S.B. Pandey, Advocate assisted by Sri Kazim Ibrahim, perused the record.

6. From the perusal of record as contended by learned counsels the matter appears to have initiated on the basis of two public complaints which were received one from Manoj Srivastav and another from Vinod Jain, to the effect that huge amount has been misappropriated in 27 Savings Accounts standing at Lalitpur Head Post Office under the Jhansi Postal Division in U.P. Circle. During the preliminary enquiry, it was found that one account was written twice, 26 accounts were found initially and an amount of Rs.16,15,600/- has been found defrauded. On the basis of report of said preliminary enquiry into complaints, an F.I.R. was lodged and the investigation proceeded. In investigation, it was found that the applicant is a Postal Assistant and he was found in conspiracy with other co-accused though being a public servant they committed criminal breach of trust and thus withdrawn by way of forgery, manipulation and falsification, thereby made a loss to the State to the tune of Rs.3,11,75,845/- and reciprocally obtained themselves illegal gain. They did so by modifying the data entries fed in computer and thereafter by deleting the same. As such in conspiracy with each other they destroyed the evidences of electronic documents also.

7. The applicant has made Annexure - 1, the certified copy of the F.I.R. in Criminal Case No. 1426 of 2017 under Sections 120-B I.P.C. read with 201, 204, 409, 420, 467, 468, 471 and 477(A) I.P.C. and Section 13(2) read with 13(1)(c) & (d) P.C. Act, Section 66 of the Information Technology Act, 2000 Police Station- C.B.I./SCB/Lucknow, District- Lucknow.

8. In the aforesaid F.I.R. details of known/suspected accused with full particulars is given. From perusal of which it appears that including accused applicant total six accused are named who are respectively (1) Sri Indra Jeet Tiwari, Postal Assistant, Account Branch, Lalitpur Head Post Office. (2) Sri Shailesh Khare, Postal Assistant, Saving Bank Control Organization Branch, Lalitpur Head Post Office, Lalitpur. (3) Sri Vinod Kumar Chaudhary, Postal Assistant, Counter Clerk, Lalitpur Head Post Office (Present applicant). (4) Sri Sunil Tiwari, Agent. (5) Sri Anil Jain @ Anil Kumar Jain, National Savings Agent, Lalitpur Head Post Office. (6) Sri Manoj Singhal, National Savings

Agent, Lalitpur Head Post Office, Lalitpur, U.P.

9. The said F.I.R. against the accused-applicant is registered on the complaint in writing made by Sri Mahendra Kumar Srivastav, Senior Superintendent of P.H.O., Jhansi Division, Jhansi addressed to the Superintendent of Police, C.B.I./S.C.B., Lucknow on 20.08.2014 with regard to the alleged fraud case of Lalitpur Head Office of Jhansi Division in U.P. Circle. The complainant has informed the Superintendent of Police, C.B.I./S.C.B., Lucknow that pursuant to the two public complaints namely of Sri Manoj Shivhare R/o Nai Basti, Lalitpur and Sri Vinod Jain R/o Ghanta Ghar, Lalitpur with regard to misappropriation of huge amount in 26 Savings Bank Account (particulars are given in the written complaint) standing at Latlitpur Head Post Office under Jhansi Postal Division in U.P. Circle, a preliminary enquiry was done. He further informed that in that preliminary enquiry it comes out that an amount of Rs.16,59,600/- has been defrauded. He further informed that the aforesaid two public complaints have disclosed that through data entry module, the entries of deposit were modified, therefore, all the available informations present in computers i.e. backup, was preserved during preliminary enquiry. As per departmental rules, the data backup should be taken everyday while last data backup was found of dated 08.6.2013, after restoration of backup data dated 08.06.2013. In this connection the preliminary enquiry further revealed that the account numbers mentioned in the aforesaid public complaints were checked in Sanchay Post (A programme of departmental Saving Bank). Out of 26 accounts, Pass books for only 5 S.B. accounts were found available in the Sanchay post and remaining 21 S.B. accounts mentioned in the complaint were shown in computer as "invalid accounts". It was found that the said 21 accounts were deleted from the system after withdrawal of amounts. It was also pointed out in the report of preliminary enquiry that all aforesaid 26 accounts were again checked in the system and they were found active up to 08.06.2013 which indicates that these accounts were deleted only after 08.06.2013. The said preliminary enquiry report on the basis of which the F.I.R. was registered further discloses that the allegation made in said two public complaints and also in the report of preliminary enquiry, it is prima facie found that there is a gang operating in Lalitpur Head Post Office comprising Sri Indrajeet Tiwari, Postal Assistant, Account Branch, Lalitpur Head Post Office, Sri Shailesh Khare, Postal Assistant, Saving Bank Control Organisation Branch, Lalitpur Head Post Office, Sri Vinod Kr. Chaudhary, Postal Assistant, Counter Clerk, Lalitpur Head Post Office, Sri Sunil Tiwari, Agent, Sri Anil Jain and Sri Manoj Singhal, National Savings Agent, Lalitpur Head Post Office.

10. The mode and manner by which the aforesaid gang of accused persons defrauded the huge amount of public money is described in the complaint and the report of preliminary enquiry that they installed Data Entry Module in there respective systems in Account Branch and then Sri Indrajeet Tiwari and Sri Shailesh Khare used the computer of account branch to modify the deposit amount in the Data Entry Module in the Post Office computer record. Thereafter, they use to sent someone at the counter to withdraw money. At the counter, Sri Vinod Kumar Chaudhary, Postal Assistant use to help

them in taking withdrawal in huge amount. In order to put a smoke screen over these fraudulent withdrawals, this gang used to take witness of above mentioned National Savings Agent on the withdrawal vouchers. On the basis of forged witness done by National Savings Agent, Sri Anil Kumar Jain and Sri Manoj Singhal huge amount of money was misappropriated. It is further complained that in this way they committed fraud in more than six thousand entries and crores of rupees have been defrauded by their gang. The preliminary enquiry further found that Data Entry Modules in other 32 accounts also fraud to the tune of Rs.27,42,200/- have come to the notice with a total amount of Rs.44,01,800/- till 10.06.2014. In the course of checking other accounts as per ledger entries it was found that from the backup data dated 08.06.2013 in respect of accounts fraudulent entries were made by the gang using Data Entry Module which were actually opened in the name of various different account holders mentioned against them. The amounts were withdrawn by fake/imposter persons with this modus operandi and huge some of money were misappropriated, though the actual depositor have not withdrawn their amount. Their amount was fraudulently withdrawn by the gang. It is further mentioned that it is prima facie responsibility of the counter Postal Assistant and Assistant Post Master (A.P.M.) to check and verify the name and identity of correct account holder which was not done by the officials namely Sri Vinod Kumar Chaudhary and Anil Kumar Jain. The amount of aforesaid 32 accounts is Rs.27,47,200/-, the enquiry report as mentioned in the complaint further discloses that National Savings Agent were also involved in this fraud as it is evident from the fact that amount of Rs.16,59,600/- were credited into the Government account by them namely, Sri Anil Kumar Jain and Sri Manoj Singhal as per report of the Post Master Lalitpur, Head Post Office. The complainant further reveals that the departmental enquiry reached at conclusions, the irregularity in Savings Bank Accounts has been detected with involvement of defrauded amount of Rs.44,01,800/- by the aforesaid modus operandi.

11. It is pertinent to note here that the applicant challenged his prosecution in criminal case no. 1426 of 2017 (C.B.I. Vs. Indrajeet Tiwari and Ors.) detailed hereinabove U/S 482 Cr.P.C. No.8428 of 2018 moving Criminal Misc. Application in the High Court, Lucknow Bench for the relief of quashing the prosecution A co-ordinate Bench of this Court refused to interfere vide order dated 10.01.2019. It was requested by learned counsel for the petitioner that the grievance of the petitioner would be sufficiently met in case bail application of the petitioner is considered expeditiously in accordance with law. The Court ordered *"In view thereof, it is provided that if the petitioner surrenders before the Court below within three weeks from today and applies for bail, the court below will consider the same, in accordance with law in view of the observation made in the case of Lal Kamlendra Pratap Vs. State of U.P. reported in 2009 (3) ADJ 328 (Supreme Court). For a period of three weeks, no coercive steps shall be taken against the petitioner. With the aforesaid, the petition is disposed of."*

12. The present bail applicant failed to move the bail application within the aforesaid prescribed time before Special Judge, C.B.I. concerned pursuant to order dated 10.01.2019 and he again moved to

the High Court U/S 482 Cr.P.C. on the ground that applicant is seriously ill and is suffering from Chronic Hepatitis-B and acute Jaundice, therefore, could not moved the bail application within the aforesaid prescribed time. He further prayed for some more time. His application was allowed vide order of the Court dated 18.12.2019. The relevant portion whereof is being quoted hereunder:-

"Time is extended by one week only. In case petitioner surrenders before the Court below within one week from today and applies for bail, the Court below will consider the same in accordance with law in view of the observation made in the case of Lal Kamlendra 2009 (3) ADJ 328 (Supreme Court)".

Pursuant thereto the applicant moved the application for grant of bail before the Special Court, C.B.I., Lucknow. The occasion of present bail application before this Court has arisen from the rejection of the bail application by the Special Judge, C.B.I., Lucknow on 07.01.2020.

13. The applicant by filing his first bail application before this Court has submitted that he is in jail since 07.01.2020. In the affidavit filed in support of the bail application it is stated that pursuant to the F.I.R. dated 28.08.2014 wherein the applicant is accused along with the other co-accused investigation is completed and charge sheet is filed therein on 30.06.2017 against him along with the other co-accused for committing the offence of criminal conspiracy through breach of trust, cheating, forgery of valuable documents, using forged documents as genuine and falsification of accounts by the abuse of official position etc., thereby causing an undue loss of approximately 44,01,800/- to the government exchequer and corresponding wrongful gain to themselves under the relevant Sections of I.P.C.

14. It is argued by learned counsel that a circle level enquiry of this fraud was conducted by Director Postal Services, the report of the enquiry dated 08.05.2015 states the role of Mr. Mahendra Kumar Srivastava (the complainant in present case), the then Senior Superintendent of Post Office, Jhansi Division, Jhansi. It is alleged in this report that Mr. Mahendra Kumar Srivastav (the complainant) is one of the principle offenders of this fraud and was having effective in departmental rules of transfer and posting of employees or officials and also manipulation of records. He was placed under suspension by the Postal Department.

15. The written complaint dated 20.08.2014 made by Sri Mahendra Kumar Srivastav, whereupon on 28.08.2014 the present F.I.R. is registered was submitted on preliminary enquiry done by him on two private complaints dated 04.03.2014 by Mr. Vinod Jain and 05.03.2014 by Mr. Manoj Shivhare. Learned counsel for the bail applicant further drew the attention towards the contents of aforesaid public complaints that they were apparently against Mr. Mahendra Kumar Srivastav himself along with the other three accused. Even then he was entrusted with the preliminary enquiry which he did almost in five years and thus save his skin, he fabricated the things towards the accused applicant.

16. Learned counsel further submitted that the charge sheet filed on 30.06.2017 itself shows the aforesaid fraud committed by the officials of the Post Office including

the present accused-applicant in a conspiracy along with other co-accused holding the same post of Postal Assistant and also making entries in the computer and they are in a position to delete the original date entry. Some of the co-accused who are National Savings Agent were also shown in the commission of offence under conspiracy. As such each of the accused in the present case shown equally involved in the offence apparently have similar role as alleged in the prosecution case. The role of the applicant in the F.I.R as alleged is merely on speculation, the evidence with regard thereto is neither mentioned in the preliminary enquiry report, FIR nor in the charge sheet, therefore, prima facie the role, complicity and involvement of the accused in the alleged conspiracy is not established.

17. Learned counsel further argued that so far as allegation as to the offence of forgery of valuable security and that of cheating, dishonesty, inducing delivery of property is concerned, the applicant has neither forged nor destroyed any valuable security, nor it is the case of prosecution also, moreover, the bare perusal of the charge sheet sufficiently shows that no act of applicant can make him liable within the scope of the above mentioned offences.

18. Learned counsel further argued that there is no iota of evidence in the charge sheet to connect the applicant with the forgery of any document and therefore, prima facie the prosecution has no material to show the commission of offence by the applicant-accused under Sections 467, 468, 471 of the I.P.C.

19. Learned counsel for the bail applicant vehemently argued that the allegation as to the obtaining unlawfully or by any dishonest or fraudulent manner undue gain causing loss to the public money. It is also not prima facie established from the prosecution case, as out of the money defrauded, the applicant has not received any amount in his account. Learned counsel further argued the applicant had ever been co-operative with the Investigating Officer, he has completed about four years service honestly and with full dedication to the Postal Department, he has to live life, which is expected to be considerably long, therefore, his application for release on bail should be considered on the aforesaid reasons.

20. He further submitted that not only in the preliminary enquiry and the departmental enquiry by the Postal Department but also after the registration of the F.I.R by the C.B.I., he had ever attended each and every call of the C.B.I. for more than five years, though he has never been arrested. He further submitted that he has been given in his petition U/S 482 Cr.P.C. by the Hon'ble Court two times, order of stay of arrest in the present matter, but even then he has never absconded and always have submitted himself to the process of the Court. Pursuant to the order of the Court, he has moved a bail application before the Special Court of C.B.I. and meanwhile has always been attending each and every proceeding. Learned counsel further submitted that as prima facie no offence is made out against the applicant and in aforesaid offences, the Special Court, C.B.I. has released on bail the co-accused Shailesh Khare vide order dated 24.01.2018 and Kalu Ram vide order dated 14.05.2019 (Annexure No.9). Later on the co-accused Anil Kumar Jain, Manoj Kumar Singhal were also granted bail by this Court vide order dated 17.07.2019 (Annexure No.10), therefore, he should

also be released on bail so that he may be able to put his defence properly when the trial begins.

21. Learned counsel further argued that despite the submission of charge sheet on 30.06.2017 still the trial has not begin, the accused is in Jail since 07.01.2020, though he is suffering from serious ailment, the Chronic Hepatitis-B and he is suffering a lot in incarceration. Learned counsel has made Annexure No.11 to the bail application, the medical prescription and treatment with that regard. Learned counsel further submitted that the First Information Report was registered on 28.08.2014, the applicant complied with all directions of the Investigating Officer and assisted the Investigating Officer. During entire period of investigation the applicant had co-operated in the investigation. During the entire period he had never been arrested but he never absconded from the process of the investigation, he has no criminal history. Relying on the judgment in case of ***Dataram Singh Vs. State of U.P. (2018) 3 SCC 22 and Bhagirath Singh Jadeja Vs. State of Gujarat*** reported in ***AIR 1984 SC 372***. Learned counsel concluded his argument with a prayer to release the accused-applicant on bail.

22. On the other hand, learned A.S.G. has opposed the bail plea of the accused-applicant on the ground that accused-applicant is participant in criminal conspiracy for withdrawing fraudulently from the National Savings Bank account of the depositors in Post Office which is public money. The accused applicant along with other co-accused has drained out a huge amount of public money. Learned A.S.G. further argued that it is clear and evident that National Savings Agents were also involved by the accused applicant and his companions in the conspiracy to commit the fraud. From the fact that the aforesaid agents arraigned in the present crime case have deposited Rs. 16,59,600/- and the same have been credited in the relevant account. The said National Savings Agent are Sri Anil Kumar Jain and Sri Manoj Singhal who are co-accused with the present applicant and other co-accused. Learned A.S.G. drew the attention towards the role of the present applicant that he is Postal Assistant and Counter Clerk, he has duty to verify the person seeking withdrawal of amount and present before him on the counter by documents like K.Y.C., Aadhar, etc. The applicant illegally omitted to discharge his duties acting under under the conspiracy and let the withdrawal done on the forged documents by imposters.

23. Learned A.S.G. argued that the applicant being a public servant posted as a counter clerk (Postal Assistant) has committed criminal breach of trust by accepting forged vouchers getting forged witnesses and thus facilitated the payment on withdrawal of the deposit in account of Savings Bank. He further submitted that during investigation it is implicated that the accused applicant working as counter clerk intentionally without identifying the real account holders done the process of withdrawal therefrom on the basis of forged identity presented by imposters.

24. Learned A.S.G. argued that this was role of accused participant in the conspiracy and as such the applicant forged more than 400 Savings Account and withdrew amount from more than 100 accounts in aforesaid manner. Thereafter the original data entry and accounts were modified and deleted. According to prosecution the fraudulent withdrawal of

amount was done from more than 169 National Savings Account with the complicity and involvement of the accused-applicant, causing the loss of Rs.1,31,35,200/-, this is a huge amount.

25. He further submitted that the applicant as it is revealed from the record, was absconding and when on 21.03.2018 an N.B.W was issued, after a considerable delay, when process was issued under Section 82 Cr.P.C. vide order dated 02.12.2019 of the Special Court and enforced, he put appearance before the Court. As such the argument of learned counsel for the bail applicant is not true that accused-applicant co-operated during the investigation and he will ensure his attendance during trial, as it is doubtful from the conduct of the accused, therefore, he should not be released on bail so as to ensure the trial to proceed further.

26. After hearing the rival contentions of learned counsel for the parties and perusal of the record, it is clear that prosecution case is with regard to the fraudulent withdrawal from the National Savings Account by the accused persons who are public servants, posted in various capacity in the service of Postal Department. A huge amount of public money is drained out whereby there had been a considerable loss of public money to the Government and an undue gain to the accused. This is also the case of prosecution that the officials of the post office namely Indrajeet Tiwari, Shailesh Khare and the present accused-applicant, Vinod Kumar Chaudhary were in collusive concert and conspiracy with the co-accused Sri Sunil Tiwari (Agent), Sri Anil Jain, Sri Manoj Singhal, National Savings Agent and thus had developed a modus operandi, wherein the amount deposited in National Savings Account in post office by public was used to have been withdrawn on forwarding of other co-accused, putting forth fictitious and imposter depositors in place of real depositors. For withdrawal they used forged documents and the applicant as Counter Clerk used to accept the forged identity of the imposters without any verification with the original entries fed in the computer. Thus he permitted the withdrawal. Thereafter the three co-accused, the officials of a Bank used to modify the entries accordingly and thereafter delete the same. This obviously, is a serious white collar offence considerably heinous with regard to the fiduciary relation of the real depositors of the National Savings Account and their trust with the Post Office as well as the Postal Employees. The said offences as being prima facie revealed from the prosecution case, the complaint and the investigation by the C.B.I. that none of the co-accused has suspended different liabilities born out of it. Their roles cannot be assessed as lesser or heavier as they have committed the offence in concert with each other with a common object to give effect to the dishonest and illegal withdrawals. If all these are proved by evidences in trial, the punishment would be severe, they cannot be placed at this stage at different pedestals, even the National Savings Agent, co-accused in the present case are also liable to be placed on the same pedestal along with the other co-accused.

27. This is a fact, important for taking into consideration that charge sheet has been filed on 30.06.2017, the learned A.S.G. has not informed the court that any further investigation either ordered by the court are intended. It is informed to the Court that despite the fact charge sheet is

submitted, till today charges are not framed by the Special Court. It is more than two years elapsed from the date of submission of charge-sheet still trial has not begun. The co-accused persons namely Anil Kumar Jain and Manoj Kumar Singhal were enlarged on bail, the present accused-applicant is in jail since 07.01.2020. Why the charges are not framed by the Special Court, is not reasonably explained. This is certainly unreasonable and unnecessary delay on the part of the Special Court, C.B.I.

28. From the order of this Court dated 10.01.2019 in Criminal Misc. Application U/S 482 Cr.P.C. bearing no.8428 of 2018, it reflects that stay of arrest was sought on the ground of applicant's suffering from Chronic Hepatitis-B whereupon for the interim period arrest was stayed prescribing time to appear before the Special Court for moving application for bail. The fact of applicant's suffering from Chronic Hepatitis-B disease is not controverted by the State in his counter affidavit though it is mentioned in the bail application and also in the application for urgent hearing dated 16.04.2020 in para-3 of the written submission, quoted hereunder:-

"That it is humbly submitted that the applicant is suffering from severe Hepatitis-B which if not treated at the immediately may even lead to liver failure or even cancer. It is humbly submitted that the petitioner is the sole bread-winner of family having a one minor son of only 1.5 years and a wife suffering from multiple chronic ailments such as life threatening gynecological problem coupled with stone in her kidney and has been advised to undergo surgery. The medical condition of his wife is continuously deteriorating and during this period of lock-down she is facing a great hardship even for securing her bread and butter. The medical prescriptions of the applicant along with the medical prescription of his wife, have already been annexed along with the bail application [Annexure-11 of the bail application]"

29. Learned counsel for the bail applicant in rebuttal of the arguments done by learned A.S.G. submits that on 30.01.2020 the World Health Organization declared the Novel Covid-19 i.e. Corona Virus as a pandemic which was specifically recognized by Govt. of India vide Circular No.212/MISC/PF/2020/SCA(G) issued by the Ministry of Health, Government of India, New Delhi. He further contended towards the fact that deadly Corona Virus has almost reached at stage 3 which is the stage of community spread of virus, putting the overcrowded places like Jails at a high risk and inmates such as present applicant who are already suffering from multiple ailments as a result of which has very low immunity, have more risk in general, become extremely vulnerable at this time. On the basis of aforesaid facts, he further prayed to give him benefit of parity also as other co-accused involved in the similar offences have been given bail.

30. Taking into consideration the aforesaid fact, the grounds and relevant consideration while granting or refusing bail it would be pertinent to refer here the relevant para-24 and 25 of the Judgment of Apex Court in ***Nimmagadda Prasad Vs. C.B.I. reported in 2013 (7) SCC 466*** are cited hereunder:-

"24. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the

punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

25. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

31. It is important to reiterate here that the role of accused cannot be distinctly carved out in the case of conspiracy as put forth by the prosecution, the other co-accused who are at par with the present applicant and the nature of evidence in support of the allegations constituting the offences, with which they are arraigned, are the same as collected and produced by the investigating officer. The claim of the accused-applicant for the benefit of parity, as the other co-accused are granted bail is worthy of consideration. At this stage it would be relevant to refer the case of ***Dataram Singh Vs. State of U.P. & Ors.*** reported in ***2018 (3) SCC 22*** wherein the Apex Court has described the factors and consideration for grant or refusal of bail and while considering the right to bail the human approach is of essence, the Apex Court has held that in jail due to non adherence of the basic principle of criminal jurisprudence regarding grant of bail and presumptions of innocence, para-14 to 16 of the judgment are cited hereunder:-

"14. Even though the State of Uttar Pradesh has been served in the appeal, no one has put in appearance on its behalf. As far as the complainant is concerned, no reply was filed by the time the matter was taken up for consideration on 29th January, 2018. Accordingly, the matter was adjourned to 2nd February, 2018 by which date also no reply was filed by the complainant. As mentioned above, no one has put in appearance on behalf of the State of Uttar Pradesh to oppose the grant of bail to the appellant.

15. Learned counsel for the complainant vehemently contended that the appellant had duped him of a considerable amount of money and that looking to the seriousness of the allegations against him, this was not a case in which the appellant ought to be granted bail by this Court. Learned counsel supported the view taken by the trial judge as well as by the Allahabad High Court. He argued that given the conduct of the appellant in not only cheating the complainant and depriving him of a considerable sum of money but thereafter issuing a cheque for which payment was stopped made it an appropriate case for dismissal.

16. In our opinion, it is not necessary to go into the correctness or otherwise of the allegations made against the appellant. This is a matter that will, of course, be dealt with by the trial judge. However, what is important, as far as we are concerned, is that during the entire period of investigations which appear to have been spread over seven months, the appellant was not arrested by the investigating officer. Even when the appellant apprehended that he might be arrested after the charge sheet was filed against him, he was not arrested for a considerable period of time. When he approached the Allahabad High Court for quashing the FIR lodged against him, he was granted two months time to appear before the trial judge. All these facts are an indication that there was no apprehension that the appellant would abscond or would hamper the trial in any manner. That being the case, the trial judge, as well as the High Court ought to have judiciously exercised discretion and granted bail to the appellant. It is nobody's case that the appellant is a shady character and there is nothing on record to indicate that the appellant had earlier been involved in any unacceptable activity, let alone any alleged illegal activity."

32. In ***Gudikanti Narsimhulu Vs. Public Prosecutor reported in 1978 (1) SCC 240*** in para-1 & 6 Hon'ble Mr. Justice Krishna Iyer has observed as follows:-

"1. "Bail or jail?" -- at the pre-trial or post-conviction stage -- belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J.

indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. [Mod. Law Rev. p. 50 ibid., 1852 I E & B 1] Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

33. Since at the stage of grant or refusal of bail the detailed examination of evidence and elaborate documentation of merit of the case need not be taken, there is a need to indicate such orders reasons for prima facie concluding while bail was being granted particularly where accused is charged of having serious offences. No doubt the accused applicant is involved in offences punishable under Sections 120-B read with 201, 204, 409, 420, 467, 468, 471 and 477(A) I.P.C. and Section 13(2) read with 13(1)(c) & (d) P.C. Act, Section 66 of the Information Technology Act, 2000. Literally there are serious offences but in the present case the other co-accused have been granted bail earlier, the applicant before this Court is languishing in jail since 07.01.2020, though charge sheet has already been submitted. The applicant is in custody for a long. In the supporting affidavit to the bail application it is averred that, applicant is suffering from several ailment. According to the information given to the court despite the submission of charge-sheet in the Court trial has not begun and even charge is not framed against the accused persons. From the grant of bail, it appears that co-accused are within the reach of the court and subject to it's process, then also the trial is not proceeded. In case of delay in trial it is held repeatedly by Hon'ble Supreme Court, bail should be granted, as keeping under trial in jail custody for infinite period violates the liberty under the constitution. It would be relevant to refer at this stage, the judgment of Hon'ble Apex Court in the case of ***Deepak Subhash Chandra Mehta Vs. C.B.I. and Anr.*** reported in ***2012 (4) SCC 134***, para-32 and 35 of the judgment cited hereunder:-

"32. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious

offence. The Court granting bail has to consider, among other circumstances, the factors such as a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and; c) prima facie satisfaction of the court in support of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted.

35. As observed earlier, we are conscious of the fact that the present appellant along with the others are charged with economic offences of huge magnitude. At the same time, we cannot lose sight of the fact that though the Investigating Agency has completed the investigation and submitted the charge sheet including additional charge sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, we are of the view that the appellant is entitled to an order of bail pending trial on stringent conditions in order to safe guard the interest of the CBI."

34. In a case like the present one where many accused serving in public service, involved in offence of fraud and misappropriation of huge amount of government money, every accused is similarly situated, should not be proceeded separately. In a case of present nature the applicant on the basis of doctrine of parity should be considered for grant or refusal of bail having regard to the bail granted to the other co-accused either by Special Court, C.B.I. or by this Court also. How so ever grave may be the offence but if the charge sheet is submitted and there is a delay in proceeding with the trial unreasonably resulting into incarceration of the accused, in such circumstances the accused may be fit for grant of bail for the time being.

35. On the basis of discussions made hereinabove, considering the facts and circumstances of the case, without expressing any opinion on merit of the prosecution case as to the complicity, role and involvement of the applicant in the offence, I find it to be a fit case for grant of bail for time being.

36. The application for grant of bail is conditionally allowed, however, it is made clear that while releasing the applicant on bail heavy amount of sureties shall be imposed to ensure his presence during trial.

37. Let the applicant Vinod Kumar Chaudhary be released on bail for four months from the date of his release under the order in the Criminal Case No.1426 of 2017 [C.B.I. Vs. Indrajeet Tiwari & Ors], Crime No.RC0532014A0006 of P.S. C.B.I./SCB/Lucknow under Sections 120-B read with 201, 204, 409, 420, 467, 468, 471 and 477(A) I.P.C. and Section 13(2) read with 13(1)(c) & (d) P.C. Act, Section 66 of the Information Technology Act, 2000 on his furnishing a personal bond and two heavy sureties to the satisfaction of the court concerned and subject to the conditions which are being imposed in the interest of justice. It is further made clear that within the aforesaid four months, the

Special Court, C.B.I. to ensure presence of all the co-accused before it for framing of charges, thereafter to begin with the trial and concluded the same.

38. The applicant is further ordered to surrender before the Court concerned after the expiry of aforesaid period of four months. The applicant is further subjected to following conditions in addition to those imposed by the court concerned:-

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

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court 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.

(2020)07ILR A14
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.05.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 219 of 2018

Eklakh Khan @ Eklakh Ahmad
...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shailendra Kumar Tripathi, Sri Mohammad Arshad Khan, Sri Babu Lal Ram

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

Criminal Law -Indian Penal Code, 1860-Conviction under Section 307 IPC- sentence awarded to the appellant to undergo five years rigorous imprisonment with fine of Rs. 10,000/-modification of the order of the sentence for the period already undergone by the appellant-Appellant has undergone about two years four months and eleven days of the awarded sentence.

Quantum of Sentence- Reformative Theory- In view of the facts and circumstances of the case and as substantial period already has undergone in prison by the appellant in this case and the fact that the appellant is an old person; he is suffering from age related ailments; that there is no bread earner in the family of the appellant and that he has realized the mistake committed by him and is remorseful of his conduct to the society to which he belongs and now he wants to transform himself, he should be given a

chance to reform himself. Ends of justice would be served, if the sentence of appellant is reduced to the period already undergone by the appellant in this case and the amount of fine be enhanced to Rs. 20,000/-.

The reformative approach to punishment as a measure to reclaim the offender, lays emphasis on rehabilitation so that the offender is transformed into a good citizen. Accordingly, in view of the fact that the appellant has already undergone more than half period of his sentence he should be given a chance to reform himself. Sentence modified to the period already undergone by the appellant and fine enhanced. (Para 16)

Criminal Appeal partly allowed. (E-3)

Case Law relied upon: -

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

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

1. This criminal appeal has been filed against the judgment and order dated 18.12.2017 passed by Additional Sessions Judge, Court no. 1, Kannauj in S.T. No. 173 of 2014, under Section 307 IPC, Police Station Chhibramau, district Kannauj, whereby learned Judge convicted and sentenced the appellant to five years rigorous imprisonment with fine of Rs. 10,000/- and in default of payment of fine, the appellant was further directed to undergo three months rigorous imprisonment.

2. As per FIR which was lodged by the complainant Bilkisa wife of Mohd. Shakeel (injured) and it was mentioned in the FIR that on 10.6.2013 at about 8.00 p.m. when the husband of the complainant namely Mohd Shakeel was coming to his village after closing his shop then near the field of Vishnu Dayal due to old enmity Aklakh Khan @ Eklakh Ahmad son of Amir Bux, Salamat son of Deen Mohammad, Aslam and Saleem son of Abdul Waheed residents of Seemant Nagar Kasba and police station-Gushaiganj, district-Kannauj caught the husband of the complainant and on the exhortation of Salamat, Aklakh attacked the husband of the complainant with firearm and the complainant's husband received gun shot injury on his shoulder. It was also mentioned that after the incident the injured was sent to the hospital then the injured was referred to Halat Hospital, Kanpur and report of the incident was lodged.

3. The matter was reported to the police by the informant at Police Station-Chhibramau and the case was registered and investigated by the police.

4. After completion of investigation the Investigating Officer has submitted charge sheet against the accused persons and the cognizance was taken by the Magistrate and considering that the case was triable by the court of Session, it was committed to the court of session and the session court charged the accused persons under Sections 307/34 I.P.C.

5. In order to prove its case the prosecution has examined five witnesses PW-1 Shakeel, PW-2 Smt. Bilkees (complainant), PW-3 Constable Ram Chandr, PW-4 S.I. Shyamvir Singh, PW-5 Dr. Abhishek Kumar. Dr. Vinay Kumar was examined as formal witness.

6. PW5 Dr. Abhishek Kumar Katiyar has examined the injured Shakeel Ahmad who was at the time of incident about 45 years old. Doctor found multiple lacerated wounds in size 18.0 cm x 8.0 cm x Dept not due to probing. Size of laceration is 4.0

x 3.5 cm. Margin inverted overt in shape charring present. Injury KUO advise x-ray chest.

7. After the closure of prosecution evidence, the statements of the accused persons were recorded under Section 313 Cr.P.C., in which they denied the charges leveled against them and stated that they have been falsely implicated in this case due to enmity with the police.

8. However, learned Additional Sessions Judge, Kannauj after assessing and evaluating the evidence adduced by the parties, acquitted three named accused Salamat, Aslam and Salim and convicted and sentenced the present accused Eklakh Khan @ Eklakh Ahmad as indicated herein above. Being aggrieved by the conviction judgement and order this appeal had been filed.

9. Heard Sri Mohammad Arshad Khan, learned counsel for the appellant, Sri Dinesh Kumar Srivastava and Sri Ram Adhar Ram, learned A.G.A. for the State and perused the record of the case.

10. At the very outset, Sri Mohammad Arshad Khan, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. he, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

11. Learned counsel for the appellant has argued that the appellant is not a previous convict; he is an old man aged about 65 years and he is suffering from age related ailments and; that there is no bread earner in the family of the appellant.

12. Learned counsel for the appellant further submits that the appellant was awarded five years rigorous imprisonment and that he has already undergone about three months and five days before conviction and two years, one month and six days after conviction, meaning thereby that he has undergone about two years four months and eleven days of the awarded sentence.

13. Sri Dinesh Kumar Srivastava and Sri Ram Adhar Ram, learned A.G.A. on the other hand have stated that they have no objection if the Court considers the mitigating circumstances.

14. Since the learned counsel for the appellant has given up challenge to the findings of conviction and there is ample evidence including, deposition of injured, eyewitness account and medical report to base conviction, accordingly, the conviction of the appellant for the aforesaid offence stands affirmed.

15. While dealing with the quantum of sentence, Hon'ble Supreme Court in ***B.G. Goswami Vs. Delhi Administration, 1973 AIR 1457***, held as under:

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

also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole.

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

16. In view of the facts and circumstances of the case and as substantial period already has undergone in prison by the appellant in this case and the fact that the appellant is an old person; he is suffering from age related ailments; that there is no bread earner in the family of the appellant and that he has realized the mistake committed by him and is remorseful of his conduct to the society to which he belongs and now he wants to transform himself, I am of the considered opinion that he should be given a chance to reform himself. This Court considers that ends of justice would be served, if the sentence of appellant is reduced to the period already undergone by the appellant in this case and the amount of fine be enhanced to Rs. 20,000/-.

17. Accused-appellant is directed to deposit the fine of Rs. 20,000/- before learned lower court within six months from the date of passing of the judgement, which shall be paid to the injured as compensation. In case the accused-appellant fails to deposit compensation within stipulated time, the Court below shall proceed against him in the light of judgment of the Hon'ble Apex Court reported in ***Kumaran vs. State of Kerala and another (2017) 7 SCC 471.***

18. Appeal is partly allowed in the above terms.

19. The accused is in jail. He shall be released from jail forthwith, if he is not wanted in any other case.

20. Copy of this order be transmitted to the concerned lower court for compliance.

21. Office is also directed to send back the record of the trial court immediately.

(2020)07ILR A17
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 1848 of 2001

Bilendra @ Virendra & Anr.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Onkar Singh, Sri Irfan Chaudhary, Sri Swetashwa Agarwal

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

Criminal Law-Code of Criminal Procedure, 1973 - Section 154-First Information Report- Evidentiary Value- FIR in a criminal case and particularly in a murder case is an extremely vital and valuable piece of evidence for the purpose of corroborating/ appreciating the oral evidence led at the trial. Oral testimony of PW1 Bholu with regard to witnessing the appellant at the time of incident is not corroborated with the FIR-Testimony of P.W.1 Bholu does not inspire confidence- In FIR PW2 has shown Bhura as an accused and during investigation finding his involvement false casts a serious doubt upon him to be a trustworthy witness and that he launched the prosecution with true facts as the incident had happened. It indicates that actually he did not see the incident and he is not the witness of the incident.

F.I.R itself has no evidentiary value but the same is vital for the purpose of corroborating the oral evidence led during trial and if the F.I.R fails to corroborate the oral testimony and also contradicts the same then such oral evidence cannot inspire confidence of the Court.

Criminal Law -Indian Penal Code, 1860- Section 34- Acts done in furtherance of common intention- In case of role of catching hold and exhortation- allegations of catching hold of a victim or of exhortation are invariably made in an attempt to falsely implicate as many persons as possible from the other side-No iota of evidence against the appellant for sharing common intention with the main accused for committing the offence.

Invariably, in cases where the medical evidence does not support the ocular evidence, the FIR fails to corroborate the oral testimony then persons from the accused side are falsely roped in by assigning the role of exhortation or catching hold of the victim.

Evidence Law- Indian Evidence Act, 1872 – Section 101- Burden of Proof- Suspicion can not take the place of legal proof and burden of proof squarely rests on the prosecution and the general burden never shifts.

It is settled law that that the burden of proving it's case beyond all reasonable doubt rests on the prosecution and suspicion, howsoever strong, cannot take place of proof.
(Para 18, 19, 20, 25, 29)

Criminal Appeal allowed. (E-3)

Case law relied upon/ Discussed:-

1. Thulia Kali Vs St. of T.N (1972) 3 SCC 393

2. Mehraj Singh Vs St. of U.P. (1994) 5 SCC 188

3. Balwant Bhai B. Patel Vs St. of Guj. & anr. (2009) 10 SCC 684

4. Digambar Vaishno & anr. Vs St. of Chattis. (2019) 4 SCC 522

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Irfan Chaudhary, learned counsel for the appellants and learned A.G.A for the State.

2. This appeal has been preferred being aggrieved from the judgment and order dated 08.06.2001 passed in Session Trial No. 873/1998, arising out of Case Crime No. 104 of 1994 (State vs. Bilendra @ Virendra and another) by which learned Additional Sessions Judge, (Court No. 3), Muzaffarnagar has convicted the appellants, under Section 302 I.P.C. read with Section 34 I.P.C. and has sentenced them to undergo life imprisonment.

3. The appellant no. 1 Bilendra @ Virendra died during the pendency of the appeal and appeal against him has been dismissed as abated vide order date

03.04.2019. Hence, this appeal is confined only for the appellant No. 2 Sukhpal.

4. According to prosecution version Bijendra, brother of the informant Rajendra had gone to irrigate his field in the evening of 25/26.05.1994. In the night the informant and his father Bholu reached the tube-well carrying dinner of Bijendra. Bijendra was sleeping on a cot in front of the tube-well. Informant and his father at about 3:00 A.M. in the night had gone to look after the irrigation in the adjoining field, where they heard a sound of fire at the tube-well, upon which they rushed to the tube well and saw that Bilendra @ Virendra and Bhura sons of Ramsewak and Sukhpal son of Nirmal were standing close to the cot of the deceased having country-made pistol in their hands. In the mean time Tara Chand son of Behu Gujar also came from the adjoining tube-well. On their exhortation Bilendra fired a shot on the chest of Bijendra from a close range and all the three accused fled away towards west side. They saw very well and identified them, in the torch and moon light. Regarding daul (Medh, plot boundary), deceased had an altercation with Bijendra, Bhura and Sukhpal 8-10 days before the incident.

On the basis of written report Ext Ka-1 Case Crime No. 104 of 1994, under Section 302 I.P.C against the accused-appellants and another Bhura under chik F.I.R. Ext. Ka-12 was registered on 26.5.1994 at 5.30 A.M. Investigation of the case was entrusted to S.H.O. Ashok Kumar Singh (P.W.4). Investigating Officer reached the spot and got prepared inquest memo Ext. Ka-2 and relevant papers i.e letter to C.M.O. Ext. Ka-3, letter to R.I. Ext. Ka-4, photo lash Ext. Ka-5, chalan lash Ext. Ka-6 by S.I. P.M. Kashyap, in his presence and thereafter, dispatched the dead body for post mortem.

5. Dr. V.K. Shukla (P.W.3) conducted autopsy on the dead body at 4.50 P.M. on 26.5.1994 and prepared a report (Ext. Ka-2A). According to the postmortem report following injuries were found on the dead body:-

1. Gun shot wound of entry 1.5 cm x 1 cm x cavity deep in front of chest left side 6.5cm from nipple in 11. O'clock position blackening present in an area of 6 cm x 5 cm around the wound.

2. Gun shot wound of exit 3 cm x 2 cm on the back of chest right side scapular region.

In internal examination 2nd and 3rd ribs were found fractured, both lungs were lacerated. In opinion of the doctor cause of death of the deceased was found shock and haemorrhage as a result of ante mortem injuries and death was possible at 3.00 A.M. in the morning of 25/26.5.1994.

6. Investigating Officer recorded the statement of complainant Rajendra, Bholu and other witnesses, inspected the place of occurrence and prepared site plan Ext. Ka-7. He collected the blood stained and plain earth from the place of occurrence and prepared recovery memo Ext. Ka-8. He also took into possession the torch from which incident was seen by the witnesses and prepared memo Ext Ka-10. The woollen sheet (chadar) etc. were also taken into possession and memo Ext.Ka-11 was prepared. After completing the investigation, charge sheet (Ext. Ka-13), under Section 302 I.P.C. was filed against the accused-appellants before the court of C.J.M., Muzaffarnagar.

7. Since offence u/s 302 IPC is exclusively triable by the court of Sessions therefore, learned C.J.M., Muzafarnagar committed accused to the court of sessions for trial where Case Crime No. 104 of 1994, under Section 302 I.P.C. was registered as Session Trial No. 873 of 1998. Learned Sessions judge framed charge against the appellants-accused under Section 302 I.P.C. read with Section 34 I.P.C., who denied the charge and claimed trial. Thereafter learned Sessions Judge made over the case for trial to the court of Additional Sessions Judge court No 3, Muzaffarnagar.

8. Prosecution to prove the charge against the appellants-accused produced four witnesses. P.W.1 Bholu and P.W.2 Rajendra informant are witnesses of fact. P.W.3 Dr. V.K. Shukla conducted postmortem and P.W.4 Ashok Kumar Singh Investigating Officer are the formal witnesses of the case. After examination of prosecution witnesses, statements of the appellants-accused were recorded under Section 313 Cr.P.C. In his statement appellant-accused Sukhpal has stated that due to enmity the case proceeded against him. He has further stated that deceased Bijendra was son of his elder father. Neither his land was adjoining to the land of Bijendra nor was there any dispute with him, he had cordial relation with the family of Bilendra, perhaps due to this reason he has been implicated in the present case. The appellants-accused led no evidence in their defence.

9. After hearing the parties and perusal of the record, learned Additional Sessions Judge, (Court No. 3), Muzaffarnagar passed the impugned judgment and order, hence this appeal.

10. Learned counsel for the appellant submits that according to prosecution version appellant Sukhpal was present at the time of incident along with the main accused Bilendra having country-made pistol in his hand. Accused Bilendra, Bhura and Sukhpal were named in the FIR. Role of causing injury to the deceased has been assigned to accused Bilendra. As per prosecution and postmortem report a single fire arm injury was caused to the deceased. At the time of the incident accused Bhura was in jail and Investigating Officer has not charge sheeted Bhura finding him in jail at the time of incident. Appellant had no dispute with the deceased Bijendra nor he has any field adjoining to the field of the deceased. Appellant accused had cordial relation with the family members of accused Bilendra and on the basis of suspicion he has been implicated in the case. Evidence of PW1 Bholu and PW2 Rajendra, the informant, indicate that they have not witnessed the incident and learned court below without proper appreciation of evidence has convicted and sentenced him.

11. On the other hand learned AGA for the respondent state submits that from the evidence adduced by the prosecution charge is fully proved and learned Additional Sessions Judge properly appreciating the evidence has rightly convicted and sentenced him. Therefore, no interference is required by this court and appeal is liable to be dismissed.

12. From the evidence, it is evident that Bijendra died of homicidal violence. It is evident from the medical evidence adduced in the case. PW3 Dr V K Shukla has conducted postmortem and prepared report Ext K-2A, according to which a gun shot wound of entry on left chest and it's exit wound on back of right chest have been found. In internal examination 2nd and 3rd ribs have been found fractured and both lungs were lacerated. Cause of death

was shock and haemorrhage as result of antemortem injuries. From the above, it is clear that Bijendra died due to injury sustained by him.

13. As per prosecution case appellant-accused was present at the time of incident having country-made pistol in his hand, when co-accused Bilendra fired a shot over the deceased Bijendra and after the incident he also fled away along with him.

14. In this appeal the only question for our consideration is whether from the evidence led by prosecution charge against appellant for committing murder of deceased Bijendra with common intention of co-accused Bilendra is proved and trial court properly appreciating the evidence on record has rightly convicted and sentenced him.

15. As per FIR Ext Ka -12 in the intervening night of 25/26.5.1994 deceased was sleeping in front of the tube well on a cot and at about 3.00 AM in the night, PW1 Bholu and PW2 Rajendra had gone to look after irrigation of adjoining field, at that time they heard a sound of fire at the tube well whereupon they rushed to the tube well and saw that Bilendra @Virendra, Bhura and Sukhpal were standing close to the cot of the deceased having country made pistol in their hand. In the meantime Tara Chand also came there. On their exhortation Bilendra fired a shot which hit the chest of the deceased Bijendra and all the accused fled away towards west side. The witnesses saw very well and identified the accused in the torch and moonlight.

16. Before adverting to the evidences, it will be apposite to refer the law laid down by Hon'ble Supreme Court regarding evidentiary value of F.I.R.

17. In para 12 of the judgment in the case of **Thulia Kali v/s State of Tamil Naidu (1972) 3 SCC 393,** Hon'ble Supreme Court has held as under :

"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 standpoint 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 name of eye witnesses present at the scene of occurrence."

Again in **Mehraj Singh v/s State of U.P. (1994) 5 SCC 188**, in para 12 of the judgment Hon'ble Supreme Court has considered regarding evidentiary value of FIR of which relevant part for appreciation of present case is referred as under:

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the name of the eyewitnesses, if any."

18. From the law laid down by Hon'ble Supreme Court in the above referred cases, it is well settled that FIR in a criminal case and particularly in a murder

case is an extremely vital and valuable piece of evidence for the purpose of corroborating/ appreciating the oral evidence led at the trial.

19. PW1 Bholu in cross examination has stated that after hearing sound of fire son and father, both rushed to the tube well. When they reached the tube well Bijendra was not alive. He has further stated that even he did not see him wriggling. He saw him in a dead condition. He has clearly stated that when they arrived at the tube well the three accused were fleeing towards west side. While as per FIR hearing sound of fire PW1 Bholu along with his son PW2 Rajendra reached the tube well, saw the appellant Sukhpal and other accused close to the cot of the deceased very well and identified them in the torch and moon light and on their exhortation co-accused Bilendra fired a shot on the chest of deceased Bijendra. If really this witness was present on the spot at the time of incident then such contradiction would not have crept. Thus, oral testimony of PW1 Bholu with regard to witnessing the appellant at the time of incident is not corroborated with the FIR. In cross-examination he has clearly stated that he saw the accused fleeing from a distance of 50 to 100 meter. As per spot map Ext. Ka-7 the witnesses have been shown at place B which is towards east side of the place of incidence and accused persons have been shown fleeing towards west side from the place of the incidence. According to FIR also after incident accused fled towards west side. Thus, with regard to fleeing of accused towards west side prosecution evidence is consistent. In view of the evidence that after the incident accused fled towards west side and at that time witnesses were towards east side from the accused, in that situation on witnessing only back of accused will be seen and witnessing back in the night from a distance of 50 to 100 meter, accused cannot be identified. This view is fortified from the fact that in FIR including the appellants one Bhura was also named but during investigation his involvement was found false as he was in jail at the time of incident and he has not been charge-sheeted.

20. Thus, keeping in view, the law laid down by Hon'ble Supreme Court in the cases of **Thulia Kali v/s State of Tamil Naidu and Mehraj Singh v/s State of U.P. (supra)**, on consideration of the evidence available on record as discussed above we find that testimony of P.W.1 Bholu does not inspire confidence that he saw the appellant-accused at the time of incident.

21. P.W.2 Rajendra is the informant and alleged eye witness of the incident. In cross examination he has stated that name of Bhura is clearly mentioned in the report which he himself has written, no other person has written it. He has also stated that he did not see Bhura on the spot by face but saw his back who was appearing like Bhura, third person was appearing like Bhura. He has further stated that before today this fact was not mentioned in the report nor disclosed to the Investigating Officer, while as per FIR hearing sound of fire he reached the tube well, saw Bilendra, Bhura and Sukhpal very well and identified them in the torch and moonlight as well as on their exhortation Bilendra fired the shot which hit the chest of deceased Bijendra. Thus, his oral testimony with regard to witnessing Bhura is contradictory to the FIR. If P.W.2 Rajendra was present, saw and identified the accused persons then he would not have named Bhura whose involvement has been found false during

investigation. It appears that when during investigation involvement of Bhura was found false as he was in jail at the time of incident then with regard to witnessing Bhura he has changed his stand by saying that the third person was looking like Bhura so as to justify himself to be eye-witness for the remaining accused. In FIR showing Bhura as an accused and during investigation finding his involvement false casts a serious doubt upon him to be a trustworthy witness and that he launched the prosecution with true facts as the incident had happened. It indicates that actually he did not see the incident and he is not the witness of the incident.

22. There is another aspect also in the case, according to FIR at the time of incident the witnesses i.e. Rajendra and Bholu were looking after irrigation in the adjoining field and hearing the sound of fire they rushed to the tube-well and saw that Bilendra @Virendra, Bhura and Sukhpal were standing close to the cot of the deceased having country made pistol in their hand. On their exhortation Bilendra fired a shot on the chest of the deceased Bijendra. As per spot map Ext. Ka-7 at the time of first fire they were at a distance of 54 steps, naturally in covering the distance of 54 steps some time will be spent. If during odd hours of night accused persons came for committing murder and that too in agricultural field certainly by firing in the air they will not invite attention of other persons and wait for coming of the persons of the locality to come and see the incident. It also does not appear natural that when a fire is made close to a sleeping person he will not awake hearing the sound of fire and try to save himself and persons at a distance of 54 steps hearing the sound will come and exhort the accused then they will cause the incident. For the reasons discussed above also a doubt is created in the mind as to whether the witnesses saw appellant-accused at the time of incident.

23. P.W.2 Rajendra in cross examination has also stated that the second fire on his brother was made when we both were 7-8 steps away from the cot. At that time assailants had not fled towards west side, while P.W.1 Bholu has stated that he saw the assailants fleeing towards west from a distance of 50-100 meters. They entered into a sugarcane field thereafter they were not seen. Thus, the place, where assailants were seen, the evidence of P.W.1 Bholu and P.W.2 Rajendra is not consistent while both had reached together after hearing sound of fire. If the witnesses were present at the time of incident then such contradiction would not have crept in their statement, which further creates a doubt as to them being witness of the incident.

24. Thus, keeping in view, the law laid down by Hon'ble Supreme Court in the cases of **Thulia Kali v/s State of Tamil Naidu and Mehraj Singh v/s State of U.P. (supra),** on consideration of the evidence available on record, as discussed above we find that testimony of PW2 also does not inspire confidence that he saw the incident as well as appellant-accused at the time of incident.

25. It is the prosecution version that accused Bilendra fired a shot on the chest of deceased and at that time appellant was present there. On going through the evidence on record we find that there is no iota of evidence against the appellant with regard to sharing common intention with the co-accused Bilendra in causing the incident.

26. Even in case of role of catching hold and exhortation Hon'ble Supreme

Court in the case of **Balwant Bhai B. Patel vs State of Gujrat & Another (2009) 10 SCC 684**, in para 5 of the judgement has held as under :

"...We are also not unmindful of the fact that allegations of catching hold of an attack victim or of an exhortation are invariably made when the number of injuries on the injured party do not co-relate to the number of accused or in the alternative in an attempt to rope in as many persons as possible from the other side."

27. As per FIR 8-10 days before the incident an altercation had taken place between deceased Bijendra and accused Bilendra, Bhura and Sukhpal which has been supported by P.W.1 Bholu and P.W.2 Rajendra, the informant through their oral testimony. It appears that on the basis of suspicion because altercation had taken place 8-10 days before the incident between deceased and accused persons, appellant has been implicated in the case.

28. In **Digambar Vaishno & Another vs State of Chattisgarh (2019) 4 SCC 522,** Hon'ble Supreme Court in para 15 of it's judgment has held as under:

"14. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of prosecution can't be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance if other circumstances unfailingly point to the guilt."

29. In view of the opinion of the Hon'ble Supreme Court in the above referred case, it is a settled principle of law that suspicion can not take the place of legal proof and burden of proof squarely rests on the prosecution and the general burden never shifts.

30. Considering the facts of the case, attending circumstances, evidence available on record as discussed above and law laid down by Hon'ble Supreme Court, we come to a conclusion that the evidence of P.W.1 Bholu and P.W.2 Rajendra, father and brother of the deceased respectively, is not inspiring confidence with regard to witnessing the appellant-accused at the time of incident. There is no iota of evidence against the appellant for sharing common intention with the main accused Bilendra for committing the offence. Prosecution has failed to prove the charge against appellant. Finding of learned trial court is not based on proper evaluation of evidence on record as such finding of trial court is perverse. Therefore, judgment and order passed by learned trial court is not sustainable and is liable to set aside.

31. Appeal is allowed. The impugned judgment and order passed by learned trial court is set aside. Consequently, appellant is acquitted of the charge under Section 302/34 I.P.C. Appellant is on bail, his bail bond is discharged. Appellant is directed to file personal bond and two sureties to the satisfaction of court concerned in compliance of Section 437-A Cr.P.C.

32. Registry is directed to send a copy of this order and original record to the court concerned for compliance.

(2020)07ILR A25
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.06.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1886 of 2017

Nazeer ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Anjali Dubey, Rajiv Mishra, Rehan Ahamad Siddiqui, Soniya Mishra

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860- Section 375/ 376, POCSO Act 2012- Section 3 & 4 – Rape- Consent - If sexual intercourse is committed by any person with any woman who is under eighteen years of age even with her consent, the prosecution has to prove only the sexual intercourse and such intercourse shall be treated as rape and if such woman is above eighteen years of age, the prosecution has to prove that such sexual intercourse was committed without free consent or will of that woman as required in section 375 IPC.

Where sexual intercourse is committed with a minor even with her consent, the same will constitute the offence of rape and if sexual intercourse is committed with a major without her consent then that too will amount to an offence of rape.

Civil Law - Juvenile Justice (Care and Protection of Children) Rules, 2007 – Rule 12- Determination of victim's age- Neither Code nor IPC or POCSO Act 2012 provides procedure for determination of victim's age. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the '2007 Rules') framed under Section 67 of the Juvenile Justice (Care and Protection of Children) Act 2000 provides procedure for determination of juvenile's age.

Since neither the IPC, the Cr.Pc or POCSO Act provide for the determination of age of a victim, hence the same can be determined as per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

Civil Law - Juvenile Justice (Care and Protection of Children) Rules, 2007 – Oral evidence or any other document for determination of age is impermissible - Trial Court while discarding medical evidence produced by the prosecution, has relied on the ocular testimony of (P.W.-1) and of victim (P.W.-2) who had stated that victim's age, at the time of occurrence was about to sixteen years and also relied on the educational document (photocopy of Mark sheet, issued by Principal, Junior High School), collected by Investigating Officer-Thus document produced by the prosecution is neither proved nor relevant to prove the DoB of the victim. Preparation of this document one day prior to the recovery further creates doubts in prosecution story. The prosecution has failed to produce a document, as required by 2007 Rules (supra) and also in view of law laid down by Supreme Court in Jarnail Singh (supra) and Rajak Mohammad (supra) to prove the DoB of victim.

The provisions of Rule 12 of the 2007 Rules are mandatory and have to be strictly complied with for the purpose of determination of age of the victim and neither any oral evidence or any other document, not proved in accordance with law, can be relied for determination of age. Hence, no reliance can be placed upon the photocopy of the mark sheet of class eight of the victim produced by the investigating officer which was not proved in accordance with law.

Civil Law - Juvenile Justice (Care and Protection of Children) Rules, 2007 –

Medical Opinion regarding age- May vary from person to person- Consideration of medical opinion regarding age of any person, based on medical and radiological evidence cannot be treated accurate and exact. Such determination of age by doctor may vary in view of race, gender, geographical area, nutritional status and other factors like colour of pubic and armpit hair, development of breast and other changes in the body of the victim. Such variation may be of one or two year of either side.

Medical opinion cannot conclusively determine the age of the victim and the same may vary from person to person on basis of biological factors.

In rape case only on the account of minor contradictions in prosecution evidence, delay in FIR, non examination of independent witnesses and delay in medical examination of victim, prosecution case can not be thrown out and prosecution can succeed only on the testimony of victim, if her statement is unblemished and reliable. Prosecution case is not supported by the medical evidence rather it is based only on the ocular testimony of victim. Prosecution has not proved or produced the statement of victim recorded by the Magistrate under Section 164 of the Code.Victim's admission that her statement under Section 161 of the Code was recorded under threat has further made the prosecution story unreliable, statement of sole eyewitness, victim (P.W.-2), is contradictory and not reliable, she was more than eighteen years at the time of occurrence, prosecution case is not supported by the medical evidence, FIR was lodged by P.W.-1 not only by delay of more than three days but its contents are contradictory to the prosecution story, prosecution has suppressed the important evidence and also withheld important witnesses.

Although the prosecution can bring home the offence of rape upon the sole testimony of the prosecutrix but the same has to be reliable and creditworthy but where the oral evidence is contradictory and not corroborated by medical evidence, FIR and other evidence, then the same cannot be held to be reliable for proving the offence of rape.

(Para 24, 27, 28, 29, 30, 33, 38)

Criminal appeal allowed. (E-3)

Case law relied upon/ Discussed: -

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

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

3. Jaya Mala Vs Home Secy. J & K & ors. AIR (1982) SC 1297

4. Santosh Prasad @ Santosh Kumar Vs St. of Bih. AIR (2020) SC 985

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

1. This Criminal Appeal, under Section 383 of the Code of Criminal Procedure 1973 (hereinafter referred to as "Code'), has been filed by the accused-appellant Nazeer (hereinafter referred to as "appellant') through Jail Superintendent, Kheri, against the judgment and order dated 07.09.2017, passed by the Additional District and Sessions Judge, Court No.2, Lakhimpur-Kheri, in Criminal Case (Special Session Trial) No.04 of 2015 (State of U.P. vs. Nazeer), arising out of Case Crime No.993 of 2014 under Sections 363, 366, 376 IPC, Section 3 (2) (5) Prevention of SC/ST of Atrocities Act, 1989 (hereinafter referred to as 'SC/ST Act) and Section ¾ Prevention of Children From Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act'), Police Station Nighasan, District Lakhimpur-Kheri, whereby the appellant has been convicted and sentenced for seven years rigorous imprisonment and fine of Rs.7000/- for offence under Section 363 IPC, for offence under section 366 IPC for ten years rigorous imprisonment with fine of Rs.10,000/- and for offence under Section 376 IPC read with ¾ POCSO Act ten years rigorous imprisonment with fine of

Rs.15,000/- with further direction that all the sentences shall run concurrently and ¾ of total fine shall be payable to the victim. It has further been directed that appellant has to undergo four months rigorous imprisonment in default of payment of fine for offence under Section 363 IPC, five months rigorous imprisonment, in default of payment of fine for offence under Section 366 IPC and seven months rigorous imprisonment in default of payment of fine for offence under Section 376 IPC read with ¾ POCSO Act with further direction that period of detention already undergone in jail shall be set off in aforesaid sentences.

2. The prosecution case, in brief, is that the victim (P.W.-2), daughter of Sarju Prasad, (P.W.-1), resident of village Dakherwa Chauraha, Police Station Nighasan, District Lakhimpur Kheri, was student of Class Xth of Kanti Devi Intermediate College, Lakhimpur. On 03.12.2014 at about 9:00 a.m., she was going to her college to take six monthly examination. As she was on the way to her college, appellant Nazeer, who was working as servant in her house, along with two other person, kidnapped her on the point of knife. A written complaint dated 05.12.2014 (Ex.Ka-1) was lodged by Sarju Prasad (P.W.-1) at Police Station Nighasan at 14:40 p.m. on 06.12.2014 with further allegation that he had apprehension that her daughter would be raped and murdered. It was further stated in complaint (Ex.Ka-1) that the whole occurrence was within the knowledge of appellant's brothers Zibrail, Wazir, Bushir, Israil and Rafiq and Wazir and Zibrail had advised him (P.W.-1) not to initiate any criminal proceedings as his daughter would be handed over till 8:00 a.m. on 05.12.2014.

3. On the aforesaid complaint (Ex.Ka-1), chik report (Ex.Ka-5) was prepared, information was entered in General Diary (Ex.Ka-6), Case Crime No.993 of 2014 under Sections 363, 366 IPC and Section 3 (1) (10) SC/ST Act was registered against appellant Nazeer and two unknown persons and the investigation of the case was entrusted to Deputy Superintendent of Police (In short 'Dy.S.P.') Ram Asrey (not examined) who visited the place of occurrence and prepared sight plan (Ex.Ka 9).

4. During investigation, victim (P.W.-2) was recovered and appellant Nazeer was also arrested on 09.12.2014 at about 5:40 p.m. by Station House Officer (In short 'SHO') Ram Kumar Yadav (not examined) accompanied with Constable 285 Kamlesh Kumar, (not examined) lady Constable 758 Shama Parveen (not examined), in the presence of Sarju Prasad (P.W.-1) and his wife Smt. Anita Devi (victim's mother) (not examined) near Bus Station Paliya, Police Station Nighasan and recovery memo (Ex.Ka-10) was prepared by S.H.O. Ram Kumar Yadav and both the Victim (P.W.-2) and appellant Nazeer were sent for medical examination who were medically examined on same day. Victim (P.W.-2) was examined by Dr. Pushplata (P.W.-4) who after examination, prepared medico-legal examination report (Ex.Ka-3). She (P.W.-2) was referred to Radiological Department for X-ray of her right knee, wrist and elbow joint in order to find out her radiological age. The radiological examination of victim was conducted under supervision of Dr. V. K. Verma (P.W.-3) on 10.12.2014 and on the basis of X-ray plate (Material Ex.Ka-1) X-ray report (Ex.Ka-2) was prepared. In medical examination report (not proved by prosecution) appellant's age was noted as seventeen years and no injury was found either on his body or his genital organs.

5. Victim's (P.W.-2) vaginal smear and cervical smear was also sent to Pathology Department, District Hospital,

Kheri, to find out the spermatozoa; but according to report of pathologist no spermatozoa was seen either dead or alive.

6. Meanwhile, on 15.12.2014, investigation was transferred to Dy.S.P. Mohd. Ibrahim (P.W.-6) who produced the victim before the Judicial Magistrate, Kheri on 17.12.2014, her statement under Section 164 of the Code was recorded and after recording of her statement under Section 164 of the Code, she was handed over to her father (P.W.-1) on 18.12.2014.

7. After investigation, charge sheet (Ex.Ka-8) under Sections 363, 366, 376 IPC, 3 (2) (5) SC/ST Act and ¾ POCSO Act, 2012 was filed against the appellant Nazeer before the trial Court who took cognizance of the case.

8. Learned counsel for both the parties were heard on the point of charges. Trial Court framed charges for offences under Sections 363, 366, 376 IPC, 3 (2) (5) SC/ST Act and ¾ POCSO Act, 2012 from which the appellant denied and claimed for trial.

9. Prosecution in order to prove its case, produced Sarju Prasad (P.W.-1), victim (P.W.-2), Dr. V.K. Verma (P.W.-3), Dr. Pushplata (P.W.-4), Head Constable Bhupendra Bahadur Singh (P.W.-5) and Mohd. Ibrahim (P.W.-6), wherein Sarju Prasad (P.W.-1) and Victim (P.W.-2) are witnesses of fact and rest are formal witnesses.

10. After conclusion of prosecution evidence, appellant was examined under Section 313 of the Code wherein he denied the prosecution story and statement of witnesses and stated that he has been falsely implicated due to previous enmity. The learned trial Court after due hearing to both the parties and considering the evidence and material available on record convicted and sentenced the appellant as above vide impugned judgment and order. Aggrieved by the said judgment and order, the appellant has preferred this appeal.

11. Heard Ms. Soniya Mishra and Shri Rajiv Mishra, learned counsels for the appellant and Shri Aniruddh Singh, learned AGA-I for the State through video conferencing and perused the record.

12. Learned counsel for the appellant has submitted that the appellant who was servant of Sarju Prasad (P.W.1) is innocent and has been falsely implicated due to a dispute arose regarding wages. Learned counsel further submitted that victim was aged about more than 18 years. She herself fell into love with the appellant and being consenting party she eloped with the appellant aged about 17 years. He further submitted that victim in her statement under Section 164 of the Code has not stated regarding any resistance made by her at the time of occurrence whereas her statement was recorded after 7-8 days of her recovery. Learned counsel further submitted that in medical examination neither any symptom of rape nor any injury was found on any part of victim's body. Learned counsel further submitted that the age of victim was not proved by the prosecution and neither any proof of birth certificate was filed nor any extract of Scholar Register was produced by the prosecution before the trial Court or authority/Principal issuing mark-sheet (age proof) as alleged by the prosecution whereas according to medico-legal examination, the victim at the time of examination was aged about 18 years who according to variation of age as in the light

of well settled principle of medical science, may be up to 20 years. Learned counsel further submitted that investigation was not properly conducted and prosecution has suppressed the material evidence during trial. Learned counsel further submitted that prosecution has neither examined any independent witnesses nor the police witnesses who recovered the victim. Learned counsel further submitted that FIR was lodged after considerable delay without any explanation ; Suraj Prasad (P.W.-1) is not an eye witness of the occurrence whereas the statement of victim (P.W.-2) is self-contradictory, untrustworthy and not supported by medical evidence. Learned counsel further submitted that the trial Court has failed to consider and appreciate the evidence of prosecution in view of settled principle of law. The impugned judgment and order of the trial Court is illegal and unjustified which is liable to be set aside and appeal be allowed.

13. Per contra, learned AGA vehemently opposing the submission of learned counsel for the appellant has submitted that prosecution has succeeded to prove that the victim was below 16 years at the time of occurrence. Learned AGA further submitted that there is no material contradiction between medical and ocular evidence and since the victim's medico-legal examination was conducted after 24 hours, non-presence of injury or spermatozoa on private parts of the victim cannot be held as decisive factor for offence of rape. Learned AGA further submitted that sole testimony of victim is trustworthy and reliable and is sufficient for conviction of the appellant. Learned AGA further submitted that the judgment of trial Court is well discussed, well reasoned, it requires no interference and the appeal is liable to be dismissed.

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

15. Sarju Prasad (P.W.-1), informant supporting the prosecution story, has stated that at the time of occurrence at about 9:00 a.m. in the morning , his daughter (P.W.-2), aged about 16 years, student of Class Xth, was going to Kanti Devi Intermediate College, Lakhimpur Kheri to take her six monthly examination. As she did not return, he enquired to his relative brother-in-law, and to his each relative but could not succeed to know the whereabouts of her daughter. He further stated that during search of his daughter (P.W.-2), he learnt that appellant Nazeer, resident of village Lakhahee who used to visit his house, had also disappeared since the date of occurrence. He further stated that his wife was village Pradhan (head woman of village) at the time of occurrence and appellant Nazeer used to ride the motorcycle to carry his wife (victim's mother). He further stated that during search, Zibrail and Wazir, brothers of appellant, requested him not to proceed for criminal proceedings as they would produce his daughter by 8:00 a.m. on 05.12.2014 and when the whereabouts of his daughter was not traced out till 8:00 a.m. of 05.12.2014, he approached the police chauki (police out post) Dakhina to lodge the complaint. He further stated that he was advised by the police of concerned police out post of Dakhina to approach Police Station Nighasan for lodging the complaint, thereafter he rushed to Police Station Nighasan and lodged a written complaint (Ex.-Ka-1). He further stated that after four days from lodging the written complaint, he was informed that his daughter was recovered from Bus Station Paliya at Nighasan and upon that

information he along with his wife rushed to Bus Station Paliya at Nighasan and found his daughter in presence of Constable, Lady Constable and Police Officer (Darogaji). Stating that after completion of recovery formality his daughter was sent for medical examination to District Hospital Kheri and she was handed over to him after 7-8 days by the police. He further stated that her daughter had told him that appellant had forcefully kidnapped her from road. During cross examination, this witness admitted that appellant was his servant for Rs.1500/-p.m. to carry out his wife who was village Pradhan at that time. He further admitted that on the day of occurrence when his daughter (victim) did not return till 6:00 p.m. he inquired her whereabouts from his wife, his real brother-in-law Banwari Lal and Dalla who failed to give any clue. Admitting further that his daughter was married after two years of the occurrence he further admitted that he had not seen the occurrence.

16. Victim (P.W.-2), sole eye witness of the prosecution, has stated that at the time of occurrence at about 8:30 a.m., she was going from her house to school to take six-monthly examination and as she reached near Malti Devi Temple, appellant who used to visit her house, met and commanded her on the point of knife to sit on his motorcycle and to go with him according to his command otherwise he would eliminate her. She further stated that due to fear she could not raise any alarm; appellant carried her on motorcycle to Paliya and thereafter from Paliya to Punjab by train. She further stated that as and when she tried to raise alarm or to complain anyone, appellant threatened her that if she would raise any alarm or complain anyone he would kill her brother. She further stated that appellant booked a room and stayed there in Punjab for 3-4 days and during that period he committed rape (bura kaam) against her will. She further stated that he had not sufficient money to stay there, he asked her to return home for money and as they reached Paliya Bus Station, police met and recovered her. She further stated that her father had also reached there and after some formality at bus station, she was sent to District Hospital for medical examination where she was medically examined and her X-ray was also conducted. She further stated that her statement under Section 164 Cr.P.C. was also recorded by the Judicial Magistrate, Kheri after 7-8 days of the medical examination and she was handed over to her parents. She further stated that, due to threat given by Station House Officer, Police Station Nighasan, she, in her statement under Section 164 of the Code, had stated that one Rajesh Verma was also involved with appellant in taking her away. In cross examination, she too admitted that appellant was a servant in her house who used to carry her mother by motorcycle. Stating that she was carried away by the appellant from Paliya to Punjab by train she further stated that she did not know whether appellant had traveled with her with ticket or without ticket. She further stated that she did not know when she reached at Punjab. In cross examination she also stated that she had not stated before the Magistrate in her statement under Section 164 of the Code that on the request of appellant Nazeer she had given her consent to follow him (main tayaar ho gayi) and if the said fact has been mentioned in her statement under Section 164 of the Code, she could not assign any reason for such statement.

17. She (victim) further stated that statement given by her before the Magistrate that Nighasan Police brought her and appellant from Punjab, was not given during her consciousness as the

appellant had administered her some intoxicants, hence she was not in a position to tell anything in this regard. She further stated that she was accompanied by lady Police Constable Shama Parveen when Nighasan Police had brought her. She further stated that the appellant took her away from Malti Devi temple and neither any person acquainted with her nor any police personnel met her on the way. She again stated that she wanted to raise alarm but appellant was threatening her that if she would raise any alarm, he would kill her along with her brother. She also stated that she did not know whether or not she had taken any meal during journey from Paliya to Punjab and also she did not know what time would have been taken in the journey. In her cross examination, she further denied that she had given any statement to Investigating Officer that appellant Nazeer would have asked her to go to Punjab at any point of time prior to the occurrence and if such statement had been recorded by Investigating Officer, she could not assign any reason.

18. Dr. Pushplata (P.W.-4), lady doctor of District Hospital, Lakhimpur Kheri, has stated t hat on 09.12.2014, victim (P.W.-2), brought by Lady Constable 758 Shama Parveen, was medically examined by her. She further stated that at the time of medical examination, the victim was normal and was in full conscious; she (P.W.-2) was 158 cm in height, 59 kg in weight; her pubic and armpit black hair were present ; and her breasts were fully developed. She further stated that victim had already changed her clothes so many times and there was no mark of injury on her body. She further stated that in medical examination her hymen was torn, old and healed and no mark of injury was found either on the genital parts or any part of her body and no sign of bleeding through vaginal or discharge was found. She further stated that according to victim, the occurrence had taken place on 03.12.2014. This witness further stated that she had prepared vaginal smear and cervical smear and sent to pathology department for confirmation of spermatozoa and for determination of victim's age, she (P.W.-2) was referred for X-ray of right knee, right wrist and right elbow. She further stated that she had prepared medico-legal examination report (Ex.Ka-3) and also prepared supplementary medical report (Ex.Ka-4) on the basis of pathological report and X-ray report. She further stated that in pathological report, no live or dead spermatozoa was found and as per X-ray plate and report of radiologist, the age of victim was found to 18 years. Lastly, this witness stated that no definite opinion regarding rape could be given by her. In cross examination, she stated that the victim might be 18 years old and she (P.W.-4) further stated that victim's age might also be 16 years or 20 years.

19. Dr. V.K. Verma (P.W.-3), Radiologist, District Hospital, Lakhimpur Kheri stated that radiological examination (X-ray) of victim's (P.W.-2) right wrist, right knee and right elbow was conducted on 10.12.2014 in his supervision by X-ray technicians and on the basis of X-ray plates (Material Ex.-1) it was found that epiphysis of right wrist, right knee and right elbow of victim was fused with their corresponding bones. He further stated that on the basis of X-ray plate he had prepared a report (Ex.Ka-2).

20. Head Constable Bhupendra Bahadur Singh (P.W.-5) has stated that on 06.12.2014, he was posted as Constable

Moharrir at Police Station Nighasan, District Lakhimpur Kheri and prepared chik report (Ex.Ka-5) on the basis of written complaint lodged by Sarju Prasad (P.W.-1) pertaining to Case Crime No.993 of 2014 under Sections 363, 366 IPC and under Section 3 (1) (10) SC/ST Act and the said information was entered in G.D. No.24 (Ex.Ka-6) by Head Constable Ram Lakhan Rawat.

21. Dy. S.P Mohd. Ibrahim, Investigating Officer (P.W.-6) has stated that on 15.12.2014, investigation of this case was handed over to him by Ex-Investigating Officer, Dy. S.P. Ram Asrey. He further stated that after perusal of medico-legal examination report of victim, he produced the victim followed by lady Constable before the Magistrate on 17.12.2014 for her statement under Section 164 of the Code and copied the same (statement of victim under section 164 of the Code) in Case Diary. He further stated that an application along with educational certificate for custody of victim was filed by her parents before the concerned Magistrate and in compliance of direction passed by the Magistrate, the victim was handed over to her parents on 18.12.2014, after preparation of handing over certificate (Ex.Ka-4). He further stated that he had copied affidavit dated 03.01.2015 filed by the victim in Case Diary and also recorded the supplementary statement of Sarju Prasad (P.W.-1) and statement of lady Constable Shama Parveen, who had recorded the statement of victim under Section 161 of the Code. He also stated that after investigation, he had filed charge sheet (Ex.Ka-8) against the appellant under Sections 363, 366, 376 IPC read with Section 3/4 POCSO Act and Section (2) (5) of SC/ST Act. During examination, he has further stated that site plan (Ex.Ka-9) was prepared by the then Investigating Officer, Dy.S.P., Ram Asrey and recovery memo of victim (Ex.Ka-10) was prepared by Sub-Inspector, Ram Kumar Yadav.

22. Appellant has been found guilty by the trial Court for offence of kidnapping and rape with victim below to 18 years old and has been convicted under Sections 363,366 and 376 IPC read with Section 3/4 POCSO Act 2012. Section 361 IPC defines offence of kidnapping, Section 375 IPC defines offence of rape and Section 3 POCSO Act defines penetrative sexual assault with child. Section 363 IPC deals punishment of kidnapping from lawful guardianship, Section 366 IPC deals with punishment for offence of kidnapping, abducting or inducing woman to compel her marriage, and Section 376 IPC read with Section 4 POCSO 2012 Act deals with punishment of offences of rape and penetrative sexual assault with child. Sections 361, 363, 366, 375 and 376 IPC (prior to Criminal Law Amendment Act 2018) and Section 3 and 4 POCSO Act 2012 are as under :

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

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

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

375. Rape.--*A man is said to commit "rape" if he--*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:--

First.--*Against her will.*

Secondly.--*Without her consent.*

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

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

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

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

Seventhly.--*When she is unable to communicate consent.*

Explanation 1.--*For the purposes of this section, "vagina" shall also include labia majora.*

Explanation 2.--*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication,*

communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

***Exception 1.**--A medical procedure or intervention shall not constitute rape.*

***Exception 2**.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

***376. Punishment for rape** (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.*

(2) .....

Section 3 and 4 POCSO Act 2012

Section 3. Penetrative sexual assault.

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

***Section 4. Punishment for penetrative sexual assault**.*

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

23. Thus aforesaid provisions show that if sexual intercourse is committed by any person with any woman who is under eighteen years of age even with her consent, the prosecution has to prove only the sexual intercourse and such intercourse shall be treated as rape and if such woman is above eighteen years of age, the prosecution has to prove that such sexual intercourse was committed without free consent or will of that woman as required in section 375 IPC. Trial Court has convicted the appellant as he had kidnapped the victim who was under eighteen years of age. Thus in this case prosecution has to prove beyond reasonable doubt, firstly whether sexual intercourse was committed with victim and secondly whether victim was under eighteen years of age at the time of offence.

24. Neither Code nor IPC or POCSO Act 2012 provides procedure for determination of victim's age. Alleged offence was committed on 03.12.2014. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the '2007 Rules') framed under Section 67 of the Juvenile Justice (Care and Protection of Children) Act 2000 provides procedure for determination of juvenile's age. This provision is as under :

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

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

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

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

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

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

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

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

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

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

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

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

*"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. I**t is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."** (Emphasis supplied)*

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

"6. On the other hand, we have on record the evidence of Dr. Neelam

Gupta (P.W.8) a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

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

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

28. In this case the trial Court has held that prosecution had succeeded to prove that victim, at the time of occurrence, was under the age of eighteen years and for determining her age, trial Court while discarding medical evidence produced by the prosecution, has relied on the ocular testimony of Sarju Prasad (P.W.-1) and of victim (P.W.-2) who had stated that victim's age, at the time of occurrence was about to sixteen years and also relied on the educational document (photocopy of Mark sheet, issued by Principal, Junior High School), collected by Investigating Officer, wherein victim's date of birth was mention as 16.10.1999. This document is photo copy of class eighth mark sheet of victim; it is neither a matriculation (or equivalent) certificate nor certificate issued by the school first attended by the victim. In the bottom of this photocopy mark sheet a separate note dated 08.12.2014 has been endorsed by the Pradhanadhypak (principal) Gayatri Devi Junior High School Lakhan Purva, Lakhimpur Kheri that DoB of victim is 16.10.1999. Neither Sarju Prasad (P.W.-1) nor victim (P.W.-2) have stated that victim (P.W.-2) was student Gayatri Devi Junior High School Lakhan Purva, Lakhimpur Kheri at any point of time. Prosecution has neither produced the extract of scholar register showing the the relevant entries of DoB nor produced the Principal of that Junior High School to prove the DoB of victim. Thus document produced by the prosecution is neither proved nor relevant to prove the DoB of the victim. In addition to above victim was recovered on 09.12.2014 but this document which was produced by the P.W.-1 before the concerned Magistrate on 18.12.2014, as stated by Mohd. Ibrahim (P.W.-6), was issued by concerned Pradhanadhyapak on 08.12.2014 i.e. one day prior to alleged recovery of victim. Preparation of this document one day prior to the recovery further creates doubts in prosecution story.

29. It is also pertinent to note at this juncture that according to prosecution, as stated by P.W.-1 and P.W.-2, victim was student of class Xth (Matriculation) of

Kanti Devi Inter College, Lakhan Purva, Lakhimpur Kheri at the time of occurrence and she was going to her college to take six monthly examination on 03.12.2014; which means that victim would have appeared in High School (Matric) examination in 2014-2015. Both these witnesses were examined before trial Court in 2017. Neither Matriculation (High School) certificate of the victim was produced by the prosecution nor any explanation was given by the prosecution for its non production. It was also not stated by the prosecution that whether or not, after this occurrence, victim appeared in High School examination. In addition to above prosecution has also failed to produce relevant extract of birth and death register, maintain in the village panchayat Dakherwa Chauraha (victim's village panchayat), to show the DoB of victim whereas victim's mother was Pradhan (Headman) of the victim's village panchayat. Thus the prosecution has failed to produce a document, as required by 2007 Rules (supra) and also in view of law laid down by Supreme Court in **Jarnail Singh (supra)** and **Rajak Mohammad (supra)** to prove the DoB of victim.

30 . So for as the consideration of medical opinion regarding the age of victim at the time of occurrence is concerned, in view of law laid down by the Supreme Court in **Jarnail Singh (supra) i**f the prosecution fails to prove her age by a document as required in sub rule (i), (ii) and (iii) of aforesaid Rule 12, medical evidence shall be relied upon as last option to determine her age. According to Dr. Pushplata (P.W.-4) victims' age, at the time of examination, was 18 years. It is also pertinent to note that opinion regarding age of any person, based on medical and radiological evidence can not be treated accurate and exact. Such determination of age by doctor may vary in view of race, gender, geographical area, nutritional status and other factors like colour of pubic and armpit hair, development of breast and other changes in the body of the victim. Such variation may be of one or two year of either side.

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

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

32. Dr. Pushplata (P.W.-4) has also admitted that victim's age may be 16 or 20 years. To arrive on this conclusion Pw4 considered the facts that victim was 158 cm in height and 59 kg in weight; her pubic and armpit black hair were present ; her breasts were fully developed ; and all the epiphysis of victim's right knee, right wrist and right elbow were fused. Prosecution has relied on the evidence of Dr. V.K.Verma (P.W.-3) and Dr. Pushplalta (P.W.-4) and various documentary evidence i.e. radiological report,(Ex.2), medico-legal examination report (Ex.3) and supplementary medico-legal report (Ex.4). In view of the aforesaid discussion, I am of the considered view that victim's age at the time of the occurrence was more than eighteen years and the finding of trial court that victim was below than eighteen years is not in accordance with law laid down by the Supreme Court i**n Jarnail Singh (supra) Razak Mohammad (supra) and Jaya Mala (supra).**

33. It is settled principle of law in rape case only on the account of minor contradictions in prosecution evidence,

delay in FIR, non examination of independent witnesses and delay in medical examination of victim, prosecution case can not be thrown out and prosecution can succeed only on the testimony of victim, if her statement is unblemished and reliable. P.W.-1 has admitted that he has not seen the occurrence. He has also admitted that upon information given by police that victim was recovered, he with his wife found victim with a Constable, one lady constable and Darogaji at Bus Station. Thus this witness is neither witness of occurrence nor of recovery of the victim. Prosecution has also neither produced any police personnel who recovered the victim nor the investigating officer who visited the place of occurrence just after the occurrence and prepared the site plan (Ex.9).

34. Victim's has been found as eighteen years or above. According to Dr. Pushplata (P.W.-4) neither any mark of injury was found on the body nor on the genital part of the victim. According to this witness (P.W.-4) hymen of the victim was old torn and healed and no opinion regarding rape could be given. Thus prosecution case is not supported by the medical evidence rather it is based only on the ocular testimony of victim.

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

"5.2. From the impugned judgments and orders passed by both the courts below, it appears that the appellant has been convicted solely relying upon the deposition of the prosecutrix (PW5). Neither any independent witness nor even the medical evidence supports the case of the prosecution. From the deposition of PW1, it has come on record that there was a land dispute going on between both the parties. Even in the cross-examination even the PW5 - prosecutrix had admitted that she had an enmity with Santosh (accused). The prosecutrix was called for medical examination by Dr. Renu Singh - Medical Officer and PW7 - Dr. Renu Singh submitted injury report. In the injury report, no sperm as well as RBC and WBC were found. Dr. Renu Singh, PW7 - Medical Officer in her deposition has specifically opined and stated that she did not find any violence marks on the body of the victim. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out (so stated in the examination-in-chief). However, in the cross-examination, she has stated that there was no physical or pathological evidence of rape.

5.3. As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical

report/evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties.

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

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

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

12. Reference has been made in ***Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] : (AIR 1996 SC 1393)*** *to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is s extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."*

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

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status

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

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

36. In view of the aforesaid law laid down by the Apex Court, it has to be seen whether the evidence of the victim (P.W.-2) is unblemished, reliable, trustworthy and of sterling quality to such extent to convict the appellant only on her statement. According to victim, she was kidnapped by the appellant on the point of knife, when she was going to her school and was passing nearby the Malti Devi Temple and was taken away by the appellant by motorcycle but neither any motorcycle nor knife was recovered by the police during investigation. Further, the victim was recovered on 9.12.2014 and nothing was recovered from her possession; she had not stated that at the time of occurrence, she was carrying any extra dress or cloths with her; she had also not stated that any dress was purchased for her between 03.12.2014 to 9.12.214; she was produced before Dr. Pushplata (P.W.-4) for medical examination on 09.12.2014 and this witness (P.W.-4) has stated that the victim had changed her dress so many times. It means that either victim had carried some extra dress with her or it was purchased for her during aforesaid period. Further, she (P.W.-2) stated that she was carried by appellant from Paliya to Punjab but

she expressed her ignorance whether they had traveled with ticket or without ticket and she further stated that she did not know whether she had taken any meal during journey or not. She further admitted that her statement was recorded before Magistrate after 7-8 days of her recovery. Stating that she had not stated before the Magistrate that as the appellant asked her to go with him she had become ready and if such statement was recorded by Investigating Officer she could not assign any reason in this regard, she further stated that statement given by her before Magistrate that she and appellant Nazeer were arrested and brought by Nighasan police from Punjab, was not given by her during consciousness because at the time of statement before the Magistrate she was under influence of intoxication administered by the appellant. Prosecution has not proved or produced the statement of victim recorded by the Magistrate under Section 164 of the Code. Dr. Pushplata (P.W.-4) has clearly stated that victim was fully conscious at the time of her medical examination. Thus statement of victim that she was under influence of intoxication, at the time of her statement,recorded after 7-8 days of her recovery, makes her statement unreliable. In addition to above she has further admitted that Darogaji (SHO) of Nighasan Police Station, had threaten her to implicate one Rajesh Verma as an accused in her statement. Thus victim's admission that her statement under Section 161 of the Code was recorded under threat has further made the prosecution story unreliable, especially when the prosecution has failed to produce SHO of Nighasan Police Station, who recovered the victim and Dy. S.P. Ram Asrey, who was investigating the case at the time of recovery of the victim.

37. Further as discussed above that victim was recovered on 09.12.2014, but her mark-sheet, to prove her date of birth got prepared on 08.12.2014 and prosecution has neither examined the Investigating Officer Sri Ram Asrey nor any member of police team who recovered the victim who could be cross-examined by the defence counsel as to when and from where the victim was recovered. Further, the prosecution has also failed to explain that if written complaint (Ex.1), prepared on 05.12.2014 and filed at concerned police station on that day, why the FIR was not registered on that day and it was registered on 06.12.2014 at 14.40 p.m. Further P.W.-1 is not an eyewitness but in FIR it was mentioned by him that victim was kidnapped by appellant and two unknown person. P.W.-2 had not stated the presence of any person other than the appellant. She has also stated that no person, known to her had met on the way. Further it is not the case of prosecution that any person had witnessed the occurrence and told P.W.-1 as to who and how many person had kidnapped the victim. P.W.-2 has also not stated the involvement any person other than the appellant. In view of these defect and contradictions in the FIR, the prosecution case further has become doubtful.

38. Thus in the light of above discussion, it is clear that statement of sole eyewitness, victim (P.W.-2), is contradictory and not reliable, she was more than eighteen years at the time of occurrence, prosecution case is not supported by the medical evidence, FIR was lodged by P.W.-1 not only by delay of more than three days but its contents are contradictory to the prosecution story, prosecution has suppressed the important evidence and also withheld important witnesses. Trial Court has not properly discussed the prosecution evidence. Prosecution has miserably failed to prove its case beyond reasonable doubt that appellant had kidnapped and raped the victim. Appellant is entitled to be acquitted.

39. I am, therefore, unable to uphold the conviction and sentence of the appellant. Impugned judgment and order passed by the Trial Court is accordingly set aside. The appellant Nazeer is acquitted. Consequently appeal is **allowed.**

40. He is in jail. He is directed to be released forthwith unless wanted in any other case.

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

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

(2020)07ILR A43
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 6279 of 2018
and
Criminal Appeal No. 6276 of 2018

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

Counsel for the Appellant:
Sri Mohammad Belal, Sri Agni Pal Singh

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

Standing Order No. 1/89 Dated 13/06/1989 (Issued by the Narcotics Department) - The accused were allegedly having various bundles of charas in their possession and it is no where mentioned in the recovery memo that the samples were taken from all the packets of the recovered charas from the possession of the accused persons. The prosecution was required to prove that samples were taken from all the packets recovered from the accused appellants and if this fact was not proved by the prosecution, the conviction of the appellants cannot be upheld. It is clear from the record that samples were not made for chemical analysis from all the packets recovered from the appellants and therefore, it cannot be conclusively held that all the packets recovered from the accused, were charas as alleged by the prosecution.

It was incumbent upon the prosecution to obtain samples from all the packets of the recovered contraband and not having done so it cannot be proved that the contraband was present in all the packets.

Criminal Law-Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 55 - Link Evidence-It is nowhere mentioned in the impugned judgment and order or in the lower court record that Maalkhana Register was produced before the Trial Court.
Failure of the prosecution to bring on record the Malkhana register, which is an important link in the case of the prosecution, and to lead oral evidence pertaining to the compliance of the provision of Section 55 of the Act casts a serious doubt upon the recovery of the contraband from the accused.

Criminal Law-Code of Criminal Procedure, 1973- Section 100- Independent witnesses-The alleged recovery was made from the accused persons from a busy Shashtri Chauraha in front of LIC office in broad day light at 9:00 A.M., but no public witness i.e. independent witness was produced in support of the prosecution story regarding the alleged recovery from the accused persons.

Non association of any independent witnesses by the prosecution at the time of the alleged recovery, although independent witnesses could have been easily available in the busy place, renders the recovery doubtful.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 57 - No such evidence is led by the prosecution in the present case during the trial that any report was ever submitted about the such arrest and seizure in compliance of the Section 57 to the superior officer.

Non- compliance of the provisions of Section 57 of the Act is bound to reflect on the credibility of the case of the prosecution and render it doubtful. (Para 14, 15, 16, 18, 19, 20, 22)

Criminal Appeals allowed. (E-3)

Case Law relied upon/ Discussed: -

1. Jitendra Singh Rathore Vs St. of U.P. decided on 8th January, 2014 (Crl. Appeal No. 4509 of 2006)

2. St. of Orissa Vs Sitansu Sekhar Kanungo (2003) 1 JIC 329 (paragraphs 3 and 4)

3. Gurbax Singh Vs St. of Har., AIR (2001) SC 1002

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

1. Heard Sri Agni Pal Singh, learned counsel for the appellant, Sri Ravi Prakash Pandey and Sri Ram Adhar Ram, learned A.G.A. appearing for the State.

2. Both the aforementioned criminal appeals are being decided by a common judgment and order as these two appeals were heard together and have been filed against one and the same judgment and order dated 29.01.2018 passed by the Trial Court.

3. These two appeals have been filed by the accused appellants challenging the judgment and order dated 29.01.2018 passed by learned Special Judge (D.A.A. Act)/Additional Sessions Judge, Etawah in Special Case No. 34 of 2015 (State Vs. Satendra Singh and another) convicting and sentencing the appellant under Section 8/20 NDPS Act for ten years' rigorous imprisonment and fine of Rs. 1,00,000/- with default stipulation that in case of non payment of the fine appellant will undergo six months additional rigorous imprisonment.

4. In brief the prosecution story is that on 23.07.2015 Sub Inspector Mohd. Afzal along with his companion police constable Pradip Kumar while doing checking he met with SI Pankaj Kumar, Constable Manoj Kumar and Nand Lal of Police Station Civil Lines who were on checking duty. On a motorcycle No. U.P. 78 DK 8780 two persons came with two bags hanging on their backs from Shastri Chauraha towards railway station and seeing police team they began to turn their motorcycle back to Shastri Chauraha. At about 9:10 A.M. (morning) they were caught before LIC office. From their bags the police found charas (cannabis). In the bag of accused appellant Satyendra Singh there was 1.336 kgs of charas wrapped in five polythene (panni) packets and in the bag of Gajendra Singh there was 1.264 kgs. of charas in four round packets and one deflated packet. Out of both the packets two samples were prepared each weighing 30 Gms. Under NDPS Act case was lodged against them. Investigation was conducted and charge sheet was submitted in Court. The Special Court of NDPS Act took the cognizance of the offence.

5. On 16.12.2015 charges were framed against the accused appellants under Section 8/22 NDPS Act. The accused

appellants denied the charges and claimed to be tried.

6. In support of the case from the side of prosecution as many as four witnesses were examined i.e. PW-1 Sub Inspector Mohd. Afzal, PW-2 Constable Pradip Kumar, PW-3, Constable Ravindra Singh and PW-4, SI Ram Babu Singh. Besides this, the following documents were presented before the learned Trial Court :-

1. Ext. Ka-1 (consent letter) ; Ext. Ka-2 (recovery memo); Ext. Ka-3 (chik report); Ext. Ka-4 (copy of GD); Ext. Ka-5 and Ka-6 (site plan), Ext. Ka-7 (charge sheet) and Ext. Ka-8 (report of Forensic Science Laboratory).

7. The accused appellants were examined under Section 313 Cr.P.C. The accused appellants have stated in defence that they were falsely implicated in this case.

8. The Trial Court after considering the prosecution evidence and considering the arguments of both the sides, convicted the accused appellants as mentioned aforesaid. Aggrieved by the conviction these present appeals have been filed.

9. The learned counsel for the appellant has submitted that the impugned judgment and order is illegal, unwarranted and bad in the eyes of law. The sentence is too severe and the fine of Rs. 1,00,000/- imposed on the appellant is excessive. It is also argued that the alleged recovery of charas is planted by the police and imposition of the sentence is against the evidence on record. The prosecution story is not supported by independent witnesses and all the witnesses are police personnel. While making the search and recovery from the accused appellant compliance of relevant provisions of the NDPS Act was not ensured and done by the police party. Moreover, samples were not taken by the police from all the packets allegedly shown recovered from the accused. It was further argued by the learned counsel that no evidence has been produced by the prosecution about the safe keeping of the alleged recovered contraband after the alleged recovery. In this regard no Maalkhana Register was produced and no such evidence was also produced which could show that the alleged recovered contraband was ever produced before the concerned Station House Officer. It has also not been shown that the concerned Station House Officer had taken the custody of the contraband and then, it was directed to be placed in the safe custody of an authorised custodian. Further argument advanced by the learned counsel is that the entire prosecution story casts serious doubt as it has been stated by the prosecution side that Daroga Ji was having weighing machine with him. It is not humanly possible that when the police personnels come in the field for checking the crime and its prevention, then, they will have with them weighing machine also. Therefore, the impugned judgment and order is liable to quashed and the appeal deserves to be allowed.

10. On the contrary, the learned AGA appearing on behalf of the State have supported the impugned judgment and order and they have argued that the impugned judgment is just, proper and correct in the eyes of law. The appeal deserves to be dismissed by this Court.

11. From the perusal of the record, this Court finds that it is no where mentioned in the impugned judgment and

order or in the lower court record that Maalkhana Register was produced before the Trial Court. PW-1 before Trial Court has stated thus:-

"थाने पर मॉल मुल्जिम देने के बाद मॉल बरामदा मॉल कहाँ जाता है क्या होता है मुझे नहीं मालूम है."

12. It is evident from the evidence on record that the prosecution failed to prove that samples were taken from all the bundles (packets) recovered from the accused appellants Gajendra Singh and Satendra Singh. Five packets were allegedly recovered from accused appellant Satendra and likewise five packets including one squashed packet were recovered from accused appellant Gajendra. But prosecution has not proved whether samples were taken from every packets recovered and were sent for examination by the expert. It has been held by a coordinate bench of this Court in **Jitendra Singh Rathore Vs. State of U.P. decided on 8th January, 2014 (Crl. Appeal No. 4509 of 2006)** in paragraphs 28 and 29 thus:-

"28. Moreover from the record, it further appears that it is categorical case of the prosecution that 29 packets have been recovered from a white bag with which the appellant was found sitting and the appellant has stated the contraband article weighed about 25 Kgs. Charas but P.W.1, who had made the arrest and seizure of the appellant did not weighed the contraband article recovered from him and only on the statement of appellant it was believed to be 25 Kgs. Charas and no actual weight was taken by P.W.1 which further creates doubt whether the alleged contraband article was the same which was recovered from the possession of the appellant and sent to chemical analysis. It is further noted that 29 packets of Charas weighing about 25 Kgs. Charas is said to have been recovered from the appellant but the sample in question which was taken before the court by the Investigating Officer does not disclose or shows that whether the sample was taken from all the 29 packets recovered from him from a white bag and send to chemical analysis by P.W.3 which further creates doubt whether the 29 packets which were recovered also contained Charas as from the report of the chemical analysis shows that he has only received one bag sealed in a cloth which was found to be Charas. The prosecution has thus failed to show from the record that ***how many samples were taken from the contraband article*** *which was recovered from the appellant and sent to chemical analysis. Lastly from the record it transpires that no sample of seal was sent along with the sample to chemical analysis for the purpose of comparing with the seal bearing on the sample, therefore, there is no evidence to prove satisfactorily that the seal found was in fact the same seal as was put on the sample bag immediately after seizure of the contraband. These loopholes in the prosecution case cannot sustain the conviction of the appellant in view of the judgment of the Apex Court in the case of State of Rajasthan vs. Gurmail Singh (Supra).*

29. The learned A.G.A. though had tried to justify the conviction and sentence of the appellant but he could not point out to the Court from the record whether the police party had taken the actual weight of the article, i.e., Charas recovered from the appellant, whether the ***Malkhana register was produced by the prosecution*** *to show that the article which was deposited by P.W. 1 in the Malkhana of the concerned police station and*

entrusted to P.W. 4 was the same which was produced before the court on 23.8.1999 and sent to the chemical analyst. Moreover, he could not also dispute the fact that the sample was not taken from all the 29 packets recovered from the white bag with which the appellant was sitting and only one sample was taken of the contraband article which was sent to chemical analysis."(emphasis supplied)

13. The next argument advanced by the learned counsel for appellant is that Malkhana Register was not produced by the prosecution before the Court below to prove the seizure list. He has argued that no reason has been given why the same was not produced. He has relied upon paragraphs - 3 and 4 of the judgment of Apex Court in the case of State of ***Orissa Vs. Sitansu Sekhar Kanungo, 2003 (1) JIC 329 (paragraphs 3 and 4)*** the Apex Court has held thus :-

"(3) The High Court, in a rather detailed judgment, stated that the vital question was whether necessary safeguards have been observed relating to the safe custody of articles alleged to have been seized and thus questioned the validity of seizure. Admittedly, the seizure was made on 31st January, 1993 and the articles seized were produced before the learned SDJM on 15.4.1993. The seizure lists related to collected samples of brown sugar/heroin, the place of seizure mentioned to be power house road, park area, Rourkela and the seizure lists were prepared on 31st January, 1993atabout7.15 p.m. and 7.30 p.m. It has been argued before the High Court that in the seizure lists, there is a reference to the plant-site police station case no. 43 of 1993 which, in the normal course of events, should not have been recorded and as such seizure lists became suspect. The High Court, however, did not find it convenient to deal with the matter oh the ground that it may not be appropriate to deal with the said plea for the first time in appeal. The High Court, however, placed strong reliance on the defence submission of ***non-production of the malkhana register****. On this ground, the High Court recorded that the malkhana register has not been tendered in evidence and acceptance of the oral statement of PW5 that the articles were in the police malkhana of plant-site police station and nothing else is available on record would not arise. Significantly however, no reason whatsoever has been ascribed* ***as to why the malkhana register could not be produced thereby exposed to the adverse presumption under the Evidence Act*** *that in the event of its production, it would have thrown sufficient light to the detriment of the respondents in the matter. The High Court, in its order (being impugned) noted that even no official attached to the plant-site police station has been examined to further the stand that the seized articles were kept in the plant-site police station. PW5, the High Court noted, has not stated that he had deposited the articles in the malkhana of the plant-site police station and there is thus a vital omission about the custody of articles and it is on this score, the High Court thought it fit that the court cannot be a silent spectator while justice is being trampled by inept handling of the case. It further held that in the case at hand,* ***the non-production of the malkhana register being one of the vital missing links,*** *the other factors highlighted above coupled with the non-production of the malkhana register have given a fatality to the prosecution case.*

(4) The learned advocate appearing in support of the appeal, however rather confidently stated that since the provisions of section 57 of the Act are now settled to be only directory and not mandatory in nature, the question of non-production of the malkhana register though vital, but the success of a case does not and cannot depend upon it. It may be a mere irregularity but cannot go to the root of the prosecution which make the prosecution vulnerable. At the first blush, the arguments seem to be rather convincing but on a closure scrutiny, however, it lost its efficacy by reason of the fact of there being no factual support therefor. The High Court has dealt with the matter purely on the factual score and concluded adversely by reason of non-production of malkhana register coupled with other set of facts, as argued before the High Court. The doubt which sprang up as regards the seizure lists, admittedly cannot be brushed aside. The seizure lists ought to have been prepared before the lodgment of the FIR and as such question of mention of the FIR no. in the seizure lists would not arise at all. But in the contextual facts, the indication of the case number in the seizure lists has resulted in the submission of the learned advocate for the defence before the High Court as also before this Court that this extra noting on the seizure lists cannot but be ascribed to be a manipulation in the document which is not permissible under the law. The High Court though not placed much reliance apparently thereon but obviously the same had its due impact and effect on the court since in the last paragraph, the High Court did speak of "other factors highlighted coupled with the non-production of malkhana register that have given fatality to the prosecution case'. This observation of the High Court by itself connotes that ***the High Court has taken note of it with due particula****rs and it is on the issue of facts that t****he High Court felt that there would be justice trampled if an order is passed in favour of the prosecution."****(emphasis supplied)*

14. Having gone through the lower court record this Court finds that the accused were allegedly having various bundles of charas in their possession and it is no where mentioned in the recovery memo that the samples were taken from all the packets of the recovered charas from the possession of the accused persons. The accused appellant (Satyendra Singh) was having 1.336 kg. of charas, as per the prosecution case, and co-accused (Gajendra Singh) was having 1.264 kg. of charas. Samples were not taken from all the packets. PW-1 has not stated in his statement before the Trial Court that samples of 30-30 grams were taken from all the packets (bundles) of the seized article. Even from the statement of PW -2 it is not evident that samples were taken from all the bundles recovered from the two bags of the accused persons. PW-2 has stated before the learned Trial Court thus:-

"दोनों अभियुक्तों को जुर्म से अवगत कराते हुए ९:१० a.m. पर हिरासत पुलिस में लेकर चरस को अलग अलग कपड़ों में रखकर व 30-३० ग्राम वास्ते नमूना मोहर हेतु चरस को अलग अलग निकाल कर शेष चरस को अलग अलग कपड़ों में रखकर सील मोहर किया. और नमूना मोहर बनाया."

15. This Court has perused the entire evidence in the light of the argument that no Malkhana Register was produced in evidence by the prosecution side. Nowhere from the evidence of the prosecution it is evident that any special report of the alleged recovered contraband was sent to

the higher officers as stipulated by the NDPS Act. It is also evident that alleged recovered contraband was never produced before the In-charge of the Police Station and he never checked or signed or gave the alleged recovered contraband to be kept in safe custody as no Malkhana Register was produced.

16. The argument raised by the learned counsel for appellants before this Court that the alleged recovery was made from the accused persons from a busy Shashtri Chauraha in front of LIC office in broad day light at 9:00 A.M., but no public witness i.e. independent witness was produced in support of the prosecution story regarding the alleged recovery from the accused persons, has force that help this Court take a different view than the view taken by the Trial Court. This Court goes through the entire record of the case and finds that no where it has been mentioned in the recovery memo that one or several persons were contacted by the police party to witness the alleged recovery of charas from accused but no public person came forward for giving the evidence. Had it been true that effort was made in that regard, the name and address of the public persons would have been certainly mentioned in the recovery memo. Their names having not been mentioned in the recovery memo, casts serious doubt on the veracity of the prosecution case.

17. The statement of the PW -1 in his cross examination also casts a serious doubt on the prosecution story. The PW -1 has stated that he has not called for weighing machine to weigh the recovered articles from any shopkeeper. He has further stated that he was having the same with him along with seal and other papers. But in the recovery memo there is nothing like this averment that this witness who has made the alleged recovery was having weighing machine with him and by that machine the weight of the alleged articles were taken. It is not humanly possible that when the police personnels come in the field for checking the crime and its prevention, then, they will have with them weighing machine also. Having regard to this, the argument of the learned counsel that as per the prosecution story Daroga Ji was having weighing machine with him has force and for this very reason the prosecution case becomes doubtful and is liable to be ignored.

18. After considering the rival submissions, it is clear from the judgment of this Court in the case of ***Jitendra Singh Rathore*** (Supra) that the prosecution was required to prove that samples were taken from all the packets recovered from the accused appellants and if this fact was not proved by the prosecution, the conviction of the appellants cannot be upheld. It is clear from the record that samples were not made for chemical analysis from all the packets recovered from the appellants and therefore, it cannot be conclusively held that all the packets recovered from the accused, were charas as alleged by the prosecution.

19. The final argument of the learned counsel for the accused-appellants regarding the non-compliance of Section 57, relying upon ***State of Orissa*** (Supra), is well founded since had the Malkhana Register been produced before the court below, seizure list could have been verified by the court below, however this Section is only directory and, therefore, much reliance on the same is not required.

20. As regards the non compliance of Section 57 of the NDPS Act which lays down that whenever a person makes any arrest or search under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior, this Court finds that no such evidence is led by the prosecution in the present case during the trial that any report was ever submitted about the such arrest and seizure in compliance of the Section 57 to the superior officer.

21. In ***Gurbax Singh Vs. State of Haryana, AIR 2001 (SC) 1002*** the Hon'ble Apex Court has held in para 9 thus:-

".....In our view, there is much substance in this submission. It is true that ***provisions of Sections 52 and 57 are directory****. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O.* ***cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. I****n the present case, I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness P.W.1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the N.D.P.S. Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed under Section 57 of the N.D.P.S. Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O., particularly when he did not know that the substance was poppy husk., but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2 SI/IO that it was a brass seal.* ***On the basis of the aforesaid evidence and faulty investigation*** *by the prosecution, in our view,* ***it would not be safe to convict the appellant for a serious offence of possessing poppy-husk."***

(emphasis supplied)

22. This Court finds that in the present case Malkhana register was not produced by the prosecution during trial before the Court. Thus, there is non compliance of the relevant Section of the NDPS Act and the prosecution has failed to prove its case against the accused appellant in proper perspective.

23. From the perusal of the record of this case, it is not evident as to who was the officer - in- charge of the concerned police station to keep the recovered articles in safe custody and it is also not clear as to who was the officer-in-charge of the police station authorised to seal the samples so taken by the police team. Further, it has also not been brought on record whether any information was given within twenty four hours to the immediate official superior of the such arrest or seizure. Thus non compliance of Sections 55 and 57 of the Act coupled with the facts that there is no independent witness to the recovery as well as non production of Maalkhana Register before Trial Court and also non

preparation of samples from all bundles goes to show that there are manifest errors factual and legal in the prosecution case that warrants interference by this Court in the impugned judgment and order.

24. In the result, both the appeals are **allowed.** The impugned judgment and order is set aside.

25. The appellants are on bail. The sureties and personal bonds of the accused appellants shall stand discharged.

26. Let a copy of this order be transmitted to the Court below for necessary compliance.

(2020)07ILR A51
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE

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

First Appeal From Order No. 866 of 2003

Smt. Santosh & Ors. ...Appellants
Versus
United India Insurance Company Ltd. Mathura & Ors. ...Respondents

Counsel for the Appellants:
Sri B.P. Verma

Counsel for the Respondents:
Sri Mohan Srivastava

A. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166, 168 - Accident - Claim petition - Hyper Technical Approach - Tribunal should not decide claim petition by taking hyper technical approach and thereby frustrate the provision of beneficial piece of legislation - *Held* - It was established that the deceased definitely met with the accident involving two vehicles - technical defect of pleading should not be made the basis of rejection of the claim petition (Para 9)

B. Civil Law - Motor Vehicles Act (59 of 1988)) - Section 166, 173 - Accident claim - Cause of accident - Contributory negligence - Meaning, reiterated - Where the claimant himself is found to be a party to the negligence then the claimant claim to the extent of his own negligence, as may be quantified, will have to be severed & the claimant can only be held entitled to such part of damages/compensation that is not attributable to his own negligence - a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place (Para 16)

C. Civil Law - Motor Vehicles Act (59 of 1988) - Section 147 - Liability of insurance company - it must be proved that there was no breach of policy condition - *Held* -Driving license of tractor trolly driver showed that driver had license to drive light motor vehicle - Tractor is a light motor vehicle - As driver had proper driving license, there was no breach of policy condition - Even if trolly is insured or not, Insurance Company would be liable to pay compensation (Para 19 20)

E. Civil Law - Motor Vehicles Act (59 of 1988)- Section 166 - Compensation - Rate of Interest - it should be 7.5% (Para 24)

Appeal partly allowed. (E-5)

List of cases cited: -

1.Joshi Rajendrakumar Popatlal Vs Thakor Ramnaji Hamirji & ors. reported in (2020) ACJ 365

2. Bimla Devi & ors. Vs Satbir Singh & ors. (2013) 4 SCC 345

3. Gurdeep Singh Vs Bhim Singh (2013) 11 SCC 507

4. Sharanmma Vs North-East Karnataka RTC (2013) 11 SCC 517

5. Dulcina Fernandes Vs Joaquim Xavier, First Appeal No. 216 of 2004 decided on 14.11.2008

6. Sunita & ors. Vs Raj St. Rd. Transport Corp. & anr. (2019) AIR SC 994

7. Kumari Deepti Tiwari Vs Banwarilal 1965 LawSuit (MP) 94

8. Ravi Vs Badrinarayan & ors. (2011) Law Suit SC 97

9. Kaushnuma Begum & ors. Vs The New India Assurance Co. Ltd. & ors. Decided on 03.01.2001

10. Vimla Devi & ors. Vs National Insurance Company Ltd. & ors.

10.Oriental insurance Co. Ltd. Vs Premlata Shukla & ors. 15.05.2007

11. Jai Prakash Vs National Insurance Co. Ltd (2010) 2 SCC 607

12. Pawan Kumar & anr. Vs M/S Harkishan Dass Mohan Lal & ors.

13. Mukund Dewangan Vs Oriental Insurance Comp. Ltd. Law SC (201)7 7 49

14. Sant lal Vs Rajesh & ors. (2017) 8 SCC 590

15. National Insurance Comp. Ltd. Vs Pranay Sethi & ors. (2017) 0 Supreme SC 1050

16. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 12

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

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

1. Heard Sri B.P. Verma, learned counsel for the appellants, Sri Mohan Srivastava, learned counsel for the respondents- Insurance Company. None appears for original owner for tempo trailor.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 30.09.2002 passed by Special Judge/Motor Accident Claims Tribunal, Mathura (hereinafter referred to as 'Tribunal') in M.A.C. No. 289 of 2001.

3. The facts in nutshell are that on the fateful day when the accident took place. The tractor trolley owned by respondent insured with the respondent-Insurance Company was responsible for the commission of the accident as it was stationed in the middle of the road, in which the deceased, who was a teacher by profession and was going from Bhartpur By-pass bridge on 25.5.2001 his motorcycle dashed with the said tractor owned by the respondent at about 9:30 p.m.. The claimants alleged that on 25.5.2001 due to the said accident the husband of Santosh claimant no.1 got injured and he had to be admitted to two hospitals first from 25.05.2001 to 26.05.2001 and later from 26.05.2001 till 04.06.2001 where he scummed to the accidental injuries on 04.06.2001. The deceased left behind him two minor children one of four years and one of 2 years and his young widow of 30 years. He was also survived by his aged parents. Bhagwan Singh deceased was 33 years of age and was a teacher in a school earning Rs.7,000/- per month also had agricultural land. The deceased had sustained several multiple injuries and the accident occurred on National Highway No.2 at about 9.30 pm.. The deceased was travelling on his motor cycle bearing No. U.P. 85C/6133. The deceased was admitted in Swarn Jayanti Samuhik Hospital, Mathura and then when the said hospital felt that he was sinking they referred him to Kamayani Hospital, Agra from where he was shifted Mathura. The respondent no..2 and 3 were

the owners and drivers of the said tractor trolly. The claimants claim was confronted by the Insurance Company contending that the vehicle was not insured with them. There was collusion between owne and claimants that the Charge sheet and F.I.R. was not filed in time. No effective and valid license was filed. The the owner of the tractor trolly was not cooperating with the Insurance Company. There was inordinate delay in filing the F.I.R. The driver of the tractor trolly was not negligent but the deceased was negligent.

4. The owners of the tractor trolly admitted the accident but denied their negligence in operating the tractor trolly.

5. The claimants filed several documentary evidence so as to prove the hospitalization and death as well as accident having occurred with the tractor trolly.

6. Before I delve into the several aspects of the matter from the record it is clear that neither the Insurance Company nor the owner of the tractor trolly ever contended that the vehicle was not involved in the accident. Despite that the claimants claim petition in absence of any rebuttal evidence being led was dismissed by claims tribunal. The tribunal dismissed the claim petition holing that the F.I.R. was belated, it did not bear the number of the tractor trolly and that there was collusion between Police Authority and the claimants and the owner and did not believe the oral testimony of eye witness.

7. It is submitted by Sri B.P. Verma, learned counsel for the appellant that the Tribunal dismissed the claim by filmcy reasons and order is perverse and dismissed on the following counts.

1. Namely in the F.I.R. number of Tractor Trolley No.U.P. 85 F 3120 was not mentioned, F.I.R. alleged was filed after 14 days of accident. In the site plan, vehicle was not shown to be there on the spot. Head Constable submitted his charge sheet report after 40 days of the accident involving the said vehicle. The Tribunal has disbelieved the involvement of the vehicle.

2. Evidence of witness produced by claimants was not believable.

3. The medical reports were scanty and did not mentioned who brought the injured to the hospital.

8. It is submitted by Sri Mohan Srivastava, learned counsel for Insurance Company that award cannot be found fault with as the vehicle No.U.P. 85 F 3120 was not involved in the accident. The vehicle should have been taken in custody by the police on the date of the accident as it is mentioned in the F.I.R. that police personnel came immediately and took injured to hospital. The evidence of witnesses examined by claimants were rightly disbelieved by the tribunal.

9. While interpreting the provisions of Section 168 and 168 (4) of the Motor Vehicle Act, 1988 (hereinafter referred as the "Act') were ignored by the Tribunal while deciding the matter. The Tribunal rejected the clam petition, though the deceased was admitted in the hospital and the F.I.R. clearly spelt out that it was due to the involvement of the vehicle. This fact was proved as the driver fled away with the vehicle though G.D. entry also there with police authorities. The post mortom report also proved the fact that deceased died due to accidental injuries. The vehicle tractor

trolly was proved to be involved in the accident. The tribunal held that the driver, owner and insurance of the motor cycle was not joined as a party. The accident had taken place on 25.05.2001 at 9.30 p.m. as a result of involment of tractor trolly which was not disputed by owner or driver or Insurance Company which has been proved by cogent evidence just because there are certain contradictions in the testimony of the witness and because who got the injured, in the hospital is not mentioned, the claim petition was dismissed and being the claimants' case is disbelieved. The fact is that the charge sheet was filed pursuant to F.I.R lodged is not just because in dispute the tractor trolly was not confiscated detained on the spot it is held that the vehicle was not involved in the said accident. Recently the High court of Gujarat in **Joshi Rajendrakumar Popatlal Vs. Thakor Ramnaji Hamirji and Others, reported in 2020 ACJ 365** has held that the Tribunal should not decide claim petition by taking hyper technical approach and thereby frustrate the provision of beneficial peace of legislation. The Apex Court in **Bimla Devi and Ors. Vs. Satbir Singh and Ors. 2013 (4) SCC 345** has held that hyper technicality should not be allowed to frustrate the aim of beneficial peace legislation. In our case hyper technicality of the learned Tribunal has resulted into the flaw in his award. It was established that the deceased had definitely met with the accident involving two vehicles. It was also proved that the accident was between the tractor trolly and the motor cycle on which the deceased was plying. The technical defect of pleading should not have been made the basis of rejection of the claim petition. I am supported in my view by the decision of Apex Court in the case of **Gurdeep Singh v. Bhim Singh, (2013) 11 SCC 507,** wherein provision of Section 173 of the "Act' read with Section 96 of the Code of Civil Procedure,1908 will permit this court to reverse the perverse findings reached by the tribunal. The Apex Court decisions in **Sharanmma V. North-East Karnataka RTC, (2013) 11 SCC 517**. The judgment in **Dulcina Fernandes V. Joaquim Xavier, First Appeal No. 216 of 2004, decided on 14.11.2008** with also help the claimants. Therefore also the appeal will have to succeed.

10. The judgments relied by the learned counsel for the appellant herein supports the judgment relied hereinabove. The decision in **Sunita & others Vs. Rajasthan State Road Transport Corporation & Anothers reported in 2019 AIR SC 994** and the later judgment thereafter will oblige this court to reverse the award of Tribunal as the award is based on a surmises and conjecture if there was collusion between the claimants and the owner, the Insurance Company could have proved their case which they have not proved. The Insurance Company has not led any rebuttal evidence. The finding of fact that the accident did not occure with the tractor trolly is based on surmises and conjunctures and is bad in law. The charge sheet was laid after 40 days appears, reason has been assigned by the police officer that they had enquired from the A.R.T.O. about the name of the owner of the tractor which was given by A.R.T.O. belatedly. Had there been a collusion between the police and the owner and the claimants they would not have inquired from A.R.T.O. about name of owner, non mentioning of the number in the GD entry or the F.I.R. was one of the reasons for rejecting the claim petition. The Insurance Company did not lead any evidence has not contended in written statement that tractor trolly was not

involved in the accident. The owner nor the Insurance Company have lead any evidence to show that the tractor trolly was not involved in the accident. The G.D. entry was there and F.I.R. was lodged immediately after the death of the injured namely after 04.06.2001. The driver of the vehicle was arrested and was enlarged on bail, these orders are on record of the Tribunal. The A.R.T.O. took a long time in supplying name of the owner of the vehicle and just to come to a finding that the witnesses were not reliable is bad in eye of law. The provision of the Section 168(4) of the Motor Vehicle Act has not been followed by learned Tribunal and therefore also the award requires interference. The post mortom report went to show that the deceased died out of accidental injuries. The tractor trolly was confiscated by police. The deceased survived for about 8 days after the incident. The finding that the widow of the deceased did not see the tractor trolly on the spot is a perverse finding as she was not an eye witness. The evidence of the other eye witness has been wrongly discarded. The number of the tractor was given immediately after the accident just because who went to the hospital with injured is not mentioned, the learned Tribunal has disbelieved that the accident took place. The deceased died due to injury on his vital part i.e his head. All these facts go to show that the Tribunal has flawed in coming in to the conclusion that the tractor trolly was not involved in the accident. Once F.I.R and charge sheet were filed it prima facie proves the involvement of the tractor in the accident. The learned Judge has committed an error of fact while going through the record.

11. In our case also the appellants are able to prove the factum of accident as the eye witness P.W.2 Mahesh has given proper account of the involvement. The belated filing of charge sheet and F.I.R. has been properly explained as the family members were busy in giving medical aid to the injured. Now G.D. entry was lodged. The finding that there was collusion between the family members, the police and the owner and driver of the vehicle is not proved. The police took him to the hospital and just because no police was examined can it be said that there was malice. The Tribunal could have as per the provisions of the act summoned the police authorities for giving evidence which was not done. The charge sheet is prima facie, a document which would show that the vehicle was involved. The accident took place at night and the admission of the respondent as per the Code of Civil Procedure, 1908 was supposed to be looked into just because Hari whose name figures in the charge sheet as to the person who took the deceased to the hospital was not examined, the learned Tribunal goes to a remote finding which cannot be accepted even in regular Civil Court that the document of both the hospitals did not mention what treatment was given though the document at Exhibit 23K shows that the first hospital where he was treated for one day referred him to Agra. The documents are produced and the judgment of Oriental Insurance Company Ltd. (Supra) and in the case of **Kumari Deepti Tiwari Vs. Banwarilal 1965 LawSuit (MP) 94** would help the appellants.

12. The tribunal has held that no documents of Bhagwan Singh were produced. Unfortunately, he has over looked the documents at 11 G also which shows that CT Scan, clinical observation, medicine of P.P. medicos and the CT Scan of brain advised by Swarn Jayanti Samudayik Hospital, Mathura were already

on record. The learned Tribunal has over looked the documents of Kamayani Hospital where he was treated till 04.06.2001. The delay in F.I.R. lodgment is explained but the learned tribunal has mislead itself. In coming to the conclusion that deceased had no accidental injury. The documents of Kamayani Hospital, Agra shows that he was admitted due to accidental injury and certificates for also given to the said fact.. The fact that the driver was enlarged on bail by the concerned authority also goes in favour of the claimant.

13. Learned counsel for the appellants has relied on judgments in the case of **Ravi Vs. Badrinarayan & Ors.** reported in **2011 Law Suit (SC) 97, Bimla Devi and Ors. Vs. Satbir Singh and Ors. decided on 28.02.2012, Kaushnuma Begum and Ors. Vs. The New India Assurance Co. Ltd. and Ors.** decided on 0**3.01.2001, Vimla Devi and Ors. Vs. National Insurance Company Ltd. and Ors.** decided on **16.11.2018 and Oriental insurance Co. Ltd. Vs. Premlata Shukla and Ors.** decided on **15.05.2007.**

14. Even if there was collusion the application under Section 170 of the Motor Vehicle Act was filed and they were permitted to lead all the evidence so as to rebut all the averments made in the claim petition and the reply filed by the respondent owner of the vehicle.

15. The appeal was allowed holding that vehicle was involved in the accident. Initially I had thought of remanding the matter but due to **lockdown** the judgment could not be uploaded on 04.03.2020 i.e. on the same date and while making corrections this court felt that the issues which are raised are similar or identical to those raised in the judgment of Apex Court in the case of Vimla Devi and Ors (Supra) and therefore as per the provisions of Section 173 of "The Act' read with Section 166, 158 and Section 140 of "The Act' and the judgement of Apex Court in the case of **Jai Prakash V. National Insurance Co. Ltd 2010 (2) SCC 607 and also 163 (A).** Should the matter be remanded was the question which arose in my mind the accident occurred in the year 2001, we are 20 years hence, the record is before this court. The matter can be decided on the touch stones of the seven para meters laid down in para 26 to 33 of the decision in Vimla Devi (Supra). Section 173, 166, 156, 140 reads as follows:-

"Section 173 of the Motor Vehicles Act, 1988

173. Appeals.--

(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court: Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent. of the amount so awarded, whichever is less, in the manner directed by the High Court: Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees.

Section 166 of the Motor Vehicles Act, 1988

166. Application for compensation.--

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. 1[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed: Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.] 2[***] 3[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.

Section 158 of the Motor Vehicles Act, 1988

158. Production of certain certificates, licence and permit in certain cases.--

(10 Any person driving a motor vehicle in any public place shall, on being so required by a police officer in uniform authorised in this behalf by the State Government, produce--

(a) the certificate of insurance;

(b) the certificate of registration;

(c) the driving licence; and

(d) in the case of a transport vehicle, also the certificate of fitness referred to in section 56 and the permit, relating to the use of the vehicle.

(2) If, where owing to the presence of a motor vehicle in a public place an accident occurs involving death or bodily injury to another person, the driver of the vehicle does not at the time produce the certificates, driving licence and permit referred to in sub-section (1) to a police officer, he shall produce the said certificates, licence and permit at the police station at which he makes the report required by section 134.

(3) No person shall be liable to conviction under sub-section (1) or sub-section (2) by reason only of the failure to produce the certificate of insurance if, within seven days from the date on which its production was required under sub-section (1), or as the case may be, from the date of occurrence of the accident, he produces the certificate at such police station as may have been specified by him to the police officer who required its production or, as the case may be, to the police officer at the site of the accident or to the officer-in-charge of the police station at which he reported the accident: Provided that except to such extent and with such modifications as may be prescribed, the provisions of this sub-section shall not apply to the driver of a transport vehicle.

(4) The owner of a motor vehicle shall give such information as he may be required by or on behalf of a police officer empowered in this behalf by the State Government to give for the purpose of determining whether the vehicle was or was not being driven in contravention of section 146 and on any occasion when the driver was required under this section to produce his certificate of insurance.

(5) In this section, the expression "produce his certificate of insurance" means produce for examination the relevant certificate of insurance or such other evidence as may be prescribed that the vehicle was not being driven in contravention of section 146.

(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer.

Section 140 of the Motor Vehicles Act, 1988

140. Liability to pay compensation in certain cases on the principle of no fault.--

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of 1[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of 2[twenty-five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or

default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement. 3[(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force: Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."

16. The term contributory negligence and composite negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. The Apex Court in **Pawan Kumar & Anr vs M/S Harkishan Dass Mohan Lal & Ors** decided on 29 January, 2014 has held as follows:

7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:

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

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other

driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

17. 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."

18. The eyewitness goes to show that the tractor trolly was parked in the middle of the road. It is not proved that the deceased was drunk or intoxicated as it is not proved by any evidence. The post mortom report filed also does not speak of any such liquid or food material. The tractor was parked facing towards Agra. It was dead of night at 9:30 p.m. when the deceased scooterist came from behind and dashed with the stationary tractor trolly. The negligence of the deceased can be attributed to 50 per cent. The reason being the tractor trolly was in the middle of the road was without any side lights, without indicators and it is proved that the accident occurred.

Liability:-

19. The principals for directing the Insurance Company to pay would be on the basis of the fact that it is to be proved that there is no breach of policy condition. The driving license of the tractor trolly driver shows that the driver he had license to drive light motor vehicle. Tractor is a light motor vehicle even if trolly is insured or not the Insurance Company would be liable as per Sant lal (infra).

20. This takes this court to the issue of whether the Insurance Company is able to prove that there was breach of policy condition, they have not laid any evidence. The license produced which is a xerox copy goes to show that the driver of tractor trolly was authorised to drive the tractor. It is now a settled legal position of law as initiated by the Apex Court in **Mukund Dewangan Vs. Oriental Insurance Company Ltd.** reported **in Law(SC) 2017**

7 49 retreated in **Sant lal Vs. Rajesh and Others reported in (2017) 8 SCC 590** that if a person has a driving license of LMV he can drive a tractor trolly. Hence, it is conclusively proved that the driver had proper driving license there was no breach of policy condition also.

21. As the uploading took time instead of remanding the matter which would take further time during this pandemic the matter is decided here in the especial facts and circumstances as the record is before this court and as per the judgment of Apex Court in Vimal Devi (Supra) and Section 173 of Act which has been reproduced hereinabove.

Compensation:-

22. This takes this court to the last issue of compensation as per the judgment in Vimla Devi (Supra) simple calculation would wipe the tears of a young widow who has waited for 20 years and the children who have lost their only bread winner who was a teacher and was admittedly earning Rs.6,000/- per month as per the documentary evidence. He was survived by his widow, two minor children aged one daughter and one son four and two years who by now must have become major, and the aged parents. The deceased was 33 years of age when the accident occurred. Hence, even by the thumb rule as held in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. Rs.6,000+Rs.3,000/- would be Rs.9,000/- deduction of 1/3rd would be Rs.3,000/- for personal expenses as there are five survivors but two are minor, hence one portion for them, hence, Rs.6,000 x 12 x 16 (multiplier) as per judgment of Apex Court in Sarla **Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 12** which would be 11,52,000+ 70,000=12,22,000/-. The medical expenses of Rs.50,000/- would also be admissible out of this 50% be deducted towards contributory negligence .

23. The claimants have proved by the cogent evidence laid before the tribunal that for the treatment of the deceased they have spent not less than Rs.50,000/-, hence, this court feels that they would be entitled to get the said amount also.

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

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

25. The appeal is partly allowed in favour of claimants.

26. The record and proceedings be sent to the Tribunal forth with.

27. The Insurance Company shall deposit the amount as computable with interest i.e. Rs.6,11,000+50,000=

Rs.6,61,000/- at the rate of 7.5% as expeditiously as possible not later than 31.12.2020

(2020)07ILR A63
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

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

First Appeal From Order No. 968 of 2010

Ansar Ahmad ...Appellant
Versus
Sri Chandra Kesharwani & Anr. ...Respondents

Counsel for the Appellants:
Sri Abhineet Kumar Jaiswal, Sri Prabha Shanker Bharti, Sri Pranav Kumar Srivastava

Counsel for the Respondents:
Archana Singh

A. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166, 168 - Accident - Claim petition - Hyper Technical Approach - Tribunal should not decide claim petition by taking hyper technical approach - *Held* - Claims Tribunal committed illegality in rejecting the claim of the injured appellant on frivolous ground as the non-attestation of the documents kept on record in evidence of the claim - testimony of respondent accepting that the vehicle was involved coupled with the fact that chargesheet was laid, the Tribunal could not have rejected the claim petition (Para 4, 5)

B. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166 - Compensation - Determination - injured 12 yrs of old when the accident took place i.e. the year 2003 - had fracture of his one lower limb - doctor opined he has 40% disability of the said limb - *Held* - His income can be considered to be Rs.1500/ per month - His functional disability can be considered to be 20% for the body as a whole - addition of 40% to his notional income will have to be done (Para 6, 7)

Appeal partly allowed (E-5)

List of cases cited:-

1.Sunita & ors. Vs R.S.R.T.C. & anr. (2019) LawSuit SC 190

2.Mangla Ram Vs Oriental Insurance Comp. Ltd.& ors. (2018) 5 SCC 656

3.Vimla Devi & ors Vs National Insurance Comp. Ltd. & anr (2019) 2 SCC 186

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

1. Heard Counsels for the appellant and the Insurance company. None appears for the owner.

2. By way of this appeal, the claimant has felt aggrieved by judgment of the Tribunal which dismissed the claim petition filed by the claimant for the accident which according to the claimant - appellant herein took place on 16/17.4.2003, when the claimant's son along with his other brother were sleeping in the open area near their home, at that time at about 3.50 a.m. in the early morning, a Marshel Jeep No. UP-73-3368 driven by Chandra Kesarwani dashed with the said couch and thereafter the vehicle dashed with a telephone pole. The driver and the vehicle were detained immediately. The claimant contended that his son namely Ansar Ahmad had fracture in his left leg and Javed Akhtar also had fracture in his lower limbs and the claimant took both his sons for treatment at Swarooprani Hospital and claimed a sum of Rs. 10,60,000/- with 9% interest. The defendant - owner as is culled out from the

judgment and the written statement filed his reply accepting that the accident took place at 5.00 a.m. in the morning. It was he, who was the person, who was driving the vehicle. His vehicle was insured with United India Insurance Company and as the policy was in vogue, it would be the Insurance company which would be liable. The Insurance company filed its reply of denial.

3. The father had filed the claim petition as the injured was a minor namely Ansar Ahmad. The Insurance company as usual filed its reply of negativity and even contended that the vehicle was not accepted to be insured with them despite the fact that documents were already produced namely the cover note, the driving licence and the policy, the F.I.R. was filed. PW1 - Gulam Server, the claimant namely father of injured examined himself on oath. Saleem Javed 38 years of age was examined as PW2. The Insurance company did not examine anybody so as to prove its stand in the written statement. The claim petitions were unfortunately segregated and were listed before different Tribunals. The claimants also filed several documents which showed that the insured were hospitalized; that the injured had fracture and they were resultant out of the accident. The Tribunal framed about 5 issues and in issue nos. 1 and 2, it is held that Ansar Ahmad, who was a minor, was not examined, and so the Tribunal came to the conclusion that though the minor was taken to Swarooprani Hospital where he was hospitalized for about 14 - 15 days and Saleem Javed informed the police through Saleem Javed was examined as PW2 has produced document 16-G/4. A chargesheet was also filed against said Sri Kesarwani. It is stated that the Tribunal came to the conclusion that the doctor, who treated the injured and the police authorities were not examined and that is why the Tribunal came to the conclusion and dismissed the claim petition and it is held that the Insured was having injuries on both legs, whereas the medical certificate shows only injury on one of the lower limbs. The Tribunal decided issue no.3 and held that the vehicle was insured with the Insurance company. As far as driving licence was concerned, the driving licence of Sri Chandra Kesarwani from 2000-18 was believed to be in vogue and decided issue nos. 1, 2 and 5 against the appellant.

4. The Claims Tribunal has committed manifest illegality in rejecting the claim of the injured appellant on such frivolous ground as the non-attestation of the documents kept on record in evidence of the claim. The Claims Tribunal has wrongly and arbitrarily over looked the testimony of PW-1 and PW-2.

5. Recently, this High Court in F.A.F.O. No.560 of 1995, Smt. Reshma Khatoon And Another Vs. Noor Mohammad And Others, of decisions where the Tribunal had dismissed claim petition on hyper technical grounds allowed the claim petitions. While relying on the decisions of the Apex Court in **Sunita and others Vs. Rajasthan State Road Transport Corporation and another, 2019 LawSuit (SC) 190, Mangla Ram Vs. Oriental Insurance Company Limited and Others, 2018 (5) SCC 656** and also a reliance is placed before this Court by the latest decision in the case of **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186,** which would be applicable in the facts of this case. Hence, the appeal requires to be allowed. Even on the fact that F.I.R. Chargesheet was there, the

rejection on the basis of the place where Vakalatnama of the Advocate is bad in eye of law. The testimony of Manoj Kumar Trivedi had to be taken in account. This High Court held that once the F.I.R. and the chargesheet go to show that accident had occurred on a hyper technical stand that the minor children were not examined in the claim petition rejecting the claim, the answer is "NO". The inference drawn by the Tribunal is required to be interfered with. The testimony of respondent accepting that the vehicle was involved coupled with the fact that chargesheet was laid, the Tribunal could not have rejected the claim petition.

6. Having considered the facts and circumstances as long time has elapsed, this Court would decide the quantum also as held by the Apex Court as the record is before this Court and all that has to be done is to calculate the quantum on the principles of decisions of the Apex Court and this High Court relating to a minor, who had fracture of his one lower limb and the doctor has opined that he has 40% disability of the said limb. The injured was 12 years of old when the accident took place that is 17 years ago. His income can be considered to be Rs.1500/ per month. His functional disability can be considered to be 20% for the body as a whole. He was in hospital for one and a half month. In that view of the matter, the calculation can be made as below: The addition of 40% to his notional income will have to be done hence his income would be approximately Rs. 2100.00 hence his future loss of income would be 20% of Rs.2100/- which means Rs.420/- x 12 x 18 is equal to Rs.90,720/- to which Rs. 25,000/- + additional amount of Rs.40,000/- under other heads hence the claimant would be entitled to Rs. 1,55,720/-.

7. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited with interest at the rate of 9% from the date of filing of the claim petition till the amount is deposited. The amount be deposited within a period of 12 weeks from today.

8. The record be sent back to the Tribunal.

(2020)07ILR A65
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2020

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

First Appeal From Order No. 1351 of 2009

The New India Assurance Company Ltd. ...Appellant
Versus
Smt. Sunita & Ors. ...Respondents

Counsel for the Appellant:
Sri Rahul Sahai

Counsel for the Respondents:
Sri A.K. Gupta, Sri Santosh K. Singh, Sri Satya Deo Ojha

A. Civil Law - Motor Vehicles Act (59 of 1988) – Section 166 - Compensation - Contributory negligence - Truck came from behind and dashed against motorcycle while overtaking - Motorcycle went away on unmetalled road & pillion rider died on spot - *Held* - Bigger vehicle has to be more cautious - Driver of motor vehicle must slow down at intersection or junction of roads or at turning of road - Version of Truck driver that motorcyclist came on road suddenly, not acceptable as it was national highway and Motorcyclist was driving motorcycle on road and there was no

curve or by lane - No contributory negligence, established on part of Motorcyclist - Insurer of offending vehicle liable to pay compensation. (Para 22)

B. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166 - Claim petition - Involvement of vehicle - Motorcycle dashed by Truck from behind - Involvement of vehicle established as F.I.R., charge-sheet and evidence of witnesses laid before Tribunal showing that truck hit motorcyclist from behind - *Held* - Just because in FIR, number of vehicle not mentioned cannot be ground to discard finding as to involvement of truck (Para 22)

Appeal Dismissed (E-5)

List of cases cited: -

1. Smt. Santosh & ors. Vs United India Insurance Comp. & ors. FAFO No.866 of 2003 decided on 4.3.2020

2. Nishan Singh Vs Oriental Insurance Co. Ltd. (2018) 6 SCC 265

3. Mangla Ram Vs Oriental Insurance Comp. Ltd AIR (2018) SC 1900

4. Rylands Vs Fletcher (1868) 3 HL (LR) 330

5. Jacob Mathew Vs St. of Punj (2005) 0 ACJ SC 1840

6. National Insurance Com. Limited Vs Pranay Sethi & ors. (2017) 0 Supreme SC 105

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

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. This appeal, at the behest of The New India Assurance Company, challenges the judgment and award dated 7.2.2009 passed by Motor Accident Claims Tribunal/ Additional District Judge, Meerut (hereinafter referred to as 'Tribunal') in M.A.C.P No. 202 of 2008 awarding a sum of Rs.13,52,060/- with interest at the rate of 6%.

3. The parties are referred to as insurance company/appellant and claimants/respondents / original applicants.

4. The claimants are the legal heirs of deceased who was a police constable earning Rs.15,000/-per month and on the faithful day i.e., 20.11.2007 when the deceased was trying to nab an accused and was plying as pillion on the motorcycle bearing No. UP 20 J 9755 at about 11:30 in night on Delhi-Saharanpur main road National Highway near Janta Hotel, a truck bearing No. HR 29 B 7865 came in a rash and negligent manner dashed with the motorcycle from behind, deceased was a pillion rider dashed the motorcycle from behind the pillion rider, i.e., husband of claimant No.1 and father of claimant No.2 died on the spot. The driver of the motorcycle on which deceased was plying sustained serious injuries, it is alleged that had the driver of the truck driven his truck in a careful manner, the accident would not have taken place. The driver of the truck came from behind and dashed on the left side of the scooter on unmetalled road (kachchee Sadak). The respondent No.1, namely, owner filed reply contending that his vehicle was being driven on its correct-side it was motorcyclist who was driving a rash and negligent driving and accident occurred due to the negligence of the motorcyclist/policeman. It is further averred that the driver of the truck was authorised to drive the truck and had a valid driving license. The vehicle had its fitness and permit which was valid and that the vehicle was insured with the insurance company. The insurance company in its

written statement filed before the tribunal did not accept the fact that the vehicle was insured with them, as the claimant had not narrated the facts and not given the copy of the policy. It was further averred that the accident occurred due to sole negligence of the motorcyclist. The claim petition was bad for non-joinder of the driver/owner and the insurance company of the motorcyclist and there was breach of policy condition.

5. Shri Rahul Sahai, learned counsel for the appellant has submitted that involvement of truck is doubtful as the F.I.R. was lodged against an unknown vehicle, the number of the truck was not mentioned in the F.I.R. just because the owner accepted that the vehicle was involved it cannot be presumed that the vehicle was involved, in the alternative, he has submitted that if this court does not accept this submission of the insurance company, then the alternative submission is that issue of negligence of the motorcycle and non-joinder of the driver/owner and insurance company of motorcyclist is also decided wrongly against insurance company.

6. It is further submitted that the site plan goes to show that the offending truck was driven on its correct side, the driver of the motorcycle seeing the truck coming from behind lost his balance and the vehicle slipped and that is how the deceased died. The tribunal did not consider this evidence of the driver and held that the driver of the truck was negligent. It is further submitted that compensation awarded is on higher side.

7. It is further averred in the grounds of the appeal memo and as submitted by counsel for insurance company that as the deceased had died while in service there is no economic loss to the family members and therefore also no compensation should have been awarded. It is further averred that in the alternative compensation awarded is highly excessive and the multiplier applied is also against settled principles of law. It is submitted by counsel for appellant that the driver of the truck was driving the vehicle on its correct side, his evidence has not been discussed while discussing the issue of negligence. It is stated that PW-2 Bhrampal had noted number of the truck but the same was absent in the FIR which was lodged immediately and within two minutes of accident how he had noted the number is also very doubtful. The involvement of the vehicle therefore is suspicious and even if it is considered that the vehicle was involved the finding of total negligence of the driver of the truck is against the record and requires interference.

8. As against this, the learned counsel for claimants has submitted that the involvement of the vehicle is proved even the owner does not dispute that the truck was not involved in the accident and therefore in absence of any evidence in the contributory negligence is concerned. The deceased was a pillion the vehicle dashed from behind it came from behind came on the unmetalled road and the driver of the truck also does not dispute that he came from behind his version is that the scooter is came in front of him which has not been believed by the learned tribunal. It is further submitted that as far as the compensation is concerned it is on the lower side no amount has been paid for future loss of income that the rate of interest is also on the lower side and request for enhancement of the amount under the head of non pecuniary damages if not on the main compensation be granted on oral request.

9. The Tribunal framed five issues and decided all of them against the appellant-insurance company.

10. The fact that the accident occurred on 11:30 p.m. is not in dispute. The involvement of both the vehicles was proved by leading cogent evidence, just because in the F.I.R. number of vehicle is not mentioned cannot be a ground to discard the finding of fact as to involvement of the truck when other reliable oral and unrebutted evidence led before tribunal made the tribunal came to the conclusion about the involvement of truck. Testimony of Brahmpal Singh, P.W. 2 who was driver of scooter proves that truck was involved. The involvement of the vehicle is proved as the F.I.R. charge-sheet and the evidence laid before the tribunal goes to show that the truck hit the motorcyclist from behind. DW-1 Satpal has been examined on oath as per his evidence, he has not denied his involvement of his vehicle. It is proved that he came on wrong side so as to overtake the motorcycle and dashed it on the left side and deceased fell on the dirt track. The deceased was a police officer, the motorcycle was on metal road but due to dash from behind the motorcycle went away on the unmetalled road this speaks about negligence of the driver of truck. Recently in **First Appeal From Order No.866 of 2003, Smt. Santosh & others versus United India Insurance Company and others**, decided on 4.3.2020, this Court has held as under: -

"While interpreting the provisions of Section 168 and 168 (4) of the Motor Vehicle Act, 1988 (hereinafter referred as the "Act') were ignored by the Tribunal while deciding the matter. The Tribunal rejected the clam petition, though the deceased was admitted in the hospital and the F.I.R. clearly spelt out that it was due to the involvement of the vehicle. This fact was proved as the driver fled away with the vehicle though G.D. entry also there with police authorities. The post mortom report also proved the fact that deceased died due to accidental injuries. The vehicle tractor trolly was proved to be involved in the accident. The tribunal held that the driver, owner and insurance of the motor cycle was not joined as a party. The accident had taken place on 25.05.2001 at 9.30 p.m. as a result of involvement of tractor trolly which was not disputed by owner or driver or Insurance Company which has been proved by cogent evidence just because there are certain contradictions in the testimony of the witness and because who got the injured, in the hospital is not mentioned, the claim petition was dismissed and being the claimants' case is disbelieved. The fact is that the charge sheet was filed pursuant to F.I.R lodged is not just because in dispute the tractor trolly was not confiscated detained on the spot it is held that the vehicle was not involved in the said accident. Recently the High court of Gujarat in **Joshi Rajendrakumar Popatlal Vs. Thakor Ramnaji Hamirji and Others, reported in 2020 ACJ 365** has held that the Tribunal should not decide claim petition by taking hyper technical approach and thereby frustrate the provision of beneficial peace of legislation. The Apex Court in B**imla Devi and Ors. Vs. Satbir Singh and Ors. 2013 (4) SCC 345** has held that hyper technicality should not be allowed to frustrate the aim of beneficial peace legislation. In our case hyper technicality of the learned Tribunal has resulted into the flaw in his award. It was established that the deceased had definitely met with the accident involving two vehicles. It was also proved that the accident was between the tractor trolly and

the motor cycle on which the deceased was plying. The technical defect of pleading should not have been made the basis of rejection of the claim petition. I am supported in my view by the decision of Apex Court in the case of **Gurdeep Singh v. Bhim Singh, (2013) 11 SCC 507**, wherein provision of Section 173 of the "Act' read with Section 96 of the Code of Civil Procedure,1908 will permit this court to reverse the perverse findings reached by the tribunal. The Apex Court decisions in **Sharanmma V. North-East Karnataka RTC, (2013) 11 SCC 517.** The judgment in **Dulcina Fernandes V. Joaquim Xavier, First Appeal No. 216 of 2004, decided on 14.11.2008** with also help the claimants. Therefore also the appeal will have to succeed."

11. When the evidence is lead to show that the F.I.R., charge sheet, other documentary evidences and the oral testimony prove that the vehicle is involved, it cannot be held otherwise as argued by the counsel for the appellant.

12. While deciding the issue whether the vehicle is involved or not this court has held that the vehicle was involved. Hence the alternative submission of learned counsel for appellant will have to be evaluated in light of the evidence led, the principles enunciated and on the evidence led before the tribunal and the alternative submission that the driver of the truck was not negligent and it was driver of the motorcycle who was negligent and even if we consider this case as a case of composite negligence, the appellant may be given the right of recovery from the driver owner and insurance company of the motorcycle involved in the accident and it is further submitted that non joinder of the other vehicle is bad is not considered by the tribunal below which would vitiate the entire award. In contra, the learned counsel for the claimants has submitted that the driver of the motorcycle was not negligent, the driver of the truck came from behind dashed on the left-side of the motorcycle whereby the deceased was thrown on the unmetalled road and died on the spot, the driver of the motorcycle also fell on the dirt road and sustained injuries. It is submitted that the decision of the Apex Court and this High Court as far as filing a claim against any of the tortfeasor is at the option of the claimants and, therefore, the tribunal has rightly rejected this objection of the insurance company.

13. The collision of the truck into the rear portion of the motorcycle resulting in death of the pillion rider and whether the truck came too suddenly on center/ right side and caused collision whether the truck did not maintain sufficient distance from the motorcycle thus amounting to rash and negligent driving, the finding recorded by the tribunal goes to show that evidence clearly indicated that the truck was driven in a rash and negligent manner which was the cause of the accident resulting in death of pillion rider. It is clearl that the law mandates maintaining sufficient distance between two vehicles running in same direction. The driver of the truck did not depose that he had maintained sufficient distance. The road was National Highway 22 feet wide in any case the truck was expected to drive with a same distance as envisaged in rule of road regulations and, therefore, the finding on issue under consideration cannot be held against the motorcycle. The tribunal has not glossed over the filing of charge sheet against the truck driver after the investigation. The evidence analyzed by the tribunal along with the finding here-in-above cannot be

reversed. I am supported in view by the judgment in ***Nishan Singh v. Oriental Insurance Co. Ltd., (2018) 6 SCC 265***.

14. Recently the apex court in **Mangla Ram v. Oriental Insurance Company Ltd, AIR 2018 SC 1900** as there is no legal evidence to answer the issue of contributory negligence against the driver of the motorcycle and in absence of any such evidence this court cannot interfere under Section 166 read with 173 of the Motor Vehicles Act, 1988.

15. In view of the submission made by both the counsels as far as negligence is concerned this court while dealing with the issue of negligence, it would be relevant to discuss the principles for deciding negligence and for considering composite / contributory negligence will also have to be looked into and the principles enunciated for considering the same in a motor accident claim.

16. Negligence means failure to exercise required degree of care 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 and likely to cause physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law it is the duty of a fast moving vehicle to slow down and if driver did not slow down at, but continued to proceed at a high speed without caring to notice that another vehicle was either or going aheadcrossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently and the driver can be held to be the author of the unforseen incident.

18. 10th Schedule appended to Motor Vehicle Act,1988 contains 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 must 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 tries to overtake of the vehicle on road, particularly when he could have easily seen, that the vehicle in or over which deceased was riding, was being played.

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.

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

21. The burden of proof would ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle driven by the driver was being driven with reasonable care or it is proved that there is equal negligence on the part the other side in causing the accident.

22. T he recent judgment of the Apex Court is also required to be seen in the factual background. The evidence of the driver of the scooter in contra indication to the evidence of the driver of the truck goes to show that the truck which was a heavier vehicle had not taken proper care, the autopsy report shows that injuries where caused by truck and it is further shown that the driver of the truck did not blow any horn. The insurer cross examined Balram Pal Singh, he has accepted that the F.I.R. was lodged against the unknown vehicle. The reason being he was unconscious for quite, some time he has noted the number of the truck, he has emphatically mentioned that the incident took place involving Truck no. HR 29 B 7865 the FIR in site plan though did not disclose this. The driver of the truck came from behind and dashed with motorcycle, this fact has not been either disputed or proved to the contrary by the insurance company or owner or driver. In this case, eye witness, PW-2 has deposed that the motorcycle was being driven at a moderate speed. The driver of the truck has disposed the scooter came all of a sudden but whether it was being driven in reckless manner is not mentioned. There is not dispute that the truck came from behind and dashed with the motorcycle going in front, it is a principle of law that a vehicle which is a bigger vehicle has to be more cautious. In this case, the truck came from behind dashed on the wrong side with the motorcycle. The motorcyclist was on his correct side is the version of the driver of the motorcyclist that due to the dash of the truck, the motorcycle went away on the unmetalled road and the deceased died on the spot this shows the impact of the accident the impact with which the truck hit the motorcycle going in front of the truck even if we consider the version of the driver of the truck namely DW-1 that the motorcyclist came on the road abruptly the same cannot be believed, the reason being it is a national highway and the motorcyclist was driving the motorcycle on road and there was no curve or by lane. The motorcycle cannot be said to be negligent as motorcyclist has also suffered injuries and therefore can it be said that he was a co-author of the accident the principles for considering

contributory negligence vis-a-vis composite negligence would also not permit this Court to hold in favour of the appellant and take a different view then that taken by the tribunal. The tribunal has given enough cogent reasons to come to the conclusion that the accident was authored by the driver of the truck against whom, the charge sheet was laid the post mortem report shows that it was an instantaneous death due to accidental injuries tribunal considered the site plan and came to the conclusion that the accident occurred due to the negligence of the driver of the truck. Hence I cannot take a different view then that taken by the tribunal. The submission that the tribunal erred in holding that truck was involved in accident cannot be accepted just because the number of the vehicle was not mentioned in F.I.R. As per the provisions of Order XII Rule 6 of Code of Procedure Code, 1908 would also not permit this Court to hold otherwise the owner has accepted that it was negligence of the driver of the motorcycle which shows that he has accepted his vehicle namely truck being involved and the alternative submission that it was a case of contributory negligence cannot be accepted. Hence, both involvement and negligence of the driver of the truck were established and were rightly considered by the tribunal in light of the aforesaid decision.

23. As far as the non-joinder of the driver owner and insurance company of motorcycle, the tribunal has given cogent reasons and as it was a case of composite negligence, there was no necessity to implead the other vehicle involved in the accident. Necessity to implead the other vehicles was not there as truck driver has been held to be sole negligent.

24. This takes this Court to the question of compensation awarded. The deceased was a police personnel and his compensation of Rs.13,52,060/- cannot be said to be higher-side. The Tribunal has added only Rs.9,500/- for the non pecuniary damages and has not awarded any amount under loss of future income. Even if no appeal is preferred this court under Section 168 of the Motor Vehicles Act, 1988 can grant just compensastion and additional amount of Rs.70,000/- for for non pecuniary damages as per the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105** would be just and proper.

25. The appeal stands **dismissed.**

26. Oral cross objection is allowed under Order 43 Rule 1 of the Code of Civil Procedure, 1908.

27. The additional amount will carry interest at the rate of 6% from the date of the filing of the claim petition till deposit. The amount be deposited within a period of eight weeks from today.

28. Records and proceedings be sent back to the Court below immediately. The amount be disbursed by the Tribunal without keeping in fixed deposit as 13 years have already lapsed.

(2020)07ILR A72
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

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

First Appeal From Order No.2288 of 2019

Chandrabhan ...Appellant
Versus
Naresh Kumar & Ors. ...Respondents

Counsel for the Appellant:
Sri Bibhuti Narayan Singh

Counsel for the Respondents:
Sri Pawan Kumar Singh, Sri Ram Singh Yadav, Sri Rohit Kumar Singh, Sri Vijay Prakash Mishra

A. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166 - Compensation - Claim for enhancement - Future Income - even for amputation, addition of future income has to be made (Para 6)

B. Civil Law - Motor Vehicles Act (59 of 1988) - Section 166 – Compensation - Interest - interest should be 9% (Para 12)

Appeal partly allowed (E-5)

List of cases cited:-

1. Sanjay Kumar Vs Ashok Kumar & anr. (2014) 5 SCC 330

2. Syed. Sadiq & ors. Vs Divisional Manager, United India Insurance Company Ltd. (2014) 2 SCC 735

3. V. Mekala Vs M. Malathi & anr. (2014) 11 SCC 178

4. Hari Babu Vs Amrit Lal & ors. 2019 (2) T.A.C. 718 All

5. Basudev Das Vs Pradymna Mohanty & anr. (2019) ACJ 3019

6. Raj Kumar Vs Ajay Kumar & anr 3 (2011) 1 SCC 343

7. Kajal Vs Jagdish Chand (2020) 0 AIJEL-SC 65725

8. National Insurance Company Ltd Vs Birender & ors. C. A. No.242/243 of 2020 4 decided 13.01.2020

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

1. Heard Sri Bibhuti Narayan Singh, learned counsel for the appellant, Sri Vijay Prakash Mishra, learned counsel for respondent no.3- Sriram General Insurance

2. This appeal, at the behest of the injured-claimant challenges the judgment and decree dated 11.12.2018 passed by Motor Accident Claims Tribunal Bulandshahar (hereinafter referred to as 'Tribunal') in Claim Petition No. 389 of 2017 awarding a sum of Rs.4,48,218/- as compensation with interest at the rate of 6%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. The injured appellant was 47 years of age at the time of accident. He was helper/cleaner on the bus and its averred that he was getting salary of Rs.14,000/- per month. He sustained 80% disability out of this accident. The Tribunal granted compensation considering the disability of 80% namely Rs.4,22,400/- for future loss.

5. I t is submitted by learned counsel for the appellant that the Tribunal has considered income of the injured-claimant to be Rs.4,000/- per year month which is unjust and should be at least Rs.14,000X12=1,68,000/- per year. It is submitted that amount under the head of future loss of income has not been granted by the Tribunal. It is also submitted that the amount under the non-pecuniary heads and the interest awarded are also on the lower side and requires to be enhanced in view of

the following authoritative pronouncements:

(i) **Sanjay Kumar Vs. Ashok Kumar and another, (2014) 5 SCC 330;**

(ii) Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735;

(iii) V. Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

(iv) Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

(v) Hari Babu Vs. Amrit Lal and others, 2019 (2) T.A.C. 718 (All.).

6. Recently, Hon'ble Supreme Court in the case of **Basudev Das Vs. Pradymna Mohanty & Another reported in 2019 ACJ 3019** wherein it is held that even for amputation, addition of future income has to be made and therefore in case of appellant also further loss will have to be added.

7. As against this, it is submitted by the learned counsel for the respondent that the quantum awarded by the Tribunal is just and proper and does not call for any interference by this Court as the income which is not proved cannot be granted.

8. After hearing the counsel for the parties and perusing the judgment and order impugned, this Court feels that his income can be considered to be Rs.6,000/- per month to which as the injured was 47 years at the time of accident, 25% of the income would have to be added as future loss of income of the injured in view of the decision of the Apex Court in **Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343** and **Syed Sadiq and others (Supra)** and **Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725.** The loss of earning capacity namely 80% as considered by the Tribunal be maintained or the same may be reevaluated.

9. The amount granted by the Tribunal for medical expenses is also on lower side. Looking to the injuries caused to the appellant-claimant and in the judgment of Apex Court in the case of Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725 this Court has held that he would be entitled a sum of Rs.1,00,000/- .

10. Hence, the total compensation payable to the appellant is computed herein below:

i. Income : Rs.6,000/-

ii. Percentage towards future prospects : 25% namely Rs.1,500/-

iii. Total income : Rs.6,000 + 1,500= Rs.7,500/-

iv. Loss of earning capacity : 60% namely Rs.4,500/-

v. Annual loss : Rs.4,500 x 12 = Rs.54,000/-

vi. Multiplier applicable : 13.

vii. Total loss : Rs.54,000 x 13 = Rs. 7,02,000/-

viii. Medical expenses : Rs.25,000/-

ix. Future medicine : Rs.25,000/- + Artificial limb of Rs.50,000/- = 75,000/- .

x. Special diet : Rs.10,000/-

xi. Attendant charges : Rs. 1,000/-

xii. Amount under pain, shock and suffering : Rs.1,00,000/-

xiii. Total compensation: Rs.7,02,000 + 25,000 + 75,000 + 10,000 + 1,000 + 1,00,000= 9,13,000/-.

11. As far as issue of rate of interest is concerned, it should be 9% in view 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.

12. As far as issue of rate of interest is concerned, I am in agreement with Sri Gour that the interest should be reviewed and. The interest should be 9% in view 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.

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

14. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of 9% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

15. The records and proceedings be send back to Tribunal for disbursement

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(2020)07ILR A75
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.06.2020

BEFORE

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

Misc. Single No. 9920 of 2018

Sumitra Devi ...Petitioner
Versus
Special Judge/Addl. Distt. & Sess. Judge E.C. Act Hardoi & Ors. ...Respondents

Counsel for the Petitioner:
Amitabh Misra, Harish Chandra

Counsel for the Respondents:
C.S.C., Anurag Shukla

A. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C (3) – U.P. Panchayat Raj (Settlement of Disputes) Rules, 1994 – Rule 4(1) – Election Petition – Presentation – As per Section 12-C (3) of the Act, 1947, an election petition has to be given or filed by any candidate at the election – It does not permit presentation of the Election Petition by the Advocate of the candidate or his clerk or any other agent or representative – Since, such a petition may lead to the vitiation of a democratic process, any procedure provided by an election statute must be read strictly. (Para 24 and 32)

Held –

51. … An Election Petition has, necessarily and mandatorily, to be presented by the candidate/election petitioner himself, if it is in his name, however, presentation of such a petition by his Advocate or clerk before the Prescribed Authority, in his presence, would be sufficient compliance of Section 12-C(3) of the Act, 1947.

B. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C (1) – 'May be' – Word 'may be'

used in the provision has nothing to do with its directory or mandatory character – It is merely indicative of the choice which a candidate at an election has i.e. to file or not to file an application under Section 12-C(1). (Para 21)

C.Civil Law - Civil Procedure Code, 1908 – Section 12- Applicability – Presentation of Election Petition – CPC cannot be applied to negate this unambiguous legislative mandate in the Act, 1947 – The provisions of the CPC would not apply so far as presentation of an election petition is concerned, as, the said field is occupied by Section 12-C(3) of the Act, 1947 thereby excluding the provisions in this regard as contained in the CPC for trial of suits. (Para 45 and 46)

D. Civil Law - U.P. Panchayat Raj (Settlement of Disputes) Rules, 1994 – Rule 4 U.P. Panchayat Raj Act, 1947 – Section 12-C (1) – Appearance of Counsel – 'May be' – Word 'may be' used in the provision has nothing to do with its directory or which it had been made – The act of presentation of an election petition and its hearing at the preliminary stage are two different acts – The intent of Section 12-C(3) of the Act, 1947 is that the act of presenting the election petition before the Prescribed Authority should be by the candidate and no one else. The fact that the counsel is also present at that time and he may argue the case is an entirely different matter. (Para 47)

E.Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C (3) – 'May be' – Word 'may be' used in the provision has nothing to do with its directory or Interpretation of Statute – When the Statute prescribes a mode of doing a thing in particular manner, it should be done accordingly, and not otherwise – Absence of any provision in the Act, 1947 or the Rules made thereunder analogous to Section 86 of the Act, 1951 does not make Section 12-C(3) any less mandatory and it does not become directory. (Para 60 and 61)

Held –

67. Even if a provision is held to be directory it does not mean that the concerned authority which is required to observe it, can ignore it, as, no Authority or Forum can ignore a statutory provision enjoining it to perform any duty especially a provision such as the one contained in Section 12-C(3). When a provision is declared to be directory all that it means is that a failure to obey it does not render a thing duly done in disobedience of it a nullity before a Court of law on the ground of its violation, its non-compliance by itself may not necessarily be made a ground for interfering with the decision, but it certainly does not mean that those public Authorities or Forums, who are enjoined to comply it, can ignore it.

F. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C (3) - Interpretation of Statute – Overriding Effect – Provision of the main Act will always override the Rules made thereunder in the event of conflict –If a subject matter is covered by the Act the Rules made by the Rule Making Authority cannot be read and understood to supplant the object and intent of Section 12-C(3) of the Act, 1947. (Para 68)

G. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C (1) and (3) – Presentation of Election Petition – Non-compliance of provision – Curable or Non-curable – Act of presentation of an election petition denotes a onetime act of giving or delivering the petition by the candidate or the elector as the case may be before the Prescribed Authority. Once presented, the act of presentation stands exhausted and there is no question of it being cured on a subsequent date in the same proceedings – Non-presentation of an Election Petition under Section 12-C (1) and (3) of the Act, 1947 by the candidate/Election Petitioner personally or, by his Advocate or clerk in his presence, is fatal and is not a curable defect in those proceedings.

Held –

72. … In the event of dismissal of an Election Petition on the ground of its non-presentation as aforesaid by the candidate, if the limitation for filing such a petition is still available, then, the candidate can file an Election Petition afresh complying Section 12-C(3) as discussed above, as, the earlier dismissal is not on merits and there is no provision in the Act, 1947, nor was

any such provision brought to our notice, which prohibits filing of a fresh Election Petition as aforesaid.

Reference stand answered (E-1)

Cases relied on :-

1. Lal Bahadur Singh Vs Vishal Singh (1963) ALJ 542

2. Smt. Prem Lata Vs Rajendra Pati (1959) ALJ 741

3. Ganpat Singh Vs Election Tribunal, Mainpuri (1960) ALJ 48

4. Viresh Kumar Tiwari Vs A.D.J., Ballia & ors. (2013) Law Suit All 3871

5. G.V. Sreerama Reddy & anr. Vs Returning Officer & ors. (2009) 8 SCC 736

6. Devendra Yadav Vs D.E.O./D.M., Mau; (2011) 9 ADJ 219

7. Urmila Vs St. of U.P. & ors. (2019) 2 ADJ 500

8. St. of Mh. Vs R.S. Nayak (1982) 2 SCC 463

9. Sheo Sadan Singh Vs Mohan Lal Gautam (1969) 1 SCC 408

10. Bhawar Singh Vs Navrang Singh AIR (1987) Rajasthan 63

11. Jagan Nath Vs Jaswant Singh & ors. AIR (1954) SC 210

12. Jyoti Basu & ors. Vs Devi Ghosal & ors. AIR (1982) SC 983

13. Kailash Vs Nanku & ors. AIR (2005) SC 241

14. M/s. Unique Butyle Tube Industries Pvt. Ltd. Vs U.P. Financial Corporation & ors. (2003) 2 SCC 455

15. Civil Appeal No. 16128 of 2008; Ram Sukh Vs Dinesh Agarwal

16. Hardwari Lal Vs Komal Singh (1972) SCR 3 742

17. Drig Raj Kuer Vs Amar Krishna Narain Singh AIR (1960) SC 444

18. Vikas Trivedi & ors. Vs St. of U.P. & ors. (2013) 2 UPLBEC 1193

(Delivered by Hon'ble Ranjan Roy, J.)

1. An interesting issue regarding the manner of presentation of an election petitions under Section 12-C(1) and (3) of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "the Act, 1947') has been referred by a Single Judge Bench for our consideration. The Single Judge Bench has referred the matter to us as it noticed conflicting opinions of various Benches of this Court on the issue involved and also as it is an issue which arises quite often before the Courts in proceedings arising from of an election petition under the Act, 1947, hence the need to settle it conclusively. The question referred to us vide order dated 13.8.2019 of the writ court, as rephrased by us vide our order dated 22.11.2019, are quoted below :-

"1.) Whether presentation of an election petition by the election petitioner personally is a mandatory requirement in view of Sub-section 3 of Section 12 C(1) of the Act, 1947 and Rule 3(1) of the Rules, 1994 and whether it's non-compliance is fatal or it would merely be an improper presentation, a curable defect?

2. Whether the decision of the Single Judge Bench of this Court in the case of ***Viresh Kumar Tiwari (supra)*** *lays down the law correctly with regard to the question framed at serial no. 1 or it is the division Bench judgment in the case* ***Lal Bahadur Singh (supra)*** *and the subsequent Single Bench judgment in the case of* ***Urmila (supra)*** *which lay down the law correctly ?"*

2. As we are not required to decide any factual issue involved in the Writ Petition andespecially as the questions referred to us are not dependent on any

peculiar facts of the case but are of a general nature, we do not find it necessary to mention the facts leading to the filing of the Writ Petition in question. Suffice it to say that according to the petitioner the election petition in question had not been presented by the candidate, it was presented by his Advocate, as is recorded in the ordersheet by the Prescribed Authority, therefore, the mandate of section 12-C(3) of the Act 1947 had not been complied which was mandatory, hence the petition was liable to be dismissed, but neither the Prescribed Authority nor the revisional authority ha*ve appreciated this aspect of the matter appropriately and in accordance with law*.

3. Learned Counsel for the petitioner argued to persuade the Court that filing of an election petition under Section 12-C of the Act, 1947 is to be done by the candidate/election petitioner himself and not by any other person, if the petition is by the candidate. Any defect in this regard, according to him, was fatal and not curable.

4. On the other hand Shri Anurag Shukla appearing for the contesting opposite party took up a contrary stand. He tried to convince us that the petition could be filed by the agent of a candidate/ election petitioner such as his Advocate or his clerk and in this regard the provisions of C.P.C would apply in view of the provision contained in Rule 4 (1) of the U.P. Panchayat Raj (Settlement of Disputes) Rules, 1994 (hereinafter referred as 'Rules 1994'). Even if it was required to be filed by the candidate/election petitioner personally, the defect was a curable one and not fatal as there were no penal consequences prescribed in the Act 1947 or the Rules 1994 for non-compliance of Section 12-C(3). Shri S.P. Singh, learned CSC took us through various provisions of this Act and his stand was the same as that of the petitioner.

5. Question no. 1 is in two parts. We would like to first of all consider the first part of Question No. 1, as to whether an application questioning the election of a person as Pradhan or as a Member of Gram Panchayat referable to Section 12-C(1) is required to be mandatorily presented by a candidate personally or it can be presented by his agent or Advocate, as the case may be, as well.

6. The State Legislature has promulgated the U.P. Panchayat Raj Act, 1947. As per its preamble, it is an Act to establish and develop local self-government in the Rural areas of Uttar Pradesh and to make better provisions for village administration and development.

7. Subsequent to promulgation of the said Act, 1947, Part-IX has been inserted in the Constitution of India by the 73rd Act, 1992 w.e.f. 24.04.1993. Part- IX provides for constitution of Panchayats, their composition and also that all the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area. As per Article 243-C(1) subject to the provisions of Part-IX of Constitution, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Article 243-K deals with elections of Panchayats.

8. Article 243-O(b) contained in Part-IX of the Constitution of India provides that "notwithstanding anything in this Constitution no election to any Panchayat shall be called in question except by an election petition presented to such authority

and in such manner as is provided for by or under any law made by the Legislature of a State'. The words *"presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State'* indicate that the manner of presenting an election petition has to be such as is provided by the State Legislature.

9. Now coming back to the Act, 1947, Section 11-B of the said Act deals with election of Gram Pradhan. Section 12 of the Act, 1947 deals with Gram Panchayat and elections to it. Section 12-BB of the Act, 1947 provides for superintendence etc. of such election by the State Election Commission. Section 12-BC to 12-BD of the Act, 1947 also deal with elections to the Gram Panchayat. Section 12-C provides for filing of an election petition and matters related thereto.

10. There are general Rules which have been made under the Act, 1947 known as U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as "the Rules, 1947').

11. This apart there are separate Rules made under Section 110 of the Act, 1947 dealing with separate subject matters. One such set of Rules, as already stated, is known as U.P. Panchayat Raj (Settlement of Disputes) Rules, 1994.

12. The Act, 1947 and the Rules made thereunder provide a complete Code for dealing with matters related to the Panchayats including elections to the same and all matters related thereto.

13. Section 12-C of the Act, 1947 which is relevant for our purpose, reads as under:-

"12-C. Application for questioning the elections - (1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that -

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected -

i- by the improper acceptance or rejection of any nomination or;

ii- by gross failure to comply with the provisions of this Act or the rules framed thereunder.

(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act.

(A) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person with the connivance of a candidate of any gratification of any person whomsoever, with the object, directly, or indirectly of including -

(a) a person to stand or not to stand as, or withdraw from being, a candidate at any election; or

(b) an elector to vote or refrain from voting at an election; or as a reward to -

i- a person for having so stood or not stood or having withdrawn his candidature; or

ii- an elector for having voted or refrained from voting.

(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right;

Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who -

i- threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

ii- induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of -

i- hearing of the application and the procedure to be followed at such hearing;

ii- setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner,

have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).

(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely -

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;

(b) that the prescribed authority has failed to exercise a jurisdiction so vested;

(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.

(7) The District Judge may dispose of the application for revision himself or may assign it for disposal to any Additional District Judge, Civil Judge or Additional Civil Judge under his administrative control and may recall it

from any such officer or transfer it to any other such officer.

(8) The revising authority mentioned in sub-section (7) shall follow such procedure as may be prescribed, and may confirm, vary or rescind the order of the prescribed authority or remand the case to the prescribed authority for re-hearing and pending its decision pass such interim orders as may appear to it to be just and convenient.

(9) The decision of the prescribed authority, subject to any order passed by the revising authority under this section, and every decision of the revising authority passed under this section, shall be final."

14. The procedure regarding proceedings of an election petition as referred in sub-rule (4) and (5) of section 12-C has been prescribed in the Rules 1994. Rule 3 and 4 of the said Rules, 1994 read as under:-

*"**3. Election Petition**. - (1) An application under sub-section (1) of Section 12-C of the Act shall be presented before the Sub-Division Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the day on which the result of the election questioned is announced and shall specify the ground or grounds on which the election of the respondent is questioned and contain a summary of the circumstances alleged to justify the election being questioned on such ground :*

Provided that no such application shall be entertained unless it is accompanied by a treasury challan to show that the amount of rupees fifty has been deposited in the personal Ledger Account of the Gram Panchayat concerned as security.

(2) The person whose election is questioned and where the petition claims that the petitioner or any other candidate shall be declared elected in place of such person, every unsuccessful candidate shall be made a respondent to the application.

(3) Every respondent may give evidence to prove that any person in respect of whom a claim is made, that such person be declared elected, should not be declared so elected on the same ground or grounds on which his election could have been questioned, if he had been elected.

***4. Hearing of the petition**. - (1) Subject to the provisions of the Act and these rules, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, for the trial of suits:*

Provided that -

(i) the Sub-Divisional Officer may hear the petitioner or his counsel and if he finds that the petition has no substance, reject the same without the issue of any notice to the opposite parties;

(ii) it shall not be necessary for the Sub-Divisional Officer to record the evidence in full and he may maintain only a memorandum of evidence produced by the parties before him;

(iii) if there is a sole petitioner and he dies, or there is a sole respondent and he dies, the petition shall abate;

(iv) the Sub-Divisional Officer may allow only such evidence to be produced as he deems relevant for the purpose of deciding the petition;

(v) the District Magistrate may at any stage on sufficient cause being shown transfer an application made under sub-section (1) of Section 12-C for hearing to another Sub-Divisional Officer;

(vi) an application not presented within time or unaccompanied by a treasury challan as required under sub-rule (1) of Rule 3 may, at any time, be dismissed by the Sub-Divisional Officer; and

(vii) the Sub-Divisional Officer may, on an application of either party made within five days after the date of his decision, review his order.

(2) If the Sub-Divisional Officer after hearing finds in respect of any person whose election is called in question by the petition, that his election was valid, he shall dismiss the petition as against such person and may award costs at his discretion and in case he finds the application to be altogether frivolous he may also order that the security deposit shall in part or whole be forfeited to the concerned Gram Panchayat.

(3) If the Sub-Divisional Officer finds that the election of any person was invalid he shall either -

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected, whichever course appears, in the particular circumstances of the case, to be appropriate, and in either case may award costs at his discretion :

Provided that no such declaration shall be made unless a claim for it has been made in the application.

(4) The security deposit or portion thereof, as the case may be, not forfeited under sub-rule (2) and not required for payment of any costs awarded to any opposite party shall be refunded by the District Panchayat Officer to the person depositing the same or in case of his death, to his legal representative."

15. The question as to whether an application under Section 12-C(1) and (3) is to be presented by a candidate or an elector personally or it could also be presented through his Advocate or his agent came up for consideration before a Division Bench of this Court in a case reported in ***1963 ALJ 542; Lal Bahadur Singh Vs. Vishal Singh*** i.e. prior to coming into force of Rules 1994. The Division Bench dealt with the issue in the light of Rule 24 and 25 of the Rules, 1947 and opined that Clause (2) of Rule 24 of the Rules, 1947 can not be interpreted as requiring an election petition to be mandatorily presented personally by the petitioner. Even if it is held that it is necessary for an election petition to be presented personally too much importance could not be attached to such a requirement. It observed, defective representation has always been held to be a curable irregularity. It referred to the Code of Civil Procedure in this regard. The Division Bench disapproved a contrary view expressed by a Single Judge Bench of this Court in the case of ***Smt. Prem Lata Vs. Rajendra Pati reported in 1959 ALJ 741*** and followed another Division Bench Judgment rendered in the case of ***Ganpat Singh Vs. Election Tribunal, Mainpuri reported in 1960 ALJ 48*** which was a

matter pertaining to a different provision contained in the U.P. Town Areas (Conduct of Election of Chairman) Rules, 1953 (hereinafter referred to as "the Rules, 1953'). The Division Bench found the provision in Rule 24(2) of the Rules, 1947 to be paramateria with Rule 47 of the Rules, 1953.

16. A striking feature of the decision in ***Lal Bahadur Sing's case*** (supra) is that the language used in Section 12-C(3) of the Act, 1947 has not been considered, instead, Rule 24(2) of the Rules, 1947 as then existing, was considered. Rule 24 (2) and 25(1) of the Rules, 1947 made under the Act, 1947, as considered in the aforesaid case, read as under:-

"24(2). The application may be presented by any candidate in whose favour votes have been recorded or whose nomination paper was rejected or by any 10 or more electors of the Sabha. "Clause (1) of R. 25 provides,

"25(1) Subject to the provisions of the Act and the Rules contained in this Chapter, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial suits."

17 Subsequently, a Single Judge Bench of this Court rendering its decision in the case of ***Viresh Kumar Tiwari Vs. Additional District Judge, Ballia and Ors., 2013 Law Suit (All)3871,*** noticed the Division Bench judgment in ***Lal Bahadur Singh's case*** (supra) but it did not follow it as it relied upon a decision of the Supreme Court in the case of ***G.V. Sreerama Reddy and Anr. Vs. Returning Officer and Ors***. reported in ***2009 (8) SCC 736***, wherein, considering a similar provision contained in Section 81 of the Representation of Peoples Act, 1951, the Supreme Court had opined that the election petition had to be necessarily presented by the candidate or the elector in person. In the said case following the aforesaid decision of the Supreme Court the learned Single Judge held that an election petition under Section 12-C(1) and (3) of the Act, 1947 was also required to be presented by the candidate personally. The Single Judge Bench repelled the argument that the defect, if any, in non-presentation of the petition by the candidate personally was curable and not fatal. The said Bench relied upon the Single Judge Bench decision in the case of ***Smt. Prem Lata*** (supra) wherein it had been held that the word "candidate' used in Section 12-C(3) and the relevant Rule, would not include the agent of the election petitioner nor his counsel.

18. This issue came up for consideration before another Single Judge Bench of this Court earlier, in the case of ***Devendra Yadav Vs. District Election Officer/District Magistrate, Mau*** reported in ***2011 (9) ADJ 219***, in the context of the U.P. Panchayat Kshetra Panchayat and Zila Panchyayat (Election of Pramukh and Up-pramukhs and Settlement of Disputes) Rules, 1994, involving Rule 35(2) therein. The Court held that presentation of the election petition in person by the election petitioner was mandatory on the ground that the provisions relating to elections should be construed and applied strictly. It was also persuaded to take this view on account of the object behind such a provision which was to avoid frivolous and fictitious litigation. The use of the word "shall' in Rule 35(2) was also a factor which led the Court to hold such a requirement to be mandatory. The Court

held that even in the absence of any penal consequences provided in the Rules, 1994 flowing from non compliance of Rule 35(2) if the statute prescribed a manner of doing a particular thing it should be done in the same manner and if there is non compliance, then, the Judge has inherent powers to dismiss the election petition otherwise it would make the provision meaningless and redundant. The Court further opined that if such a plea was not taken at the earliest that the election petition had not been presented by the candidate/election petitioner, it would be deemed to have been waived.

19. This issue again came up for consideration before another Single Judge Bench of this Court in the case of ***Urmila Vs. State of U.P. and Ors***. reported in 2***019 (2) ADJ 500.*** This was a case arising out of an election petition under Section 12-C of the Act, 1947, just as the case at hand, though the facts were slightly different. In the said case the order sheet of the election petition did not mention that the petition had been presented by the candidate i.e. the election petitioner, and the issue cropped up as to whether it was liable to be dismissed on this ground or not. The Court, relying upon the decision of the Supreme Court in the case of ***State of Maharashtra Vs. R.S. Nayak*** reported in ***1982 (2) SCC 463***, opined that an order sheet of a Court or Tribunal is conclusive evidence of the proceedings before it. However, taking the reasoning further it opined that what came out from the said decision of the Supreme Court was that the recitals in the order sheet of the Court are evidence only of the facts stated in the order sheet but are not evidence of non-existence of any fact not stated in the order sheet, meaning thereby, as the order sheet did not mention that the petitioner was not present at the time of its presentation, mere mentioning the presence of Advocate in the order sheet can not be treated as proof of non-presence of the petitioner unless it was specifically so stated. The Court also took cognizance of the fact that the Sub-Divisional Officer who is the Prescribed Authority for hearing an election petition under Section 12-C of the Act, 1947 is part of the executive structure of the State. They and their ministerial staff are not necessarily persons having knowledge of law nor are they conscious of the importance and sanctity of the recitals in the order sheet prepared in any case. In the said case the Court found that the order sheet did not indicate as to who presented the election petition, therefore, the said order sheet could not be conclusive evidence on this issue, as, it was incomplete and inadequate as regards the events which took place at the time of presentation of the petition before the Prescribed Authority. The Court relied upon a decision of the Supreme Court in the case of ***Sheo Sadan Singh Vs. Mohan Lal Gautam*** reported in ***1969 (1) SCC 408*** to hold that, even if, respondent no. 6 therein had not personally presented the petition to the Prescribed authority, the said fact would not itself be fatal for the election petitioner and it would not invite a dismissal on ground of improper presentation, if respondent no. 6 was present in the Court when the petition was being presented to the Prescribed Authority. Thus, the imprint on the first page of the election petition that it had been presented by the Advocate and the contention based thereon that it was not presented by the petitioner, was rejected. The Court thereafter took notice of the fact that no such objection had been specifically raised in the written statement filed in the election petition nor any application under order VII Rule 11 CPC had been filed. No

issues were framed on this aspect of the matter. It found that this argument was being raised for the first time before the High Court merely on the basis of recitals in the order sheet and the imprint of the first page of election petition. It relied upon Section 114(e) of the Indian Evidence Act, 1872 to opine that all Judicial and Official acts are presumed to have been regularly performed. The said presumption was rebuttable but the petitioner before the High Court did not plead nor adduce any evidence to rebut the same nor did he make any effort to get an issue framed on the controversy, as such it opined that he could not be permitted to raise any objection or dispute regarding presentation of the election petition for the first time before the High Court. The said Bench of this Court did not specifically go into the question as to whether the election petition was necessarily required to be presented by the candidate but, presumed it to have been so presented on facts and in law and thereafter, considered other issues on the basis of facts before it. It did not lay down any such proposition that the defect in this regard, if any, was curable, instead, it put the burden upon the person raising the objection of non-presentation of the petition by the candidate and found that it had not been discharged by him.

20. Coming back to the Act, 1947, Section 12-C(3) is the only provision which deals with presentation of an Election Petition referred under Section 12-C(1) of the said Act. When we peruse the provisions contained in Section 12-C(3) we find that the application under sub-section 1 of Section 12-C **may be presented by any candidate at the** election **or any elector** and shall contain such particulars as may be prescribed. The word **''may be'** is a verb phrase that indicates something that might happen or a potential state of affairs.

21. Now, the word **''may be'** used in the said provision has nothing to do with its directory or mandatory character. It is merely indicative of the choice which a candidate at an election has i.e. to file or not to file an application under Section 12-C(1).

22. However, the words **''presented by any candidate'** are significant. The word "presented' is derived from the word "present'. It conveys an act of presentation. One of the meaning assigned in the Chamber's dictionary (1993 Edition) to the word "present', which appears apposite in the context of Section 12-C(3), is, to give, or furnish, specially formally or ceremonially; to deliver, convey or handover. Thus, the word "presented' conveys an act of giving, filing or delivering, in the case of an election petition. The word **''present'** has been defined by the Oxford English Dictionary (Second Edition, 2014) to mean, the act of giving something to somebody especially at a formal ceremony.

23. Further, the word **''by'** is used in various contexts and one of the meanings assigned to the said word by the Oxford English Dictionary is that it is used after a passive verb for showing who or what did or cause something, as for example, the event was organized **''by local people'**. The same word has been explained in the Chambers Dictionary, inter alia, as meaning "through' (denoting the agent, cause, means etc.).

24. Thus, there is no doubt that in the context of the issue involved in the present

case, as per Section 12-C(3) of the Act, 1947, an election petition has to be given or filed by any candidate at the election. The language used in Section 12-C(3) does not permit presentation of the Election Petition by the Advocate of the candidate or his clerk or any other agent or representative. As, under Rule 3 of the Rules, 1994, it is the Sub-Divisional Officer concerned who is to function as the Prescribed Authority, therefore, it has necessarily to be given or filed before him, by the candidate.

25. The word "candidate' has not been defined in the Act, 1947 nor in the Rules, 1994. In this context, it is worthwhile to refer to the Single Judge Bench decision in the case of **Smt. Prem Lata** (supra), wherein, this aspect was considered and the High Court opined as under:-

"The term "candidate" has not been defined in the U.P. Panchayat Raj Act and the U.P. Panchayat Raj Rules. But if the provisions of the Act are given a proper meaning, the term "candidate" will not, on each and every case, include his agent. Proceedings arising out of an election petition are treated a quasi criminal proceedings in which the charge must be established beyond doubt and the election of a person cannot be set aside unless all the ingredients are established, for example, while defining the corrupt practice of bribery and undue influence it is mentioned that such corrupt practice should be committed by the candidate or any other person with the connivance of the candidate. Consequently, if an election agent is guilty of corrupt practice without the connivance of the candidate, the election cannot be set aside for the reason that it will not amount to a corrupt practice of bribery and undue influence as defined in the Act. In other words for purposes of sub-Sec. (2) of Sec. 12-C of the U.P. Panchayat Raj Act, candidate shall not include an agent. This finds corroboration from Sec. 81 of the Act also which lays down that any party to a civil or criminal or revenue case may appear before a Nyaya Panchayat either in person or by a servant, partner, relation or friend duly authorized in writing by him. In case the word "person" included his agent also, it was not necessary to lay down in Sec. 81 that a person could appear by his agent.

The rules framed by the State Government as contained in the U.P. Panchayat Raj Rules also lead us to the same inference. Rule 24(2) can usefully be compared with Rules 4-H and 18. Rule 24(2) lays down that the election petition may be presented by any candidate, while under Rule 18(1) the nomination paper has to be delivered to the Returning Officer by the candidate in person or by his agent. If the term "candidate" included his agent, it was not necessary to provide in this rule that the nomination paper could be delivered by the agent of the candidate. Rule 4-H governs the filing of claims or objections against the provisional Register of members, that is, the list of persons entitled to vote. It is laid down in the proviso to sub-rule (2) of this rule that a person may file any number of claims or objections including those on behalf of others by one petition. While filing a claim or objection on behalf of others, the applicant acts as their agent. In other words, for the purposes of filing claims or objections to the provisional list of voters, an agent can act for the principal.

It is thus apparent that in the U.P. Panchayat Raj Act and also in the U.P. Panchayat Raj Rules a differentiation has been made between a candidate and his agent, and consequently when an act can

be done by the candidate only, it shall be deemed that it must be done by him, and not by or through his agent.

*As indicated above, under Rule 24(2) of the U.P. Panchayat Raj Rules, an application under Sec. 12-C of the Act has to be presented by a candidate in whose favour votes had been recorded. It was not provided that the application could be presented by an agent of the candidate. The election law is a special law in the sense that it provides for a remedy complete in itself for challenging the result of the election, and it must be construed strictly. In other words, an election petition under Sec. 12-C should be presented in person by the candidate, and if it is presented by his agent, it will not be proper presentation. In the present case, the election petition was not presented by respondent no. 1, and consequent*ly it should not have been entertained and in any case, it could not be allowed."

26. In the aforesaid decision the Act, 1947 and the Rules, 1947 were considered. The Rules, 1994 were not in existence at that time. When we peruse the Rules, 1994 along with the Act, 1947 we do not find anything therein which would persuade us to hold that the term "candidate' used in Section 12-C(3) would include his agent. Thus, the observation made in the aforesaid judgment apply to the case at hand also with the same force. We shall deal with this aspect further, hereinafter.

27. Though, this decision was disapproved by the Division Bench in **Lal Bahadur Singh's case** (supra), with respect, we are inclined to agree with it for the reasons already mentioned therein and also on account of the fact that a somewhat similar provision contained in Section 81 of the Representation of Peoples Act, 1951 and the object behind such a provision was considered by the Supreme Court in the case of **G.V. Sreerama Reddy** (supra). As per the observations made therein the question to be considered by the Supreme Court in the said case was as to whether the election petition was presented in accordance with Section 81(1) of the Act, 1951 and whether the High Court was right in dismissing the same, as, it was not presented by the candidate or elector?

28. Before proceeding further, we may quote Section 81(1) of the Act, 1951:-

*"**81 (1) (1)** An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.*

Explanation.--In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not. Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

29. The words ***may be presented..... by any candidate at such election or any elector .....'*** have been used in Section 81(1) of the Act, 1951 just as they have been used in Section 12-C(3) of the Act,

1947, and it is these words which are relevant for answering the question posed before us.

30. In this context it is relevant to refer to the argument advanced in the said case before the Supreme Court on behalf of appellants before it, which was as under:-

"Learned counsel appearing for the appellants submitted that in the light of the language used in sub-section (1) there is no compulsion/obligation to present the election petition by the candidate himself. In other words, according to him, in view of the fact that the election petitioner had duly executed a vakalatnama, in favour of his advocate, he is empowered to present it to the authorized officer of the Registry. It is further contended that presentation of the election petition by a candidate or elector is not mandatory and if it is presented by his advocate duly authorized, the same is a proper presentation in terms of sub-section (1) of Section 81 of the Act. It is also contended that in cases of substantial compliance and where it is shown that absence was not to harm the respondent's case and certain exigencies existed which made the present difficult, the court should not dismiss the petition merely for non-compliance with Section 81(1) of the Act."

31. The argument advanced on behalf of learned counsel for the respondent therein, was as under:-

"On the other hand, learned counsel appearing for the contesting second respondent -successful candidate submitted that in view of the language used in sub-section (1), it is mandatory that the candidate or elector is to personally present it before the High Court. In view of the endorsement by the Registrar (Judicial) stating that the petitioners (appellants herein) were not present while presenting the election petition, the impugned order of the High Court dismissing the same cannot be faulted with."

32. The Supreme Court considered the arguments referred above and opined that the election petition under Section 81(1) was necessarily to be presented by the candidate or elector in person. It repelled the argument of the appellants as quoted hereinabove. It observed that while interpreting a special statute, which is a self contained Code, the Court must consider the intention of the Legislature. It mentioned the reason for this fidelity towards the legislative intent as being the fact that the statute had been enacted with specific purpose which must be measured from the wording of the statute strictly construed. It went on to observe that inspite of existence of adequate provisions in the Code of Civil Procedure relating to institution of a Suit, the present Act (the Act, 1951) contains elaborate provision as to disputes regarding elections. It thus opined that the provisions had to be interpreted as mentioned by the Legislature.

33. In the said case the Supreme Court observed, one can discuss why the Election Petition is required to be presented personally. It held that an election petition is a serious matter with a variety of consequences. Since, such a petition may lead to the vitiation of a democratic process, any procedure provided by an election statute must be read strictly. Therefore, the Legislature has provided that the petition must be presented "by' the petitioner himself so that at the time of presentation the High Court may make

preliminary verification which ensures that the petition is neither frivolous nor fictitious. It disapproved the decision of the Rajasthan High Court in the case of **Bhawar Singh Vs. Navrang Singh** reported in **AIR 1987 Rajasthan 63** wherein a contrary view had been taken. It also held that the object of presenting an election petition by a candidate or elector is to ensure genuineness and to curtail fictitious litigation. Thus, even from a purposive view of the matter, the reasons given by the Supreme Court regarding the object of such a provision, an Election Petition under Section 12-C(1) read with 12-C(3) of the Act, 1947, is required to be presented by the candidate so as to subserve such object.

34. It is not out of place to mention that while laying down that presentation of an election petition under section 81 of the Act 1951 by the candidate himself was mandatory, the Supreme Court gave an additional reason for its conclusion that is the provision contained in section 86 of the said Act 1951 which enjoines the High Court to dismiss an election petition on violation of section 81, but this does not dilute the importance or impact of the reasons given by it based on the language and object of section 81 which have been dealt with by the Supreme Court in the said case independent of the provisions of section 86.

35. The said observations, for the reasons mentioned therein, apply on all its fours to the provision contained in Section 12-C(3) of the Act, 1947 regarding presentation of an Election Petition under the Act 1947.

36. In fact in ***Jyoti Basu's*** case (supra) Section 81 of the Act, 1951 was also considered and what it held, as quoted below, veritably clinches the issue:-

"Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else."

37. These observations are based on the language used in section 81 of the Act 1951.

38. Such presentation of an Election Petition by the candidate and none else is also necessary as any statutory provision relating elections has to be applied strictly and there is no scope for equity or application of common law principles in this regard when the language of the statute is clear. In this regard we may quote the observations of the Constitution Bench decision in the case of ***Jagan Nath Vs. Jaswant Singh and Ors.*** reported in ***AIR 1954 SC 210,***wherein, their Lordships have held as under:-

"An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a straight

jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on common law or equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say ? "

39. As regards the permissibility of such presentation of an Election Petition by the candidate's Advocate in view of applicability of Code of Civil Procedure, 1908 to such proceedings, in view of Rule 4(1) of the Rules 1994, we must point out that the language used in section 12-C(3) of the Act 1947 regarding presentation of the election petition by any candidate or elector is very different from the provision contained in sections 15 and 26 C.P.C. read with Order III Rule 1 thereof. The aforesaid provisions of the C.P.C. do not require presentation of the plaint by the plaintiff personally as is evident from the provisions contained in section 26 which merely says 'every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order III Rule 1 permits any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where expressly provided by any other law for the time being in force be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting as the case may be on his behalf, provided that any such appearance shall, if the Court so directs, be made by the party in person. Rule 2 of Order III deals with recognized agents. Rule 4 of Order III deals with appointment of 'pleader'. The term 'pleader' has been defined in section 2(15) C.P.C. and includes an Advocate. Thus the provision contained in section 12-C(3) of the Act 1947 regarding presentation of an election petition by any candidate or elector is differently worded from the provisions contained in the C.P.C. as referred hereinabove.

40. Moreover, although as per Rule 4 of the Rules, 1994, the procedure applicable under the Code of Civil Procedure, 1908 for the trial of suits has been made applicable to the trial of an election petition under Section 12-C(1) by the Sub-Divisional Officer, but with a caveat ***''as nearly as may be'***, and moreover ***this is subject to the provisions of the Act, 1947 and the said Rules, 1994*** as is evident from the opening line of Rule 4(1) which uses the words-***"subject to the provisions of the Act and these Rules."*** These words leave no doubt that if the Act, 1947 and the Rules made thereunder provide for the manner in which the election petition is to be presented, then,

the provisions of the Code of Civil Procedure, 1908, to the contrary, will not apply, and it is the Act, 1947 and the Rules which will prevail. As already stated, as per Section 12-C(3) an election petition has to be presented by the candidate. The words Agent or Advocate has not been used in the said provision. In this context this Court in ***Smt. Prem Lata's case*** (supra) rightly held that the legislature, wherever it deemed fit in the Act, 1947 and the general Rules, 1947, used the words agents etc. in addition to the word "candidate' but in Section 12-C(3) it has only used the word "candidate', therefore, the intention of the Legislature is clear and it is in tune with the object mentioned hereinabove which is to avoid frivolous and fictitious litigations and to ensure its genuineness.

41. As regards applicability of the provisions of CPC, ***''as nearly as may be',*** which permits actual presentation of plaints though Advocates and not necessarily by the plaintiff, apart from the fact that such an argument has been repelled by the Supreme Court in ***G.V. Shri Ram Reddy's case*** (supra), in the case of ***Jyoti Basu and Ors. Vs. Devi Ghosal and Ors.*** reported in ***AIR 1982 SC 983*** also it has been held by the Supreme Court that the provisions of the Civil Procedure Code can not be invoked to permit that which the Representation of Peoples Act, 1951 does not permit. The Civil Procedure Code applies subject to the provisions of the Peoples Act, 1951 and any Rule made thereunder. The said observation/ratio applies in the instant case also in view of the provision contained in section 12-C of the Act 1947 which excludes application of any contrary provision in the CPC on the subject. In the said case the Supreme Court observed as under:-

"The questions is not whether the Civil Procedure Code applies because it undoubtedly does, but only as far as may be and subject to the provisions of the Representation of Peoples Act, 1951 and the rules made thereunder. Sec. 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked."

42. As already quoted earlier, the Supreme Court, in the said case, considered the provision of Section 81 and opined that an election petition can be presented by the candidate and none else. Hence the non-applicability of CPC in this regard.

43. We may also refer to the decision of the Supreme Court reported in ***AIR 2005 SC 241; Kailash Vs. Nanku and Ors.***, wherein, although it was held in the context of Representation of Peoples Act, 1951 that trial of an election petition encompasses all proceedings commencing from the filing of the election petition up to the date of decision but it was held that the procedure provided for the trial of civil suits under CPC is not applicable in its entirety to the trial of the election petition. The Court further observed that applicability of the procedure in CPC is circumscribed by two riders; firstly, the procedure prescribed in CPC is applicable only ***''as nearly as may be',*** and secondly, the CPC would give way to any provisions of the Act or any Rules made thereunder, therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guidelines.

44. These observations are applicable in the case of proceedings of an election

petition under the Act, 1947 also in view of the language used in Rule 4 of the Rules, 1994.

45. As Section 12-C(3) of the Act, 1947 clearly and specifically provides that it is the Candidate or the Elector who can present the Election Petition, therefore, none else can do it and CPC can not be applied to negate this unambiguous legislative mandate in the Act, 1947.

46. Thus, the provisions of the CPC would not apply so far as presentation of an election petition is concerned, as, the said field is occupied by Section 12-C(3) of the Act, 1947 thereby excluding the provisions in this regard as contained in the CPC for trial of suits and to this extent the Division Bench does not lay down the law correctly.

47. Shri Anurag Shukla learned counsel for the opposite parties placed reliance upon the proviso to Rule 4(1), wherein, it has been provided that the Sub-Divisional Officer may hear the petitioner or his counsel and if he finds that the petition has no substance reject the same without the issuance of any notice to the opposite parties, to contend that, the words "may hear the petitioner or his counsel' are indicative of the fact that the petition could be presented either by the petitioner or his counsel, as, at the stage of presentation and preliminary hearing itself the Court may see as to whether the petition has substance and if it finds that it does not have substance it can reject the same without issuance of any notice to the opposite parties, therefore, the presence of the counsel at that stage is indicative of the intent of the Legislature that the petition can be presented by him.

48. This contention is not acceptable for the reasons, firstly, the proviso to Rule 4(i) can not be read in conflict and contradistinction to the provision of main Act, 1947 under which it had been made, Secondly, the act of presentation of an election petition and its hearing at the preliminary stage are two different acts which may in a given situation be separated by time also. Even otherwise, as already discussed, the intent of Section 12-C(3) of the Act, 1947 is that the act of presenting the election petition before the Prescribed Authority should be by the candidate and no one else. The fact that the counsel is also present at that time and he may argue the case is an entirely different matter but this by itself does not persuade us to hold that presentation of the election petition can also be made by the counsel or by any other agent of the candidate in the absence of the election petitioner.

49. We are also persuaded to take this view on account of the fact that it is not for us to read something into a statutory provision which is not specifically provided therein when the language used in the statute is plain and unambiguous and does not lead to absurd results, especially when, the intention of the legislature has to be found in the words used by the legislature itself as has been held in ***G.V. Sri Rama Reddy*** (supra). Reference may also be made in this regard to the decision reported in ***2003 (2) SCC 455; M/s. Unique Butyle Tube Industries Pvt. Ltd. Vs. U.P. Financial Corporation and Ors***. If the statute prescribes the mode of doing a particular thing then it has to be done in the manner prescribed and not otherwise. In this regard we approve of the observation made by this Court in ***Devendra Yadav's case*** as noticed by us earlier. The words 'presented by any candidate' occurring in section 12-C(3) means the candidate has to himself give or deliver the petition to the Prescribed Authority, as already discussed.

The Act 1947 or the Rules 1994 does not define the term 'candidate' to include his agent or Advocate.

50. Having held as above, we need to take note of the decision of the Supreme Court in ***Sheo Sadan Singh's case*** (supra) wherein presentation of Election Petition under Section 81 of the Act, 1951 by the Advocate or clerk, in the presence of the candidate/ election petitioner was held to be substantial compliance of Section 81 of the Act, 1951 and this view has been approved by the Supreme Court in the case of ***G.V. Sri Rama Reddy*** (supra) also. In this view of the matter it needs to be clarified that even in matters of election petition under Section 12-C of the Act, 1947 if the election petition is presented by the agent or Advocate of the election petitioner/candidate in his presence before the Prescribed Authority, it would amount to substantial compliance of Section 12-C(3).

51. We are thus of the view that for these reasons an Election Petition has, necessarily and mandatorily, to be presented by the candidate/ election petitioner himself, if it is in his name, however, presentation of such a petition by his Advocate or clerk before the Prescribed Authority, in his presence, would be sufficient compliance of Section 12-C(3) of the Act, 1947. Question no. 1 is answered accordingly.

52. Now, coming to the second part of Question No. 1 i.e. whether non-compliance of Section 12-C (3) of the Act, 1947 in the sense that if the election petition is not presented by the candidate personally or by his agent or Advocate in his presence before the Prescribed Authority, would it be fatal or it would be a curable defect.

53. If a provision is held to be mandatory, then its non-compliance would be fatal.

54. The only aspect requiring consideration is whether in the absence of any provision prescribing penal consequences for non-compliance of section 12-C(3) such defect of non-presentation of an election petition by the candidate himself is a curable defect at any subsequent stage of the proceedings or not .

55. In this regard great emphasis was laid by Shri Anurag Shukla, learned counsel for the opposite parties upon the Constitution Bench decision of the Supreme Court in the case of Jagan Nath (supra) wherein the issue as to whether non joinder of necessary party in an election under the Act, 1951 was fatal or not, as, impleadment of necessary parties was mandatory, was considered. In the said case, it was observed as under:-

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however have any application if the special law itself confers authority of a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to

be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence, or does not lay down penalty for non-compliance with certain procedural requirements of that law, the justification of the tribunal entrusted with the trial of the case is not affected. It is in these circumstances necessary to set out the different provisions of the Act relevant to the matter convassed before us."

56. It further observed that the words "a petitioner shall join as respondents to his petition all the candidate who were duly nominated at the election other than himself if he was so nominated' were not considered to be of such a character as to involve dismissal of a petition in limine, as, Section 82 did not find place in the provisions of Section 85 and that the matter was such as could be dealt with by the Tribunal under the provisions of the Code of Civil Procedure specially made applicable to the trial of election petitions. It held that the provisions of law relating to the impleading of parties are not necessarily fatal and can be cured. It is for the Tribunal to determine the matter as and when it arises in accordance with the provisions of Code of the Civil Procedure.

57. Based on the aforesaid decision it was contended before us by Shri Shukla that there is no provision in the Act, 1947 or the Rules made thereunder analogous to Section 86 of the Act, 1951 which requires the High Court to dismiss an election petition which does not comply with the provisions of Section 12-C(3), therefore, Section 12-C(3) can not be said to be mandatory and the defect in presentation of an election petition by a person other than the candidate is liable to be cured on the analogy of the Constitution Bench decision in ***Jagan Nath's case*** (supra).

58. We are not persuaded by this argument for the reason, in the Act, 1951, as it existed prior to 1956, there was a provision in Section 85 thereof prescribing penal consequences for non-compliance of certain provisions such as Section 81, 83 and 117 of the said Act, however, Section 82 was not mentioned in Section 85, meaning thereby, the Legislature had consciously inserted Section 85 in the Act, 1951 enjoining the dismissal of an election petition on the ground of non-compliance of certain sections of the Act 1951, but, it deliberately and consciously omitted to mention Section 82 in Section 85, meaning thereby, the Legislative intent was clear that non-joinder of a necessary party should not mandatorily lead to dismissal of the election petition. Even generally speaking, non-implement of a necessary party in any legal proceeding is rectifiable and dismissal will follow only if the litigant declines to implead a necessary party or disputes the factum of a person being a necessary party thereby requiring adjudication on this issue as also on the fate of the proceedings based thereon. Even in the language of Section 82 no such intent of the Legislature was borne out that its non-compliance had to mandatorily result in dismissal of the election petition without any opportunity to cure the defect of non-joinder of necessary party, therefore, a valid and justified inference could be drawn in the context of the Act, 1951 as was done by the Supreme Court that non-compliance of Section 82 was not fatal and it could be rectified. The judgment in Jagan Nath's case (supra) is

therefore, to be understood in this light and the same does not help the opposite parties in view of the language of section 12-C(3) of the Act 1947 and the object behind it, as discussed earlier.

59. Further, the character of the provision contained in Section 82 of the Act, 1951 as considered in ***Jagan Nath's case*** (supra) and the object behind it was very different from Section 12-C(3) of the Act, 1947 which is similar to Section 81 of the Act, 1951, therefore, the decision in ***Jagan Nath's case*** (supra) does not help Shri Shukla. It is the assertions made in G.V. Sreerama Reddy case (supra) which are apposite to the provision contained in section 12-C (3) as already referred.

60. Absence of any provision in the Act, 1947 or the Rules made thereunder analogous to Section 86 of the Act, 1951 does not make Section 12-C(3) any less mandatory and it does not become directory merely for this reason, although the converse would have certainly made it conclusively mandatory and non-curable without any other factor being required to be taken into consideration. We may refer to a decision of the Supreme Court in the case of ***Ram Sukh Vs. Dinesh Agarwal; Civil Appeal No. 16128 of 2008*** wherein it was held that merely because Section 83 of the Act, 1951 was not mentioned in Section 86 it does not mean that High Court could not have dismissed the election petition at the threshold on the ground of absence of material facts i.e. the absence of a cause of action by applying Order VII Rule 11 C.P.C. In this regard a three Judge Bench decision of the Supreme Court in the case of ***Hardwari Lal Vs. Komal Singh*** reported in ***1972 SCR (3) 742*** was relied upon.

61. Further when the Statute prescribes a mode of doing a thing in particular manner, it should be done accordingly, and not otherwise. In the present case the election petition is required to be presented by the candidate or the elector himself, and not his agent and if it is not so done, then consequence would be dismissal of the election petition.

62. Moreover, as already stated, there is an object behind such a provision, therefore, even adopting a purposive interpretation of the provision it has to be held to be mandatory and non-curable in such proceedings so as to ensure genuineness of the proceedings and to avoid frivolousness and fictitiousness in this regard so as to secure sanctity of election proceedings challenging an election as held by the Supreme Court in G.V. Sri Ram Reddy's case (supra). In this regard we reiterate our approval of the observation made by this Court in ***Devendra Yadav's case*** as mentioned earlier.

63. Absence of a provision prescribing penal consequences for non-compliance of statutory provision is no doubt a factor to be considered while deciding whether a provision is directory or mandatory but the language of the provision in question, the intent of the Legislature and the object sought to be achieved are also to be borne in mind. The language used in section 12-C(3) and the intent behind it make it non-curable, especially as 'presentation' denotes a one time act in a proceeding.

64. Even at the cost of repetition it needs to be mentioned that Section 81 of the Act, 1951 was held to be mandatory in

J. V. Sri Ram Reddy's case (supra) on account of the object and intent of the Legislature and the provision contained in Section 86 was of course an additional conclusive factor but this does not diminish the value of the other reasons mentioned therein especially these regarding the object which Section 81 seeks to achieve, which apply to the case at hand also.

65. It is not out of place to mention that even if a provision is held to be directory it does not mean that the concerned authority which is required to observe it, can ignore it, as, no Authority or Forum can ignore a statutory provision enjoining it to perform any duty especially a provision such as the one contained in Section 12-C(3). When a provision is declared to be directory all that it means is that a failure to obey it does not render a thing duly done in disobedience of it a nullity before a Court of law on the ground of its violation, its non-compliance by itself may not necessarily be made a ground for interfering with the decision, but it certainly does not mean that those public Authorities or Forums, who are enjoined to comply it, can ignore it. Reference may be made in this regard to Paragraph 21 of Judgment of the Supreme Court in ***Drig Raj Kuer Vs. Amar Krishna Narain Singh*** reported in ***AIR 1960 SC 444.*** Reference may also be made to Paragraph 75 and 76 of the Full Bench Decision in the case of ***Vikas Trivedi and Ors. Vs. State of U.P. and Ors***. reported in ***(2013) 2 UPLBEC 1193*** wherein reference has been made to Paragraph 5-052 of De-Smith on Judicial Review regarding mandatory and directory provision in a statute to the effect- all statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole i.e. its object etc. This of course is subject to what we have already held as to the mandatory character of Section 12-C(3).

66. Further, a similar argument was advanced by Shri Shukla, learned counsel for the opposite parties, relying upon the proviso to Rule 2 read with Clause 6 of the proviso to Rule 4 of the Rules, 1994. He contended that a clear stipulation had been made by the Rule making Authority that in the event the petition is not filed within the limitation prescribed and/or is not accompanied by the requisite treasury challan, may, at any time, be dismissed by the Sub-Divisional Officer but no such stipulation is provided for dismissal of an election petition on the ground that it has not been presented by the candidate or the elector personally, therefore, relying upon the Constitution Bench decision in Jagan Nath's case (supra) he contended that absence of such a provision prescribing a penal consequence for non-filing of the election petition by the candidate or the elector personally in the Rules, 1994, while prescribing such stipulation in relation to other requirements, is conclusive of the fact that the aforesaid requirement is not mandatory but only directory and the non-filing would not be fatal.

67. Apart from the fact that this argument of Shri Shukla is not acceptable on account of the reasons already given by us, it needs to be reiterated that the provision for filing of an election petition

by the candidate or the elector is contained in Sub-section 3 of Section 12-C which is the substantive provision contained in the main Act, 1947 and not in the Rules1994. Although, under Section 110(ii-c) of the Act, 1947 the State Government is empowered to make Rules regarding presentation and disposal of election petitions and applications for revision under Section 12-C and it has in fact made the Rules, 1994, which have already been referred by us earlier, there is no provision in the said Rules 1994 as to who shall present the election petition. Such a provision is contained only in Section 12-C (3) of the Act, 1947 i.e. the main Act, under which the Rules, 1994 have been made. In contradistinction to this, other modalities such as limitation for filing the election petition and that it should be accompanied by a treasury Challan have been specifically prescribed in Rule 3 of the Rules, 1994, therefore, the consequence of non-compliance of these stipulations contained in the Rules has been prescribed in Clause 6 of Rule 4 of the Rules, 1994, but, as, there is no prescription or stipulation in the Rules, 1994 as to who should file the election petition, therefore, the consequences of non-compliance of the same is not prescribed in the said Rules 1994. It being so, no such inference can be drawn, as suggested by Shri Shukla, based on absence of such a provision prescribing such consequences regarding filing of the election petition in the Rules, 1994. It is Section 12-C(3) of the Act, 1947 which applies in this regard and the question referred has to be answered keeping the said provision and object behind it in mind. An election petition under Section 12-C(1) is required to be filed by the candidate or the elector personally, as already held, and the consequences of non-filing flow from the language, intent, and object of Section 12-C(3) as explained hereinabove, and not from the Rules, 1994.

68. It is trite that provision of the main Act will always override the Rules made thereunder in the event of conflict. If a subject matter is covered by the Act the Rules made by the Rule Making Authority can not be read and understood to supplant the object and intent of Section 12-C(3) of the Act, 1947. The argument noticed above is thus rejected. This is in addition to the reasons already given by us while rejecting such argument of Shri Shukla based on the decision in ***Jagan Nath's case*** (supra).

69. Moreover, the Act of presentation of an election petition denotes a one time act of giving or delivering the petition by the candidate or the elector as the case may be before the Prescribed Authority. Once presented, the act of presentation stands exhausted and there is no question of it being cured on a subsequent date in the same proceedings.

70. In view of above, the irresistible conclusion is that once the election petition is presented by a person other than the candidate or the elector or it is presented in his absence, Section 12-C(3) stands violated and the Prescribed Authority has no option in this regard to adjourn the matter to some other date for rectification of the error which in fact is non curable/ non rectifiable also as, act of presentation is a one time act in a proceeding.

71. hus, non-presentation of an Election Petition under Section 12-C (1) and (3) of the Act, 1947 by the candidate/Election Petitioner personally or, by his Advocate or clerk in his presence, is fatal and is not a curable defect in those proceedings.

72. Having held as above we may add that in the event of dismissal of an Election Petition on the ground of its non-presentation as aforesaid by the candidate, if the limitation for filing such a petition is still available, then, the candidate can file an Election Petition afresh complying Section 12-C(3) as discussed above, as, the earlier dismissal is not on merits and there is no provision in the Act, 1947, nor was any such provision brought to our notice, which prohibits filing of a fresh Election Petition as aforesaid. We could also not find any provision in the Act, 1947 or Rules made thereunder analogous to the explanation to Section 86 read with Section 98(a) of the Act, 1951. This, in our view, will, on the one hand, achieve the object of Section 12-C(3) and abide by the language used therein and, on the other hand, will prevent an otherwise meritorious challenge to an Election from being defeated by default.

73. We are also of the view that any objection regarding non-presentation of an Election Petition by a candidate as aforesaid should be raised at the earliest when the trial is still pending before the Prescribed Authority and not after disposal of the Election Petition such as at the Revisional stage or before the High Court. This is for the reason firstly, if not raised during trial a specific issue can not be framed in this regard and the parties would not be able to lead evidence in respect to it, secondly, if raised at a later stage evidence may not be available by then or the Officer before whom the petition was presented may himself not be available. Thirdly, once there is an adjudication of the Election petition on merits, then, it will be highly inequitable to allow such a plea or objection to be raised at the Revisional level or before the High Court under Section 226 of the Constitution, especially when, the Election Petition has succeeded. It will therefore have to be treated as waived, as has been held in ***Devendra Yadav's case*** (supra).

74. We are also of the view that Prescribed Authorities should specifically and mandatorily record in the order sheet as to whether the Election Petition has been presented by the candidate personally or, by his Advocate or clerk in the presence of the candidate, or not ? The consequences will follow accordingly as discussed above. This will avoid unnecessary litigation based on such pleas and save a lot of time and energy of all the stakeholders. The Prescribed Authorities and Revisional Authorities under Section 12-C(1) and 12-C(6) of the Act, 1947 are directed to strictly comply with these observations/directions.

75. As regards question no. 2, in view of the discussion already made by us hereinabove, we are of the view that the Division Bench in Lal Bahadur Singh does not lay down the law correctly as far as question no. 1 is concerned, subject of course to certain observations made by us in the earlier part of the judgment.

76. We must point out that Rule 24(2) of the Rules, 1947 when it used the words "by any 10 or more electors' were slightly different than the language contained in Section 12-C (3) as in the latter provision word "elector' has been used.

77. In fact the Division Bench in Lal Bahadur Singh's case (supra) only considered the said provision and did not specifically consider the language used in Section 12-C(3) of the Act, 1947 in the manner in which we have done, as such, it does not lay down the law correctly on this

issue, subject however to the observations made hereinabove.

78. As regards the decision in Viresh Kumar Tiwari's case (Supra), we approve of it in part as far as it holds that the election petition is to be filed by the candidate in person and not by his agent, but in our discussion relating to question no. 1 we have made it clear that filing of such a petition by the agent of the candidate/election petitioner i.e. his Advocate or clerk, in his presence before the prescribed authority, would amount to sufficient compliance of Section 12 C(3), therefore, subject to this modification, the said decision is approved.

79. With regard to the decision of this Court in Urmila's case (supra), we find that it does not lay down any proposition of law on the question no. 1 which has been considered by us. As already observed, it turns on its own facts. Therefore, its correctness is not required to be considered by us. Question No. 2 is answered accordingly.

80. Based on the discussion made, and subject to it, we summaries our answers to the questions referred to us (as rephrased by us), as under:-

1. (a) An Election Petition under Section 12-C(1) and (3) of the Act, 1947 has to be necessarily and mandatorily presented by the candidate/ Election petitioner himself, personally, if it is in his name. However, if it is presented by the Advocate or his clerk, in the presence of the candidate/ Election Petitioner before the Prescribed Authority, it would be sufficient compliance of Section 12-C(3) .

(b) In the event an election petition is not presented as aforesaid then it would be fatal and an incurable defect which has to result in dismissal of the petition by the Prescribed authority with liberty however, to the candidate to file a fresh petition, if the limitation is still available and before it expires, in accordance with Section 12-C(3), personally, or by his Advocate or Clerk in his presence. He can not adjourn the matter to some other date for rectification of the incurable defect in those proceedings.

2. The decision in Lal Bahadur Singh's case (supra) does not lay down the law correctly as regards Question No.1. The decision in Viresh Kumar Tiwari's case (supra) lays down the law correctly subject to the proposition that an election petition filed by the Advocate or his Clerk in presence of the candidate before the Prescribed Authority is also in accordance with section 12-C (3) of the Act 1947. In Urmila's case (supra) Question No.1 has not been decided.

81. To facilitate compliance of the judgment by the Prescribed Authorities as regards the procedure to be followed by them, the Senior Registrar of this Court at Lucknow shall communicate this Judgment to the Principal Secretary Panchayat Raj/ Additional Chief Secretary Panchayat Raj, Govt. of U.P. Lucknow, who, in turn, shall communicate it to all Prescribed Authorities in the State, for compliance.

82. A copy of this judgment shall also be circulated by the Registrar General of the High Court to all District Judges in the State of U.P., as they function as Revisional Authorities under Section 12-C(6) of the Act, 1947.

83. The records of the Petition along with our answer to the reference shall now

be placed before the Writ Court for further proceedings.

(2020)07ILR A100
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.07.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Bench No. 13415 of 2019
and
Misc. Bench No.31854 of 2019

Kamla Nehru Educational Society ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Nikhil Singh, Brijesh Kumar, Viplaw Sharma

Counsel for the Respondents:
C.S.C., Rajendra Pratap Singh, Surendra Pratap Singh

A. Civil Law - Registration Act 1908 – Section 69 – Registered deed – Cancellation – Jurisdiction of Civil Court – Legality of Administrative Order – The distinction between the jurisdiction of the Civil Court and the Revenue Court was made – A challenge to the registered deed can be made only by maintaining a civil suit – For cancellation of the deed, one need to approach the Civil Court and thereby, the cancellation deed after its registration was held to be wholly void and *non est*. (Para 45 and 46)

Held –

47. The direction of the District Magistrate to the Sub Divisional Magistrate for cancellation of deed without a civil suit would be illegal and otherwise mere cancellation of the order dated 09.02.2002 on any ground whatsoever would not be of any avail after execution of instrument with its registration unless the process of cancellation of registered deed by a civil suit is taken, as clarified hereinabove.

B. Civil Law - Nazul Manual – Rule 28 and 29 – Document – Nature – Method of Determination – The nomenclature of the document cannot be a guiding factor – What would prevail is the contents of the document – The registration of instrument was necessary in view of the Rule 29 read with Rule 28 of the Nazul Manual. In the instant case, it is not a lease deed but to be considered a sale deed after declaring land to freehold because the provisions of the Nazul Manual does not provide a deed of any other kind than lease deed or sale deed. The lease deed is executed on annual rent whereas sale deed on payment of consideration. (Para 14 and 44)

C. Civil Law - Nazul Land – Encroachment – Regularization in favour of encroacher – The Nazul Manual does not promote allotment of Nazul land to the encroachers. The circulars issued by the government are in ignorance of the provisions of the Nazul Manual – The encroachment of the government or Nazul Land takes place either in connivance of the Government officials or their negligence otherwise there was no reason for the petitioners to occupy the land without applying the means, provided under the law – Court found no reason to direct the respondents to allot the land to the encroachers or to restrain them to remove the encroachment. (Para 13, 14 and 16 of the Judgment passed in connected writ petition)

Writ Petition allowed; Connected Writ Petition no. 31854 of 2019 dismissed (E-1)

Cases relied on :-

1. Writ C No. 2973 of 2016; Smt. Kusum Lata Vs St. of U.P & ors. decided on 18.05.2018

2. Thota Ganga Laxmi & anr. Vs Govt. of A.P. & ors. (2010) 15 SCC 207

3. City and Industrial Development Vs Ekta Mahila Mandal & anr decided by Supreme Court on 17.09.2007

4. Jagpal Singh & ors. Vs St. of Punjab & ors. decided by S.C. on 28.01.2011

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. By way of this writ petition, a challenge has been made to the order dated 23.3.2019 passed by the opposite party no.2 to cancel the order dated 9.2.2002 by which land in dispute was declared freehold. It is with a direction for refund of the amount to the petioner, as was paid at time of execution of the deed.

The case has long chequered history thus need to be given in serratum for clarity.

2. By the order dated 11.3.1974, a decision was taken for lease of Nazul land in dispute to the petitioner society. The District Collector passed an order on 6.10.1976 for grant of lease for period of 30 years on an annual rent of Rs.1,135/-. It was as per the direction of the Governor of the State of U.P. under Rule 51 of the Nazul Manual. The order dated 6.10.1976 was passed in pursuance to the letter dated 7.7.1976 for grant of lease to the petitioner society. The name of the petitioner society was thereafter entered in the Nazul Register and Khatauni fasli 1389.

3. The District Collector, Raebareli sent a letter dated 4.4.193 to the Government to find out whether lease deed has been examined to undertake further process of its execution. The lease deed was however not executed despite the aforesaid. A letter was also sent by the Union Minister to the State Government for execution of lease deed as the petitioner society intend to open a Girl's college in Raebareli.

4. The State Government issued various general orders from time to time for conversion of Nazul land to freehold and accordingly the petitioner society made an application on 06.02.2001 to declare land in dispute to be freehold. The application aforesaid was supported with an amount equivalent to 25% to the value of the land in dispute. The letter aforesaid was processed by the State Government with an order on 9.2.2002 to declare land in dispute to free hold. The petitioner society accordingly paid the amount of consideration, as was directed. It was with deposit of arrear of lease rent. A total sum of Rs.30,33,600/-, apart from entire amount of lease rent, as demanded, was deposited. A deed for transfer of land was then executed on 6.3.2003. The deed was registered as per the provisions of the Registration Act, 1908.

5. A litigation by way of Writ Petition No.7464 (M/B) of 2006 was initiated by one Suresh Kumar Maurya and others with the prayer to quash the registered deed dated 6.3.2003 alleged to have obtained by fraud. The said writ petition was dismissed by the order dated 8.4.2016 on the ground of laches but with the observation that in case of fresh cause of action, the order aforesaid would not be an impediment to persue it.

6. A writ petition was preferred even by one Mani Bhadra Singh bearing Writ Petition No.11634 (M/B) of 2016. It was decided by this court vide its judgement dated 25.8.2017 after detailed discussions of facts. A direction was given to respondent no.3 therein to take a final decision in the matter within three months from the date of production of the copy of the order. The prayer in the said writ petition was also to cancel the registered deed dated 6.3.2003. The impugned order was then passed by the

7. The writ petition has been contested by the learned Standing Counsel

appearing for State Government. The arguments were advanced even by the intervenor while pressing their own writ petition alongwith with the contest of present one. The allegation of forgery on the part of the petitioner and all officials have been made though it has been refuted by the Standing Counsel.

ARGUMENTS ON BEHALF OF THE PETITIONER

8. Learned counsel for the petitioner submits that the impugned order has been passed by the District Magistrate, Raebareli in a mechanical manner. The observations made by this Court in the case of Mani Bhadra Singh (supra) was taken to be final contrary to the direction therein. In view of the above, the impugned order has been passed with pre conceived notions.

9. The District Magistrate, Raebareli has recorded finding about the manipulation and incorrect statement to get the order dated 9.2.2002 whereby the land was declared to be freehold. The petitioner did not manipulate or made incorrect statement for passing of the order dated 9.2.2002. Entry in the Nazul Register was made by the Lekhpal pursuant to the direction of the District Magistrate. It was as per the Nazul Manual but ignoring the aforesaid, erroneous finding has been recorded against the Lekhpal and entries in the Nazul Register apart from the revenue record.

10. The interference in the order dated 9.2.2002 has been made even on the ground that a lease deed was not executed in favour of the petitioner, thus, conversion of Nazul land to freehold was not permissible. It is in ignorance of the fact that under Rule 14 and 19 of Nazul Manual, sale of the Nazul land can be made by the State Government. The deed executed on 6.3.2003 is nothing but sale of the land. It has been ignored by the District Magistrate. The finding has been recorded in ignorance of the fact that decision to grant lease in favour of the petitioner was taken under Rule 51 by Governor of the State. Thus, registration of lease deed was not a pre condition as it was otherwise governed by Section 2 of the Government Grants Act, 1895. It is also stated that if registration of the deed was a pre condition then the respondents should not have taken lease rent for the period of twenty seven years before execution of the sale deed dated 6.3.2003.

11. The District Magistrate has directed for cancellation of the entries made in the Nazul Register apart from revenue record without taking procss given under the Uttar Pradesh Revenue Code, 2006. The entries were made by the Lekhpal on the direction of the District Magistrate as per Rule 5-A of the Nazul Manual. The District Collector has failed to make a reference of the provisions of the Nazul Manual and ignored its own order whereby he directed the Lekhpal to make entries in the Nazul register.

12. A reference of an agreement to sell by the petitioner has also been given. It is said to be in violation of the conditions of lease, whereas lease deed was never executed even as per the statement of side opposite. The agreement to sell was executed subsequent to the registered deed dated 06.03.2003 when petitioner society became absolute owner of the land. The consideration of Rs. 30,33,600/- for execution of the sale deed dated 06.03.2003 was on the market rate prevalent at the relevant time. The deed executed therein

shows State Government to be the seller and petitioner as purchaser with absolute ownership right.

13. Once the sale deed was executed with registration, it cannot be cancelled by the Administration itself but can be through a suit for cancellation of deed. It is now barred by limitation.

14. It is also stated that the nomenclature of the document cannot be a guiding factor. What would prevail is the contents of the document. The registered deed dated 6.3.2003 shows it to be nothing but sale of land in favour of the petitioner, thereby the impugned order deserves to be quashed even for a direction to S.D.M. to take steps for its cancelllation.

15. The impugned order sufferes from non-application of mind as it is based on the report given by the District Government Counsel and Deputy Collector, Raebareli indicating entries in the Nazul records to be without authority of law. The opinion aforesaid was given ignoring Rules 5A of Nazul Manual and otherwise once the entries were made, it could not have been ignored without its cancellation after taking the process, as given under the U.P. Revenue Code of 2006. The non compliance of Rule 5-A of Nazul Manual has been shown ignoring the fact that entries in the Nazul registered was made by the Lekhpal on the direction of the District Magistrate competent for the aforesaid.

16. In the light of the submissions made above, the prayer is to set aside the order dated 23.3.2019. The interference in the direction to change the name of the land holder in the Nazul register and revenue record without undertaking the process, as given under the Code of 2006 also deserves to be set aside while maintaining it to the extent of a direction to evict the trespassers. The writ petition be allowed with the aforesaid.

ARGUMENTS ON BEHALF OF THE STANDING COUNSEL

17. The Standing Counsel has contested the writ petition. It is submitted that the order dated 9.2.2002 was passed in ignorance of the provisions of Nazul Manual. The order to convert Nazul land to freehold was without a registered lease deed in favour of the petitioner society. The reasonings given by the District Magistrate to cancel the order dated 9.2.2002 were reiterated to contest the writ petition and would be considered alongwith the arguments of the counsel for the intervenor.

18. So far as the rights of the petitioner flowing from the registered deed are concerned, it has not been disputed. It is however stated that the Sub Divisional Magistrate has been given direction for its cancellation. Thus, whatever rights are flowing in favour of the petitioner out of the registered deed, would come to an end with cancellation of lease deed. It is also stated that the land would otherwise be made free from encroachments. The action for it would be taken forthwith.

19. A direction to remove encroachment exist in the impugned order and to that extent, even the writ petition has not been been pressed by the petitioner though a challenge to it has been made in connected writ petition preferred by the intervenor. The intervenor are not having any right to possess the land and being encroacher, they would be removed immediately pursuant to the direction given by the District Magistrate in its impugned

order dated 23.3.2019.There even the petitioners would have no right on the land the moment registered deed is cancelled by he S.D.M. The land in dispute would vests in the Government as Nazul free from encroachment.

20. The prayer is to dismiss the writ petition.

ARGUMENTS OF THE INTERVENOR

21. Learned counsel for the intervenor submits that presently the intervenors are in possession of the land. They are carrying on their business and few are having residential houses.

22. In view of the above, connected writ petition bearing Writ Petition No.31854 (M/B) of 2019 has been filed to seek a direction for allotment of land to the intervenors.

23. Contesting the writ petition, it is stated that without execution of the lease deed in favour of the petitioner society, conversion of land from Nazul to freehold by the order dated 9.2.2002 is rightly held to be illegal.

24. Learned Senior Counsel made a reference of the document submitted by the petitioner to show fraudulent entries in the record. It is to enter the name of the petitioner society without even execution of the lease deed pursuant to the order of the Government. The requirement of lease deed was even felt by the petitioner and therefore they pursued the matter through the then Union Minister late Smt. Sheela Kaul who sent letter to the State Government. The District Magistrate has made reference of the interpolations in the record. It was otherwise noted by this Court in the case of Mani Bhadra Singh (supra) though it may not be with final conclusions. The District Magistrate has not based its order on the finding of this Court in the case of Mani Bhandra Singh (supra) but considered the issues independently.

25. Learned counsel for the intervenor has further made a reference of the registered deed dated 06.03.2003 to show it to be for conversion of Nazul land to freehold and not for its sale, as stated by the petitioner. The recital of the deed has been referred to substantiate the argument aforesaid. The case does not fall under Rule 14 or 19 of the Nazul Manual as it is not a case of sale of land but conversion of Nazul land to freehold. The registration of the lease deed was necessary as per Nazul Manual before declaring land to be freehold. The District Magistrate has rightly taken note of the aforesaid aspect. It has also noted the agreement to sale executed by the petitioner contrary to the conditions of the lease. Thus, the impugned order has right been passed other than for a direction to evict the intervenor. A challenge to the direction aforesaid has been made by maintaining a separate writ petition which has also been argued alongwith the present writ petition.

26. Learned counsel for the intervenor has further contested the argument on the cancellation of the entries in the record by the impugned order. It is stated that when entries were fraudulently made, it was liable to be nullified or cancelled without taking the process, as provided under the Code of 2006. It is more so when a direction was given by this court for appropriate decision. Thus, the court may not cause interference in the impugned

order on any of the ground raised by the petitioner. A reference of the relevant provisions of the Nazul Manual apart from the provisions of the Government Grants Act, 1895 has been given. In the written argument, an additional ground in reference to the conversion charges has been raised but that is not otherwise the ground for cancellation of the order dated 9.2.2002. The aforesaid argument was not raised earlier before this court during the course of oral arguments.

27. Learned counsel for the intervenor however submitted that the arguments for cancellation of the registered lease deed without civil suit would be of no consequence because a direction for its cancellation has been given to Sub Divisional Magistrate. The prayer is accordingly to dismiss the writ petition.

FINDINGS OF THE COURT

28. The writ petition has been filed to challenge the order dated 23.03.2019 whereby earlier order dated 09.02.2002 to declare land in dispute to freehold has been cancelled.

29. Brief facts pertaining to the case have been narrated hereinabove thus, need not to be reiterated.

30. The challenge to the order passed by the District Magistrate is mainly in reference to Nazul Manual. It is urged that the District Magistrate while passing the impugned order has ignored the provisions of Rule 14 and 19 of the Nazul Manual. It is stated to be a case of sale of land by the State Government, as permissible under Rule 14 of the Nazul Manual. It is seriously contested by the intervener in reference to the registered deed. The title of the deed and contents thereof have been referred to show it to be a case of conversion of Nazul land to freehold and not a case of sale.

31. To appreciate the arguments, it would be relevant to refer Rule 14, 19, 28, 29, 51 and 74, which are quoted hereunder:-

"14. Sale or lease of a plot for building purposes shall, subject to provisions of Rule 16, be sanctioned by-

(1) the Collector, if the estimated value does not exceed Rs. 2,500;

(2) the Commissioner, if the estimated value exceeds Rs. 2,500 but does not exceed Rs. 10,00;

(3) the State Government in other cases.

In such cases, the term of sale or lease as finally arranged, shall be subject also of to confirmation by the Commissioner or the State Government as the case may be, unless the terms have already been set forth in the proposal for sale or lease and have been approved. Copies of orders sanctioning sale of nazul property shall be forwarded to the Accountant General, Uttar Pradesh.

19. Notwithstanding anything contained in Rule 18, the State Government may sanction a lease or sale of Nazul had for such purposes and at such rates as it may, having regard to the special circumstances of the case, consider proper.

28. Execution of deed of sale or lease:- Every deed of sale or lease shall be executed in duplicate by the Secretary to the State Government or the Commissioner

or the Collector, as the case may be , who has sanctioned the sale or lease. At the time of execution the vendee or lessee shall be given the duplicate copy of the sale deed or lease. If the sanction of the State Government or the Commissioner is required, three copies of the deed shall be submitted. Deeds of sale and lease will be executed in the forms approved by the State Government, copies of which can be obtained from the Superintendent, Printing and Stationary, Uttar Pradesh.

29. The date of sale or lease shall in all cases be stamped by the transferee or lessee. The duplicate copy prescribed under Rule 28 shall not be stamped. The deed of sale or lease under these rules should be registered.

51. Land for charitable purpose- Ordinarily no lease or sale of nazul land at concessional rates shall be allowed for purposes other than charitable purposes such as, for hospitals, educational institutions and orphanages, and the concession so allowed shall not exceed half the annual rental in the case of lease or half the total market value in the case of sale.

Provided that, subject to the condition that the total amount of concession does not exceed Rs. 10,000 in value, in places other than big cities the rate of concession may exceed the limit aforesaid in the case of the following categories of institutions:

(i) Girls' schools and other educational institutions for women having a popular manging body.

(ii) Institutions engaged in the uplift of Harijans and their housing and education :

Provided also that, subject to the condition that the total amount of concession does not exceed Rs. 15,000 in value in 'KAVAL' towns and Rs. 3,000 in other towns, the rate of concession may exceed the limit aforesaid in the case of educational institutions proposed to be started by local bodies in connection with the compulsory Primary Education Scheme of the Uttar Pradesh Government.

74. Removal of Encroachments:- the local body shall comply with any order of the Collector requiring the removal of any encroachment upon, or of unauthorized occupants of nazul.

32. The fact of the case shows that an application was submitted by the petitioner for grant of lease of the Nazul property to establish a girl's college. A decision to grant lease was taken by the Governor of the State by invoking Rule 51 of the Nazul Manual and accordingly, an order to grant lease for a period of 30 years was issued on 06.10.1976.The annual rent of Rs. 1,135/- was determined. A direction for execution of the lease was also given. The said order was passed subsequent to the earlier orders dated 07.07.1976 and 11.03.1974.

33. The fact however remains, is that a lease deed was not executed in favour of the petitioner. It is despite a request of the petitioner and the then Union Minister. A letter dated 04.04.1993 was also sent by the District Magistrate to find out whether lease deed has been examined so as to take further process. The lease deed was however not executed though name of the petitioner's institution was recorded in the Nazul Register and Khatauni Fasali 1389. It was even in khataunies. The name of the institution was recorded by the Lekhpal in pursuance to the order passed by the District Magistrate authorized for the aforesaid but it is a fact that registered lease deed was not executed, as per the Nazul Manual.

34. The petitioner's society made an application in the year 2001 to convert Nazul land to freehold. The twenty five percent of the amount, as provided under Nazul Manual, was deposited along with the application. The application was processed and finally a decision was taken to convert Nazul land to freehold and an order for it was passed on 09.02.2002, which has been cancelled by the impugned order dated 09.02.2002.

35. The main ground to cancel the order dated 09.02.2002 is absence of a registered lease deed and even manipulation of the enteries in Nazul Register as well as in the revenue records. It is also for violation of the condition of lease by entering into agreement to sale.

36. After proper consideration of the facts of this case in reference to the Rules quoted above, we find that despite a provision requiring registration of lease deed and request of the petitioner, it was not executed. The Rules referred above not only requires execution of lease deed but even registration thereof, which does not exist in the present case.

37. According to the petitioner, it is not a case of conversion of Nazul land to freehold but sale of land under Rule 14 and 19 of the Nazul Manual. The contest on the aforesaid has been made in reference to the registered deed dated 06.03.2003 executed in favour of the petitioner. The title of the deed and few references therein show it to be conversion of Nazul land to freehold though at many places deed makes a reference of sale of land pursuant to the direction of the State Government. The entries in the register has also been questioned by the District Magistrate in its order under challenge.

38. The issues aforesaid need to be considered in reference to the subsequent development also i.e. execution of registered deed dated 06.03.2003. A direction has been given to the Sub Divisional Magistrate for its cancellation.

39. The question for our consideration would be as to whether a direction for cancellation of registered deed can be given in the manner exist in this case. If it is not permissible than what would be the effect on the impugned order dated 23.03.2019 to cancel earlier Government order dated 09.02.2002 to declare land in dispute to freehold. It is for the reason that after the order dated 09.02.2002, a registered deed was executed. The cancellation of registered deed is not permissible in the hands of the Sub Divisional Magistrate or by the State Government rather it can only by way of a suit for cancellation of deed. It is even if deed is said to have obtained by fraud.

40. This court is accordingly considering this case first in reference to the existence of the registered deed in favour of the petitioner. The Court would even consider the argument of learned counsel for the intervener who has urged that order for conversion of Nazul land to freehold was not permissible without execution of the lease deed in favour of the petitioner. It is even allegation of manipulation in the record apart from other grounds for cancellation of the order dated 09.02.2002. It would be after consideration of the direction to cancel the registered deed executed in favour of the petitioner. The registered deed was executed to transfer land in dispute to petitioner society after receiving consideration. It was registered under the Registration Act, 1908.

41. The issue in that regard was recently considered by this Court in the case of Smt. Kusum Lata Vs. State of U.P. and others in its judgment dated 18.05.2018 passed in Writ C No. 2973 of 2016. A larger bench was constituted in view of the divergent views taken by different courts. Following issues were referred to the larger bench.

"(a). Whether after a sale deed has been registered, the Assistant Registrar has any authority of law to cancel the registered sale deed under the provisions of the Registration Act, 1908 even if allegation of impersonation/fraud are made?

(b). Whether the allegations of fraud are essentially, an allegation of fact which need examination of oral or documentary evidence and can be adjudicated on the basis of evidence to be led by the parties before competent civil court?

(c). Whether the judgment in the case of Raj Kumari (supra) or the judgment in the case of Radhey Shyam Arora (supra) lays down the correct law?"

42. The relevant paragraphs of the said judgment are quoted hereunder for ready reference:-

"Precisely, the issue before us that whether a sale deed registered under the Act, 1908 can be cancelled or set aside by registering authority or by any other authority invoking administrative powers, if the registration is questioned on the count of impersonation/fraud?

The question noticed above has been considered and dealt with threadbare by a Division Bench of this Court in Krishna Kumar Saxena and another Versus State of U.P. and 9 others, 2018 (127) ALR 466. In this case, the Assistant Inspector General (Registration/Stamp), Rampur by an order dated 18.10.2016 withdrew registration of a sale deed and annulled that on the count that the same was executed by fraud and misrepresentation. The Division Bench after examining all relevant provisions of the Act, 1908 and the law applicable held that in no case registration of sale deed could have been withdrawn and the sale deed could have been annulled by administrative fiat. The Division Bench also quashed the order dated 13.08.2013 conferring powers upon registering authority to withdraw registration of a registered deed and to annul that. The discussion made by the Division Bench and the findings arrived in the case of Krishna Kumar Saxena and another (supra) deserves to be quoted and that is as follows:-

"In the light of the rival stand made by the parties and upon consideration of the various provisions of law, we find that the Registration Act is a complete Code by itself for registration of a certain documents. The procedure for registration of a document is spelt out in Part-VI of the Registration Act. Section 32 provides for persons to be present for registration of the document. If the document is required to be compulsorily registered, in which case it becomes optional for the persons to be present under section 33 of the Act. Section 34 stipulates that enquiry is required to be done by Registering Officer before registering a document. Section 35 provides the procedure for admission or denial of execution of the document.

Section 35 of the Act does not confer any quasi-judicial power on the Registering Authority.

The Registering Officer is expected to reassure himself that the document to be registered is accompanied by supporting documents. The Registering Officer is not required to evaluate the title or irregularity in the documents. The examination to be conducted by the Registering Officer is only to ascertain that there is no violation of the provisions of the Registration Act. Section 58 provides particulars to be endorsed on document admitted to registration. Section 59 provides for an endorsement to be made and signed by Registering Officer and Section 60 provides for the registration of the document. Where the registering officer finds that a particular document cannot be registered in which case he is required to give reasons under section 71. Any persons who intentionally makes any false statement during the course of enquiry, a penalty could be imposed under section 82 with imprisonment or with fine. Section 69 provides power to the Inspector General to frame Rules which is consistent with the Act. Such Rules so framed are required to be published in the Official Gazette.

In so far as the case of Thota Ganga Laxmi versus State of A.P (2010) 15 SCC 207 is concerned, the said decision was based on a provision of Rule 26(k)(i) of the Andhra Pradesh Registration Rules 1960 which were framed in exercise of the power conferred under section 69 of the Act. It is in the light of the provision of the Rule 26(k)(i) that the Full Bench of the Andhra Pradesh High Court held that Registering Authority had the power to annul a document where fraud had been played by the parties. The said decision of Andhra Pradesh in Yanala Malleshwari (Supra) was explained by the Supreme Court in Satya Pal Anand versus State of M.P and others 2016(10) SCC 761 holding that the Andhra Pradesh High Court was only called upon to consider whether a person can nullify the sale by executing and registering a cancellation deed and whether the Registering Officer was bound to refuse registration when a cancellation deed was presented. The Supreme Court held that in view of the provisions of Rule 26(k)(i) of the Andhra Pradesh Registration Rules, which was expressly provided in the Rules applicable to that State, the registration of a document be annulled and labelled as fraudulent or nullity in law.

No such Rules have been framed under Section 69 of the Registration Act in so far as the State of U.P is concerned. In the absence of any express provision, the registration of a document cannot be withdrawn nor a sale deed could be annulled by an executive fiat on the basis of a Government Order dated 13.8.2013.

Unless and until there is an express provision in the Act or in the Rules, no Government Order could be issued giving power to a Registering Authority to annul a document on the administrative side. Such powers given would be wholly arbitrary and against and against the provisions of the Act.

The State Government cannot, while taking recourse to the executive power of the State under Art. 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily

subject to Art. 300A. The word 'law' in the context of Art. 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order; having the force of law, that is positive or State made law. This principle was pronounced by the Supreme Court in Bishambhar Dayal Chandra Mohan and others versus State of Uttar Pradesh and others(1982) 1 SCC 39.

The aforesaid principle is also in consonance with Section 31 of the Specific Relief Act which sates that it was only the Court which has the power to cancel an instrument where it is alleged that the written instrument is void or violable."

43. The judgment referred above was given when process for cancellation of lease was taken by the Sub-Registrar and thereupon, passed an order to cancel the sale deed.

44. In the instant case, a dispute about the nature of the deed has been raised. It is as to whether it is a sale deed after declaring land to be freehold. The fact however, could not be disputed by either parties that deed executed on 06.03.2003 was registered. The registration of instrument was necessary in view of the Rule 29 read with Rule 28 of the Nazul Manual. In the instant case, it is not a lease deed but to be considered a sale deed after declaring land to freehold because the provisions of the Nazul Manual does not provide a deed of any other kind than lease deed or sale deed. The lease deed is executed on annual rent whereas sale deed on payment of consideration. In any case, it can not be disputed that an registered instrument exists which cannot be cancelled other than by a civil suit.

45. It is even in view of the judgment of the Apex Court in the case of Narendra Kumar Mittal vs. M/s Nuper Housing Development Pvt. Ltd. and anothers (Civil Appeal No. 5979 of 2019) dated 31.07.2019. In that case also, deed was executed in favour of the company. The challenge to it was made by filing a civil suit. The prayer was to cancel the sale deed. The maintainability of suit was challenged in reference to Section 331 of the Uttar Pradesh Jamindari Abolition and Land Reforms Act, 1950. It was precisely on the ground that a civil suit is barred in a case of agricultural land. The arguments aforesaid was not accepted by the Apex Court. The distinction between the jurisdiction of the Civil Court and the Revenue Court was made. The Apex Court held that a challenge to the registered deed can be made only by maintaining a civil suit. The jurisdiction for cancellation of registered deed lies only with the Civil Court.

46. The same view was taken by Apex Court in another case of Thota Ganga Laxmi and Another vs. Government of Andhra Pradesh and others reported in (2010) 15 SCC 207. In the said case, after execution of sale deed, a deed for its cancellation was executed and even registered by one of the party. A challenge to the aforesaid was made. The Apex Court held that for cancellation of the deed, one need to approach the Civil Court and thereby, the cancellation deed after its registration was held to be wholly void and non est. A reference of section 69 of the Registration Act 1908 has been given. The relevant paragraphs of the said judgment are quoted hereunder:-

"2.It appears that the father of the appellants purchased the plot in question from Respondent 4 by a registered sale deed dated 21.06.1983 and since then the appellants have been in possession and enjoyment of the said property.

Subsequently, it appears that the fourth respondent purported to get the said sale deed cancelled unilaterally, executing the cancellation deed dated 04.08.2005 and the same was registered by the third respondent without any notice to the appellants.

3. A writ petition was filed seeking declaration that the cancellation deed is illegal and that has been disposed of by the impugned judgment holding that the appellants should approach the civil court.

4. In our opinion, there was no need for the appellants to approach the civil court as the said cancellation deed dated 4-8-2005 as well as registration of the same was wholly void and non est and can be ignored altogether. For illustration, if A transfers a piece of land to B by a registered sale deed, then, if it is not disputed that A had the title to the land, that title passes to B on the registration of the sale deed(retrospectively from the date of the execution of the same) and B then becomes the owner of the land. If A wants to subsequently get that sale deed cancelled, he has to file a civil suit for cancellation or else he can request B to sell the land back to A but by no stretch of imagination, can a cancellation deed be executed or registered. This is unheard of in law.

47. In the light of the aforesaid, the direction of the District Magistrate to the Sub Divisional Magistrate for cancellation of deed without a civil suit would be illegal and otherwise mere cancellation of the order dated 09.02.2002 on any ground whatsoever would not be of any avail after execution of instrument with its registration unless the process of cancellation of registered deed by a civil suit is taken, as clarified hereinabove.

48. We are not going deep on the issue of limitation for filing of the civil suit as it is otherwise provided under the Limitation Act, 1963.The district magistrate in passing the impugned order dated 23.03.2019 has ignored the provisions of law and its authority because at the end, following directions have been given which are quoted hereunder for ready reference:-

संख्या – 1063/ राजस्व सहायकदि0– नजूल/2019 दिनांक 23 मार्च 2019 प्रतिलिपि– निम्नांकित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित–

1– मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय पीठ, लखनऊ।

2– अपर जिलाधिकारी (वि0रा0) रायबरेली/प्रभारी अधिकारी नजूल को प्रश्नगत फ्री–होल्ड कार्यवाही के क्रम निष्पादित डीड के निरस्तीकरण हेतु नियमानुसार कार्यवाही हेतु।

3– नजूल अधिकारी, रायबरेली व तहसीलदार सदर को इस निर्देश के साथ प्रेषित कि नजूल सम्पत्ति रजिस्टर व राजस्व खतौनी में नियमानुसार अंकित कराये।

4– उपजिलाधिकारी सदर को इस निर्देश के साथ कि वह कृपया प्रश्नगत भूमि पर जॉच कराकर अवैध अतिक्रमणियों के विरुद्ध नियमानुसार सुसंगत धाराओं में बेदखली की कार्यवाही सुनिश्चित कराये।

5– तहसीलदार सदर को इस निर्देश के साथ किवह कृपया मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय लखनऊ पीठ लखनऊ के सम्पर्क कर मा0 न्यायालय के सांान में लाने हेतु अपेक्षित कार्यवाही कर कृत कार्यवाही से अधोहस्ताक्षरी को अवगत कराना सुनिश्चित करें।

7– याची श्री मणिभद्र सिंह पुत्र स्व0 रामसिंह निवासी 1059 सिविल लाइन, रायबरेली।

ह0अ0 23.03.19

जिलाधिकारी
रायबरेली

49. The direction in para no. 2 is for cancellation of the registered deed, as per law. If it is by filing a civil suit, there would be no illegality but it cannot be cancelled at the instance of the Sub Divisional Magistrate. The limitation for it may however come in their way.

50. The direction in para 3 to modify the entries in the revenue record is again in ignorance of the process provided for it. For the sake of argument, it is assumed that enteries in the Nazul register and even khataunies were made without execution of the lease deed and even allegation of manipulation is also taken note of, the authorities were required to take the process, as given under the Uttar Pradesh Revenue Code, 2006 and Nazul Manual to cancel the entries. It cannot be done in the manner directed in the impugned order.

51. At this place, a reference of the judgment of this Court in Writ Petition No. 11634 (M/B) of 2016 (Mani Bhadra Singh Vs. State of U.P. and others) would be relevant. In the aforesaid case, this court has made certain observation regarding non execution of the lease deed and other aspects but while concluding the judgment, it was made clear that it has not recorded conclusive finding on the issue, as the enquiry is pending with administration and final decision on it is yet to be taken. The Court therein has made a reference of the provisions of the Transfer of the Property Act, 1882 and also Section 2 of the Government Grants Act, 1985. A fact regarding payment of consideration to the tune of Rs. 30,33,600/- on execution of the instrument dated 06.03.2003 has been given to bring it under the ambit of Transfer of Property Act, 1882. The District Magistrate should not have taken judgment in the case of Mani Bhadra Singh (supra) to be final in view of the direction therein. The Court therein no doubt made reference of all the relevant facts but conclusive finding was not recorded. It did not touch the issue in reference of the Registration Act, 1908. The district magistrate ignored the fact that before registration of the deed, a direction for payment of total lease amount was given and paid by the petitioner society. It is apart from sale consideration of Rs. 30,33,600/-

52. Learned counsel for the intervener has invited our attention towards agreement to sale by the society going contrary to terms of lease. The fact aforesaid has been clarified by the petitioner. It is submitted that agreement to sale is after a registered deed dated 06.03.2003 in favour of the petitioner, without a bar for sale of land. The petitioner society had paid the amount of consideration on circle rate at the relevant time. The restriction on sale was put in the order at the time of grant of lease deed and not in the registered deed dated 06.03.2003.In fact no lease deed was executed rather it was only in the order for grant of lease. When lease deed was not executed with a condition that land would not be sold, the District Magistrate could not have taken aforesaid ground to cancel the order dated 09.02.2002. The condition was not imposed in the registered deed executed subsequently on transfer of land in terms of section 54 of the Transfer of the Property Act, 1882. There exist difference

in the lease deed and sale passing on the title on receipt of consideration. The property rights are safeguarded by the law.

53. Learned Standing Counsel appeared before this Court could not defend the directions of para nos. 2 and 3 of the impugned order, as quoted hereinabove i.e cancellation of the registered deed and even to change the entries in the Nazul register as well as in the revenue record without undertaking the process, as provided under the Code of 2006. The cancellation of registered deed cannot be without maintaining a civil suit for it.

54. The prayer of the learned Standing Counsel at this stage was that instead of setting aside the directions at para nos. 2 and 3 of the impugned order, a liberty may be given to undertake the process for it though limitation to maintain a civil suit would come in their way. It is however, submitted that so far as the direction of para no. 4 to remove the encroachment is concerned, interference therein may not be made. The provision of the Nazul Manual gives authority to remove the encroachment and it would be removed forthwith.

55. The prayer of the learned Standing Counsel is for disposal of the writ petition with necessary clarification in the impugned order instead of quashing it. It was however, admitted that if the registered deed can not be cancelled, it would have favourable consequence to the petitioner society and otherwise process to nullify the enteries made in the Nazul register as well as in the revenue record would be undertaken only if a suit for cancellation is maintained followed by a decree in favour of the State otherwise till existence of the registered deed, the process for it would unnecessarily multiply the litigations.

56. In the light of the discussion made above, till the registered instrument dated 06.03.2003 remain operational, the impugned order would not be given effect other than to remove the encroachment followed by the possession thereof to the petitioner. Since the learned Standing counsel has stated about immediate action for it, the respondents are directed to remove the encroachment forthwith, as otherwise encroachment on the land was either due to connivance of the officers or their negligence.

57. With the aforesaid, the writ petition is **allowed.**

Order in Writ Petition No. 31854 of 2019

1. By this writ petition, a challenge has been made to para no. 4 of the order dated 23.03.2019.

2. In para no. 4 of the impugned order dated 23.03.2019, a direction has been given for initiation of process for eviction of the encroachers. The challenge to it has been made by the petitioner precisely on the ground that after quashing of the order dated 09.02.2002 declaring Nazul land to freehold, entitlement of the petitioner for grant of lease persuant to their application should have been considered. After declaring the land to be freehold, deed be executed in their favour.

3. Learned counsel for the petitioner submits that number of persons are either residing or running their business in the land in dispute. The claim has been made alleging possession of the land in dispute

for last 40 to 45 years. Reference of various circulars issued by the Government as well as the provisions of Nazul Manual has been given. It is after reiterating all the facts and arguments raised while contesting the connected petition, which has been decided in the first part of this Judgment.

4. It is further submitted that pursuant to the circulars issued by the Government from time to time, even, trespassers are entitled for a lease, if it is for an area up to 100 square meter.

5. Learned counsel for the side opposite submits that impugned order dated 23.03.2019 having been interfered by this Court in the light of the registered instrument dated 06.03.2003, the claim made by the petitioner would not survive. It has been held by Apex Court in its recent judgment that encroachers have no right to seek regularization of the land and otherwise land occupied by the petitioners is more than 100 square meter in many cases. Reference of the judgments of the Apex Court as well as provision of Nazul Manual has been given to strengthen their arguments. The prayer is accordingly to dismiss the writ petition.

6. We have considered the submission made by the counsel for the parties and perused the record.

7. History of this case has been given while dealing with the Writ Petition No. 13415 of 2019. In the judgment of the aforesaid case, interference in the order dated 23.03.2019 has been made. Interference in the direction at para no. 4 of the impugned order dated 23.03.2019 has not been made because as per provisions of Nazul Manual, the official respondents have right to remove the encroachment.

8. The record available does not reflect that petitioners are in possession of the land for the last 40 to 45 years rather few encroachers occupied the land recently due to inter say dispute between the Kamla Nehru Educational Society and the official respondents.

9. So far as the grant of lease deed in favour of the petitioner in reference to the circular dated 27.09.2007 concerned, the direction therein is not in consonance to the provisions of Nazul Manual and otherwise, the land occupied by the petitioners is more than 100 square meter in many cases. They are not otherwise falling in the category of poor or below poverty line as no material has been placed to prove it. It is otherwise stated that some of the occupant are even running restaurants and doing many other commercial activities after encroaching the land. Thus, the circular dated 20.12.2007 or earlier circulars referred therein would of no assistance to the petitioners. The allotment of land can be made only as per the provisions of Nazul Manual. The last circular was issued on 04.03.2014. The petitioners have made allegation against the Society for getting registered deed and prior to it an order dated 09.02.2002 in violation of the Nazul Manual but at the same time they want allotment of land in their favour in violation of Nazul Manual. The circular cannot be applied even if it is in violation of Nazul Manual.

10. If a direction, as prayed by the petitioner is given than it would be in conflict with the judgment passed in the connected petition and even to the provisions of the Nazul Manual. Relevant provisions of it has been quoted in the connected petition. The period of occupation of the land for last 40 to 45 years has not been proved by producing

materials, which are required even as per the Government Order dated 28.09.2011. Documents produced by the petitioners do not demonstrate possession of the land for the last 40 to 45 years.

11. In the light of the facts available on record and also the judgment passed in the connected petition, we are unable to accept the prayer made by the petitioners. In this regard a reference of the judgment of the Apex Court in the case of City and Industrial Development vs. Ekta Mahila Mandal & Anr dated 17.09.2007 would be relevant. Para 7 of the said judgment is quoted hereunder for ready reference:-

"7. It is to be noted that Local Commissioner's report pointed out that the land in question was earmarked as a green belt. It is the stand of the CIDCO that lower level tree plantation has already been done and the balance work is being carried on in a systematic manner. There is no policy for regularization and as such any change in the reserved area and earmarked areas under the development plan has to be under the Act. Article 21A of the Constitution cannot come to aid to respondent No.1. What was essentially sought for by the direction was regularization of unauthorized construction. In essence what the High Court has directed is to regularize an unauthorised occupation and regularization of unauthorised encroachment. Merely because Article 21A of the Constitution has treated primary education as a fundamental right, that does not confer any right on an encroacher to seek regularization of encroachment on the ground that ultimately some children of the particular age group would be taught in the school. In Dr. G.N. Khajuria & Ors. v. Delhi Development Authority & Ors. (1995 (5) SCC 762) it was held that merely because some structures of permanent nature had been constructed is not relevant as the construction was made in a land reserved for park in residential colonies. The allotment of the land of the Delhi Development Authority was held to be illegal and the same was considered to be misuse of power and was illegal. The High Court has also not indicated any reasons as to why the allotment was to be done at concessional rate at the rate prevailing in the year 1981. Though this aspect loses relevance in view of the conclusion that the High Court's view is not sustainable, yet this adds to the vulnerability of the High Court's order. "

12. In this regard, a reference of the judgment of the Apex Court in the case of jagpal Singh & Ors vs State of Punjab & Ors dated 28.01.2011 would also be relevant. Para 13 and 14 of the said judgment are quoted hereunder for ready reference:-

"13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of

these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. n M.I. Builders (P) Ltd. vs. Radhey Shyam Sahu, 1999(6) SCC 464 the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over Rs.100 crores. In Friends Colony Development Committee vs. State of Orissa, 2004 (8) SCC 733 this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion this decision will apply with even greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers, or a dispensary for them.
"

13. In view of the above, we do not find it appropriate either to cause interference in the direction to remove the encroachment or for allotment of land to the petitioners. The Nazul Manual does not promote allotment of Nazool land to the encroachers. The circulars issued by the government are in ignorance of the provisions of the Nazul Manual. They cannot be applied de-hors the Nazul manual. It is more so when the petitioners, who themselves have urged for strict compliance of the provisions of Nazul Manual while contesting the writ petition of the Society.

14. The encroachment of the government or Nazul Land takes place either in connivance of the Government officials or their negligence otherwise there was no reason for the petitioners to occupy the land without applying the means, provided under the law.

15. The Apex Court has not endorsed the direction for regularizing of the land in favour of the encroachers even if they raised construction or are even running a school.

16. In view of the above, we do not find any reason to direct the respondents to allot the land to the encroachers or to restrain them to remove the encroachment rather learned Standing Counsel has emphasized immediate eviction of the trespassers to make land free from encroachment.

17. In view of the above, we do not find any merit in the petition to cause interference in para 4 of the impugned judgment and it is accordingly, **dismissed.**

(2020)07ILR A116
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matters Under Article 227 No. 1831 of 2020 (CIVIL)

Vijay Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Tripathi

Counsel for the Respondents:
C.S.C., Sri Krishna Mohan Asthana, Sri Prabhav Srivastava

A. Civil Law - Limitation Act, 1963 – Section 5 – Law of limitation – Condonation of delay – Principle to be followed by the Court – The purpose of laws of limitation is to ensure that the parties may remain vigilant to their cause and institute their claim in good time – Laws of limitation are statutes of repose. They are usually triggered in cases of inordinate delay caused by apathy of litigants – The mandate of laws of limitation is not to shut the doors of justice to the parties or decline adjudication on merits – The courts should adopt a liberal, pragmatic and a justice oriented approach matters of condonation of delay – Equally the courts should avoid a pedantic view and eschew servitude to procedure in such matters. (Para 6 and 7)

Held –

17. The petitioner is the sole heir of deceased/Vijay Pal Singh whose lands were acquired. The petitioner is entitled to prosecute the claim for compensation on behalf of his father and is liable to be substituted. There was no inordinate delay on part of the petitioner to institute the substitution application. The petitioner was reasonably diligent to his cause. Part of the delay was caused by systematic deficiencies.

Petition allowed (E-1)

Cases relied on :-

1. Collector, Land Acquisition Vs Mst. Kati Ji & ors. (1987) 13 ALR 306 SC

2. N. Balakrishnan Vs M. Krishnamurthy (1998) 7 SCC 123

3. Smt. Prabha Vs Ram Prakash Kalra (1987) Suppl. SCC 339

4. Vedabai @ Vaijayanatabai Baburao Patil Vs Shantaram Baburao Patil & ors. (2001) 44 ALR 577 SC

5. New India Insurance Co. Ltd. Vs Smt. Shanti Misra AIR (1976) SC 237

6. Shakuntala Devi Jain Vs Kuntal Kumari AIR (1969) SC 575

7. O.P. Kathpalia Vs Lakhmir Singh AIR (1984) SC 1744

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Sri Akhilesh Tripathi, learned counsel for the petitioner, learned Standing Counsel for the respondent-State and Sri K.M. Asthana, learned counsel assisted by Sri Prabhav Srivastava, learned counsel for the respondent No.4.

2. The father of the petitioner late Vijay Pal Singh had carried the order passed by the learned reference court in appeal by instituting the First Appeal No.395 of 2001 (Vijay Pal Singh Vs. State of U.P. and others). The father of the petitioner was prosecuting the first appeal before this Court. The first appeal was decided by this Court by judgment and order dated 09.10.2014. The matter was remitted by this Court to the learned reference court by judgment and order dated 09.10.2014.

3. The father of the petitioner had expired in the year 2012. The records of the first appeal were transmitted to the court of learned reference court in the year 2017. The petitioner moved an application before the learned reference Court in Misc. Case No.557 of 2017 (Vijay Pal Singh Vs. State of U.P. and others) for hearing of the reference. The hearing of the reference commenced thereafter. The petitioner was able to access the full records of the case only on 04.11.2019, before the learned reference court. It was on that date the petitioner got knowledge that the substitution application was not filed on his

behalf after the death of his father. The petitioner immediately upon getting such knowledge moved a substitution application for being substituted in place of deceased father/Vijay Pal Singh. An application under Section 5 of the Limitation Act for condonation of delay was filed in aid of the substitution application.

4. While rejecting the delay condonation application the learned reference court in the impugned order dated 13.12.2019 has set forth these findings. The father of the petitioner died on 29.09.2012. This Court decided the First Appeal No.395 of 2001 (Vijay Pal Singh Vs. State of U.P. and others) by the judgment and order rendered on 09.10.2014. The petitioner has made a substitution application seven years after the death of his father. This inordinate delay is not liable to be condoned.

5. I am afraid the learned reference court misdirected itself in law by taking an entirely pedantic view in a matter which engages the most substantive rights of the petitioner. The learned reference court is overlooked the fact that the delay was inbuilt in the system itself. This Court had rendered its judgment and remitted the matter to the reference court way back in the year 2014. The records of the case were transmitted to the reference court three years after the judgment of the court. The proceedings before the learned reference court commenced only in the year 2017 and that also on the misc. application made by the petitioner.

6. The purpose of laws of limitation is to ensure that the parties may remain vigilant to their cause and institute their claim in good time. Laws of limitation are statutes of repose. They are usually triggered in cases of inordinate delay caused by apathy of litigants. The mandate of laws of limitation is not to shut the doors of justice to the parties or decline adjudication on merits. On the contrary it should be the constant endeavour the courts of law to adjudicate issues on merits and dispense justice on a substantive basis.

7. There is good authority to say that the courts should adopt a liberal, pragmatic and a justice oriented approach matters of condonation of delay. Equally the courts should avoid a pedantic view and eschew servitude to procedure in such matters.

8. The narrative shall now be reinforced with such authorities in point.

9. The Hon'ble Supreme Court in the case of Collector, Land Acquisition V. Mst. **Kati Ji and others, reported at 1987 (13) ALR 306 (SC)** held as follows:

"The legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy."

And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown

out at the very threshold and cause of justice being defeated. As against this; when delay is condoned, the highest that can happen is that a cause would he decided on merit after hearing the parties.

3. "Every" day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational, common sense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side can not claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by restoring to delay. In fact, he runs a serious risk.

6. It must be grapped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

10. A similar view was taken by the Hon'ble Supreme Court in the case of ***N. Balakrishnan Vs M. Krishnamurthy reported at 1998 (7) SCC 123.*** The relevant portion of the judgment is extracted here under:-

"The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy."

11. In ***Smt. Prabha V. Ram Prakash Kalra reported in 1987 (Suppl.) SCC 339***, the Supreme Court took the view that the Court should not adopt an injustice-oriented approach in rejecting the application for condonation of delay.

12. The Apex Court made a distinction in delay and inordinate delay in ***Vedabai @ Vaijayanatabai Baburao Patil V. Shantaram Baburao Patil and others reported at 2001 (44) ALR 577 (SC)*** by holding :

"In exercising discretion under section 5 of the Limitation Act, the Courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the otherwise will be a relevant

factor so the case calls for a more cautious approach...."

13. The importance of discretion of the court was emphasized by the Hon'ble Supreme Court in ***New India Insurance Co. Ltd. V. Smt. Shanti Misra*** reported at ***AIR 1976 SC 237*** by holding that discretion given by section 5 should not be defined or crystallized so as to convert a discretionary matter into a rigid rule of law. The express "sufficient cause" should receive a liberal construction.

14. The Hon'ble Supreme Court in ***Shakuntala Devi Jain V. Kuntal Kumari*** reported at ***AIR 1969 SC 575***, held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of section 5 is proved, the application must not be thrown out or any delay can not be refused to be condoned.

15. Adopting a justice oriented approach to delay condonation application the Hon'ble Supreme Court in ***O.P. Kathpalia V. Lakhmir Singh*** reported in ***AIR 1984 SC 1744*** held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay.

16. The petitioner was not substituted in place of his father even before this Court confirms the fact that the father of the petitioner was prosecuting the first appeal and not the petitioner. There is nothing abnormal in this conduct. In fact it is the most natural manner in which litigations are prosecuted in this State.

17. The petitioner is the sole heir of deceased/Vijay Pal Singh whose lands were acquired. The petitioner is entitled to prosecute the claim for compensation on behalf of his father and is liable to be substituted. There was no inordinate delay on part of the petitioner to institute the substitution application. The petitioner was reasonably diligent to his cause. Part of the delay was caused by systematic deficiencies. Substantive rights of the petitioner are engaged in the controversy and in these facts rejection of the delay condonation application has resulted in a serious miscarriage of justice.

18. The authorities cited in the preceding part of the judgment are thus squarely applicable to the facts of the case.

19. The delay condonation application is liable to be allowed. The delay condonation application is allowed.

The order dated 13.12.2019 passed by the learned reference court/learned Additional District Judge, Moradabad is set aside.

20. The matter is remitted to the learned reference court/learned Additional District Judge, Moradabad to execute the following direction:

21. The learned reference court/learned Additional District Judge, Moradabad shall decide the substitution application immediately upon receipt of a certified copy of this order.

22. The petition is allowed.

(2020)07ILR A120
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2020

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.

Matters Under Article 227 No. 8287 of 2019
(CIVIL)

Jaikaran Singh & Ors. ...Petitioners
Versus
Balakram & Ors. ...Respondents

Counsel for the Petitioner:
Sri Virendra Kumar Jaiswal, Sri Ashok Kumar Singh

Counsel for the Respondents:

A. Constitution of India – Article 227 – Maintainability – Transfer Order of Lower Court – An Application under Article 227 did not lie against an order passed under Section 24 of the CPC by the District Court – Since the High Court had not to sit in appeal or under its supervisory jurisdiction over the order passed by the District Court while rejecting a Transfer Application, and in fact it had to independently decide the Transfer Application afresh, the Application under Article 227 of the Constitution of India is not maintainable. (Para 10 and 15)

B. Civil Law - Civil Procedure Code, 1908 – Section 24 – Transfer of case – Jurisdiction of High Court – Judicial Hierarchy – The High Court can always independently look into the grounds of a Transfer Application afresh – The jurisdiction conferred on both - the High court and the District was concurrent and was independently available to both the Courts – However, the parties should approach the District Court first and thereafter the High Court as judicial property demand that judicial hierarchy be maintained – Held – It was, therefore, always in the interest of justice that the powers of the District Court be invoked initially and, thereafter, those of the High Court. (Para 10 and 11)

Petition dismissed (E-1)

Cases relied on :-

1. Sunita Devi Vs Ram Kripal & anr. (2015) 2 AWC 1543

2. Dadi Jagannadhan Vs Jammulu Ramulu Vs & ors. (2001) 7 SCC 71

3. Asrumati Debi Vs Kumar Rupendra Deb Raikot & ors. AIR (1953) SC 198

(Delivered by Hon'ble Siddharth Varma, J.)

1. This application under Article 227 of the Constitution of India has been filed against the order dated 4.10.2019 by which the District Judge Ghaziabad had refused to interfere in the Transfer Application filed by the petitioner. A further prayer in the application is that the Civil Appeal No. 8 of 2019 (Balakram and others vs. Jaikaran Singh and others) be Transferred from the Court of 4th Additional District Judge, Ghaziabad, to any other Court of the judgeship of Ghaziabad.

2. Even before notices could be issued to the respondents, the learned Additional Chief Standing Counsel Sri Neeraj Upadhyay opposed the filing of the instant application under Article 227 of the Constitution of India and, therefore, before entering into the merits of the case, the Counsel were heard with regard to the maintainability of the application under Article 227 of the Constitution of India.

3. Learned counsel for the petitioner relied upon Sunita Devi vs. Ram Kripal and another1 and submitted that an application when was rejected by the District Court under Section 24 of the C.P.C., a further application under Section 24 of the C.P.C. was not maintainable before the High Court. Learned counsel relied upon the provisions of Section 24 of the C.P.C. and submitted that when the provisions of Section 24 of the C.P.C. itself stated that an Application for Transfer or withdrawal of the Suit could be filed before the High Court "or" the District Court then the provision had to be construed strictly and relying upon **Dadi Jagannadhan v.**

Jammulu Ramulu and Other2 submitted that when only one Court could be approached because of the word "or" between the word "High Court' and "District Court" then a party could approach either the High Court or the District Court and it could not approach the High Court after approaching the District Court under the same jurisdiction. He submitted that the High Court under its supervisory powers could look into the judgement of the District Court but it could not entertain a fresh Transfer Application when once it had been rejected by the District Court.

4. Learned counsel submitted that legislature chose its word very carefully and the Court could not add words to a statute and, therefore, he submitted that when it was provided that either the High Court or the District Court could transfer a Suit then, when, once the application was rejected by the District Court then the same application could not be filed before the High Court.

5. Learned Additional Chief Standing Counsel, however, in reply, submitted that even though the order passed by the learned District Judge was final it did not decide any controversy between the parties when it terminated the proceeding with regard to the Transfer Application. No litigation between the parties was brought to an end. Learned Standing Counsel submitted that an order in a Transfer Application was virtually an administrative order passed on the judicial side.

6. Learned Standing Counsel also submitted that when Section 24 of the C.P.C used the words "High Court or the District Court" then it did not mean that when the application was filed before the District Court then the filing of the application before the High Court was excluded. Learned Standing Counsel relied upon Sections 438 and 439 of the Cr.P.C. and submitted that an anticipatory bail or a bail application could be filed in both the District Court and the High Court, one after the other. Learned Standing Counsel submitted that if the provisions of Order IX Rule 13 of the CPC were perused then it would become clear that legislature intended that after an Appeal had been disposed of against a decree alleged to have been passed ex parte then no application lay under the Order IX Rule 13 of the CPC for setting aside the ex parte decree and, therefore, he submitted that unless the filing of the application under Section 24 was excluded by any provision of Section 24 of the CPC before the High Court after the District Court had rejected an earlier application, the transfer application could be filed one after the other in the two different Court. He, therefore, submitted that when the application was rejected by the District Court it could definitely be independently filed before the High Court.

7. Learned Standing Counsel further submitted that if the application under Section 24 of the C.P.C. had decided any litigation between the parties then of-course the supervisory jurisdiction under Article 227 could be invoked. Learned Standing Counsel submitted that a supervisory jurisdiction could have then looked into the merits of the judgement passed by the District Court. In a Transfer Application, he submitted that, when the merits of the Transfer Application had been looked into by the District Court and an order had been passed, then the High Court was not required to look into the merits of the order passed by the District Court but it was required to look into the merits of the

Transfer Application afresh as had been filed under Section 24 of the CPC before it. Learned Standing Counsel submitted that under Article 235 of the Constitution of India the High Court had power of superintendence over its District Courts and, therefore, it was aware of how judges in the District Court were functioning and had a wider vista before it of its judges in the State than was available with District Courts. Therefore, the Transfer Application which was filed after the transfer application was rejected by the District Court was virtually a fresh application filed before the High Court. It was not in any way filed under the supervisory jurisdiction whereby the order of the District Judge passed on the Transfer Application could be looked into and examined on the judicial side.

8. Learned Standing Counsel further submitted that since there was a judicial hierarchy in the State it was proper that after the party had appraoched District Court it came to the High Court and not vice-versa otherwise it would create an anarchy. He further submitted that if the parties were not satisfied by the order passed by the High Court under Section 24 of the C.P.C. then they could go before the Supreme Court under Section 25 of the CPC. To substantiate that an order passed under Section 24 of the C.P.C. did not adjudicate any rights of the parties learned Standing Counsel relied upon a judgement passed in **Asrumati Debi vs. Kumar Rupendra Deb Raikot And others3** and specifically relied upon paragraph 13 of that judgement which is being reproduced here as under:-

13. The question that requires determination in an application under clause 13 of the Letters Patent is, whether a particular suit should be removed from any Court which is subject to the superintendence of the High Court and tried and determined by the latter as a court of extraordinary original jurisdiction. It is true that unless the parties to the suit are agreed on this point, there must arise a controversy between them which has to be determined by the court. In the present case, a single Judge of the High Court has decided this question in favour of the plaintiff in the suit; but a decision on any and every point in dispute between the parties to a suit is not necessarily a 'judgment'. **The order in the present case neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground as has been referred to by Couch C.J. in his observations quoted above.** An order directing a plaint to be rejected or taken off the file amounts to a final disposal of the suit so far as the court making the order is concerned. That suit is completely at an end and it is immaterial that another suit could be filed in the same or another court after removing the defects which led to the order of rejection. **On the other hand, an order of transfer under clause 13 of the Letters Patent, is, in the first place, not at all an order made by the court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another court, the proceedings in the latter to be taken only from the stage at which they were left in the court in which the suit was originally filed.**

9. In that judgement, the power of transfer of the Calcutta High Court under

Clause 13 of the Letters Patent was being looked into and it was held that an order passed thereunder was not a judgement between two litigating parties and, therefore, no supervisory power could be exercised over the order passed by the Court. He submitted that the order passed under Section 24 CPC by the District Court also did not settle any issue between the parties.

10. Having heard the learned counsel for the parties, I am of the view that an Application under Article 227 of the Constitution of India did not lie against an order passed under Section 24 of the CPC by the District Court. The High Court can always independently look into the grounds of a Transfer Application afresh. The jurisdiction conferred on both - the High court and the District was concurrent and was independently available to both the Courts.

11. However, the parties should approach the District Court first and thereafter the High Court as judicial property demand that judicial hierarchy be maintained. It was, therefore, always in the interest of justice that the powers of the District Court be invoked initially and, thereafter, those of the High Court. Certainly an order passed on a Transfer Application does not bring to an end the litigation between the parties and, therefore, as has been held in ***Asrumati Debi vs. Kumar Rupendra Deb Raikot And others (supra***) as an order passed under Section 24 of the C.P.C. is not a judgement the High court cannot exercise its supervisory jurisdiction. Thus, once when the doors of the District Court have been knocked the filing of a Transfer Application before the High Court is neither prohibited nor excluded. A bare reading of the Section 24 of the C.P.C. would clarify the point in issue and, therefore, Section 24 of the C.P.C. is being reproduced here as under:

24. General power of transfer and withdrawal.- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District court may at any stage -

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section. -

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Cases shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

12. In contrast, the provisions of Order IX Rule 13 of the C.P.C. may also be looked into which clearly put a bar on the filing of an application under Order IX Rule 13 of the C.P.C. once the parties had got an Appeal decided by a higher court.

13. The provisions of Order IX Rule 13 of the C.P.C. are also being reproduced here as under:-

13. Setting aside decree ex parte against defendant. - In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

[Explanation. - **Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]**

14. Under such circumstances, to say that the legislature desired the filing of only one application, either before the High Court or before the District Court would be an erroneous interpretation.

15. Therefore, relying on ***Asrumati Debi vs. Kumar Rupendra Deb Raikot And others4*** I hold that since the High Court had not to sit in appeal or under its supervisory jurisdiction over the order passed by the District Court while rejecting a Transfer Application, and in fact it had to independently decide the Transfer Application afresh, the Application under Article 227 of the Constitution of India was not maintainable.

16. The application, therefore, under Article 227 of the Constitution of India is dismissed as being not maintainable.

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(2020)07ILR A126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.06.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No.9646 of 2019
(CIVIL)

Smt. Geeta Devi ...Petitioner
Versus
Om Prakash & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vineet Singh, Sri H.N. Singh

Counsel for the Respondents:
Sri Ayush Khanna, Sri Atul Dayal

A. Civil Law - Transfer of Property Act, 1882 – Section 44 and 55(6) – Undivided Joint Property – Transfer by co-owner to an outsider of family – Seeking and Delivery of Possession – An outsider, who has purchased the share of co-sharer in an undivided estate, can seek possession of his/her share only through partition by amicable mutual settlement by metes and bounds or through a decree of the court. (Para 29)

Held –

31. In this view of the fact, the petitioner cannot get the possession of the share purchased by her in the disputed premises until a decree for partition is obtained by her and the disputed property has been partitioned in the execution of the decree by metes and bounds.

B. Civil Law - Transfer of Property Act, 1882 – Section 111(d) – Doctrine of Merger – Applicability – Vesting of interest of Lessee and lessor – According to Section 111 (d), a lease of immoveable property determines in a case where the interests of the lessee and that of the lessor in the whole of the property become vested in the tenant – Two conditions are mandatory to attract Section 111 (d); that it is only the tenant who should acquire the property of the landlord; second, the tenant should purchase assignment of the rights of the landlord in the property in its entirety. (Para 36)

Held -

37. In the instant case, the petitioner admits that she is not the tenant of the disputed premises and has purchased 1/3rd share of Sri Ram and not the entire ownership interest in the disputed premises, therefore, the twin conditions of applicability of the doctrine of merger of the tenancy are lacking.

Petition dismissed (E-1)

Cases relied on :-

1. Pramod Kumar Jaiswal & ors. Vs Bibi Husn Bano & ors. (2005) 2 ARC 921

2. India Umbrella Manufacturing Co. & ors. Vs Bhagabandei Agarwalla & ors. (2004) 3 SCC 178;

3. T. Lakshmipathi & ors. Vs P.Nithyananda Reddy & ors. (2003) 5 SCC 150.

4. Ramdas Vs Sitabai & ors. (2009) 7 SCC 444

5. Hardeo Rai Vs Sakuntala Devi & ors. (2008) 7 SCC 46

6. Ghantesher Ghosh Vs Madan Mohan Ghosh & ors. (1996) 11 SCC 446

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri H.N. Singh, Senior Advocate assisted by Sri Vineet Kumar Singh, learned counsel for the petitioner and Sri Atul Dayal, Senior Advocate assisted by Sri Ayush Khanna, learned counsel for the respondents.

2. The petitioner through pre0sent petition has assailed the order dated 30.09.2019 passed by Judge, Small Causes Court, Allahabad in Miscellaneous Case No.812 of 2017 arising out of Execution Case No.6 of 2017 rejecting the petitioner's

application under Section 47 of C.P.C. and order dated 27.11.2019 passed by the Sessions Judge, Court No.1, Allahabad in Civil Revision No. Nil of 2019 preferred by the petitioner against the order dated 30.09.2019.

3. The facts giving rise to the present petition are that premises bearing Municipal No.599 (Old) (New No.1008) situated in Mutthiganj, Allahabad (hereinafter referred to as 'disputed premises') was owned by Smt. Chameli Devi and Om Prakash (respondent no.1), Rajendra Prasad(respondent no.2) and Sri Ram (respondent no.3) grandsons of Smt. Chameli Devi. Respondent nos.1 to 3 claimed the ownership of disputed premises on the basis of Will dated 28.12.1976 executed by Smt. Chameli Devi who died on 30.07.1985.

4. The disputed premises was let out to one Mishri Lal in the year 1968 on rent of Rs.96/- per month. The respondent nos.1 to 3 instituted a Suit No.252 of 1989 for eviction of Mishri Lal from the disputed premises on the ground of default of payment of rent and subletting the disputed premise to Moti Chandra.

5. The suit was contested by Mishri Lal by filing written statement contending, inter-alia, that there was no default in payment of rent. He further denied the subletting of the disputed premises to Moti Chandra as according to him Moti Chandra was his nephew and partner in his business.

6. The suit was decreed by the judgement dated 08.08.1991 which was challenged by Mishri Lal in Civil Revision No.145 of 1991. The District Judge, Allahabad by judgement and order dated 04.12.1991 allowed the revision on the ground that respondents (Plaintiff in suit) have failed to prove that they were exclusive owner and landlord of the disputed premises. The respondents preferred Writ Petition No.11498 of 1992 before this Court challenging the order dated 04.12.1991 in Civil Revision No.145 of 1991. The writ petition was allowed by this Court by judgement and order dated 2nd of August, 2006 and the matter was remanded back to the court below to decide the revision by the law.

7. It appears that respondent no.3 during the pendency of the Writ Petition No.11498 of 1992 transferred his 1/3rd share in the disputed premises to the petitioner Smt. Geeta Devi W/o Moti Chandra by sale deed dated 25.02.2003

8. It transpires from the record that after remand the petitioner filed an application for impleadment in Civil Revision No.145 of 1991 which was allowed by the revision court by order dated 28.01.2008 and revision-applicant (Misri Lal) was directed to move an application to implead Smt. Geeta Devi as O.P. No.4 in the case. It is not clear from the record as to whether Smt. Geeta Devi (petitioner) was impleaded as O.P. No.4 by the tenant- Mishri Lal and whether Smt. Geeta Devi after having been impleaded as the party had contested the revision.

9. The revision court again allowed the revision No.145 of 1991 of tenant Mishri Lal by order dated 27.02.2010 and set aside the order of the trial court. The order of revision court dated 27.02.2010 came to be challenged by the respondent nos.1 and 2 in Writ A No.26732 of 2010 which was dismissed by this Court by judgement and order dated 25.02.2014.

10. The respondent nos.1 & 2 challenged the judgement of this Court

dated 25.02.2014 before the Apex Court in Civil Appeal No.4309 of 2017. The record reveals that during the pendency of Civil Appeal No.4309 of 2017 Misri Lal, original tenant, had died and his wife Smt. Savitri Devi was substituted as his legal heir. The Apex Court by judgement dated 21.03.2017 allowed the appeal and decreed the Suit of the respondent no. 1 & 2. The relevant extract of the order of the Apex Court is reproduced hereinbelow:-

"35...Having regard to the conclusions recorded on the aspect of default in payment of rent and sub-letting, both statutorily recognized grounds for eviction of a tenant under Section 20 of the Act, it is considered inessential to dilate on the ground of bona fide requirement and comparative hardship. In the wake up of the above, the impugned judgments and orders of the High Court are set-aside and the suit of the appellants is decreed in full. The respondents would vacate the suit premises at the earliest and in no case later than three months from today. The appeals are allowed. No costs."

11. The respondent nos. 1 & 2 thereafter preferred an execution application registered as Execution Case No.6 of 2017.

12. In the execution case, the petitioner preferred an objection under Section 47 of C.P.C. registered as Miscellaneous Case No.812 of 2017 contending, inter-alia, that the Suit No.252 of 1989 of the respondents have been decreed and one of the co-owner Sri Ram during the pendency of the Suit transferred his 1/3rd share in the disputed premises to the petitioner by registered sale deed dated 25.02.2003. Therefore, petitioner became co-owner of the disputed premises from the date of purchase of 1/3rd share of Sri Ram in the disputed premises. It was further averred that after the judgement of the Apex Court, tenant Smt. Savitri Devi had delivered the possession of disputed premises to petitioner on the instruction of Sri Ram, respondent no. 3, therefore, possession of one co-owner will be deemed to be the possession of all. It was further pleaded that the decree stood satisfied on delivery of the possession by the tenant to the petitioner and proceeding in the execution case cannot continue. It was also stated that petitioner has instituted Original Suit No.746 of 2008 against the respondent nos.1 & 2 for partition.

13. The respondents filed a reply to the objection of the petitioner under Section 47 of C.P.C. contending, inter-alia, that the alleged delivery of possession by Smt. Savitri Devi to petitioner is illegal since the petitioner cannot get possession of the disputed property in law, claiming herself to be the co-owner on the basis of sale deed dated 25.02.2003 executed by Sri Ram, respondent no.3.

14. The trial court rejected the objection of the petitioner under Section 47 of C.P.C. by order dated 30.09.2019 on the ground that the Apex Court had accepted the case of the respondents regarding subletting of disputed premises to Moti Chandra and petitioner Smt. Geeta Devi is the wife of Moti Chand. The trial court further held that after the judgement of the Apex Court all orders in the revision are deemed to have been set aside, thus, the petitioner cannot take any advantage of the order dated 28.01.2008 passed by the revision court allowing her impleadment application. The trial court further held that the status of the parties is to be determined on the date of institution of the suit, and on

the date of institution of the suit, the status of the petitioner was that of the wife of subtenant of the disputed premises, hence, petitioner could not get possession as co-owner of the disputed premises.

15. The trial court further held that merely because petitioner has obtained an assignment of rights of the landlord and ownership of the disputed premises from one of the co-owner that would not entitle her to seek possession of the disputed premises in the capacity of the landlord from the tenant in the execution of a decree. The trial court further noted that suit for partition has been instituted by the petitioner and she can get possession after the decision of the suit for partition in her favour.

16. The petitioner, thereafter, preferred Civil Revision No. Nil of 2019 against the order dated 30.09.2019. The revision court also placed reliance upon Section 111 (d) of the Transfer of Property Act, 1882 (hereinafter referred to as 'Act, 1882) to conclude that since petitioner has purchased only a share of one of the co-owner to the extent of 1/3rd in the disputed premises, therefore, there cannot be any merger of tenancy, consequently, she cannot obtain possession of the disputed premises in the execution of a decree for eviction.

17. Challenging the aforesaid two orders, learned Senior Counsel for the petitioner has argued that the petitioner having purchased 1/3rd share of one of the co-owner Sri Ram by sale deed dated 25.02.2003 has become co-owner of the disputed premises, accordingly, the decree of eviction is also in her favour. Therefore, tenant, treating the petitioner to be decree-holder and co-landlord, delivered the possession of the disputed premises in compliance with the judgement of Apex Court. Consequently, decree stood satisfied on delivery of possession of disputed premises to the petitioner, therefore, the courts below have erred in rejecting the objection of the petitioner.

18. It is further urged that the petitioner is one of the co-owner cannot be considered to be a tenant or subtenant of the disputed premises, therefore, her possession is as per law because of Section 44 of the Act, 1882 and petitioner cannot be said to be the unauthorized occupant of the disputed premises. He further submits that the petitioner is ready and willing to part with 2/3rd share of the disputed premises and handover the possession of the same on any date fixed by the court to respondent nos.1 & 2, and the petitioner may be permitted to retain 1/3rd share of the disputed premises purchased by her from Sri Ram.

19. Per contra, Sri Atul Dayal learned Senior Counsel for the respondents would contend that petitioner, who alleges to have purchased 1/3rd share of Sri Ram through sale deed dated 25.02.2003, is not a member of the family and is a third party, therefore, she cannot enter into the possession of the disputed premises. In support of his aforesaid contention, he has placed reliance upon the second paragraph of Section 44 of the Act, 1882. He further contends that the benefit of Sections 44, 54 and 55(6) as claimed by the petitioner cannot be extended to her being an outsider of the family.

20. He further urged that petitioner has purchased only 1/3rd share of the disputed premises of Sri Ram and on the strength of the alleged purchase, she cannot

obtain possession as the doctrine of the merger of tenancy contemplated under Section 111(d) of the Act, 1882 is not attracted in the case in hand. In support of his contention, he has placed reliance upon the following judgements of Apex Court:-

(i). ***Pramod Kumar Jaiswal and Others Vs. Bibi Husn Bano and Others 2005 (2) ARC 921;***

(ii). ***India Umbrella Manufacturing Co. and Others Vs. Bhagabandei Agarwalla (Dead) By LRS Savitri Agarwalla (Smt.) and Others (2004) 3 SCC 178;***

(iii). ***T. Lakshmipathi and Others Vs. P.Nithyananda Reddy and Others (2003) 5 SCC 150.***

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

22. Sri H.N. Singh learned Senior Counsel has argued that the transfer of 1/3rd share of Sri Ram in favour of the petitioner has been through a sale deed dated 25.02.2003 which conforms to the requirement of sale as provided under Section 54 of the Act, 1882, therefore, petitioner is entitled to the benefit of Sections 44 and 55 (6) (a) of the Act, 1882.

23. To appreciate the aforesaid contention, it would be appropriate to extract Sections 44 and 55 (6) (a) of the Act, 1882:-

*"4**4. Transfer by one co-owner.**--Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.*

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

***55. Rights and liabilities of buyer and seller.**--In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-*

(1)...
(2)...
(3)...
(4)...
(5)...
(6) The buyer is entitled--

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof."

24. Sri Atul Dayal, learned Senior Counsel for the respondents while refuting the submission of counsel for the petitioner has invited the attention of the Court to the second paragraph of Section 44 of the Act, 1882 to contend that disputed premises is

dwelling house and petitioner admittedly being not a member of the family is not entitled to the protection provided in the first paragraph of Section 44 read with Section 55 (6) (a) of the Act, 1882. He submits that the petitioner has already instituted a suit for partition and the only mode which law recognises for delivery of possession in the case of joint property in respect of the transfer of ownership by one of the co-owner to the extent of his/her share is through the partition. The submission is that after the partition of the disputed premises by metes and bounds, the petitioner can get the possession. He submits that the question as to whether petitioner is entitled to partition based on sale deed dated 25.02.2003 is yet to be determined in the Suit No. 746 of 2008.

25. It would be apt to refer a few judgements of the Apex Court wherein the Apex Court has explained the scope of the second paragraph of Section 44 of the Act, 1882.

26. The Apex Court in the case of ***Ramdas Vs. Sitabai and Others (2009) 7 SCC 444*** held that in the case of a purchase of an undivided share of co-sharer by a third party, possession can be handed over by partition amicably through mutual settlement by metes and bounds or by a decree of the court. Paragraphs 17 to 19 of the judgement are being extracted herein below:-

"17. Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this Court in M.V.S. Manikayala Rao Vs. M. Narasimhaswami & Ors. [AIR 1966 SC 470], wherein this Court stated as follows:

"Now, it is well settled that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and ask for allotment to him of that which, on partition, might be found to fall to the share of the co- parcener whose share he had purchased."

18. It may be mentioned herein that the aforesaid findings and the conclusions were recorded by the Supreme Court by placing reliance upon an earlier judgment of this Court in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh & Ors. [AIR 1953 SC 487], wherein this Court held as under:-

"All that (vendee) purchased at the execution sale, was the undivided interest of co-parcener in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work-out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour (Emphasis added)

19. In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court."

27. The Apex Court in the case of ***Hardeo Rai Vs. Sakuntala Devi and Others (2008) 7 SCC 46*** held that a coparcener's interest can be transferred subject to the condition that the purchaser without the consent of other coparceners cannot get possession of what he has purchased. Paragraphs 25 and 26 of the judgement are being extracted herein below:-

"25. In M.V.S. Manikayala Rao vs. M. Naraisimhaswami and others: AIR 1966 SC 470 this Court stated the law thus : (AIR p.478, para 5)

"5....it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased."

26. Thus, even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition."

28. The Apex Court in the case of ***Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others (1996) 11 SCC 446*** in paragraph 4 of the judgement while considering the purpose of the enactment of Section 4 of Partition Act, 1893 (hereinafter referred to as 'Act, 1893') also considered the reasons for introducing Section 44 in the Act, 1882. Paragraph no. 4, 6 & 10 of the judgement is useful in the context of the present case and are being reproduced hereinbelow:-

"4. It is in the background of these rival contentions that we address ourselves to the consideration of this question. Before we refer to the cleavage of judicial opinion amongst different High Courts on the scope and ambit of Section 4 of the Act, it would be profitable to have a look at the provision itself. The Statement of Objects and Reasons for enacting the Partition Act, 1893 amongst others, provided as under :

"It is also proposed in the Bill to give the Court the power of compelling a stranger, who has acquired by purchase a share in a family dwelling-house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such share holders by section 44, paragraph 2 of the Transfer of Property Act, and is an application of a well- known rule which obtains among Muhammadans everywhere and by custom also among Hindus in some parts of the country."

It is obvious that the Act intended to extend the privilege already available to a co-sharer in a family dwelling house as per Section 44 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act')...

...

It is obvious that by the time the Act came to be enacted, the legislature had in view the aforesaid parent provision engrafted in section 44 of the T.P. Act to the effect that a stranger to the family who becomes the transferee of an undivided share of one of the co owners in a dwelling house belonging to undivided family could not claim a right of joint possession or common or part enjoyment of the house with other co-owners of the dwelling house.

Implicit in the provision was the legislative intent that such stranger should be kept away from the common dwelling house occupied by other co-sharers. It was enacted with the avowed object of ensuring peaceful enjoyment of, the common dwelling house by the remaining co-owners being members of the same family sharing a common hearth and or home. It is in the light of the aforesaid pre-existing statutory background encompassing the subject that we have to see what Section 4 of the Act purports to do. Section 4 of the Act provides as under:...."

6. In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share-of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co-owners under Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the T.P. Act. It is true that amongst other conditions, Section 4 requires for its applicability that such stranger transferee must sue for partition and only in that eventuality the right of pre-emption envisaged by Section 4 can be made available to the other contesting Co-owners. In this connection, great emphasis was placed by Dr. Ghosh on the words such transferee sues for partition as employed by Section 4. However, it has to be noted that this section does not provide as a condition for its applicability that such stranger transferee must file a suit for partition. The words transferee sues for partition are wider than the words transferee filing a suit for partition . The latter phraseology is conspicuously absent in the section. The Partition Act does not define the words "suing for partition". The connotation of the term "sue" can be better appreciated by looking at certain standard works defining such a phrase. In Black's Law Dictionary, Sixth Edition, at page 1432 the meaning of the word "sue is mentioned as under :-

"To commence or to continue legal proceedings for recovery of a right; to proceed with as an action, and follow it up to its proper termination; to gain by legal process".

In Collins English Dictionary, 1979 Edition, at page 1452, one of the meaning of the word "sue" has been shown as under:

"To institute legal proceedings against".

In Aiyar's Judicial Dictionary, 10th Edition (1988), at page 980, the word 'sue" is said to have the following meaning :-

"To take only legal proceedings against one".

It is further observed that the word is used most exclusively to prosecute a civil action against one."

10. We have also to keep in view the avowed beneficial object underlying the

said provision. Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger-outsider to the family who may obviously be having different outlook and mode of life including food habits and other social and religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquility not only of the occupants of the dwelling house but also of neighbours residing in the locality and in the near vicinity. With a view to seeing that such homogenious life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this statutory right of pre-emption is made available to the co-owners who undertake to buy out such undivided share of the stranger co-owner...."

29. It is perspicuous from the aforesaid judgements of the Apex Court that an outsider, who has purchased the share of co-sharer in an undivided estate, can seek possession of his/her share only through partition by amicable mutual settlement by metes and bounds or through a decree of the court.

30. The petitioner, being an outsider and third party to the family of the respondent, can seek possession of 1/3 share in the disputed premises purchased by her through the partition of the disputed property by metes and bounds through amicable mutual settlement or by a decree for partition. The petitioner has instituted Original Suit No. 746 of 2008 for partition wherein the issue whether petitioner is entitled to a decree of partition based on the sale deed is yet to be determined. The respondents have the right to contest the partition suit by taking all defences available in law, including their right of preemption as provided in Section 4 of the Act 1893.

31. In this view of the fact, the petitioner cannot get the possession of the share purchased by her in the disputed premises until a decree for partition is obtained by her and the disputed property has been partitioned in the execution of the decree by metes and bounds. Therefore, the delivery of possession of the disputed premises by the tenant Savitri Devi to petitioner in the execution of the decree of eviction cannot have any sanctity in law. Accordingly, this Court holds that the alleged possession of petitioner over the disputed premises is illegal and without authority in law and the petitioner is not entitled to the benefit of Section 44 and Section 55 (6) of the Act, 1882.

32. It would be expedient at this point to consider the argument of counsel for the respondent that doctrine of merger provided in Section 111(d) of the Act,1882 is not attracted in the instant case. Section 111(d) of the Act, 1882 reads as under:-

"111. Determination of lease.--A lease of immoveable property determines--

(a) ...

(b) ...

(c)...

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right."

33. The Apex Court in the case of ***Pramod Kumar Jaiswal and Others (supra)*** had interpreted Section 111 (d) of the Act, 1882. In the said case, the appellant-tenant had challenged the order of the High Court whereby High Court had affirmed the order of the trial court directing the appellant to deposit the rent of the property @ Rs.4950/- per month being the rent fixed under the Bihar Rent Control Act. The challenge of the aforesaid order was laid by the appellants on the ground that they have taken assignment of the rights of certain heirs, therefore, being co-owner and landlord, the lease has terminated and they are not liable to pay rent as fixed by the authority. In the aforesaid backdrop, the Apex Court considered the issue as regards the effect of purchase of the rights of certain co-owners landlords of the building by the tenants i.e. appellants on the lease originally taken by them which was the basis of their possession of the building. The Apex Court rejected the contention of the appellants and held in paragraph 6 of the judgement, that a lease can terminate only where the interests of a lessee and that of the lessor in the whole property leased become vested at the same time in one person in the same right. Paragraph no. 6 & 16 of the judgement are being extracted herein below:-

"6 Obviously, the taking of an assignment of a fraction of the reversion, or the rights of a co-owner landlord, does not and cannot bring about a determination of the lease in terms of Section 111(d) of the Transfer of Property Act. That a lease is not extinguished because the lessee purchases a part of the reversion was laid down by the Privy Council in Faquir Baksh vs. Murli Dhar (58 Indian Appeals 75). Their Lordships after setting out the terms of Section 111 of the Transfer of Property Act quoted with approval the statement of the law made by the trial Court in that case that for a merger to take place, "The fusion of interests required by law is to be in respect of the whole of the property." This Court in Badri Narain Jha and others vs. Rameshwar Dayal Singh and others (1951 SCR 153) held that if a lessor purchases the whole of the lessee's interest, the lease is extinguished by merger, but there can be no merger or extinction where one of several joint holders of the mokarrari interest purchases portion of the lakhraj interest. It was held that when there was no coalescence of the interest of the lessor and the lessee in the whole of the estate, there could be no determination of the lease by merger. We do not think that it is necessary to multiply authorities in the face of the plain language of the provision and the authoritative pronouncements of the Privy Council and of this Court referred to above. <u>The position emerging from the relevant provision of the Transfer of Property Act is that the lease or tenancy does not get determined, by the tenant acquiring the rights of a co-owner landlord and a merger takes place and the lease gets determined only if the entire reversion or the entire rights of the landlord are purchased by the tenant.</u>

16. A plain and grammatical interpretation of Section 111(d) of the Transfer of Property Act leaves no room for doubt that unless the interests of the lessee and that of the lessor in the whole of the property leased, become vested at the same time in one person in the same right, a determination of the lease cannot take place. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property do not become vested at the same time in one person in the same right. Therefore, a lessee who has taken assignment of the rights of a co-owner lessor, cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord. It is, thus, clear that there is no substance in the contention of the learned counsel for the appellants that in the case on hand, it should have been held that the tenancy stood determined and the application of the landlord for a direction to the tenant to deposit the rent in arrears should have been dismissed. The position of the appellants as tenants continue and they are bound to comply with the requirements of the Rent Control Act under which the order for deposit has been passed against them. The High Court has rightly dismissed the revision."

34. In the case of ***T. Lakshmipathi and Others (supra),*** the Apex Court held that to attract the principle of the merger of the tenancy provided in Section 111 (d), interests of the lessee and lessor in the whole of the property shall vest in one person at the same time and in the same right. Paragraph 18 of the judgement is being extracted hereinbelow:-

*"18. In the case at hand, it cannot be denied, nor has it been denied, that the appellants herein are not purchasers of the entire ownership interest in the property. What they have purchased is interest of some out of all the co-owners of the property. The interest of the respondent No.1, whatever be its extent, has not come to vest in the appellants. The appellants have also acquired the tenancy rights in the property. Thus they have acquired partial ownership and full tenancy rights. It cannot be said that the interests of the lessee and the lessor in the whole of the property have become vested in the appellants at the same time and in the same right. The lease cannot be said to have been determined by merger. So long as the interests of the lessee, the lesser estate and of the owner, the larger estat*e do not come to coalesce in full either the water of larger estate is not deep enough to enable annihilation or the body of lesser interest does not sink or drown fully."

35. In the case of India ***Umbrella Manufacturing Co. and Others (supra)***, the Apex Court while considering the doctrine of merger under Section 111 (d) of the Act, 1882 held that one of the co-owner cannot withdraw his consent midway the suit to prejudice the other co-owner. Paragraph 6 of the judgement is being extracted hereinbelow:-

"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., (1976) 4 SCC 184; Dhannalal Vs. Kalawatibai & Ors., (2002) 6 SCC 16, 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."

36. According to Section 111 (d), a lease of immoveable property determines in a case where the interests of the lessee and that of the lessor in the whole of the property become vested in the tenant. Thus, two conditions are mandatory to attract Section 111 (d); that it is only the tenant who should acquire the property of the landlord; second, the tenant should purchase assignment of the rights of the landlord in the property in its entirety.

37. In the instant case, the petitioner admits that she is not the tenant of the disputed premises and has purchased 1/3rd share of Sri Ram and not the entire ownership interest in the disputed premises, therefore, the twin conditions of applicability of the doctrine of merger of the tenancy are lacking. Accordingly, this court finds substance in the argument of the respondent that the doctrine of merger of tenancy is not attracted in the present case.

38. Since this Court has held the possession of the petitioner over the disputed premises is illegal, therefore, the submission of counsel for the petitioner that petitioner is ready to part with 2/3rd share of the disputed premises and handover the same to respondent nos.1 & 2 is devoid of merit.

39. Thus, for the reasons given above, the writ petition under Article 227 of Constitution of India lacks merit and is accordingly, ***dismissed.*** There shall be no order as to costs.

(2020)07ILR A137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE RAMESH SINHA, J.

Public Interest Litigation No. 532 of 2020

In Re: Banners placed on roadside In The City of Lucknow ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Suo motto

Counsel for the Respondents:
C.S.C.

Constitutional Law - Right to Privacy - The Constitution of India: Article 21 - No Law is in existence permitting the State to place the banners with personal data of the accused from whom compensation is to be charged. (Para 22)

The Court examined the legitimacy of the display of photographs, name and address of certain persons by the district administration and police administration of the city of Lucknow through banners seeking compensation and further to confiscate their property, if they failed to pay compensation. (Para 3)

List of cases cited:-

1. State of Uttaranchal Vs Balwant Singh Chaufal . & ors. (2010) 3 SCC 402 *(distinguished)*

2. Re:- Destruction of Public & Private Properties (2009) 5 SCC 212

3. Malak Singh and others Vs State of Punjab and Haryana . & ors. AIR 1981 SC 760

4. K. S. Puttaswamy (Retd.) & anr. Vs U.O.I. and ors. (2015) 8 SCC 735

5. K.P. Puttaswamy and ors Vs U.O.I. & ors. AIR 2017 SC 4161

6. People's Union for Civil Liberties (PUCL) Vs U.O.I. (1997) 1 SCC 301

(Delivered by Hon'ble Govind Mathur, C.J.
&
Hon'ble Ramesh Sinha, J)

1. Heard Sri Raghvendra Singh, learned Advocate General assisted by Sri Neeraj Tripathi, learned Additional Advocate General, Sri Shashank Shekhar Singh, Additional Chief Standing Counsel and Smt. Archana Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. Privacy is a fundamental human right recognized in the United Nations Declaration of Human Rights, the international convenant on civil and political rights and many other international and regional treaties. The privacy underpins human dignity and key values of a democracy. Nearly every country in the world recognizes a right of privacy explicitly in their constitution. In our country, where privacy is not explicitly recognized as fundamental right in the constitution, the Courts have found such right protected as an intrinsic part of life and personal liberty under Article 21 of the Constitution of India. This fundamental right provides lungs to the edifice of our entire constitutional system. A slightest injury to it is impermissible as that may be fatal for our values designed and depicted in the preamble of the constitution.

3. In this public interest writ proceedings, undertaken by the Court at its own, the simple question is the legitimacy of the display of photographs, name and address of certain persons by the district administration and police administration of the city of Lucknow through banners. The banners came up at a major road side with personal details of more than 50 persons those accused of vandalism during protest in the month of December, 2019. The poster is seeking compensation from the accused persons and further to confiscate their property, if they failed to pay compensation.

4. The installation of banners was reported in several newspapers, television and internet channels on 6th and 7th of March, 2020. Noticing injury to the right of privacy, the Chief Justice of this Court directed the Registry to register a petition for writ in public interest and list that before the Bench nominated. By an advance notice, the Commissioner of Police, Lucknow and District Magistrate, Lucknow were called upon to explain the provisions under which the banners were placed on road side. An explanation was also sought about the provisions relating to placement of any banner on road side that causes interference in movement of traffic in crowded areas. Accordingly, the Commissioner of Police and District Magistrate, Lucknow are before us through the Advocate General of the State.

5. Learned Advocate General while accepting absence of any statute permitting

executive authorities to put such banners, opposed the petition with all vehemence with following submissions:-

(i) The Court erred in invoking public interest jurisdiction in the instant matter, that being available to under privileged section of the society only. The persons whose personal details are given in the banners are capable enough to agitate their grievance, if any, at their own.

(ii) The cause in the instant matter, if any, that arose at Lucknow, therefore, the petition at Allahabad lacks territorial jurisdiction.

(iii) The cognizance of any issue that is to be adjudicated in public interest litigation jurisdiction could have been taken by a Division Bench and not by a single Bench as taken in the instant matter.

(iv) The object of displaying personal details of the individuals is to deter the mischief mongers from causing damage to public and private property. Such bonafide action taken by the State must not be interfered by the Court in its public interest litigation jurisdiction.

6. To substantiate the first submission, learned Advocate General heavily relied upon the judgment of Hon'ble Supreme Court in S***tate of Uttaranchal Vs. Balwant Singh Chaufal and others, 2010 (3) SCC 402*** laying down guidelines for Courts to streamline PIL jurisdiction. The Apex Court while doing so issued following directions:-

"(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar

novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

7. Learned Advocate General while referring para 32, 34, 35 and 36 of the judgment aforesaid emphasized that the public interest litigation jurisdiction is evolved by the Courts to get access to justice to a large section of society that is otherwise not getting any benefit from judicial system.

8. So far as this argument is concerned, suffice to state that the most of the directions issued under para 181 of the judgment aforesaid would have no application in the instant matter being arising out of a suo motu action taken by the Court. However, it would be appropriate to state that the Court while calling upon the respondents duly applied its mind to ensure that the PIL is aimed at redressal of genuine public harm or public injury. In our constitutional scheme executive, legislature and judiciary are given distinct and separate powers and generally each branch is not allowed to encroach the powers of other. All the three wings of governance being face of the State, check and balance each other. The judiciary usually takes action once a case or cause is brought before it by a party and that is mostly in adverse litigation. But, where there is gross negligence on part of public authorities and government, where the law is disobeyed and the public is put to suffering and where the precious values of the constitution are subjected to injuries, a constitutional court can very well take notice of that at its own. The Court in such matters is not required to wait necessarily for a person to come before it to ring the bell of justice. The Courts are meant to impart justice and no court can shut its eyes if a public unjust is happening just before it. The concept of "standing" has acquired a new shape in our justice delivery system. A well meaning citizen or body certainly possess a locus to stand before the Court of law for a well meaning cause. In the case in hand, a valid apprehension of causing serious injury to the rights protected under Article 21 of the Constitution of India exists which demands adequate treatment by the Court at its own. The economic status of the persons directly affected in such matters is not material. The prime consideration before the Court is to prevent the assault on fundamental rights, especially the rights protected under Article 21 of the Constitution of India. As already stated, in the instant matter the act of the district and police administration of Lucknow is alleged to be in conflict with the right of life and liberty. Hence, the *suo motu* action by the Court is justified.

9. The second objection raised by learned Advocate General is that the entire cause of action in the instant matter arose at Lucknow, hence, this Court at Allahabad lacks territorial jurisdiction. Cause of action means the whole of the material facts that is necessary for a plaintiff to allege and prove. The cause of action consists of a bundle of facts that gives cause to enforce the legal injury for redress in a a Court of law.

10. In the present case, the cause is not about personal injury caused to the persons whose personal details are given in the banner but the injury caused to the precious constitutional value and its shameless depiction by the administration. The cause as such is undemocratic functioning of government agencies which are supposed to treat all members of public with respect and courtesy and at all time

should behave in manner that upholds constitutional and democratic values. It would also be appropriate to state that the United Nations also under its Resolution No.58/4 dated 31st October, 2003 desired such conduct from public officials. Pertinent to note that the government agencies in the State of Uttar Pradesh have proposed to install the banners of accused persons in other cities also where the protest took place and compensation is claimed against alleged damage to public property. The proposed installation of banners in the city of Meerut is reported in newspapers of today only. Looking to the state wide nature of impugned action, it cannot be said that this Court at Allahabad is not having territorial jurisdiction to adjudicate the cause involved.

11. It is also stated by learned Advocate General that no cognizance of an issue could have been taken in public interest litigation jurisdiction by a single Bench may that be by the Chief Justice of this Court, as the jurisdiction to do so is available to a Division Bench. According to learned Advocate General, the reference of the issue for adjudication as a public interest litigation is incompetent. We do not find any merit in this argument. The Chief Justice has only noticed a wrong and directed the Registry to place before a nominated Division Bench for its adjudication. It is in accordance with settled norms to entertain a PIL suo motu.

12. The next submission of learned Advocate General is that the persons whose photographs have been placed in the banners with their identity have already challenged the notice issued to them for payment of compensation for causing damage to public property. Hence, no useful purpose shall be served by this public interest litigation, which essentially pertains to recovery of compensation from such persons.

13. In our considered opinion, this limb of objection too is bereft of merit. In the instant matter, the issue is not the compensation that is to be recovered from any body but depiction of personal data of persons on a road side, which may amount unwarranted interference in privacy of a person.

14. In last, it is submitted by learned Advocate General that the object of installing the banners with identity of certain persons is only to deter citizens from participation in illegal activities. The placement of banners with details of the accused persons at conspicuous place is in a larger public interest and, therefore, the Court must not interfere with the same.

15. No doubt the state can always take necessary steps to ensure maintenance of law and order but that cannot be by violating fundamental rights of people.

16. Now coming to the main issue about the unwarranted interference in privacy of people, it would be appropriate to state that admittedly no statutory provisions in this regard are available with the State. The State has initiated the proceedings to charge compensation from the accused of vandalism during protest in the month of December, 2019, on the basis of a government order that is said to be in tune of the directions given by Supreme Court in ***"Re:-Destruction of Public and Private Properties" reported in 2009 (5) SCC 212.*** The government order referred by learned Advocate General certainly provides a procedure to charge compensation from the persons causing

damage to the public property but that does not permit the State to encroach privacy of a person. As already stated, we are not concerned with validity of the compensation fastened but to the act about disclosure of personal details of the accused persons.

17. Under the Code of Criminal Procedure, 1973, the power is available to a Court to publish a written proclamation requiring appearance of a persons against whom a warrant has been issued and such person is concealing himself to avoid execution of warrant. No other power is available in the Code to police or the Executive to display personal records of a person to public at large. There are certain provisions empowering the investigating agencies or other Executives to take picture of accused for the purpose of their identification and record but that too is not open for publication. The only time these photographs be published is to have assistance in the apprehension of a fugitive from justice.

18. The Supreme Court in ***Malak Singh and others Vs. State of Punjab and Haryana and others*** reported in ***AIR 1981 SC 760*** held that even for history sheeters who have the necessary criminal history the information about the history sheet and the surveillance has to be kept discreet and confidential that cannot be shared with public and there is no question of posting the photographs of history sheeters even at police stations.

19. The Supreme Court in People's Union for Civil Liberties (PUCL) Vs. Union of India and another reported in 1997 (1) SCC 301 examined the issue with regard to availability of a fundamental right of privacy. The Apex Court discussed the concept and held as under:-

"12.Both sides have relied upon the seven-Judge Bench judgment of this Court in Kharak Singh Vs. State of U.P. The question for consideration before this Court was whether "surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by "domiciliary visits at night" was held to be violative of Article 21 on the ground that there was no "law" under which the said regulation could be justified.

13. The word "life" and the expression "personal liberty" in Article 21 were elaborately considered by this Court in Kharak Singh's case. The majority read "right to privacy" as part of the right to life under Article 21 of the Constitution on the following reasoning:

"We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois (1877) 94 U.S. 113, 142, where the learned Judge Pointed out that "life" in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-his arms and legs etc. We do not entertain any doubt that the word "life" in Article 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal

comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the trainers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in Wolfs. Colorado:

'The security of one's privacy against arbitrary intrusion by the police is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the fourteenth Amendment.'

Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty.

It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads :

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man- an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in Semayne's case (1604) 5 Coke 91, where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne's case was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

In our view Clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional."

14. Subba Rao J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of the Constitution but went a step further and struck down Regulation 236 as a whole on the following reasoning:

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolfv. Colorado, (1949) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restriction or encroachments on his person, whether those restriction or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."

15. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh's case (majority and the minority opinions) to include that "right to privacy" is a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

16. In Gobind Vs. State of U.P., a three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said Article.

17. In R. Rajagopal alias R.R. Gopal and another v. State of Tamil Nadu , Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to Kharak's case, Govind's case and considered a large number of American and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to

safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

8. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

20. The issue again came up before a three Judges Bench of Hon'ble Supreme Court in Justice ***K.S. Puttaswamy (Retd.) and another Vs. Union of India and others, 2015 (8) SCC 735***, the Bench referred the issue for its crystallization by a larger Bench. Accordingly, a Bench of nine Judges examined the entire issue.

21. The Supreme Court in its historical judgment in Justice ***K.P. Puttaswamy and others Vs. Union of India and others*** reported in ***AIR 2017 SC 4161*** affirmed the constitutional right to privacy. It declared privacy an intrinsic component of Part III of Constitution of India that lays down our fundamental rights relating to equality, freedom of speech and expression, freedom of movement and protection of life and personal liberty. These fundamental rights cannot be given or taken away by law and laws. All the executive actions must abide by them. The Supreme Court has however, clarified that like most other fundamental rights the right to privacy is not "absolute right". A persons privacy interests can be overridden by compounding state and individual interests subject to satisfaction to certain tests and bench marks. The nine Judges Bench noticed certain tests and bench marks, which are liability, legitimate goal, proportionately and procedural guarantees.

22. We have examined the action of the State under consideration in the instant matter by the touch stones aforesaid. So far as legality part is concerned, suffice to state that no law is in existence permitting the State to place the banners with personal data of the accused from whom compensation is to be charged. The legitimate goal as held by the Supreme Court in the case of ***K.S. Puttaswamy*** (supra) the proposed action must be necessary for a democratic society for a legitimate aim. On scaling, the act of the State in the instant matter, we do not find any necessity for a democratic society for a legitimate aim to have publication of personal data and identity. The accused persons are the accused from whom some compensation is to be recovered and in no manner they are fugitive. Learned Advocate General also failed to satisfy us as to why placement of the banners is necessary for a democratic society for a legitimate aim.

23. The third test is that there should be rational nexus between the object and means adopted to achieve them and further that how the extent of interference is proportionate to its need. The object as disclosed to us is only to deter the people from participating in illegal activities. On asking, learned Advocate General failed to satisfy us as to why the personal data of few persons have been placed on banners though in the State of Uttar Pradesh there are lakhs of accused persons who are facing serious allegations pertaining to commission of crimes whose personal details have not been subjected to publicity. As a matter of fact, the placement of

personal data of selected persons reflects colorable exercise of powers by the Executive.

24. In entirety, we are having no doubt that the action of the State which is subject matter of this public interest litigation is nothing but an unwarranted interference in privacy of people. The same hence, is in violation of Article 21 of the Constitution of India.

25. Accordingly, the District Magistrate, Lucknow and the Commissioner of Police, Lucknow Commissionerate, Lucknow are directed to remove the banners from the road side forthwith. The State of Uttar Pradesh is directed not to place such banners on road side containing personal data of individuals without having authority of law.

26. A report of satisfactory compliance is required to be submitted by the District Magistrate, Lucknow to the Registrar General of this Court on or before 16th March, 2020. On receiving such compliance report, the proceedings of this petition shall stand closed.

(2020)07ILR A146
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR-II, J.

Second Appeal No. 7 of 2008

Krishna Chandra & Ors. ...Appellants
Versus
Smt. Sarju Dei (died) & Ors. ...Respondents

Counsel for the Appellants:
D.C. Mukerjee, Mohammad Aslam Khan

Counsel for the Respondents:
S.K. Mehrotra, Anurag Srivastava, I.D. Shukla, Ishwar Dutt Shukla, Santosh Kumar Mehrotra

Civil Law - Adverse Possession - Possession of defendants on disputed portion 227-A and 227-C is "permissive possession" based on "implied permission/license" given by plaintiff. Hence defendants have not perfected their title on the basis of alleged adverse possession. (Para 141(ix))

D.W. 3 has also accepted that plaintiff, Durga Prasad, is receiving rent from tenants of aforesaid house. He never received rent from tenants of aforesaid house. It is pertinent to mention here that the entry/access of plaintiffs in disputed house was never restricted/prohibited in disputed house was never restricted/prohibited from common portions of disputed house. Defendants are unable to prove and plead specifically that when and at which time possession of defendants of disputed portions of house became adverse to title of plaintiffs. (Para 141 (x))

(a) Substantial question of law cannot be formulated only to appreciate and analyze a piece of evidence/documentary evidence. (Para 140)

(b) Period of Limitation - Limitation Act, 1908: Articles 104, 136 137, 138, 140, 141, 142, 144 and 47 - Limitation Act, 1963: Articles 64, 65 - Provisions of Article 142 and 144 of Old Act and Article 65 of New Act. Article 142 and 144 of Old Act and Article 65 of New Act prescribe period of limitation 12 years from the period/ the date of the dispossession or discontinuance and when the possession of the defendant becomes adverse to the plaintiff. (Para 127)

Since the respondents/plaintiffs were not dispossess by the appellants, and the defendants/appellants are only claiming themselves as co-sharers of the disputed house,

Article 142 of the Old Act would not apply to the facts and circumstances of the present case. (Para 128)

Provisions of Article 144 of the Old Act and provisions of Article 65 of the New Act would apply to the facts and circumstances of the present case. Both the provisions provide period of 12 years for perfecting the title on the basis of adverse possession/ Therefore, materially and substantially both these provisions are pari materia. (Para 129)

Possession over potion of disputed house was permissible possession/ license, Dargahi and his family entered in the disputed house on the basis of implied permission/license. Therefore, the defendants/appellants could not in any way perfected their title regarding disputed property. The plaintiffs are the exclusive owner of the disputed house and the defendants are not the co-sharers. The defendants are compelled to enter in shoes of their ancestors Bhagwan Das. (Para 133)

Second Appeal rejected. (E-10)

List of cases cited: -

1. Santosh Hazari Vs Purushottam Tiwari (2001) 3 SCC 179

2. Madhukar Vs Sangram (2001) 4 SCC 756

3. Jagdish Singh Vs Madhuri Devi (2008) 10 SCC 497

4. Munshi Manzoor Ali Khan Vs Sukhbasi Lal AIR 1974 SC 706, 1969 (2) UJ 343 SC

5. Nathulal Vs Ambaram 1981 SCC OnLine MP 76, 1982 MP LJ 59, AIR 1982 MP 114

6. Uma Shankar . & ors. Vs Dy. Director of Consolidation (1979) SCC OnLine All 1161, 1979 RD 305

7. Shashidhar Vs Ashwini Uma Mathad (2015) 11 SCC 269, (2015) SCC OnLine SC 26

8. Vinod Kimar Vs Gangadhar (2015) 1 SCC (Civ) 521, (2014) SCC OnLine SC 826

9. Laliteshwar Prasad Singh Vs S.P. Srivastava (2017) 2 SCC 415, (2017) 1 SCC (Civ) 680, 2016 SCC OnLine SC 1476

10. G. Amalorpavam Vs R.C. Diocese of Madurai (2006) 3 SCC 224

11. Arumgham Vs Sundarambal (1999) 4 SCC 350

12. Radha Raman Samanta Vs Bank of India (2004) 1 SCC 605, (2004) SCC (L&S) 248

13. SBI Vs S.N. Goyal (2008) 8 SCC 92, (2008) 2 SCC (L&S) 678

14. Gurunam Singh Vs Lehna Singh (2019) 7 SCC 641, (2019) 3 SCC (Civ) 709, 2019 SCC OnLine SC 374

15. Naresh and ors. Vs Hemant & ors. 2019 CC OnLine SC 1490

16. Damodar Lal Vs Sohan Devi (2016) 3 SCC 78, (2016) 2 SCC (Civ) 36, 2016 SCC OnLine SC 5

17. Uttam Chand (D) through Lrs. Vs Nathu Ram (D) through Lrs. & ors. 2020 SCC OnLine SC 37

18. Dalla Vs Nanhu (2018) SCC OnLine All 5845

19. Smt. Mamju Lata Agarwal Vs St. of U.P. & ors. (2008) 1 UPLBEC 211

20. Dagadabai Vs Abbas (2017) 13 SCC 705, (2017) 5 SCC (Civ) 718, 2017 SCC OnLine SC 431, 2017 (35) LCD 1112

21. Girish Chandra Singh Vs Sheo Nath 2013 SCC OnLine All 14241, (2013) 120 RD 337, 2013 (31) LCD 1193

22. Rama Kant Vs Borad of Revenue 2005 SCC OnLine All 49, (2005) 1 AWC 929, (2005) 98 RD 389, 2005 (26) LCD 1057

23. Thulasidhara Vs Narayanappa (2019) 6 SCC 409

24. State of M.P. Vs Dungaji (2019) 7 SCC 465

25. Narayana Gramani Vs Mariammal (2018) 18 SCC 645

26. Arulmighu Nellukadai Mariamman Tirukkoil Vs Tamiarasi (2019) 6 SCC 686

27. Chand Kaur Vs Mehar Kaur (2019) 12 SCC 202, 2019 SCC OnLine SC 426

28. State of Rajasthan Vs Shiv Dayal (2019) 8 SCC 637, (2019) 4 SCC (Civ) 203, 2019 SCC OnLine SC 1034

29. Saroop Singh Vs Banto (2005) 8 SCC 330

30. Des Raj Vs Bhagat Ram (2007) 9 SCC 641

31. Arundhati Mishra (Smt) Vs Sri Ram Charitra Pandey (1994) 2 SCC 29 *(followed)*

32. State of Kerala Vs Mohd. Kunshi (2005) 10 SCC 139

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

1. Heard Shri Mohammad Arif Khan, learned Senior Counsel, assisted by Shri Mohammad Aslam Khan and Shri Mohiuddin Khan, learned counsel for the appellants and Sri I.D.Shukla, learned counsel for the respondents.

2. The present Second Appeal No. 7 of 2008: Krishna Chandra and others Vs. Smt. Sarju Devi (since dead) and others, has been preferred assailing impugned judgment and decree dated 26.09.2007 delivered by the Court of Civil Judge (Senior Division), Court No. 15, Sultanpur in Civil Appeal No. 45 of 1970.

3. The first appellate court has set aside judgment and decree dated 28.02.1970 delivered by the Court of Munsif (South), Sultanpur in Regular Suit No. 209 of 1963, by which suit of respondents/ plaintiffs was dismissed. During pendency of original suit before the trial court defendant No.1-Dargahi had expired and his legal representatives were substituted. The present matter was decided by learned trial Court Munsif South Sultanpur vide judgment dated 28.02.1970. The appellants assailed impugned judgment dated 28.02.1970 in Civil Appeal No. 45 of 1970.

4. Learned District Judge, Sultanpur dismissed aforesaid Appeal No. 45 of 1970 vide impugned judgment dated 10.11.1970. The plaintiffs/respondents preferred Second Appeal No. 2585 of 1970: Durga Prasad and another Vs. Dargahi and others, before this Court, which was decided on 01.08.1980 by coordinate Bench and matter was remanded to the first appellant court.

Therefore, Civil Appeal No. 45 of 1970 was again decided by first appellate court of Additional Civil Judge-II, Sultanpur vide impugned judgment dated 09.09.1986. The first appellate court again dismissed the suit of plaintiffs/respondents. Hence, Durga Prasad (since dead) through his legal representatives Sarju Devi and Bhaiya Ram preferred Second Appeal No. 677 of 1986 : Durga Prasad and another Vs. Smt. Chameli Devi and others. This court decided Second Appeal No. 677 of 1986 on 16.12.2004 and again remanded the matter to the first appellate court.

5. **The appellants of present second appeal preferred Special Appeal to Leave (Civil) assailing judgment dated 16.12.2004 passed by this court in Second Appeal No. 677 of 1986. Hon'ble Apex Court had dismissed it on 26.04.2005.**

6. The first appellate court of Civil Judge (Senior Judge), Court No. 15, Sultanpur again decided Civil Appeal No.

45 of 1970 and delivered impugned judgment and order dated 26.09.2007. Learned first appellate court has set aside impugned judgment dated 28.02.1970 delivered by the trial court of Munsif South, Sultanpur and decreed the suit of plaintiffs. Learned first appellate court has directed to the appellants/defendants to vacate the disputed house within one month from the date of judgment.

7. The appellants/defendants have preferred present second appeal assailing impugned judgment and order dated 26.09.2007 delivered by first appellate court.

8. It is pertinent to mention here that during proceedings of Second Appeal No. 2585 of 1970 and Second Appeal No. 677 of 1986 and proceedings of Appeal No. 45 of 1970, original plaintiffs and defendants have expired and their legal representatives have been substituted.

9. In Second Appeal No. 7 of 2008, originally Durga Prasad and Bhaiya Ram were the plaintiffs and Dargahi, Phool Chand, and Prem Chand, Deep Chand were defendants, out of them Durga Prasad and Bhaiya Ram-plaintiffs and Dargahi, Phool Chand and Prem Chand defendants have expired.

10. The present appeal was admitted on 25.05.2009 and coordinate Bench has passed order dated 25.05.2009 and formulated substantial question of law after hearing learned counsel for the appellants. The order dated 25.05.2009 is reproduced hereunder:

"Heard Sri D.C. Mukherjee, learned counsel for the appellants and Sri S.K. Mehrotra, Advocate who has put in appearance on behalf of the caveator-respondents.

Learned counsel for the appellants argued that by order dated 16.12.2004, passed in Second Appeal No. 677 of 1984, the another Bench of this Court remanded the First Appeal to the Court of District Judge, Sultanpur to decide the appeal afresh; that despite the directions of this Court that the appeal be decided by the District Judge, the appeal was decided by the Civil Judge, Senior Division. Relying upon a decision reported in 2005 (98) RD 389, Rama Kant Vs. Board of Revenue, U.P. At Allahabad as well as another decision reported in AIR 1923 Madras 351, Uthjuman smmal and another Vs. Naina Mahomed Rowther the learned counsel for the appellants argued that, thus, the First Appeal was decided against the directions given by this Court.

The order dated 16.12.2004, passed by the another bench of this Court reveals that the Second Appeal No. 677 of 1984 was against the appellate judgment passed by 2nd Addl. Civil Judge. The valuation of this suit and appeal was only Rs. 4000/-. No reason is stated in the order dated 16.12.2004 as to why the appeal be not decided by the appellate court, having jurisdiction and why it should be heard and disposed of by the District Judge or Addl. District Judge.

It appears that since majority of the judgments assailed in Second Appeal are the judgments given by the District Judge or Addl. District Judge, hence, under that impression, it was inadvertently dictated that the appeal be decided afresh by the District Judge.

The impugned judgment was given by the Court having appellate jurisdiction over the mater. The Bench by which the order dated 16.12.2004 was passed, did not intend that the appeal be

not disposed of by the Court having jurisdiction over the First Appeal. The point regarding jurisdiction has, therefore, no force. The appeal cannot be admitted on this point.

The another point raised by the learned counsel for the appellants is that a Death Certificate of Harishchandra having signatures and seal of the Issuing Authority was lost or misplaced in the Court, hence, it was re-constructed. That the First Appellate Court by the impugned judgment declined to rely upon such re-constructed Death Certificate giving reasons that the death certificate has no signature or seal of the Issuing Authority. He argued that the Death Certificate has the crucial impact upon the judgment of the court below.

Learned counsel for the caveator-respondents, on the other hand, argued that death of Sri Harishchandra has no crucial impact upon the judgment of the court below. On being asked, the learned counsel for the caveator-respondents refused to admit that the death certificate of Harishchandra contains true and correct information.

The appeal is admitted.

The substantial question of law involved in this appeal is, ***(i) "Whether rejection of the re-constructed Death Certificate of Harishchandra on the ground that it has no signature or seal of the Issuing Authority, is legally correct and sustainable."***

Since Sri S.K. Mehrotra represents all the respondents, there is no need of issuing notices to them.

The Original Suit was filed in the year 1963 and it was decided in the year 1971. The matter came repeatedly to this Court while it was pending in First Appellate Court. Therefore, there is great need that this Second Appeal be decided on top priority.

Summon the lower court record within two weeks through courier or in any other efficient manner.

List in 2nd week of July, 2009 peremptorily for final hearing.

The operation and implementation of the impugned judgment and decree dated 26.09.2007, passed by Civil Judge (S.D.), Sultanpur shall remain stayed till next date of listing."

11. It is pertinent to mention here that this Court remanded the matter twice to the first appellate court. For the first time vide order dated 01.08.1980 passed in Second Appeal No. 2585 of 1970: Durga Prasad and another Vs. Dargahi and others. The order dated 01.08.1980 is reproduced hereunder:

"The present second appeal has been filed by the plaintiffs. Admitted fact of the case are that the house was purchased by a sale-deed dated 12.9.1919 by two brothers Bhagwan Das and Sita Ram. These brothers were separate and not members of joint family at that time. On 19.2.1920 Bhagwan Das executed a sale deed in favour of Sita Ram in respect of half share in the disputed house. Subsequently he expired in 1926. The defendants in the instant case are the sons and grandsons of Bhagwandas. According to the plff, he had granted a licence to the defendants as they were the brothers son and they were in occupation of a portion of the house as licensees of the plaintiffs.

According to the plaint the licence was granted in the year, 1955. The licence having been revoked, the defendants were liable to be ejected.

The defence was that the sale-deed executed by Bhagwandas was a fictitious document and not a real document. It was claimed that the

defendants were in possession of the property in their own right or in the alternative in adverse possession.

The trial court found that the defendants were residing in the house from before 1955 and had matured title by adverse possession. The lower appellate court, however, found that the principal defendant Dargahi was brought up by Sita Ram and his wife, alter death of Bhagwan Das. However, the Court below held that the question of a adverse possession was not Rightly decided by the Munsif. He also held that the findings of the trial court that the licence was not proved and, therefore, the defendants were in adverse possession was also erroneous. However, without going into the question of the fictitious nature of the deed of the year, 1920, it held just in one line that the deed of 1920 executed by Bhagwandas in favour of Sitaram was fictitious.

After hearing the learned counsel for the parties, I find that the case has not at all been dealt within a correct manner by the court below. I have seen the sale-deed of the year, 1920, paper no.l1 executed by Bhagwan Das in favour of Sitaram in presence of the Sub-Registrar. The court below has also found that Dargahi was brought up by Sita Ram himself. The title of Sitaram was never before denied by the defendants. Thus title of Sitaram remained untarnished. Under the circumstances articles 65 of the Limitation Act could be applicable and not article 64. The suit was based on title and under Article 65 of the Limitation Act, the adverse possession can mature from the date when the title of the defendant becomes adverse to the plaintiff. I find that stair case, open space and other things shown in the map, which is a part of the plaint and a part of the decree are common. The plaintiff has not been excluded from those common portion by the defendant. For possession being adverse it was essential that the plff. Should have been denied access to the property. Further the finding that the defendant was residing with Sitaram and was brought up by him and his wife would certainly go to prove a case of implied licence. The lower appellate court has also held that there was no licence. However, I find that the matter, in view of Article 64 and 65 of the Limitation Act has to be decided in view of the evidence on record.

I, however, find that the plff - pleaded that the license was granted to Dargahi in the year, 1955. The court below has rejected the plft's case on the ground that this Dargahi was proved to have been residing in the Mohalla or in the house from before do not go to prove the adverse nature of the defendant. The possession could be adverse only from the date when it was not claimed by the defendant and not from any imaginary point of time. The sale deed of 1920 is binding on Dargahi and his heirs. It is not disputed that Bhagwandas had executed the sale – deed.

Under the circumstances the judgment and decree passed by the lower appellate court, dismissing the suit of the plff. is set aside and the case is sent down to it for deciding it afresh in accordance with law and observations made above. As the case is being remanded to the lower appellate court and the judgment and decree under appeal has been set aside, the appellant will be entitled to a refund of the court fee paid on the names of the appeal under section 13 of the court fees Act."

12. This court in Second Appeal No. 677 of 1986: Durga Prasad (deceased) and another Vs. Smt. Chamela Devi and others, passed the order dated 16.12.2004, which is as follows:

"1. This is second appeal under Section 100 of Code of Civil Procedure against the judgment and decree dated 9.9.86 in Civil Appeal No. 45 of 1970 passed by IInd Addl. Civil Judge, Sultanpur dismissing the appeal against the judgment and decree dated 28.2.1970 in Regular suit No. 209 of 1963 passed by Munsif South Sultanpur dismissing the suit.

2. I have heard Shri S. K. Mehrotra for the plaintiffs - appellants and Shri PN. Mathur for the defendants – respondents.

Plaintiffs' case

3. The plaintiffs - appellants filed a suit for possession against Dargahi predecessor of the respondents and his sons alleging therein that Ramanand original owner of the house in dispute executed a sale deed dated 12. 9. 1919 selling the above house for Rs. 2,000 / - to Sitaram predecessor of the plaintiff and Bhagwan Das Predecessor of the defendants who were real brother. The sale deed was registered on 18.10.1919 and possession of the house was delivered after sale. Bhagwan Das and Sitaram had half share each in the house. Bhagwan Das sold his half share in the house to Sitaram for Rs. 1, 000 / by registered sale deed dated 19.2.1920 and delivered the possession of his share to Sitaram and since then Sitaram has been the owner of the entire house. It is alleged that in 1926, Sitaram reconstructed the house. The defendant no. 1 Dargahi (deceased) came to occupy the portion of the disputed house as a licensee of the plaintiffs in 1955. Plaintiffs revoked the above license the above license vide notice dated 24.4.1963 but the defendant did not vacate it.

Defendants' case

4. The case of the defendants is that they are the co-sharers of the house and the sale deed executed by Bhagwan Das dated 19.12.1920 was a sham document which was executed only with the object of saving the share of Bhagwan Das from passing to his third wife on the death of Bhagwan Das. The case of the licence was denied and plea of adverse possession was taken.

Finding of the trial court

5. The trial court rejected the plaintiffs' case of grant of licence and defendants' case of adverse possession. But the plea of co-ownership taken by the defendants was accepted and the suit was dismissed.

6. Plaintiffs filed the first appeal which was dismissed. The plaintiffs - appellants filed second appeal no. 2585 of 1970 and the judgment and decree of the first appellate court dated 1.8.1980 was set aside and the matter was remanded. It is after the remand that the judgment dated 9.9.1986 has been passed Civil Appeal No. 45 of 1970; Durga Prasad and others Vs. Chameli and others which has been impugned in this second appeal.

Substantial question of law

7. The following substantial question of law were formulated on 19.2.1987:

"Whether the learned court below has given contrary findings on certain points which were already concluded by the order of the High Court through which the case was remanded."

8. After hearing the learned counsel for the parties and the perusal of the judgment of this court in earlier second appeal no. 2585 of 1970, I find that there is a concluded finding of the court that the sale deed dated 19.2.1920 is binding on Dargahi and his heirs and it is not disputed that Bhagwan Das had executed a sale deed. Just contrary to this finding, the first appellate court has given the finding that sale deed is a Sham transaction. The High

Court has held that title of Sitaram was never denied by the defendants and thus title of Sitaram remains untarnished. Under the circumstances, Article 65 of the Limitation Act could be applicable and not Article 64 of the Limitation Act. It was also held that from the position of the passage etc. it is established that plaintiffs were never excluded from the common portion by the defendants. For possession being adverse, it was essential that the plaintiffs should have been denied access to the property. It was also held that the defendants were residing with Sitaram and were brought up by him and it certainly goes to prove the case of implied licence.

9. It was also held that the rejection of the plaintiffs' plea of licence on the ground that Dargahi was proved to be residing in Mohalla or in house from before, dies does not prove adverse nature of possession and possession could be adverse from the date when it is so claimed by the defendants and not from any imaginary point.

10. Learned counsel for the defendants- respondents Shri P.N. Mathur has also conceded that it appears that the first appellate court has not looked into the judgment of this Court dated 1.8.1980 in Second appeal no. 2585 of 1970.

Finding on substantial question

11. I am of the view that the first appellate court cannot go beyond the findings recorded by this court in second appeal at the time of remand of the matter. Therefore, the judgment of the trial court being contrary to the finding concluded by this court in the earlier judgment dated 1.8.1980 in the second appeal arising out of the same suit is to be set aside.

12. In view of the above the appeal is allowed. The impugned judgment and decree dated 9.9.1986 passed in civil appeal no. 45 of 1970: Durga Prasad and others Vs. Chameli and others is hereby set aside. Appeal is remanded to the District Judge Sultanpur to decide it afresh after hearing both the parties and after keeping in view the judgment of this court dated 1.8.1980 given in second appeal no. 2585 of 1970: Durga Prasad and other Vs. Dargahi and others. Costs easy."

13. Earlier the appellants of present appeal preferred the aforesaid Special Leave to Appeal (Civil) before the Hon'ble Apex Court. Hon'ble Apex Court dismissed Special Appeal vide order dated 26.04.2005, which is as follows:

"Permission to file Special Leave Petition is granted.

We are not inclined to interfere with the impugned order of the High Court. However, in view of the delay which has already taken place, it is directed that the first appellate court shall hear and decide the appeal expeditiously by giving an out of turn date of hearing in the matter.

The special leave petition is dismissed."

14. On 17.02.2020 the following additional substantial question of law has been framed:

"(ii) Whether in any view of the matter the impugned judgment and decree passed by learned lower appellate court is illegal, perverse and against the evidence brought on record arises as additional substantial question of law."

15. Learned Senior Counsel has argued on the basis of grounds of present second appeal that the present second appeal has been preferred by the appellants assailing impugned judgment dated

26.09.2007 on the grounds that first appellate court acted illegally and with material irregularity in reversing the judgment delivered by the learned trial Court. The learned trial court has disbelieved evidence of plaintiffs' witnesses. Learned first appellate court has not assigned any reason for taking different view. The present original suit was filed on 22.08.1963, therefore, provisions of Article 142 and 144 of old Limitation Act, prior to its amendment of 1963 were applicable, which were materially and substantially different than those of Article 65 of new Act. Learned first appellate court committed manifest error in misinterpreting the provisions of Article 144 of old Act in the light of new Article 65 of Amendment Act, which was not applicable to the facts narrated in the plaint.

16. It is also pleaded in grounds of appeal that first appellate court committed manifest error of law in rejecting the Death Certificate of Harishchandra son of original defendant no.1 on the ground that said certificate did not bear seal and signature of any authority and is only signed by the original defendant losing sight of the fact that the original certificate which was filed was sealed and signed by the authority, which were lost by the court officials and its copy was reconstructed and kept on record under the orders of the court. Therefore, first appellate Court has drawn wrong conclusion.

17. It is also mentioned in grounds of appeal that first appellate court illegally and with material irregularity in completely ignoring and not considering another material documents brought on record by the plaintiffs (Ex 25) a copy of written statement filed in S.C.C. Suit No. 20 of 1953 and its degree (Ex 26). These documents were considered and relied upon by the learned trial Court for holding that the defendant No. 1 had been residing in the house in dispute from much before the alleged license was created falsifying the case of the plaintiffs.

18. Learned counsel for appellants further argued that the first appellate court has not considered that rights of appellants/defendants matured and perfected by their adverse possession on the disputed house. The first appellate court has not considered this fact that ancestor of appellants Sri Bhagwan Das on the date of execution of sale deed dated 19.02.1920 had not delivered the possession to Sita Ram-ancestor of the plaintiffs. Sri Bhagwan Das continued to occupying the disputed house during his life time and thereafter the defendant Dargahi (since dead) continued his possession till his death and thereafter appellants are continuing in possession.

19. It is further argued and pleaded by appellants that learned Civil Judge (Senior Division) Sultanpur had no jurisdiction to hear and decide the civil appeal contrary to the specific direction given by this Court for deciding the appeal after remand by the District Judge himself.

20. On the basis of aforesaid grounds the impugned judgment and decree delivered by learned first appellate court been termed by the appellants as illegal, perverse and against the material available on record.

21. In the grounds of appeal, learned counsel for the appellants have formulated seven substantial questions of law, whereas as mentioned above, only two substantial questions of law were framed by this court

and admitted present appeal on the aforesaid two substantial questions of law only.

22. This court has discarded arguments of learned counsel for the appellants that first appellate court of Civil Judge (Senior Judge), Court No. 15, Sultanpur was not competent to decide present appeal, because this court vide order dated 16.12.2004 directed to the District Judge, Sultanpur to decide appeal No. 45 of 1970: Durga Prasad and others Vs. Chameli and others himself.

23. This court at the point of time of admission of present appeal vide order dated 25.05.2009 has specifically observed as follows:

"The order dated 16.12.2004, passed by the another bench of this Court reveals that the Second Appeal No. 677 of 1984 was against the appellate judgment passed by 2nd Addl. Civil Judge. The valuation of this suit and appeal was only Rs. 4000/-. No reason is stated in the order dated 16.12.2004 as to why the appeal be not decided by the appellate court, having jurisdiction and why it should be heard and disposed of by the District Judge or Addl. District Judge.

It appears that since majority of the judgments assailed in Second Appeal are the judgments given by the District Judge or Addl. District Judge, hence, under that impression, it was inadvertently dictated that the appeal be decided afresh by the District Judge.

The impugned judgment was given by the Court having appellate jurisdiction over the mater. The Bench by which the order dated 16.12.2004 was passed, did not intend that the appeal be not disposed of by the Court having jurisdiction over the First Appeal. The point regarding jurisdiction has, therefore, no force. The appeal cannot be admitted on this point."

24. I have heard learned counsel for the appellants and learned counsel for the respondents. They concluded their arguments on 26.02.2020.

25. At the point of time of preparing judgment it was revealed that Exhibits-4 to 8 and 12 to 26 and the Exhibits-A-2 to A-7 and A-12 have been misplaced or weeded out by the trial court. It was reported by the concerned clerk that Natthi-Ga has been weeded out, therefore, vide order dated 16.03.2020 the District Judge, Sultanpur was directed to inquire into the matter and a report was called for whether reconstruction of these aforesaid exhibits was possible or not. It was also directed to fix the responsibility of the concerned employee regarding misplacement of aforesaid exhibits. District Judge, Sultanpur, has reported on 09.06.2020 that the Assistant Record Keeper has weeded out the Natthi-Ga of Regular Suit No. 209 of 1963 on 09.01.1979. The learned District Judge has also examined Shri Abdul Kareem, Advocate, engaged on behalf of plaintiff and Shri O. P. Lal, Advocate, engaged on behalf of defendant. Both the learned counsels have apprised the learned District Judge that they have no copy of the aforesaid documents weeded out by the Assistant Record Keeper. The District Judge has also reported that Assistant Record Keeper, Shri Ram Prakash Srivastava has expired on 10.11.1990 after taking V.R.S. on 20.07.1990. His wife is getting family pension.

In the aforesaid circumstances, the District Judge has reported that reconstruction of Exhibits-4 to 8 and 12 to

26 and the Exhibits-A-2 to A-7 and A-12 is not possible.

26. Learned counsel for appellants Shri Mohammad Aslam Khan and the learned counsel for respondents, Shri I. D. Shukla, have also stated at the Bar that they have no copy of the aforesaid exhibits and the present second appeal may be decided on the basis of material available on record.

27. I have perused record of Original Suit No. 209 of 1963: Durga Prasad (since dead) and others Vs. Dargahi (since dead) and others and record of First Appeal No. 45 of 1970: Durga Prasad (since dead) and others Vs. Dargahi (since dead) and others.

28. The original plaintiffs Durga Prasad and Bhaiya Ram instituted Original Suit No. 269 of 1963 on 22.08.1963 along with plaint map, in which portion of disputed house in possession of defendant Dargahi, Phool Chand, Prem Chand and Deep Chand was marked by "red colour".

Factual Matrix:

29. The brief facts contended by the plaintiffs in their plaint are that House No. 618 (A) Khata No. 620 situated in Mohalla Parkinsganj city Sultanpur was owned by one Ram Anand son of Baladin Kalwar, who sold it to Sita Ram and Bhagwan Das by means of sale deed dated 12.09.1919 for consideration of amount of Rs. 2,000/-. At this point of time Sita Ram and Bhagwan Das were living separately. Bhagwan Das and Sita Ram were having equal share in the house purchased by them.

30. It is further pleaded that Bhagwan Das sold his half share in the disputed house to Sita Ram, who is grand father of plaintiffs by means of registered sale deed dated 19.02.1920 for consideration of Rs. 1000/- and delivered possession to Sita Ram. Therefore, Sita Ram became the owner of entire house. The ancestor (Sita Ram) of plaintiffs demolished the house purchased by them and renovated it in the month of April, 1926 in accordance with a map approved by Municipal Board, Sultanpur.

31. It is also mentioned in grounds of plaint that Sita Ram died nearly 27 years back leaving behind his son Bindeshwari, who was father of the plaintiffs and nearest heirs of Sita Ram. Bindeshwari expired in the year 1954 and plaintiffs inherited the disputed house. Their names were mutated on the entire house in place of Bindeshwari. The grand father of plaintiff, their father paid and now the plaintiffs were paying House Tax and Water Tax and carried out whitewashing and repairing in it.

32. It is further pleaded that disputed house consists of seven portion of which disputed portions "A" and "C" of the house in dispute are shown in sketch map/plaint map. Five other portions are in possession of tenants. Names of tenants is mentioned in para 6 of the plaint. The disputed accommodation in possession of defendants/appellants has been numbered by Municipal Board, Sultanpur as 227A and 227C.

33. It is further pleaded that disputed portion of house of plaintiffs was given on licence in the year 1955 to defendant No. 1 to live in these portions.

34. The plaintiffs were not intending to keep defendants in the disputed portion of house as licencee. Therefore, they gave notice on 24.04.1963, which was served on defendant No.1 Dargahi (since dead) on

25.04.1963. The plaintiffs asked defendants to vacate within a month, failing which, it was informed that legal action would be taken against them. The condition of license has been mentioned by plaintiffs in para-7 of the plaint.

35. The defendants instead of vacating disputed portion they expressed that they are co-owners of disputed house along with the plaintiffs and they are not willing to vacate. Hence, plaintiffs instituted the present suit.

36. During pendency of original suit, the trial Court passed order dated 09.08.1967, 16.03.1967 and 17.04.1967, on the basis of which, under orders passed by trial court, plaint was amended and on the basis of market value, valuation of suit for the purpose of payment of court fees was mentioned as amount of Rs. 4,000/- and court fees amounting to Rs. 537.50 was paid by the plaintiffs.

37. On the basis of above mentioned grounds plaintiffs sought relief for decree of possession of the portion in occupation of the defendants along with cost.

38. The defendant Nos. 1 to 3 filed their written statement, paper No.-30 Ka, jointly and defendant No. 4 filed written statement 33Ka through his guardian. In both the written statement all defendants made same contentions. In the grounds it has been mentioned that Bhagwan Das and Sita Ram had not partitioned the disputed house in the year (1919) or after it. Bhagwan Das had not sold his half share in the disputed house to Sita Ram nor he was ever ousted from it. The ancestor of the defendants Bhagwan Das had been living in the disputed portion of house purchased by him until his death. Bhagwan Das has expired. The defendants are in possession of the disputed accommodation as owners thereof.

39. It is further pleaded that Bhagwan Das died in the year 1924, when defendant No. 1 Dargahi was only 07-08 years old, hence he was brought up by Sita Ram. Sita Ram and Bhagwan Das were real brothers and at the point of time of death of Bhagwan Das they were members of joint family. It is also mentioned in written statement that mother of defendant No. 1 Dargahi expired in the year 1916, when he was six months old. Smt. Mera wife of Sita Ram brought him up.

40. It is further pleaded by defendant that Bhagwan Das solemnized his second marriage, but his second wife died issueless, then Bhagwan Das again solemnized marriage with Smt. Lakhpati. Bhagwan Das fell ill and suffered from Tuberculosis. Smt. Lakhpati was young lady, therefore, Bhagwan Das and Sita Ram got executed sham sale deed dated 19.02.1920 only to save property of Bhagwan Das from Smt. Lakhpati. In fact Bhagwan Das had not intended to sell his share in disputed property nor delivered possession to Sita Ram. The sale deed is fictitious and forged one. Bhagwan Das was younger brother of Sita Ram and was under his influence. Therefore, sale deed executed by him does not extend any benefit to the plaintiffs.

41. The defendants admitted the contentions of plaint that Sita Ram was father of Bindeshwari Prasad and plaintiffs are their descendants. It is further pleaded that defendant No.1 Dargahi was nephew of Sita Ram, therefore, he was also his heir.

42. It is pertinent to mention here that the defendant Nos. 1 to 3 has mentioned

contradictory pleadings in para 4 and para 15 of written statement 30 Ka. In para-4, defendant-Dargahi contended that he resided in the disputed house purchased by his father continuously after purchase and since death of Sita Ram plaintiffs were in possession of disputed house. Whereas in para 15 he has pleaded that defendant Dargahi resided in the house with plaintiff, in which, they are residing at present and they were doing business in this house.

43. The defendants have pleaded alternatively that they are residing in the disputed house on the basis of adverse possession for more than 12 years. Therefore, they have perfected their title in the house and they are in possession of it as owner. Both parties are still the member of joint family.

44. In para 6 it is contended that plaintiff and defendants were doing joint business in the shop situated in the disputed house. This fair price shop was closed in the year 1942 and there was loss in the business. Therefore, "Kothari" in which goods were stored, were given on rent to different persons due to financial constraints.

45. The defendants had denied this fact that disputed portion of the house was given to them on licencee in the year 1955. The conditions of licencees mentioned in para 7 of the plaint were also denied. They disclosed their right of ownership in respect of the disputed house. It is mentioned in para 9 that plaintiffs should have instituted suit for partition. It is also pleaded by defendant No.1 that his sons defendant Nos. 2 to 4 were residing with him in the disputed portion of house and were doing business with him.

46. Defendant No.4 has mentioned same facts in his written statement 33-Ka, which were narrated by defendant Nos. 1 to 3 in their written statement. The defendants filed written statement, paper No.-176Ka and 184-Ka regarding valuation of suit and payment of court fee.

47. Learned trial Court framed following issues on the basis of pleadings of both parties:

"(1) Whether the sale-deed dated 19.2.1920 is invalid as alleged in para 3 of the W.S.?

(2) Whether the defendants are licensess if so are they liable to ejectment ?

(3) Whether the defendants are Co-shares are alleged?

(4) To what relief, if any are the plaintiffs entitled ?

Addl. Issues

(5) Whether the suit has not been properly valued and the court fee paid is insufficient ?

(6) Whether the defendants have perfected their title over the house in suit by adverse possession as alleged in para 4 W.S. ?"

48. Plaintiff No. 1 Durga Prasad examined himself as PW-1 and produced witnesses PW-2 Mahraji and PW-3 Bhaiya Ram/plaintiff No.2, PW-4 Ram Gulam, PW-5 Mohd. Yaiya Khan.

49. The defendants produced witness DW-1 Nazir Mohammad, DW-2 Ganesh Prasad and defendant No.1 examined himself as DW-3.

50. The plaintiff/ respondent filed original sale deed dated 12.09.1919 (Paper No. 10-Ka, Ex.-1), original sale deed dated 19.02.1920 (Paper No. 11-Ka, Ex.-75), Ex.-76 post office receipt, Ex.-3 acknowledgement dated 22.08.1963, Ex.-

27 to Ex.-67 house tax receipts issued by Municipality and Ex.-70, Ex.-77, Mortgage deed. The plaintiff has filed five documents through list-317-Ga, which were accepted by the court of learned A.D.J.-II, Sultanpur vide order dated 25.01.1984, two documents through list-331-Ga, which were accepted by the same court vide order dated 28.04.1984, five documents through list-334-Ga which were accepted by the court of Special Judge/A.D.J., Sultanpur vide order dated 29.10.1985, four documents through list 342-Ga, which were accepted by the same court vide order dated 05.11.1985, three documents through list-349-Ga, which were accepted by the same court vide order dated 15.11.1985, one document through list-379-Ga.

51. Learned trial court has rejected the documents, paper No. 103 to 125, paper No. 127 to 130 filed by the plaintiffs being irrelevant.

52. Appellants/ defendants filed report dated 10.10.1963 (A-1) regarding the fact that register house tax of year 1943 up to 1950 were weeded out, therefore, copy could not be issued, A-8, A-9, death certificate (A-11) of Harishchandra, S/o Dargahi, two documents through list-324-Ga which were accepted by the court of Additional District Judge-II, Sultanpur vide order dated 24.03.1984, two documents through list-313-Ga which were accepted by the same court vide order dated 20.12.1983.

53. Learned trial Court vide impugned judgment dated 28.02.1970 has dismissed suit of plaintiffs. After remand by this Court, first appellate court has decided Appeal No. 45 of 1970 and delivered impugned judgment dated 26.09.2007 decreeing the suit of the plaintiffs.

54. The appellants aggrieved by impugned judgment passed by first appellate Court have preferred present second appeal.

55. The learned Senior Counsel Shri Mohammad Arif Khan has put forth and reiterated his argument that the learned trial court has observed regarding Exhibit-25, which was not considered by the first appellate court. On the other hand plaintiff in his statement has made admission that appellants were not having any other house, except the disputed house. On the other hand, Shri I. D. Shukla, the learned counsel for respondents has pointed out that there is also admission of Dargahi that they were residing in another house in Pratapganj.

56. In the aforesaid circumstances, there is no option, but to decide the present second appeal on the basis of material available on record.

57. The arguments of both the parties thus has been concluded earlier on 26.02.2020 and concluded on 07.07.2020.

58. Learned counsel for the appellants has relied upon the following expositions of law:

A Full Bench of Hon'ble Apex Court in para-15 of its judgment given in the case of **Santosh Hazari Vs. Purushottam Tiwari, (2001) 3 SCC 179 at page 188**, has held as under:

15. A perusal of the judgment of the trial court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not

produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudhary [AIR 1967 SC 1124]). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das v. Narayanibai [(1983) 1 SCC 35 : AIR 1983 SC 114]) The rule is -- and it is nothing more than a rule of practice -- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh [AIR 1951 SC 120]) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law

in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one.

A Full Bench of Apex Court in paras-5, 6, 7, 8 & 9 of its judgment given in **Madhukar Vs. Sangram, (2001) 4 SCC 756 at page 758** has observed as under:

5. We have carefully perused the judgment and decree of the High Court in the first appeal. We find that substantial documentary evidence had been placed before the trial court including certified copies of certain public records besides copy of the judgment and decree of the earlier suit (OS No. 93 of 1971). Oral evidence had also been led by the parties before the trial court which was noticed and appreciated by the trial court. However, the impugned judgment in the first appeal is singularly silent of any discussion either of documentary evidence or oral evidence. Not only that, we find that though the trial court had dismissed the suit on the ground of limitation as also on the ground that the decision in the earlier suit (OS No. 93 of 1971) operated as res judicata against Defendant 1 only, the High Court has not even considered, much less discussed the correctness of either of the two grounds on which the trial court had dismissed the suit. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate court. The judgment under appeal is so cryptic that none of the relevant aspects have even been noticed. The appeal has been decided in a very unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

6. In Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179 : JT (2001) 2 SC 407] this Court opined: (SCC pp. 188-89, para 15)

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

7. The salutary principles referred to above in Santosh Hazari case [(2001) 3 SCC 179 : JT (2001) 2 SC 407] have been respected in their breach.

8. Our careful perusal of the judgment in the first appeal shows that it hopelessly falls short of considerations which are expected from the court of first appeal. We, accordingly set aside the impugned judgment and decree of the High Court and remand the first appeal to the High Court for its fresh disposal in accordance with law.

9. We wish to clarify that nothing said hereinabove shall be construed as any expression of opinion on the merits of the case.

A Division Bench of Hon'ble Supreme Court in paras-27, 28, 36, 37 &, 38 in the case of **Jagdish Singh Vs. Madhuri Devi, (2008) 10 SCC 497 at page 504** has held as under:

27. It is no doubt true that the High Court was exercising power as the first appellate court and hence it was open to the Court to enter into not only questions of law but questions of fact as well. It is settled law that an appeal is a continuation of suit. An appeal thus is a rehearing of the main matter and the appellate court can reappraise, reappreciate and review the entire evidence--oral as well as documentary--and can come to its own conclusion.

28. At the same time, however, the appellate court is expected, nay bound, to bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had an advantage and opportunity of seeing the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court possesses the same powers as that of the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been recorded by the trial court mainly on appreciation of oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is erroneous, contrary to well-established principles of law or unreasonable.

36. Three requisites should normally be present before an appellate court reverses a finding of the trial court:

(i) it applies its mind to reasons given by the trial court;

(ii) it has no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.

37. If the above principles are kept in mind, in our judgment, the decision of the High Court falls short of the grounds which would allow the first appellate court to reverse a finding of fact recorded by the trial court. As already adverted earlier, the High Court has "virtually" reached a conclusion without recording reasons in support of such conclusion. When the court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law.

38. Unfortunately, in the instant case, the said exercise has not been undertaken by the High Court. So-called conclusions reached by the High Court, therefore, cannot be endorsed and the decree passed in favour of the wife setting aside the decree of divorce in favour of the husband cannot be upheld. The order, therefore, deserves to be quashed and set aside and is hereby set aside.

A Full Bench of Hon'ble Supreme Court on 14.03.1969 in the case of **Munshi Manzoor Ali Khan Vs. Sukhbasi Lal : AIR 1974 SC 706, 1969 (2) UJ 343 SC**, in paras-10 & 11 of its judgment has observed as under:

10. The learned Counsel for the appellants was unable to point out any

material to show that there was any evidence on the record establishing that the plaintiffs were in possession of the suit land within 12 years of the date of the suit. In our opinion the High Court was right in holding that the suit was barred under Article 142 of the Limitation Act.

11. The learned Counsel contended that the suit was within limitation because it was brought within 3 years of the order of the Magistrate, dated March 4, 1969, the period provided in Article 47. But a suit may be within limitation under one article and may yet be barred under another article of the Limitation Act in two cases decided by the Privy Council the suits failed under Article 144 although these were instituted within 3 years of the orders of the Magistrates under Section 145, Criminal P. C. See Jahandad Khan v. Abdul Ghafur Khan and Radhamoni Debi v. The Collector of Khulna (1900) ILR 27 Cal 943 (PC).

A learned Single Judge of Madhya Pradesh High Court in the case of **Nathulal Vs. Ambaram, 1981 SCC OnLine MP 76 : 1982 MP LJ 59 : AIR 1982 MP 114 at page 60** has observed as under:

5. These concurrent findings of fact are not assailed to any extent before me nor they could be so assailed. It is in the background of these concurrent findings of fact that this Court has to determine whether the Courts below had rightly applied. Article 144 or whether, actually it was Article 142 alone which was attracted, as has been now argued by the learned counsel for the appellants. The lower appellate Court, after citing certain rulings, laying down the principles governing the applicability of Article 142 or 144, has ruled out the applicability of Article 142 to the fact and circumstances of the present case on the ground that there was no "discontinuance of possession", i.e., abandonment of title on the part of the plaintiffs, since the plaintiffs had all along been anxiously taking steps to get back the possession by referring the matter to revenue authorities by successive proceedings as detailed and discussed in para 8 of its judgment. It was, hence, held that "discontinuance of possession" being, thus, not deducible from the facts and circumstances, as pleaded and proved on the side of the plaintiffs, Article 142 was not applicable, and that, only Article 144 alone was applicable which, on being applied, entitled the plaintiffs to the decree for possession in the absence of the defendants' any plea regarding adverse possession beyond the statutory period.

6. The lower appellate Court's above findings and the reasonings there in do not appear to be sound when considered in the light of the plethora of case law dealing with the crucial matter, as to what actually constitutes "discontinuance of possession."

7. The distinction between "discontinuance of possession" and "dispossession" was pointed out in the leading case of Rains v. Buxton [(1880) 14 Ch. D. 537.] in these words:

"The difference between dispossession and discontinuance of possession might be expressed in this way--the one is where a person comes in and drives out the others From possession, the other case is where the person in possession goes out and is followed into possession by other persons."

This definition has been widely accepted in Maharban Lalli v. Usuf Khan Kallu [AIR 1939 Nag. 7.], where, the law has been succinctly laid down by Vivian Bose, J. thus:

"The term "dispossession' applies when a person comes in and drives out

others from the possession. It imports ouster, a driving put from possession against the will of the person in actual possession..... The term "discontinuance" however implies a voluntary act, an abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession. But this cannot be assumed."

8. In Gangoobai v. Soni [1942 NLJ 99.] , it is held that "if a plaintiff sues for possession on the allegation that the defendant came into possession under a licence from the plaintiff and the defendant denies the same, the suit will be governed by Article 142 and not by Article 144 of the Limitation Act, as the plaintiff will be deemed to have discontinued possession within the meaning of the former Article. The plaintiff in such a case must prove that the defendant's permissive possession began within 12 years of the suit." (Emphasis supplied.)

9. In Official Receiver v. Govindaraju, the plaintiff had pleaded permissive possession and defendant had failed to establish it, as is also the case here. It was held by their Lordships after placing reliance on Alam Khan Sahib v. Karunpannaswami Nadan [(1938) 1 MLJ 113 : AIR 1938 Mad. 415.], that such a suit is governed by Article 142 and not by Article 144; and that in such a situation, the plaintiff was bound to prove his possession within 12 years of the suit. Similar view has been held in Krishna Pillai v. Kumara Pillai [AIR 1954 Trav. Co. 449.] and quoted with approval in the said High Court's subsequent decision Venkiteswara Iyer v. Cherivathu Mathen [AIR 1957 Trav. Co. 223.]. Their Lordships, invoking the applicability of Article 142, have observed in this connection that "the defendant in admitted possession of the property is not obliged to lead evidence to prove that his possession has been hostile for the statutory period. When the alleged origin of his possession as also its permissive or derivative nature are seen to be baseless, the plaintiff's claim for recovery of possession on the strength of such allegations must fail unless there is acceptable evidence on his side to the effect that he was in possession of the property within 12 years prior to the date of suit, so as to keep his title alive." The other cases which deserve attention in this regard are Taja Bibi v. Ghulam Mohd. [AIR 1961 J & K 82.] and Lingamma v. Putte Gowda [AIR 1963 Mys. 1 (FB).].

10. In the light of the decisions referred to above, it may be observed that in the present case also, the defendants are in possession of the land in question belonging to the plaintiffs for over 40 years continuously. Further, plaintiffs' allegations regarding licence and permissive possession are found to be not established. Hence, in these circumstances, plaintiffs would be deemed to have discontinued their possession within the meaning of Article 142. Article 144, would, in such circumstances, have no application at all. The plaintiffs admittedly being not in possession of the suit-land within 12 years before the suit, their suit for possession would, thus, fail; and the defendants, in such a case, would not be required either to plead or prove their adverse possession to any extent. In view of this matter, disagreeing with the lower appellate Court and so also with the trial Court, it has to be held in the light of the facts and circumstances of the case, that the suit, in the matter of limitation, would be governed

by Article 142, and not by Article 144 of the Limitation Act, 1908.

11. In the result, thus, the defendants' appeal is allowed. Setting aside the Judgment and Decree of the lower appellate Court, it is ordered and decreed that the plaintiffs' suit for possession be and is now dismissed as being time-barred under Article 142 of the Limitation Act, 1908.

In the case of **Uma Shankar and others Vs. Dy. Director of Consolidation, 1979 SCC OnLine All 1161 : 1979 RD 305 at page 306**, a learned Single Judge of this Court in paras-5, 6 & 7 of its judgment has observed as follows:

5. The learned counsel or the respondents contended that the respondents have claimed right in the specific plots and not in the share in any holding. Therefore, the limitation applicable in this case will not be 12 years but it will be two years under Section 180 of the U.P. Tenancy Act as the possession of the respondent commenced much before the enforcement of that Act. The learned counsel also contended that on the basis of the evidence on the record, all the consolidation authorities have accepted possession of the respondents for over 25 years and this is a question of fact, which cannot be challenged in the writ-jurisdiction. He further contended that even assuming the fact that the respondents claimed any possession with the consent of Gaya Prasad, but no step was taken for ejectment prior to the enforcement of Zamindari Abolition and Land Reforms Act. The respondents matured their tittle on the basis of long possession, much before August 1, 1963, when the suit for declaration and possession in the alternative was filed against the respondents by the petitioners.

6. I have considered the argument of the learned counsel for both the parties and the material placed before me. On careful, examination of the case set up by the parties before the Consolidation Officer, it appears that respondents had set up a case that they had been in adverse possession for the last 31 years, whereas the petitioners have totally denied the possession of the respondents in any capacity. It was not the case of the petitioners that the respondents had been in permissive possession and thereby, had not acquired any title. A copy of the grounds of revision filed with this petition as Annexure 9 also does not disclose that they ever alleged about the possession of the respondents, as permissive. On the other hand, in para 3 of the grounds of revision, it has been clearly alleged that the respondents were never in possession, and have no right or title therein. As far as the question of possession of the respondents over the plots claimed by them is concerned, a clear finding of fact has been recorded by the Deputy Director of Consolidation that Komal, the respondent No. 4 is in possession from before 1952. The learned counsel for the petitioners has failed to assail this finding of fact. The result is that the possession of the respondent from before 1952 stands proved.

7. The next question for consideration is about the nature of possession. According to the case set up by both the parties before the Consolidation authorities, there is no case of permissive possession and it was not even open for any consolidation authority to make out a new case of permissive possession. The Deputy Director of Consolidation from the evidence on record, has rightly recorded possession of respondents from before 1952. The learned counsel for respondents urged that on the basis of this finding of possession, in absence of any case of permissive possession, the possession of the

respondents will bo presumed to be adverse possession. In support of this contention, he placed reliance on the decision of this court reported in Nanhey Khan v. Mst. Gomiti([(1949) Alld. 289.]) wherein it has been held that "in a suit for possession of land where the defendants had been in possession for over 50 years by keeping his owntal, the presumption of law that the possession is to be presumed to be adverse unless proved, otherwise becomes applicable. Such a presumption cannot be reverted by equivocal facts." In Khanjan Singh v. Abhey Ram([1966 A.W.R. 254.]) relying in Municipal Board, Etawah v. Mt. Ram Sree ([A.I.R. 1931 Alld. 679.]) it was held that "where a right is based on title, extended over 30 years, plea of adverse possession need not be specifically pleaded as it is included in the plea of title." In this case also, the plaintiff's possession for over 30 years has been accepted.

A Division Bench of Hon'ble Supreme Court in the case of **Shasidhar Vs. Ashwini Uma Mathad, (2015) 11 SCC 269 : 2015 SCC OnLine SC 26** in its paras-11 to 18 and in the case of **Vinod Kumar Vs. Gangadhar, (2015) 1 SCC 391 : (2015) 1 SCC (Civ) 521 : 2014 SCC OnLine SC 826** at page 393, in paras-10 to 17 has observed as under:

As far back in 1969, the learned Judge -- V.R. Krishna Iyer, J. (as His Lordship then was the Judge of the Kerala High Court) while deciding the first appeal under Section 96 CPC in Kurian Chacko v. Varkey Ouseph [Kurian Chacko v. Varkey Ouseph, 1968 SCC OnLine Ker 101 : AIR 1969 Ker 316] , reminded the first appellate court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned Judge held as under: (SCC OnLine Ker paras 1-3)

"1. The plaintiff, unsuccessful in two courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate court.

3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation." (emphasis supplied)

This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.

In **Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179]**, this Court held as under: (SCC pp. 188-89, para 15)

"15. ... the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of

fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

The above view has been followed by a three-Judge Bench decision of this Court in ***Madhukar v. Sangram [Madhukar v. Sangram, (2001) 4 SCC 756],*** *wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.*

In ***H.K.N. Swami v. Irshad Basith [H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243]*** *, this Court stated as under: (SCC p. 244, para 3)*

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

Again in Jagannath v. Arulappa [Jagannath v. Arulappa, (2005) 12 SCC 303] , while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p. 303, para 2)

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion."

Again in ***B.V. Nagesh v. H.V. Sreenivasa Murthy [B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530*** *: (2010) 4 SCC (Civ) 808] , this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)*

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a

valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v.Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] , SCC p. 188, para 15 and Madhukar v. Sangram [Madhukar v. Sangram, (2001) 4 SCC 756] , SCC p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

The aforementioned cases were relied upon by this Court while reiterating the same principle in ***SBI v. Emmsons International Ltd. [SBI v. Emmsons International Ltd., (2011) 12 SCC 174*** *: (2012) 2 SCC (Civ) 289] This Court has recently taken the same view on similar facts arising in* ***Vinod Kumar v. Gangadhar [Vinod Kumar v. Gangadhar, (2015) 1 SCC 391*** *: (2015) 1 SCC (Civ) 521 : (2014) 12 Scale 171].*

Division Bench of Hon'ble Supreme Court in the case of **Vinod Kumar Vs. Gangadhar, (2015) 1 SCC 391 : (2015) 1 SCC (Civ) 521 : 2014 SCC OnLine SC 826** at page 393 has further in para-18 to 20 has observed as follows:

18. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellant and/or the respondent nor it took note of the grounds taken by the appellant in grounds of appeal nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case law applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial court can be sustained or not and if so, how, and if not, why.

19. Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 CPC mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law. It is for this reason, we are unable to uphold the impugned judgment [Vinod Kumar v. Gangadhar, First Appeal No. 173 of 1999, decided on 21-3-2013 (MP)] of the High Court.

20. The appeal thus succeeds and is accordingly allowed. The impugned judgment [Vinod Kumar v. Gangadhar, First Appeal No. 173 of 1999, decided on 21-3-2013 (MP)] is set aside. The case is remanded to the High Court for deciding the first appeal afresh, keeping in view the principle of law laid down by this Court quoted supra.

59. In support of his arguments, learned counsel for the respondents has

relied upon the following expositions of law:

A Division Bench of Honble Supreme Court in the case of **Laliteshwar Prasad Singh Vs. S.P. Srivastava, (2017) 2 SCC 415 : (2017) 1 SCC (Civ) 680 : 2016 SCC OnLine SC 1476 at page 421** in para-12 has observed as under:

12. As per Order 41 Rule 31 CPC, the judgment of the first appellate court must explicitly set out the points for determination, record its reasons thereon and to give its reasonings based on evidence. Order 41 Rule 31 CPC reads as under:

***"31. Contents, date and signature of judgment.**--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 propounded be signed and dated by the Judge or by the Judges concurring therein."

It is well settled that the first appellate court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties.

A Division Bench of Hon'ble Apex Court in the case of **G. Amalorpavam Vs. R.C. Diocese of Madurai, (2006) 3 SCC 224 at page 226** in para-9 of its judgment has observed as under:

9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus

attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC.

A Division Bench of Hon'ble Supreme Court in the case of **Arumugham Vs. Sundarambal, (1999) 4 SCC 350 at page 356** in para-14 of its judgment has observed as under:

14. From the aforesaid judgment of the three-Judge Bench in Ramachandra Ayyar case [AIR 1963 SC 302] it is clear that this Court held that the second appellate court cannot interfere with the judgment of the first appellate court on the ground that the first appellate court had not come to close grips with the reasoning of the trial court. It is open to the first appellate court to consider the evidence adduced by the parties and give its own reasons for accepting the evidence on one side or rejecting the evidence on the other side. It is not permissible for the second appellate court to interfere with such findings of the first appellate court only on the ground that the first appellate court had not come to grips with the reasoning given by the appellate trial court. The aforesaid judgment of this Court in Ramachandra Ayyar case [AIR 1963 SC 302] specifically distinguished Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur [10 CWN 630 : 16 MLJ 272 (PC)] rendered by the Privy Council on the ground that that was a case wherein the High Court was dealing with a first appeal. The observations made by the Privy Council in that context would not be applicable to cases where the second appellate court was dealing with the correctness of the judgment of the first appellate court which reversed the trial court.

Another Bench of Hon'ble Supreme Court in the case of **Radha Raman Samanta Vs. Bank of India, (2004) 1 SCC 605 : 2004 SCC (L&S) 248** at page 609 in para-12 of its judgment has observed as follows:

12. On the earlier occasion when the matter was considered by the Division Bench, the respondent Bank did not raise any issue of alternative remedy or any question relating to non-maintainability of the writ petition. We may also notice that when such issues might and ought to have been raised but had not been done so, it must be taken that the Division Bench had rejected such contentions and the order of the Division Bench remanding the matter to the learned Single Judge was not carried in appeal and became final. Therefore, the learned Single Judge was bound to address only on one issue upon which the matter had been remanded. Thus, the Division Bench could not have overlooked these facts in the appeal arising from the order of the learned Single Judge on the second occasion after remand and need not have gone into the question as to whether the writ petition could have been entertained at all or not. Therefore, we are of the view that the High Court could not have overlooked these facts and interfered with the order of the learned Single Judge.

A Division Bench of Hon'ble Supreme Court in the case of **SBI Vs. S. N. Goyal, (2008) 8 SCC 92 : (2008) 2 SCC (L&S) 678 at page 102** has discussed in para-13 as under:

What is a substantial question of law?

13. Second appeals would lie in cases which involve substantial questions

of law. The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the High Court concerned), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the High Court concerned) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case. Be that as it may.

A Division Benh of Hon'ble Supreme Court in the case of **Gurnam Singh Vs. Lehna Singh, (2019) 7 SCC 641 : (2019) 3 SCC (Civ) 709 : 2019 SCC OnLine SC 374** in its para-14 has observed as under:

14. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain [Ishwar Dass Jain v.Sohan Lal, (2000) 1 SCC 434]. In the aforesaid decision, this Court has specifically observed and held: (SCC p. 437)

"Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible

evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

A Division Bench of Hon'ble Supreme Court in the case of **Naresh and Others Vs. Hemant and others, 2019 SCC OnLine SC 1490** in para-13 of its judgment has observed as under:

13. In Madamanchi Ramappa v. Muthaluru Bojappa, (1964) 2 SCR 673, this court with regard to the scope for interference in a second appeal with facts under Section 100 of the Civil Procedure Code observed as follows:

"12. ....The admissibility of evidence is no doubt a point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. It has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a second appeal. Sometimes, this position is expressed by saying that like all questions of fact, sufficiency or adequacy of evidence in support of a case is also left to the jury for its verdict. This position has always been accepted without dissent and it can be stated without any doubt that it enunciates what can be properly characterised as an elementary proposition. Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by s. 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

A Division Bench of Hon'ble Supreme Court in the case of **Damodar Lal Vs. Sohan Devi, (2016) 3 SCC 78 : (2016) 2 SCC (Civ) 36 : 2016 SCC OnLine SC 5** in para-14 of its judgment has observed as follows:

14. In S.R. Tewari v. Union of India [S.R. Tewari v. Union of India, (2013) 6 SCC 602 : (2013) 2 SCC (L&S) 893] , after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131] , it was held at para 30: (S.R. Tewari case [S.R. Tewari v. Union of India, (2013) 6 SCC 602 : (2013) 2 SCC (L&S) 893] , SCC p. 615)

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of

evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (VideRajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], Gamini Bala Koteswara Rao v. State of A.P.[Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372] and Babu v. State of Kerala [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179].)"

This Court has also dealt with other aspects of perversity.

A Division Bench of Hon'ble Supreme Court in the case of **Uttam Chand (D) Through Lrs. Vs. Nathu Ram (D) Through Lrs. and Others, 2020 SCC Online SC 37** in paras-6, 9 and 15 of its judgment has observed as follows:

6. In the first appeal by the plaintiff, the learned First Appellate Court affirmed the findings recorded by the trial court on Issue Nos. 1 and 3 that the plaintiff is the owner of the property in question. However, in respect of Issue No. 2 as to whether the suit is time barred, the learned First Appellate Court returned a finding that the suit is within time as the same was filed on February 17, 1979 i.e. before the completion of 12 years. Issue No. 2 was decided against the defendants holding that the findings recorded by the trial court that the limitation starts from the date of purchase of the suit property is not sustainable. The right of the respondents over the property was challenged before the completion of 12 years, therefore, the suit filed in February, 1979 is within period of limitation. Under issue No. 4, the findings recorded were that the mere possession of land, however long it may be, would not ripe into possessory title unless the possessor has animus possidendi to hold the land adverse to the title of the true owner. The assertion of title must be clear and unequivocal. Consequently, Issue No. 5 was also decided against the defendants and the suit stood decreed.

9. Learned counsel for the appellant argued that for a successful plea of adverse possession against the true owner, the person in possession has to admit hostile possession to the knowledge of the true owner. The defendants in their written statement have not admitted the title of the appellant and of adverse possession to the knowledge of the true owner. The defendants have denied vesting of the land with the Managing Officer and the subsequent sale in favour of the appellant. The trial court has returned a finding as to the title of the appellant itself and such finding has not been set aside neither by the First Appellate Court nor by the High Court. The defendants are asserting their long and continuous possession but such possession howsoever long cannot be termed as adverse possession so as to perfect title within the meaning of Article 65 of the Limitation Act. It was argued that long possession is not necessarily adverse possession. Reliance is placed upon ***Karnataka Board of Wakf v. Government of India (2004) 10 SCC 779 ,Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma alias Nacharamma (2008) 15 SCC 150 and Dagadabai (Dead) by Legal***

Representatives v. Abbas alias Gulab Rustum Pinjari.(2017) 13 SCC 705

15.The matter has been examined by a Constitution Bench in ***M Siddiq (D) through LRs v. Mahant Suresh Das*** *wherein, it has been held that a plea of adverse possession is founded on the acceptance that ownership of the property vests in another, against whom the claimant asserts possession adverse to the title of the other. The Court held as under:*

"747. A plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed. Evidently, therefore, the plaintiffs in Suit 4 ought to be cognisant of the fact that any claim of adverse possession against the Hindus or the temple would amount to an acceptance of a title in the latter. Dr. Dhavan has submitted that this plea is a subsidiary or alternate plea upon which it is not necessary for the plaintiffs to stand in the event that their main plea on title is held to be established on evidence. It becomes then necessary to assess as to whether the claim of adverse possession has been established.

748. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous - possession which meets the requirement of being ''nec vi nec claim and nec precario'. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading paragraph 11(a), it becomes evident that beyond stating that the Muslims have been in long exclusive and continuous possession beginning from the time when the Mosque was built and until it was desecrated, no factual basis has been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

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752. In ***Supdt. and Remembrance of Legal Affairs, West Bengal v. Anil Kumar Bhunja****, (1979) 4 SCC 274, Justice R S Sarkaria, speaking for a three judge Bench of this Court noted that the concept of possession is "polymorphous. embodying both a right (the right to enjoy) and a fact (the real intention). The learned judge held:*

"13. "It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edn., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real

intention. It involves power of control and intent to control. (See Dias and Hughes, ibid.)."

These observations were made in the context of possession in Section 29(b) of the Arms Act 1959.

In ***P Lakshmi Reddy v. L Lakshmi Reddy****, 1957 SCR 195, Justice Jagannadhadas, speaking for a three judge Bench of this Court dwelt on the "classical requirement" of adverse possession:*

"4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of ***State for India v. Debendra Lal Khan*** *[(1933) LR 61 IA 78, 82]). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor."*

The court cited the following extract from U N Mitra's ***"Tagore Law Lectures on the Law of Limitation and Prescription"****:*

"7...An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic) who was in possession. (Angell, Sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession." (6th Edition, Vol. I, Lecture VI, at page 159)

This Court held:

"7...Consonant with this principle the commencement of adverse possession, in favour of a person implies that the person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus."

In ***Karnataka Board of Wakf v. Government of India****, (2004) 10 SCC 779, Justice S Rajendra Babu, speaking for a two judge Bench held that:*

"11...Physical fact of exclusive possession and the animus possidendi 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."

The ingredients must be set up in the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings without evidence will not establish a case in law.

In ***Annakili v. A Vedanayagam****, (2007) 14 SCC 308, this Court emphasized that mere possession of land would not ripen into a possessory title. The possessor must have animus possidendi and hold the land adverse to the title of the true owner. Moreover, he must continue in that capacity for the period prescribed under the Limitation Act."*

A learned Single Judge of this Court in the case of ***Dalla Vs. Nanhu, 2018 SCC OnLine All 5845*** *in paras- has observed as follows:*

31. In the case of Jagdish Singh v. Amresh, reported 2018 (36) LCD Page

2729, in Para-13, this Court held as under:--

"So far as the contention of learned counsel for the appellant that there is no statutory compliance of Order XLI Rule 31 CPC is concerned, suffice is to observe that the Apex Court in a recent judgment dated 4.8.2017 passed in Civil Appeal No. 9951 of 2017; U. Manjunath Rao v. U. Chandrashekhar, has held that the compliance of Order XLI Rule 31 CPC will depend in the facts and circumstances of the case and in case there is substantial compliance of Order XLI Rule 31 no illegality can be attributed. In the present case there is substantial compliance of Order XLI Rule 31 CPC as such the contention raised has no force."

A Division Bench of this Court in the case of ***Smt. Manju Lata Agarwal Vs. State Of U.P. and others, (2008) 1 UPLBEC 211 at page 211*** *in paras-46 & 49 has observed as under:*

46. In Sawarn Singh v. State of Punjab,AIR 1976 SC 232,while dealing with such a issue, the Court held as under:

"In view of this, the deficiency or reference to some irrelevant matters in the order of the Commissioner, had not prejudiced the decision of the case on merit either at the appellate or revisional stage. There is authority for the proposition that where the order of a domestic tribunal makes reference to several grounds, some relevant and existent, and others irrelevant and non-existent, the order will be sustained if the court is satisfied that the authority would have passed the order on the basis of the relevant and existing ground, and the exclusion of irrelevant or non-existing ground could not have affected the ultimate decision". (Emphasis added).

49. A similar view has been reiterated by the Hon'ble Apex Court in Dwarka Das Bhatia v. The State of Jammu,1957 AIR 164, and Kashmir; State of Orissa and Ors v. Bidyabhushan Mohapatra,AIR 1963 SC 779; The State of Maharashtra v. Babulal Kriparam Takkamore, AIR 1967 SC 1353 and Ors.; Binny Ltd. v. Their Workmen and Anr. and P. D. Agrawal v. State Bank of India and Ors, AIR 2006 SC 2064.

Another Division Bench of this Court in the case of **Dagadabai Vs. Abbas, (2017) 13 SCC 705 : (2017) 5 SCC (Civ) 718 : 2017 SCC OnLine SC 431 at page 708 Equivalent citation 2017 (35) LCD 1112** *in paras-16, 17, 18 & 19 has observed as under:*

16. Fourth, the High Court erred fundamentally in observing in para 7 that, "it was not necessary for him (defendant) to first admit the ownership of the plaintiff before raising such a plea". In our considered opinion, these observations of the High Court are against the law of adverse possession. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants.

17. It is only thereafter and subject to proving other material conditions with the aid of adequate evidence on the issue of actual, peaceful, and uninterrupted continuous possession of the person over the suit property for more

than 12 years to the exclusion of true owner with the element of hostility in asserting the rights of ownership to the knowledge of the true owner, a case of adverse possession can be held to be made out which, in turn, results in depriving the true owner of his ownership rights in the property and vests ownership rights of the property in the person who claims it.

18. In this case, we find that the defendant did not admit the plaintiff's ownership over the suit land and, therefore, the issue of adverse possession, in our opinion, could not have been tried successfully at the instance of the defendant as against the plaintiff. That apart, the defendant having claimed the ownership over the suit land by inheritance as an adopted son of Rustum and having failed to prove this ground, he was not entitled to claim the title by adverse possession against the plaintiff.

19. In the light of this settled legal position, the plea taken by the defendant about the adoption for proving his ownership over the suit land as an heir of Rustum was rightly held against him.

Another learned Single Judge of this Court in the case of **Girish Chandra Singh Vs. Sheo Nath, 2013 SCC OnLine All 14241 : (2013) 120 RD 337 at page 342, Equivalent citation 2013 (31) LCD 1193** in paras-20, 21, 23, 26, 28, 29, 32, 33, 34, 35, 37, 38 & 39 of its judgment has observed as follows:

20. Pleadings are necessary. Recently, the Apex Court has considered in detail the various authorities on the question of adverse possession in Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan, [(2009) 16 SCC 517 : AIR 2009 SC 103 : 2009 (106) RD 784 (9C).] 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.

21. The Court also referred to its arlier decision in D.N. Venkatarayappa v. State of Karnataka, [(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, tite 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 Mahesh Chand Sharma v. Raj Kumari Sliarma, [(1996) 8 SCC 128 : AIR 1996 SC 869.] the necessity of plead ing was emphasized and the Court in para 36 said:

"In this connection, we may emphasise that 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 the facts necessary to establish his adverse possession. For all the above reasons, the plea of limitation put forward by the appellant, or by Defendants Nos. 2 to 5 as the case may, be is rejected."

26. The pleading must be specific to the date when possession become ad

verse. In Ram Charan Das v. Naurangi Lal, [AIR 1933 PC 75.] the property of a Mutt was alienated by Mahant by executing a Mukararri (permanent lease) in favour of one Munshi Naurangi Lal. The 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 the 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. The Trial Court held latter date to be correct while the High Court took a contrary view and upheld the former date. The 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)

28. In T. Anjanappa v. Somalingappa, [2006 (101) RD 705 (SC)2006 (65) ALR 151.] 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."

29. 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 v. Jagadish Kalita, [(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."

32. 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 v. Ganga Saran Dhama) [AIR 1993 Del. 19.] In Parwatabai v. Sotia 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 suffi-ciept clarity when his possession became adverse and the nature of such possession. [See Mahesh Chand Shartna (supra)].

33. In Parsinnin v. 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.

34. 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 v. Sabitri Bera. [JT 2009 (10) SC 538.]

35. In Gautam Sarup v. Leela Jetly, [(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.

37. 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 Talukdar 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."

38. In SM. Karim v. Mst. BM Sakitia, [AIR 1964 SC 1254.] the Hon'ble Apex 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 section 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 the 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 section 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 v. Ram Basi Kuer, [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, [AIR 1940 P.C. 202.] the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea."

39. In B. Leelavathi v. Honnamtna, [(2005) 11 SCC 115.] the Hon'ble Supreme Court has held that the adverse possession is a question of fact which has to be specifi cally pleaded and proved and in the absence of any plea of adverse posses sion, 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."

60. A learned Judge of this Court in the case of **Rama Kant Vs. Board of Revenue, 2005 SCC OnLine All 49 : (2005) 1 AWC 929 : (2005) 98 RD 389 at page 931, Equivalent citation 2005 (26) LCD 1057** in paras-6 & 7 of its judgment has observed as under:

6. 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.

7. The order of remand dated 22.11.1979, became final between the parties an 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.

Principles for entertaining Second Appeal

61. On the point of admission of Second appeal, the following expositions of law is relevant:-

62. In the case of **Thulasidhara v. Narayanappa, (2019) 6 SCC 409** the Hon'ble Supreme Court has held as under:

"7.1. At the outset, it is required to be noted that by the impugned judgment and order [Narayanappa v. Rangamma, 2007 SCC OnLine Kar 737] , in a second appeal and in exercise of the powers under Section 100 CPC, the High Court has set aside the findings of facts recorded by both the courts below. The learned trial court dismissed the suit and the same came to be confirmed by the learned first appellate court. While allowing the second appeal, the High Court framed only one substantial question of law which reads as under:

"Whether the appellant is the owner and in possession of the suit land as he purchased it in the year 1973, that is, subsequent to the date 23-4-1971 when Ext. D-1, partition deed, Palupatti is alleged to have come into existence?"

No other substantial question of law was framed. We are afraid that the aforesaid can be said to be a substantial

question of law at all. It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only with the second appeal involving a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC.

7.2. As observed and held by this Court in ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722],*** *in the second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:*

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Apex Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in the second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.

7.3. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain v. Sohan Lal ***[Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434]*** *. In the aforesaid decision, this Court has specifically observed and held: (SCC pp. 441-42, paras 10-13)*

"10. Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. ...

12. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. ...

13. In either of the above situations, a substantial question of law can arise."

63. In the case of **Gurnam Singh v. Lehna Singh, (2019) 7 SCC 641** the Hon'ble Supreme Court has held as under:

"13.1. The suspicious circumstances which were considered by the learned trial court are narrated/stated hereinabove. On reappreciation of evidence on record and after dealing with each alleged suspicious circumstance, which was dealt with by the learned trial court, the first appellate court by giving cogent reasons held the will genuine and consequently did not agree with the findings recorded by the learned trial court. However, in second appeal under Section 100 CPC, the High Court, by the impugned judgment and order has interfered with the judgment and decree

passed by the first appellate court. While interfering with the judgment and order passed by the first appellate court, it appears that while upsetting the judgment and decree passed by the first appellate court, the High Court has again appreciated the entire evidence on record, which in exercise of powers under Section 100 CPC is not permissible. While passing the impugned judgment and order, it appears that the High Court has not at all appreciated the fact that the High Court was deciding the second appeal under Section 100 CPC and not first appeal under Section 96 CPC. As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in ***Kondiba Dagadu Kadam [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722]*** *, in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:*

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Supreme Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal."

64. Hon'ble Supreme Court in **State of M.P. Vs. Dungaji, (2019) 7 SCC 465** has propounded regarding interference by High Courts in exercising of power under Section 100 C.P.C. as follows:

"10. Now, so far as the impugned judgment and order [Dungaji v. State of M.P., Second Appeal No. 580 of 2003, order dated 29-10-2010 (MP)] passed by the High Court declaring and holding that the marriage between Dungaji and Kaveribai had been dissolved by way of customary divorce, much prior to the coming into force the provisions of the 1960 Act and therefore after divorce, the property inherited by Kaveribai from her mother cannot be treated to be holding of the family property of Dungaji for the purposes of determination of surplus area is concerned, at the outset, it is required to be noted that as such there were concurrent findings of facts recorded by both the courts below specifically disbelieving the dissolution of marriage between Dungaji and Kaveribai by way of customary divorce as claimed by Dungaji, original plaintiff. There were concurrent findings of facts recorded by both the courts below that the original plaintiff has failed to prove and establish that the divorce had already taken place between Dungaji and Kaveribai according to the prevalent custom of the society. Both the courts below specifically disbelieved the divorce deed at Ext. P-5. The aforesaid findings were recorded by both the courts below on appreciation of

evidence on record. Therefore, as such, in exercise of powers under Section 100 CPC, the High Court was not justified in interfering with the aforesaid findings of facts recorded by both the courts below. Cogent reasons were given by both the courts below while arriving at the aforesaid findings and that too after appreciation of evidence on record. Therefore, the High Court has exceeded in its jurisdiction while passing the impugned judgment and order in the second appeal under Section 100 CPC.

11. Even on merits also both the courts below were right in holding that Dungaji failed to prove the customary divorce as claimed. It is required to be noted that at no point of time earlier either Dungaji or Kaveribai claimed customary divorce on the basis of divorce deed at Ext. P-5. At no point of time earlier it was the case on behalf of the Dungaji and/or Kaveribai that there was a divorce in the year 1962 between Dungaji and Kaveribai. In the year 1971, Kaveribai executed a sale deed in favour of Padam Singh in which Kaveribai is stated to be the wife of Dungaji. Before the competent authority neither Dungaji nor Kaveribai claimed the customary divorce. Even in the revenue records also the name of Kaveribai being wife of Dungaji was mutated. In the circumstances and on appreciation of evidence on record, the trial court rightly held that the plaintiff has failed to prove the divorce between Dungaji and Kaveribai as per the custom.

12. At this stage, it is required to be noted that before the competent authority, Kaveribai submitted the objections. Before the competent authority, she only stated that she is living separately from Dungaji and Ramesh Chandra, son of Padam Singh, has been adopted by her. However, before the competent authority neither Dungaji nor Kaveribai specifically pleaded and/or stated that they have already taken divorce as per the custom much prior to coming into force the 1960 Act. Therefore, as rightly observed by the learned trial court and the first appellate court only with a view to get out of the provisions of the Ceiling Act, 1960, subsequently and much belatedly, Dungaji came out with a case of customary divorce. As rightly observed by the learned trial court that the divorce deed at Ext. P-5 was got up and concocted document with a view to get out of the provisions of the Ceiling Act, 1960. As observed hereinabove, the High Court has clearly erred in interfering with the findings of facts recorded by the courts below which were on appreciation of evidence on record."

65. Hon'ble the Apex Court in the case of **Narayana Gramani v. Mariammal,** reported in **(2018) 18 SCC 645** has held as under:-

17. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of

law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal. (See Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] and Surat Singh v. Siri Bhagwan [Surat Singh v. Siri Bhagwan, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94])

66. In the case of **Arulmighu Nellukadai Mariamman Tirukkoil Vs. Tamilarasi,** reported in **(2019) 6 SCC 686**, Hon'ble Apex Court has held as under:-

10. The need to remand the case has occasioned because we find that the High Court failed to frame any substantial question of law arising in the case while admitting the appeal as required under Section 100(4) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and further failed to decide the appeal as provided under Section 100(5) CPC.

11. It is noticed that the High Court framed two substantial questions of law (see para 7 of the impugned judgment [Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684]) for the first time in the impugned judgment [Tamilarasi v.Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684] itself. In other words, what was required to be done by the High Court at the time of admission of the appeal was to formulate a question of law after hearing the appellant as provided under Section 100(4) CPC, but the High Court did it in the impugned judgment. Similarly, the High Court could have taken recourse to the powers conferred by the proviso to Section 100(5) CPC for framing any additional question of law at the time of final hearing of the appeal by assigning reasons for framing additional question, if it considered that any such question was involved. It was, however, not done. Instead, the High Court framed the questions for the first time while delivering the impugned judgment.

12. In our considered opinion, the procedure and the manner in which the High Court decided the second appeal regardless of the fact whether it was allowed or dismissed cannot be countenanced. It is not in conformity with the mandatory procedure laid down in Section 100 CPC.

13. Recently, this Court had an occasion to examine this very question in Surat Singh v.Siri Bhagwan [Surat Singh v. Siri Bhagwan, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94] . The law is explained in paras 19 to 35 of this decision which read as under: (SCC pp. 567-69)

"19. ... Section 100 of the Code reads as under:

*''**100. Second appeal.**--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.*

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.'

20. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court.

21. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under

sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

22. Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment [Bhagwan v. Murti Devi, 2006 SCC OnLine P&H 2175] in its concluding paragraph could frame the substantial question of law for the first time and simultaneously answered the said question in appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

23. Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding paragraph.

24. Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

25. In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

26. In other words, since the High Court failed to frame any substantial question of law under sub-section (4) of Section 100 at the time of admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section (4) of Section 100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after

the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

31. It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

32. It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that manner only and in no other manner. (See Interpretation of Statutes by G.P. Singh, 9th Edn., p. 347 and Baru Ram v. Prasanni [Baru Ram v. Prasanni, AIR 1959 SC 93].)

33. The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

34. While construing Section 100, this Court in Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

35. It is, therefore, the duty of the High Court to always keep in mind the law laid down in Santosh Hazari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] while formulating the question and deciding the second appeal."(emphasis in original)

14. In the light of the foregoing discussion, we cannot sustain the impugned judgment [Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684] which, in our view, is not in conformity with the mandatory requirements of Section 100 CPC and hence calls for interference in this appeal.

15. The appeal thus deserves to be allowed and it is accordingly allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the second appeal afresh in accordance with law. The High Court will frame proper substantial question(s) of law after hearing the appellant and if it finds that any substantial question(s) of law arises in the case, it will first formulate such question(s) and then accordingly decide the appeal finally on the question(s) framed in accordance with law.

67. The Division Bench of Hon'ble Apex Court in the case of **Chand Kaur Vs. Mehar Kaur, (2019)** reported in **12 SCC 202 : 2019 SCC OnLine SC 426** at page 203 has held in paragraph no. 3 to 5 has held as under:-

3. The need to remand these cases to the High Court is called for because we find that the High Court though

disposed of bunch of second appeals (RSAs Nos. 2066 to 2068 of 1987 and RSAs Nos. 2292 to 2294 of 1987) but it did so without framing any substantial question(s) of law as is required to be framed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

4. In our opinion, framing of substantial question(s) of law in the present appeals was mandatory because the High Court allowed the second appeals and interfered in the judgment of the first appellate court, which was impugned in the second appeals. It is clear from the last paragraph of the impugned order [Mehar Kaur v. Chand Kaur, 2011 SCC OnLine P&H 17686] quoted hereinbelow: (Mehar Kaur case [Mehar Kaur v. Chand Kaur, 2011 SCC OnLine P&H 17686] , SCC OnLine P&H paras 15-16)

"15. However, I am unable to convince myself with the latter part of the judgment of the learned lower appellate court wherein Chand Kaur was held to be entitled to ½ share of the property of Jaimal, by placing reliance on the judgment delivered in the previous litigation between Mehar Singh and Chand Kaur. Once the learned lower appellate court arrived at a specific finding of fact that Chand Kaur was neither the daughter of Santo nor Santo is daughter of Cheta, thus, there was no basis for it to hold that Chand Kaur was entitled to hold half of the property of late Jaimal. By placing reliance on the previous judgment, the learned lower appellate court went against its own judgment and impliedly admitted that Santo was the daughter of Cheta. It is obvious that such a status of things cannot co-exist. By necessary implication, as a result of the finding arrived at by the learned lower appellate court regarding Santo not being the daughter of Cheta, the entitlement of the property of late Jaimal falls on Mehar Singh and Mehar Kaur in equal shares.

16. In view of above, RSAs Nos. 2066-68 of 1987 filed by Mehar Kaur succeed and RSAs Nos. 2292-94 of 1987 filed by Chand Kaur are dismissed. The findings of the learned lower appellate court are modified to the extent that Mehar Singh and legal heirs of Mehar Kaur are held entitled to succeed to the entire property of late Jaimal Singh in equal shares and the legal heirs of Chand Kaur shall have no right to such property at all."

5. This Court has consistently held that the High Court has no jurisdiction to allow the second appeal without framing a substantial question of law as provided under Section 100 of the Code. In other words, the sine qua non for allowing the second appeal is to first frame the substantial question(s) of law arising in the case and then decide the second appeal by answering the question(s) framed. (See Surat Singh v. Siri Bhagwan [Surat Singh v. Siri Bhagwan, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94] and Vijay Arjun Bhagat v. Nana Laxman Tapkire [Vijay Arjun Bhagat v. Nana Laxman Tapkire, (2018) 6 SCC 727 : (2018) 3 SCC (Civ) 801] .)

68. The Division Bench of Hon'ble Apex Court in the case of **State of Rajasthan Vs. Shiv Dayal,** reported in **(2019) 8 SCC 637 : (2019) 4 SCC (Civ) 203 : 2019 SCC OnLine SC 1034 at page 639** has held in paragraph nos. 7, 8 and 11 to 17 and 25 as under:-

7. By impugned order [State v. Shiv Dayal, Civil Second Appeal No. 83 of 1999, order dated 23-3-1999 (Raj)] , the High Court dismissed the second appeals holding that the appeals did not involve any substantial question of law. It is against this order, the State felt aggrieved and has filed the present appeals by way of special leave before this Court.

8. So, the short question, which arises for consideration in these appeals, is whether the High Court was justified in dismissing the State's second appeals on the ground that these appeals did not involve any substantial question of law.

11. In our opinion, the need to remand the case to the High Court has arisen because we find that the second appeals did involve several substantial questions of law for being answered on merits in accordance with law. The High Court was, therefore, not right in so holding.

12. Indeed, we find that the High Court dismissed the second appeals essentially on the ground that since the two courts have decreed the suit, no substantial question of law arises in the appeals. In other words, the High Court was mostly swayed away with the consideration that since two courts have decreed the suit, resulting in passing of the decree against the State, there arises no substantial question of law in the appeals. It is clear from the last paragraph of the impugned order, which reads as under:

"Under these circumstances, when both the learned courts have arrived at the conclusion that the disputed area is outside the forest area. Therefore, the principles laid down in T.N. Godavarman Thirumulpad v. Union of India (abovequoted) cannot be enforced in this appeal." (emphasis supplied)

13. We do not agree with the aforementioned reasoning and the conclusion arrived at by the High Court. It is not the principle of law that where the High Court finds that there is a concurrent finding of two courts (whether of dismissal or decreeing of the suit), such finding becomes unassailable in the second appeal.

14. True it is as has been laid down by this Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). However, this rule of law is subject to certain well-known exceptions mentioned infra.

15. It is a trite law that in order to record any finding on the facts, the trial court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the appellate court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial court or reverse it. If the appellate court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding". These expressions are well known in the legal parlance.

16. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (See observation made by learned Judge, Vivian Bose, J., as his Lordship then was a Judge of the Nagpur High Court inRajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar [Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar, 1942 SCC OnLine MP 26 : AIR 1943 Nag 117] para 43.)

17. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law

within the meaning of Section 100 of the Code.

25. In our view, the High Court, therefore, should have admitted the second appeal by framing appropriate substantial question(s) of law arising in the case and answered them on their respective merits rather than to dismiss the appeals without considering any of the aforementioned questions.

69. Learned counsel for respondents has argued that defendant's father, Bhagwan Das sold his half share in the disputed house by means of sale deed dated 19.02.1920. Sitaram, ancestor of plaintiffs and his wife brought up Dargahi-defendant No. 1. He resided with Sitaram and Smt. Mera in the house of Pratapganj and also assisted in business of fair price shop of Smt. Mera in the shop situated in the disputed property. The plaintiffs have proved that the disputed portion of the house was given to defendant No. 1-Dargahi on license by plaintiffs. They terminated license vide notice dated 24.04.1963 and notice was served on defendant No. 1 on 25.04.1963. The defendants are not co-sharer of the disputed house and their title has not been perfected on the basis of alleged adverse possession, rather it was permissive possession. The impugned judgment delivered by first appellate court is in consonance of observations made by this Court vide judgment dated 01.08.1980 and 16.12.2004 while remanded the matter to the first appellate court twice. The special leave petition instituted by defendants against the order dated 16.12.2004 of this Court has been dismissed, therefore, the observations of this Court have become final. The appellants are liable to be evicted from the disputed portion of the house No. 620/ 618 situated in locality Parkinsganj, Sultanpur City. The impugned judgment dated 26.09.2007 decreeing the suit of plaintiffs delivered by first appellate court cannot be termed as perverse or against the evidence available on record. The judgment is liable to be affirmed.

I have heard arguments put forth by learned counsels for both the parties at length and perused the exposition of law relied upon by learned counsels and exposition of law quoted by me regarding entertainment of second appeal and duties of first appellate court.

I have perused record of trial court and first appellant court and the material available on record.

The present appeal has to be examined, evaluated and appreciated on the basis of aforesaid exposition of law.

Substantial question of law No. 1:

70. Substantial question of law formulated on 25.05.2009 at the time of admission of present appeal relates to the directions given by this Court, while remanding the matter vide order dated 16.12.2004 passed in Second Appeal No. 677 of 1986. It was directed to the first appellate court that first appellate court cannot go beyond the findings recorded by this Court in Second Appeal No. 2585 of 1970 of remand of the matter. The judgment dated 09.09.1986 of first appellate court being contrary to the findings concluded by this Court in the earlier judgment dated 01.08.1980 passed in the second appeal, arising out the same suit, is to be set aside.

71. **Therefore, the first appellate court was bound to comply observations made by this Court in the judgment dated 01.08.1980 passed in Second Appeal No. 2585 of 1970, Durga Prasad**

and another Vs. Dargahi and others and the order dated 16.12.2004 passed in Second Appeal No. 677 of 1986.

72. This Court vide order dated 01.08.1980 specifically observed that earlier first appellate court, while deciding Appeal No. 45 of 1970 had not considered the dispute in light of Article 64 and 65 of the Limitation Act regarding pleadings of defendant in respect of adverse possession. This Court while passing the order dated 01.08.1980 had also observed that the first appellate court has rejected the plaintiffs' case that Dargahi proved to have been residing in Mohalla or in the house from before, do not go to prove adverse nature of defendant. It was also observed by this Court that the plaintiff has not been excluded from those common portion by the defendant of the disputed house, such as, staircase, open space and other things shown in plaint map. It was further observed that for possession being adverse it was essential that the plaintiffs should have been denied access to the property. Further the findings that the defendant was residing with Sitaram and was brought up by him and his wife certainly go to prove a case of implied license.

Along with the aforesaid observations this Court also mentioned in the order dated 01.08.1980 that the sale deed of 1920 is binding on Dargahi and on his heirs. It is not disputed that Bhagwan Das had executed the said sale deed. The same observations were noticed by this Court, while passing the order dated 16.12.2004 and remanded the matter to the first appellate court.

73. There is no substance in the argument of learned Senior Counsel appearing for appellants that the first appellate court could examine the validity of sale deed dated 19.02.1920 again, and the first appellate court could not set aside the findings recorded by the trial court regarding the alleged license given to defendent No. 1-Dargahi, "that the plaintiffs were not successful to prove alleged license of the year 1955".

74. The learned first appellate court decided the Civil Appeal No. 45 of 1970 by taking note of observations of this Court, appreciated and analyzed the evidence available on record and delivered the impugned judgment dated 26.09.2007.

75. It is pertinent to mention here that the learned trial court has decided the Issue Nos. 1 and 3 regarding facts and circumstances in which the sale deed dated 19.02.1920 (Ex.-2) was executed by Bhagwan Das in favour of Sitaram. The defendents pleaded regarding sale deed dated 19.02.1920 that it was a sham and fictitious document executed by Bhagwan Das in favour of Sitaram, only due to, this fact that his third wife, Lakhpati was a young woman and he fell ill due to tuberculosis. The defendant No.1, Dargahi was aged six months old when his mother was died in the year 1916 and he was aged 7-8 years when Bhagwan Das died. Therefore, considering the circumstances of his family he thought that his property may be misappropriated by his third wife, therefore, sham transaction was made and Ex.2-sale deed dated 19.02.1920 was executed by Bhagwan Das.

76. The learned trial court has appreciated the evidence of both the parties and analyzed the sale deed dated 19.02.1920 and observed that the impugned sale deed is a very old document, Bhagwan Das has received amount of consideration

of one thousand rupees before the Sub Registrar concerned as consideration for execution of the sale deed. He had also made a mention in it of the fact that his brother Sitaram was separate from him. The defendants cannot say anything contrary to that admission of Bhagwan Das. There are overwhelming documentary evidence from the side of plaintiffs to show that Bhagwan Das and Sitaram were separated and had their separate dealings. The statement of defendant No. 3, Dargahi also indicate the same thing.

77. The trial court has further held that there is, therefore, a presumption that the parties are also separate in all respect. The sale deed dated 19.02.1920 was held not to be invalid for the reasons disclosed by the defendants in their statements, as such they are not co-sharers in the house in question along with the plaintiffs. Hence, both the issues No. 1 and 3 were decided in favour of plaintiffs.

78. The first appellate court has also appreciated the evidence of both the parties in detail and found that the predecessor in title Ram Anand, S/o Wali Deen Kalwar transferred disputed house by means of sale deed dated 12.09.1919 in favour of Sitaram and Bhagwan Das. They occupied equal half share in the disputed house. Bhagwan Das transferred his half share by means of sale deed dated 19.02.1920 (Ex.-2). Therefore, Bhagwan Das had no share in the disputed property.

79. The contention of appellants/ defendants was also considered by the first appellate court regarding health condition of Bhagwan Das and his marriage with third wife, Lakhpati and nature of sale deed dated 19.02.1920. The first appellate court has observed that in sale deed dated 19.02.1920 Bhagwan Das had mentioned his address as Sadar Sultanpur, locality Parakinsganj, Pargana Meeranpur, Tehsil and District Sultanpur by mentioning that he was living separately from his brother Sitaram.

80. The plaintiffs/respondents has produced copy of plaint of Original Suit No. 35 of 1998 (380-Ga/1-5) which was perused by the first appellate court and it was found that Krishna Chandra, S/o Phool Chandra instituted suit for partition of properties including disputed house. Krishna Chandra is descendant of Bhagwan Das. He mentioned in his plaint-380-Ga/1-5 details of properties which are as follows:

(i) House situated in Mohalla Parkinsganj, Chhavani Sadar, Pargana Meeranpur, District Sultanpur:

Boundaries: North – Road
South - House of Raja
East - House of Hameed
West - House of Ganga Dhobi

(ii) House situated in locality Parkinsganj, Chhavani Sadar, Pargana Meeranpur, District Sultanpur:

Boundaries: North – Road
South - House of Sheetal Prasad
East - House of Habibullah
West – Lane

(iii) House situated in locality Civil Lines, Pratapganj, Chhavani, Pargana Meeranpur, District Sultanpur:

Boundaries: North – *Nallah*
South - Campus of Zahid
East - House of Om Prakash
West – Lane

(iv) House situated in locality Civil Line, Pratapganj, Chhhavani, Tehsil Sadar, Pargana Meeranpur, District Sultanpur:

Boundaries: North - House of Jagannath

South - House of Gaya Prasad S/o Babula

East – Lane

West - Road Galla Mandi

Therefore, the first appellate court rightly observed that two houses owned by family of both the parties were situated in locality Parkinsganj, Pargana Meeranpur, Tehsil Sadar, District Sultanpur.

81. Learned defence counsel argued before the first appellate court that death certificate of Bhagwan Das and Harish Chandra who was son of defendant No. 1 were issued at the address of disputed house situated in locality Parkinsganj, whereas, on perusal of aforesaid details of houses mentioned in plaint of O.S. No. 35 of 1998 (380-Ga/1-5), four houses were mentioned as property to be partitioned between the parties.

82. The first appellate court has observed that in death certificate-223-Ga of Harish Chandra, S/o Dargahi only locality Parkinsganj is mentioned, no house number was mentioned in this document, therefore, first appellate court discarded the argument of learned defence counsel that Harish Chandra expired in the disputed house. Although, first appellate court has also mentioned in the impugned judgment that there was only signature of Dargahi Lal, no seal or signature of officer, who issued copy, were not available. This observation could not help the appellants in any way, because the appellant Krishna Chandra had admitted in his plaint of partition suit that there was two houses of family, which were situated in locality Parkinsganj of City Sultanpur. The facts narrated by Krishna Chandra in the aforesaid partition suit fortified that the defendants have concealed the second house situated in locality Parkinsganj.

83. The first appellate court has also analyzed the evidence of D.W.1-Nazeer Mohammad, D.W.2-Ganesh Prasad and D.W.3-Dargahi(Defendant No.1). D.W.3-Dargahi had admitted in his cross-examination that he had not paid any house tax to Nagar Palika, whereas late Sitaram and late Bindeshwari who are the ancestors of plaintiffs and now plaintiffs paid all the taxes to Nagar Palika. He never tried to get mutated his name in the records of Nagar Palika.

84. I have also verified these facts from the statement of D.W.3-Dargahi (defendant No. 1). He has admitted this fact also that Bhagwan Das and Sitaram purchased six houses and two shops in city of Sultanpur, one house is Pratapganj, one in Chowk, in which, Grey Company was tenant, disputed house and two houses situated at *Nallah*. He has also admitted that he sold a house to the wife of Kedarnath, who is Bipta. Sitaram, S/o Ram Autar sold house situated in locality Majorganj, Sultanpur, which was purchased by him in auction on 16.04.1917, to Bindeshwari, S/o Kashi Agrahari by means of sale deed dated 13.11.1922 (345-Ga/346-Ga).

85. He has also stated regarding Ex.-25 that his address of disputed house was mentioned in plaint of S.C.C. Suit No. 20 of 1953 (314/2-Ga) Bindeshwari and Surajdeen, both sons of Kashiram and others Vs. Dargahi and Phoolchand. The plaintiffs have filed certified copy 314/2-Ga of entries of institution register. On perusal of which it reveals that number of house situated in Parkisnganj has not been mentioned in these details. S.C.C. suit was

instituted on 24.02.1953 and decided on 24.04.1953 regarding recovery of Rs.161.

86. The Ex.25 has been weeded out and now it could not be reconstructed, only certified copy of institution register of S.C.C. Suit 20 of 1953 is available, there3fore, there is no substance in the arguments of learned Senior Counsel for appellants that Ex.-25 was not considered by the first appellate court.

87. On the other hand, D.W.3-Dargahi had admitted in this regard in his cross-examination that Bindeshwari, S/o Surajdeen instituted suit against him and his son Phool Chandra 17 to 18 years ago (from the date of his statement, i.e., 04.02.1970). **The plaintiffs were not arrayed as party in S.C.C. Suit No. 20 of 1953.** Therefore, the facts narrated in plaint regarding address of defendant-Dargahi and Phool Chandra was not binding on the plaintiffs.

88. D.W.3-Dargahi has also admitted that his father Bhagwan Das solemnized second marriage within a year of death of his mother. His mother died when he was six months old. Second wife of his father died within one and half year, then even six and half months his father solemnized his marriage with Lakhpati. Sitaram and his wife Mera brought him up and his marriage was solemnized by Sitaram. When his mother died he resided with Sitaram in house situated in Pratapganj. He has also admitted that fair price shop was allotted to wife of Sitaram and he looked after this shop up to 1942.

89. D.W.3 in his examination-in-chief himself admitted that when his father died he resided with Sitaram in the house situated at Pratapganj. He is residing in disputed house on the basis of mutual understanding from 25 to 26 years ago. He has also stated that when Sitaram and his wife Mera were alive. He also resided in disputed house on the basis of alleged mutual understanding.

90. D.W.3-Dargahi has tried to prove this fact that disputed house and other properties including fair price shop were joint family property and Sitaram was *Karta Khandan*, but on the basis of sale deed (Ex.-2) dated 19.02.1920 defendants had no such right, they are not co-sharers of the disputed house. He has admitted in his cross-examination that only house in which Grey Company was tenant, was sold. He has further stated that other five houses were not recorded in his name. He and his son Phool Chandra sold a house situated in Majorganj locality, which was situated behind the house of Balwanta.

91. The plaintiff-P.W.1 and his witnesses, P.W.2-Mehraji and P.W.3-Bhaiyaram have proved this fact that Bhagwan Das and defendants earlier resided in the house situated at Majorganj locality. Admission of D.W.3-Dargahi fortified evidence of plaintiff-P.W.1-Durga Prasad and witnesses, P.W.2-Mehraji and P.W.3-Bhaiyaram in this regard.

92. D.W.3-Dargahi has also admitted in his cross-examination that the disputed house was *Kachcha* and his father resided in this house alone, because he was the patient of tuberculosis. Lakhpati resided in house at Pratapganj and food was cooked in that very same house. He has stated that he was separated from plaintiffs 25 to 26 years ago and business was separated 10 to 15 years ago. His mother Lakhpati solemnized marriage with another person and left him 20 to 25 years ago. D.W.3 has stated that

he never received rent from tenants of disputed house. He has stated that his father Bhagwan Das died in 1924 in the disputed house, then Sitaram renovated it.

93. From the statements of D.W.3 it reveals that his father Bhagwan Das shifted in the house situated at Pratapganj and resided with Sitaram, then his statement that he resided in the disputed house from life time of Sitaram and Mera, is not acceptable.

94. D.W.3 in his cross-examination has also stated that Harish Chandra, his son, was aged 2 to 2-1/2 years old, when he died in the year 1952-53. Sitaram expired in 1936 and Mera expired in 1961.

95. Therefore, first appellate court has not discarded death certificate of Harish Chandra only on the ground that no seal or signature of officer, who issued it. The main ground of rejection was that house number and details were not mentioned in it. The plaint instituted by Krishna Chandra, appellant, was also/ rather main ground of rejection of death certificate that two houses of the family were situated in locality Parkinsganj.

96. Learned first appellate court has analyzed document-332-Ga, certified copy of assessment register of the year 1950-55 situated in locality Parkinsganj regarding House No. 620/618 and found that name of Bindeshwari, S/o Sitaram was mentioned as owner. In column of possession, Bindeshwari himself, Kallu, S/o Chhedi, Mahadev, Ram Harak was mentioned.

97. It is also observed that in the document 333-Ga, assessment of the year 1955-60, Bindeshwari, S/o Sitaram was shown as owner. Against portion 227-A and 227-C, name of Dargahi (defendant No.1) has been mentioned, on portion 372-B Kallu, S/o Thakur, Baburam Bakkal is mentioned. On portion 374-D, 276-F and 277-G names of other tenants are mentioned.

98. The first appellate court has also analyzed assessment 336-G, hindi translation-377-Ga, certified copy of house tax register of the year 1925-30 of House No. 618/620, in these documents Sitaram Bakkal shown as owner. In document 338-Ga, hindi translation-339-Ga-340-Ga, certified copy of register/ house documents of the aforesaid house of Bindeshwari, S/o Sitaram, he has been shown as owner. Bindeshwari was shown in occupation of house No. 620/618, i.e., disputed house. Dargahi(Defendant No.1) has not been shown in occupation of disputed house No. 618/620 of the portion 227/A, 227/C in the year 1950-51 and 1954-55.

99. On appreciation and analyzation of evidence of D.W.1-Nazeer Mohammad and D.W.2-Ganesh Prasad, the learned first appellate court has found that D.W.1-Nazeer Mohammad was aged 60-70-80 years and stated that Dargahi is in possession of disputed house from 20 to 25 years ago. This statement is contradictory to the statement/ admission of D.W.3-Dargahi, because this period comes to the year 1945, as observed by the learned first appellate court.

100. Sitaram renovated the disputed house in the year 1926. The learned first appellate court has analyzed in this regard the document 350-Ga/1-2, copy of report dated 23.01.1943 regarding application of Sitaram to construct tin shed, document 351-Ga/1-2 order passed by Municipal Board dated 08.04.1926 and 352-Ga/1-2

application dated 08.04.1926 moved by Sitaram and found that Sitaram, S/o Ram Autar ancestor of plaintiffs renovated the disputed house and his son Bindeshwari constructed tin shed and projection.

101. The first appellate court has observed that defendants never tried to get mutated their names on the basis of possession in Municipal Board. The learned first appellate court has held that plaintiffs are descendants of Sitaram, who purchased share of Bhagwan Das by means of sale deed dated 19.02.1920 and it is valid. The defendants are not co-sharer of disputed house. It is observed by the first appellate court that defendants never challenged title of Sitaram or his descendant Bindeshwari and plaintiffs.

102. The learned first appellate court has mentioned that this court also found Sitaram exclusive owner of the disputed property on the basis of sale deed dated 19.02.1920. Bhagwan Das in his life time and defendants have not challenged the sale deed dated 19.02.1920 in any competent court for its cancellation on the grounds claimed by them.

103. Therefore, the findings recorded by the first appellate court regarding sale deed dated 19.02.1920 (Ex.-2) is in consonance with the observations of this Court made in the order dated 01.08.1980 and 16.12.2004. The appellants/ defendants challenged the order of this Court dated 16.12.2004 before Hon'ble apex Court and the Hon'ble Apex Court has dismissed the special leave petition vide order dated 26.04.2005. Hence, the observations of this Court regarding implied license given by the plaintiffs to defendants Dargahi and his family to reside in disputed portion 227-A and 227-C and about sale deed dated 19.02.1920 could not be ignored by the learned first appellate court.

104. The learned first appellate court has formulated point of determination regarding license given by plaintiffs to defendants and their claim regarding adverse possession over the disputed property and perfection of their title on the basis of alleged adverse possession. The first appellate court has analyzed evidence of P.W.1-Durga Prasad, P.W.2-Mehraji, P.W.3-Bhaiyaram, P.W.4-Ram Gulam and P.W.5, Mohd. Yahiya Khan.

105. P.W.2-Mehraji and P.W.3-Bhaiyaram have provided their evidence that defendant No.1-Dargahi himself called them to take permission/ license from P.W.1-Durga Prasad in the year 1955 in the month of *Jeth* or *Asaadh*. Dargahi-D.W.3 has admitted in his cross-examination that he was brought up by Sitaram and his wife Mera and resided with them in the house situated at locality Pratapganj, City Sultanpur, they have also told this fact that Bhagwan Das was living separately from Sitaram in the house situated in locality Majorganj.

106. P.W.2 and P.W.3, Mehraji and Bhaiyaram asked P.W.1-Durga Prasad to give permission/ license in their presence and in presence of Kedarnath and Bhagwan Das. Only Mehraji and Bhagwan Das are alive, Kedar Nath and Bhagwan Das have expired. According to the defence witnesses, P.W.1-Nazeer Mohammad and P.W.2-Ganesh Prasad they have no knowledge about the title of disputed suit.

107. D.W.1-Nazeer Mohammad had accepted that he only knows Dargahi. He does not know other residents of locality of Parkinsganj. D.W.2-Ganesh Prasad has

stated that Bhagwan Das, when he was alive, resided with Sitaram in the house situated at Pratapganj. Bhagwan Das did not reside in the disputed house. D.W.2-Ganesh Prasad is ignorant about the details of tenants residing in disputed house, because he has given contradictory statement of D.W.3-Dargahi that Raghunath Das was not residing in the disputed house as a tenant.

108. The first appellate court has also observed that P.W.4-Ram Gulam took *Kothari* on rent 12 to 13 years ago from the date of recording of his statement on 10.10.1979. He has stated that Durga Prasad removed woods kept in *Kothari* and then *Kothari* was given to him on rent. He does not know regarding occupation of Dargahi in the disputed house, whether on license or as tenant, but he has stated in his cross-examination that Dargahi was residing in Majorganj from 12 to 13 years ago.

109. D.W.3-Dargahi admitted in his cross-examination that he and his son Phool Chandra sold house situated at Majorganj with Mera wife of Sitaram. He has also admitted that he never received rent from tenants residing in the disputed house.

110. Therefore, observations of first appellate court that since Sitaram and his wife Mera brought up D.W.3-Dargahi /defendant No.1 since his age of six months, hence, after the death of Bhagwan Das at his age 7 to 8 years, he resided with Sitaram at house of Pratapganj. According to his admission he started separate living 25 to 26 years ago from family of Sitaram, whereas he looked after the fair price shop allotted to Mera, wife of Sita Ram.

111. Hence, on the basis of admission of D.W.3-Dargahi, findings recorded by first appellate court, that defendants resided in disputed portion 227-A and 227-C of the disputed house No. 618/620 situated in Parkinsganj on the basis of implied permission/ license, are recorded in correct perspectives. No entry of occupation registered in Municipal Board Sultanpur, prior to the year 1955, could not be produced by the defendants before the trial court. The defendants witnesses, D.W.1, D.W.2 and D.W.3-Dargahi were produced. They could not prove by documentary evidence that prior to 1969-70, when evidence of defence witnesses were recorded by the trial court, the defendants occupied the aforesaid disputed portions 23 to 24 years ago (about in 1945).

112. The learned defence counsel/ learned counsel for appellants of the present appeal relied upon the death certificate of Bhagwan Das and his son, Harish Chandra, aged 2 to 2 and 1/2 year, does not extend any benefit to the defendants regarding the fact that they were in adverse possession of the aforesaid portion of the disputed house, because there was burden of proof on the defendants also that they ought to have pleaded in written statement specifically that when possession of disputed portion of house No. 618/620 became adverse to the plaintiffs and access in the disputed house was restricted/ prohibited in the knowledge of plaintiffs.

113. On the other hand, D.W.3-Dargahi has admitted this fact that his name was never mutated in municipal records. He never tried to challenge the title of Sitaram on the basis of sale deed dated 19.02.1920. He never received rent from

other tenants of the disputed house. He has stated that taxes of Municipal Board was paid by Sitaram, after him by his son Bindeshwari and now taxes are being paid by plaintiff-P.W.1, Durga Prasad, who has proved he has received rents from other tenants of the disputed house.

114. Therefore, the details of plaint of S.C.C. Suit No. 20 of 1953 regarding address of Dargahi mentioned in it, of house situated in locality Parkinsganj is not sufficient to prove adverse possession of the defendants. Moreover, plaintiffs were not party to the aforesaid S.C.C. suit, therefore, details mentioned in plaint instituted by Bindeshwari and Surajdeen, S/o Kashi Ram is not binding on plaintiffs. The appellant, Krishna Chandra has himself mentioned in plaint of Suit No. 35 of 1998, Krishna Chandra Vs. Durga Prasad and others, has mentioned details of four houses, out of which two houses were situated in the locality Parkinsganj.

115. Therefore, the details of address of D.W.1-Dargahi mentioned in plaint of S.C.C. Suit No. 20 of 1953 or decree of that suit and death certificate of Bhagwan Das and Harish Chandra does not extend any help to defendants, on the basis of admission of Krishna Chandra and D.W.3-Dargahi.

116. Krishna Chandra is descendant of Bhagwan Das and the descendants of Bhagwan Das are not found to be co-sharers of the disputed house. They never prohibited/ restricted access/ entry of the plaintiffs in the disputed house No. 618/620, perfecting their title on the basis of alleged adverse possession.

117. On the basis of findings recorded by the learned first appellate court it was found that possession of defendants was not proved to be adverse, but rather they were in possession of disputed portion of plaintiffs' house on the basis of implied permission/ license. This finding of first appellate court was in consonance with the observations of this Court made in the orders dated 01.08.1980 and 16.12.2004 while Appeal No. 45 of 1970 was remanded by this Court twice.

118. Therefore, substantial question of law No. 1 is hereby decided against the appellants.

Substantial question of law No.2:

119. The findings recorded by the first appellate court are based on analysis and appreciation of evidence of both the parties, oral as well as documentary. The first appellate court has found possession of defendants/ appellants based on implied permission/ license, therefore, permissive entry/ possession cannot be termed as adverse possession. The defendants cannot claim that they have perfected their right on the basis of alleged adverse possession of portion No. 227-A and 227-C of the disputed house. It is also clear from the observations of the learned first appellate court that the appellants including Krishna Chandra have suppressed this fact that two houses of the family were situated in the locality Parkinsganj of Sultanpur City.

120. As far as, learned counsel for appellants has argued that the learned first appellate court has not considered the provisions of Section 65 of the Limitation Act, 1963 and Section 144 of old Limitation Act, 1908, is concerned, the learned first appellate court has observed in the impugned judgment dated 26.09.2007 that the provisions of Article 65 of the Limitation Act, 1963, comprised of

provisions enumerated in Article 136, 137, 138, 140, 141, 144 and 47 of the old Act of 1908 and the period of 12 years has been prescribed regarding institution of suit based on adverse possession. In both the Articles 65 of the Limitation Act, 1963 and Article 144 of the Limitation Act, 1908, prescribe the same period 12 years for institution of suit.

121. Therefore, the argument of learned defence counsel was discarded by the first appellate court relying on various expositions of law by observing that appellants/ defendants were unable to plead and prove specifically this fact when their possession became adverse to the title of plaintiffs.

122. The admission of D.W.3-Dargahi regarding the fact that until 23 to 24 years back, when he was brought up by Sitaram and his wife Smt. Mera and he resided in the house situated at Pratapganj.

123. It is also pertinent to point out here that the defendants never prohibited access of plaintiffs in the disputed house to receive rent from the tenants and to use common portion staircase, open space and other places shown in plaint map. According to P.W.4-Ram Gulam, plaintiffs, had used to store wood in the other accommodation available in the disputed house in the shape of *Kothari* also, when he took his Kothari on rent.

124. Learned counsel for the appellants has argued that provisions of Article 142 and 144 of old limitation Act, 1908 and Article 64 and 65 of Limitation Act, 1963 are materially and substantially almost different and are not pari materia as held by learned first appellate court.

125. I have perused provisions of Article 65 of Limitation Act, 1963 and Article 144 of Limitation Act, 1908, Article 64 and 65 of Limitation Act, 1963 provide as follows:

Description of Suit	**Period of Limitation**	**Time from which period beings to run.**
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years.	The date of dispossession.
65. For possession of immovable property or any interest therein based on title. Explanation.--For the purposes of this article-- (a)where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b)	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c)where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		

126. Article 136 to 144 of Limitation Act, 1908, which provide as follows:

Description of Suit	**Period of Limitation**	**Time from which period beings to run.**
136.- By a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	Twelve years	When the vendor is first entitled to possession.
137. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years	When the judgment-debtor is first entitled to possession.
138.- Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	Twelve years	The date when the sale becomes absolute.
139.- By a landlord to recovery possession from a tenant.	Twelve years	When the tenancy is determined.
140.- By a remainderman, a reversioner (other than a land lord) or a devisee, for possession of immovable property.	Twelve years	When his estate falls into possession.
141.- Like suit by a Hindu or Muhammadan entitled to the possession of immovable property on the	Twelve years	When the female dies.

death of a Hindu or Muhammadan female		
142.--For possession of immovable property when the plaintiff while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
143.- Lise suit, when the plaintiff, has become entitled by reason of nay forfeiture or breach of condition	Twelve years	When the forfeiture is incurred or the condition is broken.
144.--For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

127. On perusal of provisions of Limitation Act, 1908 it reveal that Articles, 142 and 144 of Old Act may only cover case of appellants, other Articles 136, 137, 138, 139, 140, 141 provide another category of facts and circumstances in which possession of true owner became adverse. Provisions of Article 142 and 144 of Old Act are covered by provisions of Article 65 of New Act. Article 142 and 144 of Old Act and Article 65 of New Act prescribe period of limitation 12 years from the period/ the date of the dispossession or discontinuance and when the possession of the defendant becomes adverse to the plaintiff.

128. In the present case, as per pleadings of both parties respondents/ plaintiffs were not dispossessed by the appellants, and defendants/ appellants are only claiming themselves as co-sharers of the disputed house, therefore, Article 142 of the Old Act would not apply to the facts and circumstances of the present case.

129. Hence, provisions of Article 144 of the Old Act and provisions of Article 65 of New Act would apply to the facts and circumstances of the present case. Both the provisions provide period of 12 years for perfecting the title on the basis of adverse possession. Therefore, materially and substantially both these provisions are pari materia.

Rulings on Article 64 & 65 of Limitation Act and Article 142 & 144 of Limitation Act, 1908

A Division Bench of Apex Court in the case of **Saroop Singh Vs. Banto, (2005) 8 SCC 330 at page 338** in paras-26 to 31 of its judgment has observed as under:

26. In the instant case, the question of applicability of the Limitation Act does not arise. The appellant-first defendant could have legitimately raised a plea that Indira Devi having died in the year 1961, his possession thereafter has become adverse to the true owner and, thus, on the expiry of the statutory period of limitation he had perfected his title by

adverse possession. But, he did not raise such a plea. Even before us, Mr Jain categorically stated that the appellant does not intend to raise such a plea.

27. Articles 64 and 65 of the Limitation Act read thus:

	Description of suit	*Period of Limitation*	*Time from which period beings to run.*
64.	*For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.*	*Twelve years*	*The date of dispossession.*
65.	*For possession of immovable property or any interest therein based on title. Explanation.--For the purposes of this article-- (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of*	*Twelve years*	*When the possession of the defendant becomes adverse to the plaintiff.*

	possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		

28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak [(2004) 3 SCC 376] .)

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. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita [(2004) 1 SCC 271] , SCC para 21.)

31. Yet again in Karnataka Board of Wakf v. Govt. of India [(2004) 10 SCC 779] it was observed: (SCC p. 785, para 11)

"Physical fact of exclusive possession and the animus possidendi 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 the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

A Division Bench of this Court in the case of **Des Raj Vs. Bhagat Ram**, (2007) 9 SCC 641 at page 647 in paras-16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28 and 29 has observed as under:

16. We have noticed hereinbefore the factual aspects of the matter which are neither denied nor disputed. Admittedly, the plaintiff-respondent had remained in possession for a long time i.e. since 1953.

17. It may be true that in his plaint, the plaintiff did not specifically

plead ouster but muffosil pleadings, as is well known, must be construed liberally. Pleadings must be construed as a whole.

18. In Devasahayam v. P. Savithramma [(2005) 7 SCC 653] this Court opined: (SCC p. 661, para 20)

"20. The pleadings as are well known must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different considerations on construction of pleadings may arise between pleadings in the mofussil court and pleadings in the original side of the High Court."

19. Only because the parties did not use the terminology which they should have, ipso facto, would not mean that the ingredients for satisfying the requirements of statute are absent. There cannot be any doubt whatsoever that having regard to the changes brought about by Articles 64 and 65 of the Limitation Act, 1963 vis-à-vis Articles 142 and 144 of the Limitation Act, 1908, the onus to prove adverse possession would be on the person who raises such a plea. It is also furthermore not in dispute that the possession of a co-sharer is presumed to be possession of the other co-sharers unless contrary is proved.

20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

21. In a case of this nature, where long and continuous possession of the plaintiff-respondent stands admitted, the only question which arose for consideration by the courts below was as to whether the plaintiff had been in possession of the properties in hostile declaration of his title vis-à-vis his co-owners and they were in know thereof.

22. Mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendant-appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the defendant-appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action therefor would be continuous one. But, it is equally well settled that pendency of a suit does not stop running of "limitation". The very fact that the defendants despite the purported entry made in the revenue settlement record-of-rights in the year 1953 allowed the plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the plaintiff-respondent had been in hostile possession thereof.

23. Express denial of title was made by the plaintiff-respondent in the said suit in his written statements. The courts, therefore, in the suits filed by the defendant-appellants, were required to determine the issue as to whether the plaintiff-respondent had successfully ousted

the defendant-appellants so as to claim title in himself by ouster of his co-owners.

25. The parties went to trial fully knowing their respective cases. The fact that they had been co-owners was not an issue. The parties proceeded to adduce evidences in support of their respective cases. Defendant-appellants, keeping in view of the fact that they had unsuccessfully been filing suit for partition, were also not prejudiced by reason of purported wrong framing of issue. They knew that their plea for joint possession had been denied. They were, therefore, not misled. They were not prevented from adducing evidence in support of their plea.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

27. Mr Dash has relied upon a decision of this Court in Saroop Singh v. Banto [(2005) 8 SCC 330] in which one of us was a member. There is no dispute in regard to the proposition of law laid down therein that it was for the plaintiff to prove acquisition of title by adverse possession.

28. We are also not oblivious of a recent decision of this Court in Govindammal v. R. Perumal Chettiar [(2006) 11 SCC 600 : (2006) 11 Scale 452] wherein it was held: (SCC p. 606, para 8)

"In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case."

29. Yet again in T. Anjanappa v. Somalingappa [(2006) 7 SCC 570] it was held: (SCC pp. 574-75, para 12)

"12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. 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 denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

130. This Court has observed in order dated 01.08.1980 as follows while Second Appeal No. 2585 of 1970 was remanded to the first appellate court:

The title of Sitaram was never before denied by the defendants. Thus title of Sitaram remained untarnished. Under the circumstances articles 65 of the Limitation Act could be applicable and not article 64. The suit was based on title and under Article 65 of the Limitation Act, the adverse possession can mature from the date when the title of the defendant becomes adverse to the plaintiff. I find that stair case, open space and other things shown in the map, which is a part of the plaint and a part of the decree are common. The plaintiff has not been excluded from those common portion by the defendant. For possession being adverse it

was essential that the plff. Should have been denied access to the property. Further the finding that the defendant was residing with Sitaram and was brought up by him and his wife would certainly go to prove a case of implied licence.

131. Learned trial court and the first appellate court have held that sale deed dated 19.02.1920 executed by Bhagwan Das in favour of Sitaram is valid. The defendants were not found co-sharers of disputed house by both the courts. Article 64 provides for claim based on previous possession, whereas, Article 65 provides for claim based on title. Primarily, the defendants claimed that they are co-sharers of the disputed house. In alternative they claimed that they have perfected their title, because they are in uninterrupted continuous possession of disputed portions of house for more than twelve years. The provisions of Article 142 of Act, 1908 are *pari materia* to provisions of Article 64 of Act, 1963 and the provisions of Article 144 of Act, 1908 and Article 65 of Act of 1963 prescribed period of limitation for claim based on adverse possession is more than twelve years. Although, Article 65 comprises provisions of Article 136, 137, 138, 140, 141 and 144 of Act, 1908. The Article 136, 137, 138, 140, 141 and 142 are not applicable to the facts and circumstances of the present case.

132. The provisions of Article 144 of Act of 1908 and Article 65 of Act of 1963 prescribes period for adverse possession is the same, i.e., more than twelve years. Therefore, provisions of Article 144 of Act, 1908 and Article 1965 are *pari materia* in this regard.

133. On perusal of aforesaid provisions and analyzation and appreciation of both the parties, it reveal that possession over portion of disputed house (227-A and 227-C) was permissive possession/ license, Dargahi and his family entered in the disputed house on the basis of implied permission/ license. Therefore, the defendants/ appellants could not in any way perfected their title regarding disputed property. The plaintiffs are the exclusive owner of the disputed house and the defendants are not the co-sharers. The defendants are compelled to enter in shoes of their ancestors Bhagwan Das.

134. On the basis of exposition of law propounded by Hon'ble Apex Court the defendants were having burden of proof to plead and prove facts of adverse possession claimed by them. They are unable to prove these facts. They cannot take inconsistent plea of adverse possession along with their claimed title being co-sharers of disputed house as held by Division Bench of Hon'ble Supreme Court in the case of **Arundhati Mishra (Smt) Vs. Sri Ram Charitra Pandey, (1994) 2 SCC 29 at page 32, contradictory plea of adverse possession cannot be taken by defendants claiming owner of the disputed property.**

A Single Judge of this Court in the case of **Girish Chandra Singh Vs. Sheo Nath (supra)** in paras-34 and 35 of its judgment has observed as under:

34. 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 v. Sabitri Bera. [JT 2009 (10) SC 538.]

35. In Gautam Sarup v. Leela Jetly, [(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.

A Division Bench of Hon'ble Supreme Court in the case of **Arundhati Mishra (Smt) Vs. Sri Ram Charitra Pandey**, (1994) 2 SCC 29 at page 32 in para-4 of its judgment has observed as under:

4.The question in this case is whether the plea of adverse possession sought to be set up by the respondent could be permitted to be raised. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. *It is his own case that he came into possession of the suit house in his own right and remained in possession as an owner. The appellant is only benamidar. Therefore, his plea is based on his own title. He never denounced his title nor admitted the title of the appellant. He never renounced his character as an owner asserting adverse possession openly to the knowledge of the appellant and the appellant's acquiescence to it. Thereafter, he remained in open and peaceful possession and enjoyment to the knowledge of the appellant without acknowledging/or acquiescing the right, title and interest of the appellant. The plea of adverse possession, though available to the respondent, was never raised by him. Only on receipt of the first notice he denied title of the appellant and made it known to him for the first time through the reply notice got issued by him. Even then the plea of adverse possession was not raised in the written statement. No explanation for the belated plea was given. Even assuming that the reply dated March 15, 1971 constitutes assertion of adverse possession, the limitation would start running against the appellant only from March 15, 1971 and not earlier. The suit was filed in 1978 within 12 years. Under these circumstances, the High Court is not justified in permitting the respondent to raise the plea of adverse possession. It is made clear that we are not expressing any opinion on merits. The judgment of the High Court is set aside and the matter is remitted to the High Court for disposal on merits according to law. The appeal is allowed but without costs.*

135. Learned counsel for appellants has vehemently argued while quoting the statement of P.W.1-Durga Prasad that Durga Prasad has stated before the trial court that he handed over portion of house to Dargahi, when he was already residing in the house. He has also stated that he gave portion of house on license to Dargahi.

136. On the basis of this statement positive interpretation can be made that since Dargahi was uncle of Durga Prasad and P.W.2-Mehraji and P.W.3-Bhaiyaram were called by him to request P.W.1-Durga Prasad for giving him permission/ license. It may be probable that P.W.1 gave permission/ license to D.W.3-Dargahi to reside in the disputed portion of house because his house was going to fell down and was in dilapidated condition. P.W.1, P.W.2 and P.W.3 witnesses have proved this fact that it was month of *Jeth* or Asaadh of the year 1955. It is not a damaging statement of P.W.1-Durga Prasad against the plaint version that disputed portion of house was given to Dargahi on his request.

137. As far as defendants relied upon the fact that on the basis of death certificate of Harish Chandra it can be inferred that Dargahi was residing with his family already from the year 1953 or even prior to

this year it will not go against the plaintiffs, because death certificate does not disclose House No. 618/ 620 of locality Parkinsganj. The appellant, Krishna Chandra, instituted partition suit No. 35 of 1998 and details of two houses situated in locality of Parkinsganj were mentioned in plaint of the said suit.

138. Therefore, now defendants cannot claim that Harish Chandra died in the disputed portion of the house in the year 1953. On the other hand, this Court has observed vide order dated 01.08.1980 and 16.12.2004 specifically that by mere residing in the disputed portion of house it will not go to prove adverse possession of the defendants and they are obliged to plead and prove this fact specifically when their possession became adverse to the plaintiffs' title.

139. D.W.3 has also accepted that plaintiff, Durga Prasad, is receiving rent from tenants of aforesaid house. He never received rent from tenants of aforesaid house. It is pertinent to mention here that the entry/ access of plaintiffs in disputed house was never restricted/ prohibited from common portions of disputed house. Defendants are unable to prove and plead specifically that when and at which time possession of defendants of disputed portions of house became adverse to title of plaintiffs.

Substantial question of law cannot be formulated only to appreciate any piece of evidence.

A Division Bench of Hon'ble Apex Court in the case of **State of Kerala Vs. Mohd. Kunhi, (2005) 10 SCC 139 at page 139** in paras-2 & 5 of its judgment has observed as follows:

2. From the perusal of the impugned judgment it is clear that the High Court in a way has reappreciated the evidence on record and reversed the concurrent findings recorded by the two courts below going beyond the scope of Section 100 of the Code of Civil Procedure.

5. Having considered the submissions made by the learned counsel for the parties and looking to the reasons recorded by the trial court as well as the first appellate court, we have no hesitation in holding that the High Court committed an error in reversing the concurrent findings of fact recorded by the two courts below by reappreciating the evidence placed on record. In fact, no substantial question of law did arise for consideration before the High Court. The substantial question of law formulated by the High Court at the time of admitting the appeal, in our view, again touches the appreciation of evidence in relation to Exhibits A-2 to A-4. We do not think it necessary to record detailed reasons again as we agree with the reasons recorded by the first appellate court in rejecting the case of the plaintiff having regard to Exhibits A-2 to A-4 and the other documentary and oral evidence. Hence, the appeal is allowed. The impugned judgment is set aside. No costs.

140. On the basis of exposition of law of Hon'ble Apex Court mentioned above, substantial question of law cannot be formulated only to appreciate and analyze a piece of evidence/ documentary evidence.

141. On the basis of above discussion, I found following facts and circumstances, which were also analyzed by the first appellate court:

(i) D.W.3 has accepted in his cross-examination that his father Bhagwan

Das expired in the year 1924. His father executed sale deed dated 19.02.1920 in favour of his brother Sitaram of his half share. No mutation in Nagar Palika is available during period 19.02.1920 up to 1924 in favour of Bhagwan Das. Name of Sitaram was mutated and he paid taxes of Nagar Palika.

(ii) D.W.3 has also admitted that he was brought up from his age six months by Sitaram and his wife Smt. Mera after death of his mother in 1916. He has also stated that he resided with Sitaram and Smt. Mera in their house situated in locality Pratapganj. D.W.1, D.W.2 and D.W.3-defendant-Dargahi have stated that D.W.3 separated himself 23-24 years ago before the year 1969-1970; when their statements were recorded before the trial court. The first appellate court has considered these statements and observed this period comes in the year 1945.

(iii) D.W.3 has stated that he never paid taxes of Nagar Palika and never challenged title of plaintiffs regarding disputed house. The plaintiffs and their ancestors Sitaram and Bindeshwari paid taxes of house to Nagar Palika. Earlier, Sitaram was recorded in records of Nagar Palika and afterwards Bindeshwari was recorded up to 1955 in these records.

(iv) D.W.3 has stated in his examination-in-chief that under mutual understanding he resided in disputed house after separation from plaintiff's family. D.W.3 was not recorded even in the period 1945-1955 in record of Nagar Palika. The evidence of D.W.1, D.W.2 and D.W.3 is not acceptable in this regard. It is pertinent to mention here that P.W.1, P.W.2 and P.W.3 have proved that D.W.3-Dargahi was residing in house situated at Majorganj. The statement of P.W.1, P.W.2 and P.W.3 is corroborated by evidence of P.W.4-Ram Gulam and D.W.2-Ganesh Prasad in this regard.

(v) P.W.1, P.W.2 and P.W.3 have also proved that disputed portion of House No. 618/ 620 was given to D.W.3-Dargahi on license in the month of Jeth or Asaadh in the year 1955. This fact is corroborated by record of Nagar Palika of the year 1955, in which, D.W.3 is recorded against portion 227-A and 227-C in column of possession.

(vi) There is admission of appellant, Krishna Chandra that two houses of family were situated in locality Parkinsganj according to his plaint instituted for partition of four houses of family of plaintiffs and defendants. **This fact has been suppressed by defendants in their written statements.** Therefore, death certificates of Bhagwan das (1924) and Harish Chandra (1953) cannot be connected with disputed house No. 618/ 620 of Parkinsganj. The finding in this regard has been recorded by first appellate court in correct perspectives. D.W.3 had not been recorded in 1953 in record of Nagar Palika.

(vii) The statement of D.W.3-Dargahi in respect of the "mutual understanding" to reside in disputed house at the point of his separation from plaintiffs family, squarely covers under "implied permission" and "permissive possession". The same fact has been held by the first appellate court and observed by this Court while passed the order dated 01.08.1980 and 16.12.2004.

(viii) The defendants are claiming ownership of half share on the basis of sale deed of 1919 and pleaded that sale deed dated 19.02.1920 was sham and fictitious documents. They are not able to prove to be co-sharer of disputed house and sale deed dated 19.02.1920 has been found valid by the first appellate court as well as by this

Court. The defendants are not entitled to plead inconsistent plea of adverse possession, because, they were claiming themselves co-sharers of disputed house.

(ix) The first appellate court has recorded finding in correct perspectives that possession of defendants on disputed portion 227-A and 227-C is "permissive possession" based on "implied permission/ license" given by plaintiffs. Hence, defendants have not perfected their title on the basis of alleged adverse possession. They are liable to be dispossessed/ evicted from the disputed portion of House No. 618/ 620 situated in locality Parkinsganj of Sultanpur City.

(x) D.W.3 has also accepted that plaintiff, Durga Prasad, is receiving rent from tenants of aforesaid house. He never received rent from tenants of aforesaid house. It is pertinent to mention here that the entry/ access of plaintiffs in disputed house was never restricted/ prohibited from common portions of disputed house. Defendants are unable to prove and plead specifically that when and at which time possession of defendants of disputed portions of house became adverse to title of plaintiffs.

142. For the sake of arguments, if it may be accepted that the defendants were residing in the year 1953 as claimed by them that Harish Chandra, S/o Dargahi expired in the disputed portion of the house, in this regard, it is pertinent to mention here that defendants are unable to prove their possession on the disputed portion prior to 1953 and from the year 1953 up to institution, present suit was well within 12 years of prescribed period for adverse possession, because suit was instituted in the court of Munsif (South), Sultanpur on 22.08.1963.

143. The findings of first appellate court regarding implied permission/ license for occupying the disputed portion of house on behalf of plaintiffs is recorded on the basis of oral as well as documentary evidence. It cannot be said that the impugned judgment dated 26.09.2007 is against the evidence available on record or inadmissible evidence or no evidence. Therefore, substantial question of law No. 2 is hereby decided against the appellants.

144. On the basis of above discussions and exposition of law quoted by me and relied upon by learned counsel for respondents, the appellants are unable to plead and prove their plea of adverse possession perfecting their title regarding disputed portion of the disputed house. The first appellate court has rightly decreed the suit of plaintiffs by recording finding based on oral as well as documentary evidence adduced by plaintiffs in correct perspectives. The expositions of law relied upon by the learned Senior Counsel on behalf of defendants, does not apply to the facts and circumstances of the present case and does not extend any benefit to the appellants.

145. The present second appeal lacks merit. The judgment dated 26.09.2007 is liable to be upheld. Accordingly affirmed and the appeal is hereby dismissed with costs.

146. Interim order dated 25.05.2009, granted earlier, stands vacated.

147. The copy of judgment along with record of first appellate court, trial court and executing court be transmitted for further action and compliance.

(2020)07ILR A213
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Second Appeal No. 1079 of 2019

Smt. Sujata Gandhi ...Appellant
Versus
Sh. S.B. Gandhi ...Respondent

Counsel for the Appellant:
Sri T. Islam, Sri Jatin Sahgal

Counsel for the Respondent:
Sri Anil Kumar Srivastava, Sri J.B. Singh

Civil Law - Substantial Question of law - Domestic Violence Act, 2005: Sections 2(s), 17, 26 - CPC: Order 1 Rules 3,9 and 10 - It is a settled law that a substantial question of law arises only out of pleadings and judgments of the lower court. In the present case, there was no pleadings with respect to the impleadment of husband as a necessary defendant or even a party to the suit for the for seeking decree of eviction filed against the daughter-in-law. Even in appeal before the lower appellate court, this ground was not taken. (Para 16)

(a) Words & Phrases - Shared Household - After considering the definition of shared household as provided under Section 2(s) of the Act, 2005 the appellant daughter-in-law can be evicted without seeking decree of eviction against son with whom she had moved on 1st floor of the suit property after marriage of the son of the plaintiff with the appellant. (Para 38)

(b) The Court observed that the property did not belong to husband Amit Batra nor it was a joint family property of which Amit Batra is a member. It is exclusive property of mother (plaintiff), hence cannot be a 'shared household'. (Para 25)

The Court under similar circumstances where son, husband of the defendant has left the house and started residing somewhere else, had held the status of defendant being that of a licensee she had no right to reside in the house after cancellation of the license. Therefore, the house in question cannot be treated a shared household. (Para 35)

(c) Impleadment of parties - Joinder & Non-Joinder of Necessary Parties - CPC: Order 1 Rule 10(2) The plaintiff in a suit being *dominus litis*, may choose the person against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. (Para 20)

It is only under the provision of Rule 10 (2) a discretion is exercised by the court either on application of either of the parties or suo moto if it deems fit that any party is a necessary or proper part to the suit. Thus, in a suit for eviction or injunction, it is the discretion of the plaintiff to choose the person against whom he does not seek any relief. (Para 24)

Second Appeal Rejected. (E-10)

List of cases cited:-

1. Kavita Gambhir Vs Hari Chand Gambhir and another (2009) 162 DLT 459 *(distinguished)*

2. Neetu Rana Vs St. of U.P. (2016) 94 ACC 408 *(distinguished)*

3. Nishant Sharma Vs St. of U.P. 2012 (78) ACC 328 *(distinguished)*

4. Subhash . & ors. Vs Shivani 2016 (4) RCR (Civil) 21

5. Prabhakaran S. Vs St. of Kerala 2009 (1) KLJ 278

6. Roma Rajesh Tiwari Vs Rajesh Dinanath Tiwari Writ Petition No. 10696 of 2017

7. Preeti Satija Vs Raj Kumari AIR 2014 Delhi 46

8. B.P. Achala Anand Vs Appi Reddy & anr. (2005) 3 SCC 313 *(distinguished)*

9. Harbans Lal Mailik Vs Payal ILR 2010 (6) Delhi 625

10. S.R. Batra Vs Taruna Batra (2007) 3 SCC 169 *(followed)*

11. Virendra kumar & anr. Vs Jaswant Rai & anr. RSA No. 46 of 2011

12. Kanhaiya Lal & anr. Vs Nathi Lal RSA No. 27 of 2017

13. Shumita Didi Sandhu Vs Snajay Singh Sandhu & ors. 2007 (96) DRJ 697

14. Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari (2014) 5 SCC 312

15. Sri Chunnilal Vs Meta Sons Ltd. Vs Century Spinning and Manufacturing Company Ltd. AIR 1962 SC 1314

16. Mumbai International Airport Private Limited Vs Regency Convention Centre and Hotels Private Limited and ors. 2010 (7) SCC 417

17. Singh Bhatia Vs Kiran Kant Robinson & ors. 2019 AIR (SC) 3577

18. Kasturi Vs Uyyamperumal (2005) 6 SCC 733

19. Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors. 2020 (1) ARC 381

20. Girish Kumar Vs St. of Mah. (2019) 6 SCC 647

21. Pamm Development (Pvt.) Ltd. Vs St. of W.B. (2019) 8 SCC 112

22. B.P. Achala Anand Vs S Appi Reddy & anr. (2005) 3 SCC 313

23. Vimlaben Ajitbhai Patel Vs Vatslaben Ashokbhai Petal and ors. (2008) 4 SCC 649

24. Richa Gaur Vs Kamal Kishore Gaur 2020 (1) AWC 667

25. Vaishali Abhimanyu Joshu Vs Nanashaib Gopal Joshi (2017) 14 SCC 373 *(distinguished)*

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Jatin Sahgal, learned counsel for the appellant and Sri J.B. Singh, learned counsel for the respondent.

2. The present appeal has been filed for setting aside the judgment and decree dated 19.9.2019 and 23.9.2019 passed by the Additional District Judge, Court No. 13, Ghaziabad in Civil Appeal No. 63 of 2017 (Sujata Gandhi vs. S.B. Gandhi) and judgment and decree dated 8.3.2017 and 22.3.2017 passed by Civil Judge (S.D.), Ghaziabad in Original Suit No. 907 of 2014 (S.B. Gandhi vs. Smt. Sujata Gandhi).

3. Necessary facts shorn of details are that the appellant was married with the plaintiff's son namely, Vijay Gandhi on 29.4 .1998 and two children born out of this wedlock. In the year 2013 Vijay Gandhi, son of the plaintiff deserted the appellant and thereafter filed a divorce petition under section 13 of the Hindu Marriage Act. One NCR/FIR was lodged at police station Link Road, Ghaziabad by the plaintiff against the appellant. According to the plaint case the plaintiff is owner of House Number A-242, Surya Nagar, Ghaziabad. After marriage of his son he permitted his son and the defendant to live on the first floor of his house. It is alleged that he is old and his wife is also old and is handicapped. The defendant started harassing the plaintiff and his wife. Under such circumstances the plaintiff asked his son to vacate the house along with the defendant. His son Vijay Gandhi left the suit property and started living somewhere else with the defendant, however, after sometime she came back and forcibly

occupied the suit property and thereafter the defendant refused to vacate the house. As such, the suit for eviction of the defendant was filed. The case of the defendant is that she never left the matrimonial house and is continuously living in the same.

4. I have heard learned counsel for the parties at length.

5. I find that the arguments of learned counsels for the parties have been appropriately noted in the order dated 19.11.2019 when the appeal was admitted and substantial question of law was framed by this court, which is quoted as under; respondents.

This second appeal has been filed under section 100 of CPC being aggrieved by judgment and decree dated 19.9.2019 and 23.9.2019 passed by Additional District Judge, Court No. 13, Ghaziabad in Civil Appeal No. 63 of 2017, Sujata Gandhi Vs. S.B. Gandhi, affirming the judgment and decree passed by the Civil Judge (S.D.), Ghaziabad in OS No. 907 of 2014, S.B. Gandhi Vs. Sujata Gandhi on 8.3.2017 asking the present appellant-defendant before the Trial Court to evict the suit property situated at A-242, Surya Nagar, Ghaziabad.

Counsel for the appellant submits that it is an admitted position that father-in-law of the present appellant namely S.B. Gandhi filed a suit without impleading his son Vijay Gandhi as party. It is submitted that appellant's marriage was solemnized with the plaintiff's son namely Vijay Gandhi on 29.4.1998 and two children born out of this wedlock on 23.4.2004 and 8.3.2007. In the year 2013 Vijay Gandhi deserted the appellant and thereafter has filed a petition seeking dissolution of marriage under section 13(1) (ia) and Section 13 (I) (ii) of Hindu Marriage Act, 1955 in Delhi. An NCR/FIR was lodged at police station Link Road, Ghaziabad by the plaintiff against the appellant stating that Vijay Gandhi had left the suit property and the appellant is still living in the suit property. It is submitted that in the year 1998 the appellant in absence of Vijay Gandhi, who married him, was allowed to stay on the first floor of the suit property. Merely Vijay Gandhi left the suit premises will not made that appellant has lost interest in share and shared household.

Counsel for the appellant has drawn attention of this court to Section 2(s) read with Section 17 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act, 2005) which defines "shared household', and submits that in absence of the son being a party, household in which she had first stepped in alongwith her husband will continue to be her share household, and she cannot be evicted unless Vijay Gandhi, her husband and son of the respondent is not impleaded as party.

In support of his contention, counsel for the appellant has placed reliance on the judgment of the Delhi High Court as referred in Case of Kavita Gambhir Vs. Hari Chand Gambhir & Anr as reported in [(2009) 162 DLT 459]. He has also placed reliance on the judgment of the High Court of Allahabad in case of Nishant Sharma Vs. State of UP [[2013(1) RCR (Civil) 410 and in case of Neetu Rana Vs. State of UP [2016 (2) ACR 1797].

On the other hand, counsel for the respondent has placed reliance on the judgment of Supreme Court in case of S.R.

Batra and another VS. Tarun Batra (Smt) [(2007) 3 SCC 169)] wherein Hon'ble Supreme Court in para-29 has taken note of provisions contained in Section 2(s) of Act, 2005 and has expressed its opinion that a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question neither belongs to Amit Batra nor was it taken on rent by him nor it is a joint family property of which the husband Amit Batra is a member. Therefore, it is exclusive property of Appellant - 2, mother of Amit Batra. Hence it cannot be called a "Shared household". Similarly reliance has been placed on the judgement of Delhi High Court in case of Virendra Kumar and another Vs. Jaswant Rai and another in RAS NO. 46 of 2011, wherein in para-7, it has been noted that even if defendant had raised money to construct the rooms on the first floor, it would not be by itself give any right to the defendant in the land beneath as raising of the super structure would not have made him owner of the suit land.

Reliance has also been placed on the judgment of Delhi Court in case of Kanhaiya Lal and another Vs. Nathi Lal in RSA No 27 of 2017, wherein in para-15 and 16, it has been observed that merely because out of love and affection father-in-law has permitted his son and daughter-in-law to live on the first floor, does not mean that he is in some legal obligation to provide shelter and accommodation to disobedient son or daughter-in-law who are source of continued nuisance for him. In para 16, it has been observed that none of the statute dealing with the rights of a married women, be it the Hindu Marriage Act, 1955; The Hindu Succession Acct, 1956; The Hindu Adoption and Maintenance Act, 1956, the Protection of Women from Domestic Violence Act, 2005 confer any right of maintenance including residence, for the married women as against the parents of her husband. Law permits a married woman to claim maintenance against her in-laws only in a situation covered under Section 19 of the Hindu Adoption and Maintenance Act, 1956. Thus, the contention raised on behalf of the appellant that the Civil Court has no jurisdiction in view of the provisions of the Family Court Act, 1984 and the Protection of Women from Domestic Violence Act, 2005 is liable to be rejected.

Reading such observations of the Delhi High Court, counsel for the respondent-plaintiff submits that there is no infirmity in the concurrent findings of two courts and that need not be disturbed in the second appeal.

As this stage, counsel for the appellant submits that in all of the judgments stated above, husband was impleaded. In fact, in case of Kanhaiya Lal and others it has been observed that the status of son and daughter-in-law i.e. appellant could not be more than that of a licencee and that status also come to end when they were served a notice to vacate the suit property. The suit property being self-acquired, the respondent-plaintiff is under no obligation to maintain his son and daughter-in-law in view of the legal position enunciated in the decision of SR. Batra Vs. Taruna Batra (Supra). Therefore, these judgments have not refered the earlier judgments of Delhi High Court as referred in case of Kavita Gambhir & Another, they turn on their own facts.

After hearing counsel for the parties, this second appeal is admitted on the following substantial questions of law.

(I) Whether as per definition of shared house hold provided under section 2(s) of the Act, 2005 appellant daughter-in-law can be evicted without seeking a decree of eviction against son with whom she had admittedly moved on the first floor of the suit property after marriage of the son of the plaintiff with appellant?

(ii) As parties are represented, no fresh notice is required.

Heard Civil Misc. Stay Application No/I.A. No 1 of 2019. It is directed that till the next date of listing execution of impugned judgments and decree dated 19.9.2019 and 23.9.2019 passed by Additional District Judge, Court No. 13, Ghaziabad in Civil Appeal No. 63 of 2017, Sujata Gandhi Vs. S.B. Gandhi, affirming the judgment and decree passed by the Civil Judge (S.D.), Ghaziabad in OS No. 907 of 2014, S.B. Gandhi Vs. Sujata Gandhi on 8.3.2017 shall remain stayed.

With the consent of parties, list this case on 22.1.2020 for final hearing."

6. Elaborating the arguments, attention was also drawn to Section 17 of the Act, 2005. Arguments were mainly advanced on the term "shared household". Learned counsel for the defendant-appellant has placed reliance on the judgments rendered in the cases of **Kavita Gambhir vs. Hari Chand Gambhir and another (2009) 162 DLT 459** (Paragraphs 6, 18, 19, 20, 23 and 24), **Neetu Rana vs. State of U.P. (2016) 94 ACC 408 (Paragraphs 5 and 7), Nishant Sharma vs. State of U.P. 2012 (78) ACC 328** (Paragraphs 4, 10, 12, 13 and 14), Subhash and others vs. Shivani 2016 (4) RCR (Civil) 21 (Paragraphs 3, 5, 8 and 9), **Prabhakaran S. Vs. State of Kerala 2009 (1) KLJ 278** (Paragraphs 14, 19, 20 and 23), **Roma Rajesh Tiwari vs. Rajesh Dinanath Tiwari (Writ Petition No. 10696 of 2017)** Paragraphs 13, 17 and 18, **Preeti Satija vs. Raj Kumari AIR 2014 Delhi 46, B.P. Achala Anand Vs. S. Appi Reddy and another 2005 (3) SCC 313** (Paragraphs 5, 32 and 33), **Harbans Lal Malik vs. Payal Malik ILR 2010 (6) Delhi 625** (Paragraphs 17, 18 and 19) and **S.R. Batra vs. Taruna Batra 2007 (3) SCC 169** (Paragraphs 7, 21 and 29).

7. Much emphasis was given on the definition of "shared household" and it was submitted that the house in question is a matrimonial house of the petitioner and is a shared house as after marriage the defendant came to reside in the house in question along with the husband and even if her husband has left the house, she cannot be evicted from the house unless the husband is impleaded and his license is also revoked by the plaintiff. It was further submitted that in any case the impleadment of husband is necessary so that the defendant may be able to show that the house in question is a shared house on cross-examining the husband. The crux of the submission is that unless husband is impleaded in a case seeking decree of eviction filed against the daughter-in-law, she cannot be evicted as she had moved in the suit property after marriage of the son of the plaintiff with the defendant.

8. On the other hand, submission of learned counsel for the plaintiff-respondent is that in view of the judgment of S.R. Batra (supra) submission is that the plaintiff is admittedly exclusive owner of the house in question and therefore, the same cannot be said to be a shared house therefore, the question of impleading husband does not arise and in any case his

impleadment is not at all necessary. He further summits that the ownership of the plaintiff was not disputed and was infact, rather admitted in the written statement filed by the defendant and the objection regarding non-impleadment of husband was never raised before the courts below and therefore, the same now cannot be raised. He has placed reliance on the judgments rendered in the cases of V**irendra Kumar and another vs. Jaswant Rai and Another RSA No. 46 of 2011** decided on 10.3.2011 (Paragraph 7), **Kanhaiya Lal and another vs. Nathi Lal RSA No. 27 of 2017** decided on 16.2.2017 (paragraphs 15 to 18), **Shumita Didi Sandhu vs. Snajay Singh Sandhu and others 2007 (96) DRJ 697, S.R. Batra and another vs. Taruna Batra 2007 (3) SCC 169** (Paragraphs 22, 23, 24, 25, 26, 27, 29, 30).

9. In rejoinder, learned counsel for the defendant-appellant submitted that the arguments on Act, 2005 were not available at the time when judgment in **S.R. Batra (supra)** was rendered and therefore, the same is distinguishable and no reliance can be placed by the plaintiff on the same. He further summits that in any case wife cannot be rendered roofless in such a situation, therefore, impleadment of husband is necessary.

10. Before proceeding further it would be relevant to take note of Section 2 (s), Section 17 and Section 26 of the Domestic Violence Act, 2005, which are quoted as under:-

"2. (s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equality and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

17. Right to reside in a shared household- (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

26. Relief in other suits and legal proceedings- (1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that that aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

11. It would also be appropriate to note the provisions of Order 1 Rules 3, 9 and 10 CPC, which are quoted as under:-

"**3. Who may be joined as defendants**- All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transaction is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.

9. Misjoinder and non-joinder- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

[Provided that nothing in this rule shall apply to non-joinder of a necessary party.]

10. Suit in the name of wrong plaintiff- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties- The court may at any stage of the proceeding, 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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1988 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

12. Insofar as the argument that the house in question is a "shared household" is concerned, it is relevant to note that in paragraph 1 of the plaint it has been categorically stated by the plaintiff that he is owner in possession of residential House Number 8-242, Surya Nagar, Ghaziabad U.P. through registered sale deed. Suffice to note that in the written statement filed by the defendant-appellant in paragraph 1 the

contents of paragraph 1 of the plaint had been categorically admitted. No additional plea has been taken in the written statement disputing the aforesaid fact. Therefore, any evidence, documentary or oral, cannot be seen in absence of a pleading. A reference may be made to the judgment rendered by Hon Supreme Court in the case of **Arikala Narasa Reddy versus Venkata Ram Reddy Reddygari (2014) 5 SCC 312 w**herein it has been held that party has to plead necessary and material facts; party cannot go beyond pleadings; in absence of pleadings, evidence cannot be considered; relief not founded on pleadings should not be granted, paragraph 15 whereof is quoted as under:-

"15. This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been "materially affected". There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (Vide: Ram Sewak Yadav v. Hussain Kamil Kidwai & Ors AIR 1964 SC 1249; Bhabhi v. Sheo Govind and others AIR 1975 SC 2117; and M. Chinnasamy v. K.C. Palanisamy and others (2004) 6 SCC 341)."
(emphasis supplied)

13. Even otherwise, a concurrent finding has been recorded by both the courts below that the defendant has even failed to demolish the case of the plaintiff or to prove her argument/assertion that the plaintiff is not the exclusive owner of the house. On the strength of judgments relied on by learned counsel for the defendant-appellant, much emphasis was given that unless the husband is impleaded in the suit she did not have the opportunity to prove that the plaintiff was not the exclusive owner of the house in dispute and that the same is a shared house. This argument is entirely misconceived in as much as exclusive ownership of the plaintiff was admitted and the plea of husband being a necessary party was never raised before the courts below.

14. A reference may be made in this regard to the judgment of Hon Supreme Court in **S.R. Batra (supra)**, paragraph 7, 21, 22, 23, 24, 25, 26, 27, 29, 30 are quoted as under:-

"7. It is admitted that Smt. Taruna Batra had shifted to her parent's residence because of the dispute with her husband. She alleged that later on when she tried to enter the house of the appellant no.2 which

is at property No. B-135, Ashok Vihar, Phase-I, Delhi she found the main entrance locked and hence she filed Suit No. 87/2003 for a mandatory injunction to enable her to enter the house. The case of the appellants was that before any order could be passed by the trial Judge on the suit filed by their daughter-in- law, Smt. Taruna Batra, along with her parents forcibly broke open the locks of the house at Ashok Vihar belonging to appellant No. 2, the mother- in-law of Smt. Taruna Batra. The appellants alleged that they have been terrorized by their daughter-in-law and for some time they had to stay in their office.

21. It may be noticed that the finding of the learned Senior Civil Judge that in fact Smt. Taruna Batra was not residing in the premises in question is a finding of fact which cannot be interfered with either under Article 226or 227 of the Constitution. Hence, Smt. Taruna Batra cannot claim any injunction restraining the appellants from dispossessing her from the property in question for the simple reason that she was not in possession at all of the said property and hence the question of dispossession does not arise.

22. Apart from the above, we are of the opinion that the house in question cannot be said to be a `shared household' within the meaning of Section 2(s) of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the 'Act'). Section 2(s) states:

"2. (s) `shared household` means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household".

23. Learned counsel for the respondent Smt. Taruna Batra has relied upon Sections 17 and 19 (1) of the aforesaid Act, which state:

"17. (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

19. (1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order--

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman".

24. Learned counsel for the respondent Smt. Taruna Batgra stated that the definition of shared household includes a household where the person aggrieved lives or at any stage had lived in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household.

25. We cannot agree with this submission.

26. If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grand parents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in the all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.

27. It is well settled that any interpretation which leads to absurdity should not be accepted.

29. As regards Section 17 (1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a `shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of appellant No. 2, mother of Amit Batra. Hence it cannot be called a `shared household'.

30. No doubt, the definition of `shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society."(emphasis supplied)

15. In the above quoted paragraph no. 29 the Hon'ble Supreme Court has considered the aspect of shared household

and has held that where the plaintiff is the exclusive owner, it cannot be called a "shared household". Even the claim of the wife for alternative accommodation against the plaintiff was rejected and was held that it can be claimed only against the husband and not against the in-laws or other relatives.

16. Thus, in the opinion of the Court, on facts, the question much less the substantial question of law, whether son was liable to be impleaded in the present case, does not arise. Needless to say that his (son) impleadment as defendant would be necessary if decree of eviction is to be passed against him. It is the settled law that a substantial question of law arises only out of pleadings and judgments of the lower court. It is needless to point out that in the present case, as already noticed, there was no pleading in this regard that husband is a necessary defendant or even a party to the suit and is liable to be impleaded. Even in appeal before the lower appellate court, this ground was not taken. Therefore, in view of the settled law on this ground no such substantial question of law arise or can be raised in the present second appeal. Thus, insofar as the present second appeal is concerned, the same has no merits.

17. Since the second appeal has already been admitted on the substantial question of law already framed in the order dated 19.11.2019, which has already been quoted above, the arguments raised by the learned counsel for the parties are being considered to answer the question in view of the observations made and as held by Hon'ble Supreme Court in **Sri Chunilal Vs. Mehta Sons Ltd versus Century Spinning and Manufacturing Company Ltd AIR 1962 SC 1314,** paragraph 6 whereof 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)

18. In this regard it would be relevant to notice the provisions of Order 1 Rule 3 and Rule 9 CPC, which have already been quoted above. It is not in dispute that the husband is not residing in the suit property and has left the house. It is also not being questioned that if parents permit his son to live in their house he would be a licensee. If his wife is also living with him, she would also be a licensee. Order 1 Rule 3 CPC clearly provides "Who may be joined as defendants." It is needless to point out that in the present case or say, where the son has left and is not residing in the suit property, no relief is being or is claimed against him. Since he is not living in the suit property, question of filing a separate suit or which may attract any common question of law or fact would also not arise. Therefore, he cannot be said to be a

necessary party to the litigation between the plaintiff and the defendant.

19. Order 1 Rule 9 CPC is a provision on mis-joinder and non-joinder of parties, which clearly provides that no suit shall be defeated by reason of mis-joinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. However, the Proviso was added by Act 104 of 1976, Section 52, w.e.f 1.2.1977 that provided that nothing in this rule shall apply to non-joinder of a necessary party. Thus, for a suit to be bad for non-joinder of party, it has to be proved that the party who has not been impleaded in the suit is a necessary party without whose presence the suit cannot be decided.

20. The principle of "*dominus litis"*, is too well-known in regard to impleadment of parties, which clearly provides that the plaintiff in a suit being *dominus litis*, may choose the person 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. However, this general rule is subject to provisions of Order 1 Rule 10 (2) CPC, which provides for impleadment of proper or necessary parties. Even in the aforesaid provision, a discretion is left with the court to implead a party at any stage of proceedings, either upon or without the application of either parties and on such terms strike out name of a person improperly impleaded or joined and add the name of a person who ought to have been joined whether as plaintiff or defendant or whose presence will be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be addressed.

21. In view of the settled law it is needless to say that a necessary party is a person who ought to have joined as a party in whose absence no effective decree could be passed at all by the court. A proper party is a party who may not be a necessary party but would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit though he may not be a person in whose favour or against whom a decree is to be made. Thus, it is clear that it cannot be said that by operation of law a particular person or category is a necessary party, unless statutorily provided in this regard. A reference may be made in the judgment of Hon'ble Supreme Court in Mumbai I**nternational Airport Private Limited Vs. Regency Convention Centre and Hotels Private Limited and others 2010 (7) SCC 417**. Paragraphs 13, 14 and 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)

22. 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)

23. 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.**

24. This may be looked from another angle also. Order 1 Rule 9 CPC provides for mis-joinder and non-joinder of parties. Up till 1977 when a proviso was added by Act 104 of 1976 vide Section 52 w.e.f. 1.2.1977, the Rule 9 provided that no suit shall be defeated by reason of mis-joinder or non-joinder of parties. It is only by the aforesaid amendment proviso was added to the effect that "Provided that nothing in this rule shall apply to non-joinder of necessary party." Thus, it is clear that in an original

suit, unless statutorily provided, it is the discretion of the plaintiff to implead any person as party or who may be joined as defendants for that matter. It is only under the provision of Rule 10 (2) a discretion is exercised by the court either on application of either of the parties or suo moto if it deems fit that any party is a necessary or proper party to the suit. Requirements of holding a person as a necessary party are strict in nature and as already held by Hon'ble Supreme Court in the above quoted judgment, 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. Thus, in a suit for eviction or injunction, it is the discretion of the plaintiff to choose the person against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. In some of the enactments it is provided that in a suit certain party or parties are necessary party. Even in those cases, generally speaking, it has been statutorily provided and the necessary party is usually either the State or any other statutory authority and not a private person. For example, Section 176 (i) of the UP Zamindari Abolition and Land Reforms Act, 1950 (Section 116 of the UP Revenue Code, 2006) provides that a bhumidhar may sue for division of his holding. Sub-section (2) provides that to every such suit the Goan Sabha concerned shall be made a party. As already discussed, plaintiff is the dominus litis in a suit between the private parties, however, it has been left on the discretion of the court under Order 1 Rule 10 (2) CPC that the court may strike out or add parties. Even this discretion is to be exercised judiciously and not merely on whims or on mere asking of a party. A satisfaction is to be recorded by the court that addition of a party is for effectual and complete adjudication of all the questions involved in the suit. Thus, in a suit for eviction or injunction it is the discretion of the plaintiff to choose the person against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief.

25. Coming back to the definition of "shared household" as provided under Section 2 (s) of the Act, 2005 it would be relevant to come back to the judgment of Hon'ble Supreme Court rendered in the case of S.R. Batra (supra) which has already been extensively quoted above where in the said definition was considered and the argument for learned counsel for the respondent (wife) that definition of shared household includes a house where the person aggrieved lives or at any stage had lived in a domestic relationship was specifically considered and rejected. On facts also it was found that the property did not belong to husband Amit Batra nor it was a joint family property of which Amit Batra is a member. It is exclusive property of mother, hence cannot be called a 'shared household'. Hence claim of daughter-in-law was rejected. A reading of the said judgment, subject to correction, prima facie, reflects that husband was not a party to the suit and it was held that the claim for alternative accommodation can only be made against the husband and not against the in-laws or other relatives. The said observation clearly leads to the conclusion that the answer to the substantial question of law framed in the present second appeal would be in negative. In other words, even in view of the definition of shared house as provided under Section 2 (s) of the Act, 2005 daughter-in-law can be evicted without seeking decree of eviction against the son with whom she had admittedly moved in the suit property after marriage of the son of the plaintiff.

26. Much emphasis was given by learned counsel for the appellant on **Ambika Jain (supra)** where a direction was given to the trial court to implead the husband in all cases where they have not been impleaded by invoking its suo moto powers under Order 1 Rule 10 CPC. I have already discussed the provisions of Order 1 Rule 3, Rule 9 and Rule 10 CPC. For the reasons already discussed above coupled with the judgment of Hon'ble Supreme Court in the case of **S.R. Batra (supra)**, I am in respectful disagreement with **Ambika Jain (supra)**. There is yet another reason. In case, any such direction is given by the higher court to the trial court to invoke it suo moto powers under Order 1 Rule 10 CPC, in my opinion, the discretion left on the trial court under the provisions of Order 1 Rule 10 CPC would no longer remain a discretion left with the trial court. It is the golden rule of interpretation that when language used in statute is unambiguous, plain and simple, provision is required to be read as it is and nothing is to be added. A reference may be made to **Girish Kumar Vs. State of Maharashtra (2019) 6 SCC 647** (paragraph 9). In **Pam Development (Pvt.) Ltd. Vs. State of West Bengal (2019) 8 SCC 11**2 (paragraphs 19 and 20) it was held that a provision under a statute cannot be read in such a manner that it takes away the power conferred under that statute. Therefore, this provision of Order 1 Rule 10 CPC has to be read in its plain and simple language and cannot be read in such manner that it takes away the discretion left with the court. It would amount to legislate if husband, in general is directed to be impleaded as a necessary party whereas impleadment of a particular category (i.e. husband/son) party in general can only be provided by statutory provision. The settled law on the principle of dominus litis would also be compromised if any such general direction is issued or if it is held that husband, in such proceedings, is a necessary party and has to be impleaded or added as one of the defendant and/or relief of eviction against him must also be claimed to make the suit maintainable. In other words, if husband is not a necessary party then how claiming relief of eviction against him can also be held to be mandatory? Clearly, answer is in negative.

27. Learned counsel for the appellant has also placed reliance on the judgment of Hon'ble Delhi High Court in the case of **Kavita Gambhir (supra)**. In that case the question of joint Hindu property was raised. In the present case, concurrent finding has been recorded by both the courts below that the defendant has even failed to demolish the case of the plaintiff or failed to prove her argument/assertion that the plaintiff is not the exclusive owner of the house. In **Kavita Gambhir (supra)** it was not the case of the plaintiff that they have terminated the arrangement with their son under which he was occupying their property with his family. In the present case, the son along with his wife, the defendant and children was asked to go out and thus, his license was cancelled and he in fact, left the house and started living elsewhere. Moreover, in **Kavita Gambhir (Supra)** although a reference has been made to **S.R. Batra (supra)**, however, why the said judgment is not applicable or is distinguishable has not been discussed at all and the judgment is strongly based on the judgment of Hon'ble Supreme Court in B.P. Achala **Anand Vs. S Appi Reddy and another (2005) 3 SCC 313** which was rendered on 11.2.2005 whereas the Act, 2005 came into force on 26.10.2006. Thus, said judgment cannot be a ground for answering the substantial question of law

raised in the present case. Even otherwise, in view of the judgment of Hon'ble Supreme Court in **S.R. Batra (supra)** I am not inclined to place reliance on the same.

28. Learned counsel for the defendant-appellant has placed reliance on B.P. **Achala Anand (supra)**, however, for the reasons stated above no reliance can be placed on the same as at that point of time the Act, 2005 was not in force and was obviously not available for consideration before the Court.

29. Insofar as the judgments in **Neetu Rana (supra)** and **Nishant Sharma (supra)** are concerned, suffice to note that they have been rendered in proceedings arising out of criminal proceedings and turn on their own facts.

30. In view of the judgment of Hon'ble Supreme Court in the case of **S.R. Batra (supra)** I am not inclined to place reliance on the other judgments of Hon'ble High Courts. I, however, find that in most of the judgments interpretation has been given on a sympathy or sentiments showed towards the daughter-in-laws either by observing that for proving that suit property is a "shared household" or not, the daughter-in-law needs the presence of son as one of the parties and it has also been provided that till the litigation between the plaintiff and the defendant, in other words, the in-laws and the daughter-in-law, accommodation is to be provided by the parents till any order is made against the son. In my opinion, this sentiment is misplaced and misconceived. In this regard a reference may be made to the judgment of Hon'ble Supreme Court in the case of **Vimlaben Ajitbhai Patel vs. Vatslaben Ashokbhai Patel and others 2008 (4) SCC 649,** wherein the provisions of the Act, 2005 and the provisions of Hindu Adoptions and Maintenance Act, 1956 have also been considered, paragraph 21, 22, 27, 28, 48 and 49 whereof are quoted as under:-

"21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.

22. Wholly un-contentious issues have been raised before us on behalf of Sonalben (wife). It is well settled that apparent state of affairs of state shall be taken a real state of affairs. It is not for an owner of the property to establish that it is his self-acquired property and the onus would be on the one, who pleads contra. Sonalben might be entitled to maintenance from her husband. An order of maintenance might have been passed but in view of the settled legal position, the decree, if any, must be executed against her husband and only his properties could be attached therefor but not of her mother-in-law.

27. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the

legislation extends to joint properties in which the husband has a share.

28. Interpreting the provisions of the Domestic Violence Act this Court in S.R. Batra vs. Taruna Batra : (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating :

"17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in- law or mother-in-law.

18. Here, the house in question belongs to the mother- in-law of Smt Taruna Batra and it does not belong to her husband Amit Batra. Hence, Smt Taruna Batra cannot claim any right to live in the said house.

19. Appellant 2, the mother-in-law of Smt Taruna Batra has stated that she had taken a loan for acquiring the house and it is not a joint family property. We see no reason to disbelieve this statement."

48. Sympathy or sentiment, as is well known, should not allow the Court to have any effect in its decision making process. Sympathy or sentiment can be invoked only in favour a person who is entitled thereto. It should never be taken into consideration as a result whereof the other side would suffer civil or evil consequences.

49. We are at a loss to understand as to on what premise such a contention has been raised. If we accept the contention of the learned counsel the same would mean that we send the old couple to jail or deprive them of their lawful right of a valuable property and/or ask them to meet obligations which statutorily are not theirs. Such a direction, in our opinion, should also not be passed, keeping in view the conduct of the 3rd respondent. She not only filed a large number of cases against her in-laws, some of which have been dismissed for default or withdrawn but also have been filing applications for cancellation of their bail on wholly wrong premise."

(emphasis supplied)

31. In the above noted decision the Hon'ble Supreme Court has also held that it is not for the owner of the property to establish that it is a self-acquired property and the onus would be on the person who pleads contra. Thus, the law is clear that for these reasons it cannot be held that in view of the provisions of the Act, 2005 a suit for eviction of daughter-in-law is not maintainable without seeking decree of eviction against the son. In paragraph 28 as quoted above the Hon'ble Supreme Court has quoted the judgment of **S.R. Batra (supra)** with approval. In fact considering the conduct of the daughter-in-law, apart from passing other orders cost was also imposed on her.

32. In view of the above, I observe that the argument of learned counsel for the defendant-appellant that the arguments on Act, 2005, were not available at the time when judgment in **S.R. Batra (supra)** was rendered is patently misconceived. In fact, I find it to be misleading, contrary to the record and somewhat against the majesty of the Hon'ble Supreme Court. Moreso, when the same was relied on by Hon'ble Supreme Court in the case of **Vimlaben Ajitbhai Patel (supra)** with approval.

33. Learned counsel for the plaintiff-respondents has placed reliance on

judgment of the High Court of Delhi in **Shumita Didi Sandhu (supra)** wherein **S.R. Batra (supra)** was relied on, paragraph 17 and relevant extract of 18 whereof are quoted as under:-

"17. Learned Counsel for the plaintiff, however, submitted that the Supreme Court did not go to the extent of holding that daughter-in-law had no right to stay in the house belonging to parents-in-law even if it was a matrimonial home. His submission was that in the aforesaid judgment it was not decided as to whether the house in question was a matrimonial home and if it was so, whether daughter-in-law had right to stay in the said house or not. He pleaded that in the absence of authoritative pronouncement on this aspect by the Supreme Court, decision in the case of Taruna Batra (supra) should prevail. I am afraid and it is difficult to read the judgment of the Supreme Court in the manner learned Counsel for the plaintiff wants me to read. Ratio of this case is clear, namely, the daughter-in-law has no legal right to stay in the house which belongs to her parents-in-law.

18. Legal position which emerges is that the husband has legal and moral obligation to provide residence to his wife. Therefore, wife can claim right of residence against her husband. If the house in question where she lived after marriage belongs to her husband, it would certainly be treated as matrimonial home. Likewise, if the house in question belongs to HUF in which her husband is a coparcener, even that can be termed as matrimonial house. However, where the house belongs to parents-in-law in which husband has no right, title or interest and they had allowed their son along with daughter-in-law to stay in the said house, it would be a permissive possession by the daughter-in-law but would not give any right to her to stay in the said house. What would be the position if there is no dispute between the husband and wife but the parents of the husband do not want their son and son's wife to stay in the said house for certain reasons. Obviously, their son, who is only a permissive licensee and staying in the house with his wife cannot claim legal right therein. If son cannot claim any such right against his parents to stay in a house which belongs to his parents, his wife obviously would also have no case to claim such a right. That is how I read the principle of law laid down by the Supreme Court in the aforesaid judgment. In the present case, even otherwise, there is a serious dispute as to whether the suit property can be termed as matrimonial house. In the plaint it is nowhere stated by the plaintiff that she was living in the suit property with the defendants even before their marriage. From the pleadings it prima facie appears that she lived in the suit property from the date of marriage till 1996 when she moved out to defense Colony in May 1996 (para 5 of the plaint). She returned to the suit property in March 1999 and reading of the plaint gives an impression that she remained there till 2004 when she was forced to leave the house allegedly to avoid any harm to her life and limb. In her statement recorded on 19.1.2006 it is admitted by her that she took a flat in Mumabi during the period December 1999 till November 2000. The lease of the said flat was in her name and she stayed there for 3-4 months. Her husband also joined her. There is no complaint by her that she was forced to leave the matrimonial house in 2004. The plaintiff has also admitted that she re-entered the house on 10.10.2004. Though she states that she opened the first floor with her keys, it is strange that she

had to come in the dead of night, i.e. at 2:30 am for re-entering the house as she had admitted the timings of her so-called entry. It prima facie lends some credence to the allegations of the defendants that she (plaintiff) forced her entry into the house of the defendant Nos. 2 and 3 at odd hours." (emphasis supplied)

34. Learned counsel for the plaintiff-respondent has placed reliance on judgment dated 16.2.2017 of the High Court of Delhi in **Kanhaiya Lal (supra)** wherein **S.R. Batra (supra)** was relied on, paragraph 15, 16, 17 and 18 whereof are quoted as under:-

"15. The respondent/plaintiff is the original allottee of the suit property. Merely because out of love and affecftion, he has permitted his son and daughter-in-law to live on the first floor, does not mean that he is under some legal obligation to provide shelter and accommodation to disobedient son or daughter-in-law who are source of continuance nuisance for him. After the mutual relationship of love, respect and trust vanished and the stage reached to the extent that criminal case has been filed against the father-in-law, he is under no statutory obligation to provide residence to his son and daughter-in-law and also suffer at their hands.

16. None of the Statute dealing with the rights of a married woman in India, be it The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Adoption and Maintainance, 1956; The Protection of Women from Domestic Violence Act, 2005 confer any right of maintenance, including residence, for the married woman as against the parents of her husband. Law permits a married woman to claim maintenance against her in-laws only in a situation covered under Section 19 of the Hindu Adoption and Maintenance Act, 1956. Thus, the contention raised on behalf of the appellant that the Civiil Court has no jurisdiction in view of the provisions of The Family Court Act, 1984 and The Protection of Women from Domestic Violence Act, 2005 is liable to be rejected.

17. It is settled law that in second appeal the High Court cannot set aside concurrent finding of fat given by the Courts below unless a substantial question of law is raised. Where there is a clear enunciation on a question of law the appellant cannot claim that the case involves substantial question of law.

18. I completely agree with the conclusions arrived at by the Courts below as law is now well settled by the judgment of the Supreme Court in S.R. Batra's case (Supra). The status of the respondent/plaintiff being that of the allottee of the plot, he is residing there in his capacity as a allottee, the status of his son and daughter-in-law i.e. appellants herein could not be more than that of a licencee and that status also came to an end when they were served with a notice to vacate the suit property. The suit property being self-acquired, the respondent/plaintiff is under no legal obligation to maintain the his son - appellant No. 1 and daughter-in-law appellant No. 2 in view of the legal position enunciated in the decision S.R. Batra vs. Taruna Batra (Supra)."

(emphasis supplied)

35. Under the similar circumstances where son, husband of the defendant had left the house and started residing somewhere else, it was held by me in **Richa Gaur versus Kamal Kishore Gaur**

2020 (1) AWC 667 that the status of defendant being that of a licensee she had no right to reside in the house after cancellation of the license. In the facts and circumstances of the case it was also held that house in question cannot be treated a shared household. Reliance was placed on S.R. Batra (supra) and **Vimlaben Ajitbhai Patel (supra)**, which have already been quoted above extensively. Further reliance was placed on decision of Hon'ble Single Judge dated 29.9.2015 passed in First Appeal No. 76 of 2014 (Smt Sunita Vs. Smt Ramawati and another). Paragraph 12, 13, 14, 15 and 16 of **Richa Gaur (supra)** are quoted as under:-

"12. It would also be relevant to extract the relevant paragraphs of Smt. Sunita (supra) which are quoted as under:-

"The appellant is daughter-in-law of the plaintiff who has filed a suit for mandatory injunction against her son and daughter-in-law. The defendant no. 1, son of the plaintiff did not appear in the suit and hence the suit had proceeded ex-parte against defendant no. 2. The claim made by defendant no. 2 was that soon after marriage, she came to this house and as such she has a right to reside therein. The plaintiff cannot evict her from her marital home.

.....

More so, in view of the findings recorded by the court that the defendant no. 2 was a mere licencee and has no right to reside in the house in question after cancellation of licence by the original owner i.e. plaintiff.

The challenge to this finding on issue no. 1 cannot be accepted for the reason that a woman has a right to reside in the house of her husband after marriage. She has no claim on the house of her father-in-law or mother-in-law. The property in dispute was self acquired property of her father-in-law and the plaintiff had inherited the said house after death of her husband. On account of mis-deeds of defendant no. 2, the relations between mother-in-law and daughter-in-law have strained and therefore, the plaintiff has asked the defendants to leave her house. The plaintiff is a 70 years old lady and she cannot be subjected any more physical or mental harassment at the hands of the defendant, her son and daughter-in-law."

13. Thus, not only what has been held in S.R Batra (supra) as held by Constitutional Bench in Uma Devi (supra) referred to in Vimlaben Ajitbhai Patel (supra), if any relief is granted to the defendant-appellant it would be a case of misplaced sympathy in favour of the defendant, who had already filed several cases including criminal case against the old age plaintiff and other family members.

14. In the present case, undisputedly, the house in question belongs to the father, the plaintiff and he had divested his son from his property and admittedly, the son (husband of the defendant) is not living in the house.

15. In view of the discussion as made hereinabove, it is clear that the house, which admittedly belongs to the plaintiff, cannot be treated as a shared house in the facts and circumstances of the case and as such the status of defendant, as rightly held by the trial court, would be merely of a licensee, whose license stood terminated by the original owner i.e. the plaintiff herein.

As such she has no right to reside in the house in question after cancellation of the license by the original owner i.e. the plaintiff herein.

16. In case of Smt. Sunita (supra) the plaintiff was about 70 years old lady and in the present case also the plaintiff was aged about 68 years in the year 2017 when the suit was filed and as such the ratio of the said judgment applies with full force."(emphasis supplied)

36. Learned counsel for the appellant has half-heartedly referred to the judgment of **Vaishali Abhimanyu Joshi Vs. Nanasahib Gopal Joshi (2017) 14 SCC 373** to contend that a counter claim of the daughter-in-law for residence can be considered in a case of eviction instituted against her.

37. I have gone through the judgment. I find that the same is on a different issue and is not related to the substantial question of law framed in the present case. In that case the question before the Hon'ble Supreme Court was as to whether the counterclaim filed by the appellant seeking right of residence in accordance with section 19 of the 2005 Act in a suit filed by the respondent, (her father-in-law) under the Provincial Small Cause Courts Act, 1887 is entertainable or not and whether the provisions of the 1887 Act bar entertainment of such counterclaim? It was held that the counterclaim filed by the defendant-appellant (daughter-in-law) was entertainable by Judge, Small Causes Court. Therefore, I find that the same is on a different issue and is not related to the substantial question of law framed in the present case.

38. Coming back to the facts of the present case, I find that in view of the specific assertion made in the plaint that the plaintiff is the exclusive owner of the suit property, the contents of paragraph 1 of the written statement clearly indicates that it is an admitted case of the defendant-appellant in his written statement that the suit property is the exclusive property of the plaintiff. It is also not in dispute that the plaintiff is an old person and his wife, the mother-in-law of the defendant, is a handicapped person with one amputated leg. It is also not in dispute that a divorce petition is pending between the son (husband) and the defendant and the assertion / pleadings of the plaintiff that his son has left the house and is living elsewhere could not be dislodged by the defendant-appellant and there is a concurrent finding of fact by both the courts below, which do not appear to be perverse in nature so as to require any interference by this court. No objection was ever raised before the trial court that husband is a necessary party. This was not even the ground before the lower appellate court. As such this cannot be raised at this stage. As already observed a substantial question of law arises out of pleadings and the judgments of the lower court. As such, on this ground no such substantial question of law can be raised at this stage in the present appeal. Even otherwise, the answer to the substantial question of law framed in the present case is that even considering the definition of shared household as provided under Section 2 (s) of the Act, 2005, the appellant daughter-in-law can be evicted without seeking decree of eviction against son with whom she had moved on the 1st floor of the suit property after marriage of the son of the plaintiff with the appellant.

39. There is yet another aspect of the matter that a futile relief cannot be granted by the court. It is not in dispute that the assertion / pleadings of the plaintiff that his son has left the house and is living elsewhere could not be dislodged by the defendant-appellant and there is a concurrent finding of fact by both the courts below, which does not appear to be perverse in nature so as to require any interference by this court. Thus, to say that the appellant daughter-in-law cannot be evicted without seeking decree of eviction against son with whom she had moved on the 1st floor of the suit property after marriage of the son of the plaintiff with the appellant, would be a futile relief claimed against the son who is not residing in the house in question, therefore, cannot be granted by the court.

40. In fact, generally speaking, it is unfortunate that a doctor son had to leave the house because of strained relationship between husband and wife leaving his parents in old age, particularly, his mother being in such physically challenged condition and even if doctor son is visiting them periodically to look after them, the same is being projected as a negative activity on his part. It is not even the case of the defendant-appellant that she is looking after them. In fact, the plaint case is contrary to the same. Therefore, it would be even more unfortunate that under such circumstances the parents are compelled to seek decree of eviction against the son when the real relief is, in fact, being sought against the daughter-in-law who has made the life of in-laws miserable.

41. Thus, for the discussion made hereinabove, the answer to the substantial question of law framed in the present case is in negative and is that even considering the definition of shared household as provided under Section 2 (s) of the Act, 2005, the appellant daughter-in-law **can be** evicted without seeking decree of eviction against son with whom she had moved on the 1st floor of the suit property after marriage of the son of the plaintiff with the appellant.

42. With the observations made hereinabove present appeal stands **dismissed.**

(2020)07ILR A234
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No. 442 of 2020

Kapil Deo Prasad ...Petitioner
Versus
Joint Director of Education & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Ojha, Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
C.S.C., Sri Akhilesh Kumar Singh, Sri Ashok Kumar Pandey, Sri Ramesh Chandra Dwivedi, Sri Samarath Singh, Sri Sankalp Narain, sri G.K. Singh, Sri H.P. Sahi

A. Education/Service Law – U.P. Intermediate Education Act, 1921:- Sections 16G (3)(a), 16G (5), 16G (7) Disciplinary proceedings – Reversion - Reduction in emolument - - Petitioner was reverted by Manager of institution on the same day vide impugned order dated 26.12.2019, after receiving direction to take action against the petitioner. It was held that provisions of

S.16G (5) and S.16G (7) have not been followed by the Manager of the institution, while passing the impugned order. (Para 7, 8)

B. U.P. Secondary Education Service Selection Board Act, 1982- Section 21 - The impugned order passed by the Manager of the institution certainly amounts to reduction in emolument. This could not have been done by the manager of the institution without approval under Section 21 of Act, 1982. (Para 10)

Writ Petition allowed. (E-4)

Precedent followed:

1. Hem Lata Agrawal Vs District Inspector of Schools, 2003 (2) AWC 939 (Para 11)

Petition challenges orders dated 24.12.2019, 26.12.2019 and 26.12.2019, passed by Joint Director of Education, 7th Region Gorakhpur, District Inspector of Schools, Kushinagar and Authorised Controller, Janta Inter College Sohsa, Mathiya, Kushinagar respectively.

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

1- Heard Sri R.K.Ojha, learned Senior Advocate assisted by Sri Assisted by Sri Adarsh Singh, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1 to 4 and Sri G.K. Singh, learned senior Advocate assisted by Sri Ashok Kumar Pandey, learned counsel for respondent no.7. None appears on behalf of respondent no.6.

2- This writ petition has been filed praying for the following relief:

"I. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 24.12.2019, 26.12.2019 and 26.12.2019 passed by respondent no. 1,2 and 3 (Annexure No.7, 8 and 9 to the writ petition respectively).

II. Issue a writ, order or direction in the nature of mandamus restraining the respondents from interfering in the functioning of the petitioner on the post of Principal of the Janta Inter College Sohsa, Mathiya, Kushinagar under the impugned orders dated 24.12.2019, 26.12.2019 and 26.12.2019 passed by respondent no. 1,2 and 3 (Annexure No.7, 8 and 9 to the writ petition respectively) and to give all service benefits including salary for the post of Principal."

3- On 26.2.2020, this Court passed the following order:

"Second Supplementary Affidavit filed today, is taken on record.

Learned standing counsel representing the respondent nos. 1 to 4 and the learned counsel for respondent nos.5 and 6 pray for and are granted a week's time to file counter affidavit. In the counter affidavit, the State respondents shall also disclose the authority of law under which the impugned order has been passed. They shall also file a copy of the inquiry report, if any.

Put up in the Additional Cause List on 5.3.2020."

4- Despite afore-quoted order dated 26.2.2020, the respondents have not filed any counter affidavit.

5- Standing Counsel on instructions states that in the matter of the F.I.R. No.0722 of 2019 dated 18.12.2019, under Sections 419, 420, 406 and 506 I.P.C., Police Station Kasya, lodged by the committee of management against the petitioner, the police has submitted final

report dated 6.2.2020 before the concerned court, which has not yet been accepted.

6- By the impugned order dated 24.12.2019, the Joint director of Education, 7th Region, Gorakhpur, has directed the District Inspector of Schools, Kushinagar, to take action against the petitioner working as Officiating Principal on the basis of a complaint received against him. The impugned order dated 26.12.2019 was passed by the District Inspector of Schools, Kushinagar in consequence to the order of the Joint Director of Eduction, Gorakhpur, whereby the District Inspector of Schools, Kushinagar, has directed the committee of management to take action against the petitioner. On the same day, the impugned order dated 26.12.2019 was passed by the manager of the respondent no.3 institution, whereby he initiated disciplinary proceeding against the petitioner and reverted him.

7- Despite being asked and also despite the afore-quoted order dated 26.12.2020, none of the respondents have shown authority of law to pass the impugned orders. **By the impugned order dated 26.12.2019, the petitioner has not been suspended instead he has been reverted**. The committee of management has power to initiate the disciplinary proceeding and to suspend the petitioner under Section 16G (5) of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the 'Act'). Sub section (3)(a) of Section 16G of the Act, provides that **no Head of Institution or teacher shall be suspended by the Management, unless in the opinion of the management, the charges against him are serious enough to merit his dismissal, removal or reduction in rank; or his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him; or any criminal case for an offence involving moral turpitude against him is under investigation, inquiry or trial. Section 16G(7) provides for approval/disapproval of suspension.**

8- Undisputedly, the provisions of Section 16G (5) and 16G (7) of the Act, have not been followed by the Manager of the institution, while passing the impugned order dated 26.12.2019.

9- Section 21 of U.P. Secondary Education Service Selection Board Act, 1982 provides **that the management shall not, except with the prior approval of the Board, dismissed any teacher or remove him from service, or serve on him any notice of removal from service, or reduce him in rank or reduce his emoluments or withhold his increment for any period whether temporarily or permanently and any such thing done without such prior approval shall be void.**

10- The impugned order passed by the Manager of the institution certainly amounts to reduction in emolument. This could not have been done by the manager of the respondent no.3 institution without approval under Section 21 of Act 1982. Therefore, the impugned order dated 26.12.2019 passed by the respondent no.3 is wholly without authority of law.

11- Section 21 of the Act, 1982 has also been similarly interpreted by this Court in **Hem Lata Agrawal v. District Inspector of Schools, 2003(2) AWC 939.** Relevant portion of the judgment in the case of Hem Lata Agrawal (supra) is reproduced below:

"9. The question whether the reversion of a teacher, who was appointed on temporary adhoc basis as Principal

under Section 18 of the Act would amount to reduction in rank so as to require approval of the Board need not be considered here as whether or not it is a reduction in rank, it is clear that it amounts to reduction of emoluments. The petitioner is entitled to the salary for the post of Principal and reverting her, as a Lecturer would undoubtedly affect the emoluments to which she is entitled. The language of Section 21 of the Act is wide enough to cover within its scope the order impugned in this writ petition."....

10. Even though the promotion as Principal on purely ad hoc basis may not be treated as a promotion in rank, the substantive post of the teacher being still that of lecturer but it is clear that Section 18 creates a right in favour of the senior most teacher to be given a promotion on adhoc basis as Principal and a person appointed on the basis of such seniority cannot be divested of the right to work as ad hoc Principal unless the statute so provides and no such provision has been brought to my notice. In such cases, if the ad hoc Principal commits any misconduct such as is alleged in the present case in the counter-affidavit, the power of suspension can be invoked."

12- For all the reasons afore-stated, the impugned order dated 24.12.2019 passed by the Joint Director of Education 7th Region, Gorakhpur (respondent no.1), impugned order dated 26.12.2019 passed by the District Inspector of Schools, Kushinagar (respondent no.2) and the impugned order dated 26.12.2019 passed by the Authorised Controller, Janta Inter College, Soha, Mathiya, Kushinagar are hereby quashed. Liberty is granted to the respondent no.3 to proceed against the petitioner in accordance with law, if lawfully required.

13- With the aforesaid observations, the writ petition is **allowed.**

(2020)07ILR A237
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ A No. 2838 of 2020

Raj Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shrawan Dwivedi, Sri Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C.

A. Education/Service Law – Appointment/Recruitment - Sanjay Gandhi Post Graduate Institute Act, 1983: Section 12; Sanjay Gandhi Post Graduate Institute First Rules, 2011 – No investigation into allegation of malafide can be directed by the Court if detail of the particulars and supporting documents are not brought on the record by the petitioner – Petitioner has made wild and reckless allegations of malafides without any particular or materials. (Para 10 to 16)

B. Scope of judicial review in respect of selection and appointment of holder in office which carries high responsibility in the administration - In the absence of the statutory provision, the administrative authority is under no legal obligation to record reason in support of its decision. The function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative. In the academic matters, the Courts have a very limited role particularly when no malafides have been alleged against the experts constituting the selection committee. It would normally be prudent, wholesome and safe for the Courts to

leave the decisions to the academicians and experts. (Para 20, 23)

No illegality or irregularity whatsoever has been committed by the selection committee in respect of selection and appointment of the respondent No. 3 on the post of Director of the Institution in question. (Para 25)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Tara Chand Khatri Vs Municipal Corporation of Delhi, (1997) 1 SCC 472 (Para 11)

2. Utkal University Vs Dr. Narsinghcharan Sarangi, (1999) 2 SCC 193 (Para 12)

3. Purushottam Kumar Jha Vs State of Jharkhand and others, (2006) 9 SCC 458 (Para 13)

4. M.VS Thimaiah Vs UPSC, (2008) 2 SCC 119 (Para 14)

5. University of Mysore etc. Vs C.D. Govinda Rao and Anr., AIR 1965 SC 491 (Para 18)

6. R.S. Dass Vs Union of India, AIR 1987 SC 593 (Para 20)

7. National Institution of Mental Health Vs Dr. K. Kalyana Raman, AIR 1992 SC 1806 (Para 20)

8. UPSC Vs Hiranyalal Dev, AIR 1983 SC 1069 (Para 20)

9. The Chancellor Vs Dr. Bijayanand Kar, (1994) 1 SCC 169 (Para 21)

10. B.C. Mylarappa Vs Dr. Venkatasubbaiah, (2008) 14 SCC 306 (Para 22)

11. Basavaiah (Dr.) Vs Dr. H.L. Ramesh, (2010) 8 SCC 372 (Para 23)

12. Transport and Dock Workers Union Vs Mumbai Port Trust, (2011) 2 SCC 575 (Para 24)

Petition challenges order dated 25.01.2020, issued by Visitor, Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard counsel for the petitioner and learned Standing Counsel appearing on behalf of respondent no. 2.

2. The petitioner has preferred the present writ petition with the following prayers:-

"I) issue a writ, order or direction in the nature of certiorari, quashing the order dated 25.1.2020 issued by the Visitor, respondent no. 2 (Annexure : 5 to the writ petition) ;

ii) issue a writ, order or direction in the nature of certiorari, quashing the entire proceeding of the Committee which recommended the panel of names to the Visitor for filing up the post of Director, Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow pursuant to the advertisement dated 5.10.2019 (Annexure : 1 to the writ petition) ;

iii) issue a writ, order or direction in the nature of mandamus, directing respondents to reconstitute the Committee under section 12 of the Act of 1983, complete the proceeding of recommendation of the panel of names of three persons by the committee and appointment by the Visitor on the post of Director, Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow strictly in accordance with law ;

iv) issue such other appropriate writ, order or direction in the nature of writ, which this Hon'ble Court may deem fit and proper in the circumstances of the case

to which the petitioner be entitled under law ; and

v) award costs to the petitioner."

3. Facts in brief as contained in the writ petition are that an advertisement was issued by the Governor of the State inviting applications for appointment of Director, Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow (hereinafter referred to as the SGPGI). The institute in question was constituted under the Sanjay Gandhi Post Graduate Institute Act, 1983 and Rules framed thereunder namely Sanjay Gandhi Post Graduate Institute First Rules, 2011. The petitioner being a fully eligible candidate applied for the post of Director as per the aforesaid advertisement on 15.10.2019. The petitioner is at present working on the post of Vice Chancellor U.P. University of Medical Sciences, Saifai Etawah. The provision for appointment on the post of Director are contained under section 12 of the Act of 1983. The relevant provisions are reproduced below:-

*"**Director 12. (1)** There shall be a Director of the Institute who shall be appointed by the Visitor on the recommendation of a committee consisting of the following members, namely :-*

(a) the President of the Institute;

(b) one person who is a Judge of the High Court at Allahabad to be nominated by the Visitor, who shall also be the Convener of the committee.

(2) The committee constituting under sub-section (1) shall have as Advisers two medical experts to be nominated by the Visitors;

(3) Whenever a vacancy occurs or is likely to occur in the office of Director, the committee constituted in accordance with the provisions of sub-section (1) shall prepare a panel of names of three persons who are in its opinion suitable to hold the said office.

(4) The committee shall forward to the Visitor, the panel of names prepared by it, together with a concise statement showing the academic qualifications and other distinctions of each of the persons included in such panel, but shall not indicate any order of preference.

(5) That Visitor shall appoint the Director out of the panel of names submitted to him under sub-section (4)."

4. In paragraph 8 of the writ petition it is stated that in the selection committee there should be two Medical Experts as adviser nominated by the Visitor. In this regard it is stated that the Medical Experts who were nominated by the Visitor as advisers in the committee are junior to the petitioner. It is further stated that there is no provision under section 12 of the Act of 1983 for taking interview for the post of Director, SPGI. It is further stated in the writ petition that against the provisions of the Act of 1983 the committee interviewed the candidates in the presence of Dr. Rajneesh Dubey who is Principal Secretary, Medical Health & Education, Government of U.P. It is further stated in the writ petition that no person, except the members of the committee is authorized to participate in the meeting but wholly illegally Dr. Rajneesh Dubey actively participated in the proceeding for making recommendation to the Visitor. It is further stated that the petitioner faced the interview on 04.01.2020 though there was no

provision for taking interview for the post of Director, SPGI. Subsequently the aforesaid committee prepared a panel contains names of three persons who were in its opinion suitable to hold the office of Director and thereafter forwarded the names to the Visitor along with concise statement showing the academic qualifications and other distinctions of each of the persons whose names were included in the panel. It is argued that though the petitioner was a highly qualified person but his name was wholly illegally not recommended by the committee to the Visitor.

5. Vide order dated 25.01.2020 issued by the Visitor, Sanjay Gandhi Post Graduate Institute of Medical Sciences/respondent no. 2 appointed professor (Dr.) Radha Krishna Dhiman/respondent no. 3 as Director, SPGI. It is argued by the counsel for the petitioner that the appointment of the respondent no. 3 by the respondent no. 2 is bad in the eyes of law since the petitioner is more meritorious candidate than respondent no. 3.

6. Being aggrieved against the action taken by the respondent no. 2 in respect of appointment of the respondent no. 3 as Director of the Institute, the petitioner has preferred the present writ petition.

7. Although in certain paragraphs allegations of malafide have been made in respect of the selection of respondent no. 3 on the post of Director of the Institute but no document whatsoever has been submitted by the petitioner in support of the allegations made in the writ petition. Further no argument in respect of the malafide in selection of respondent no. 3 whatsoever has been raised by the counsel for the petitioner. Only arguments raised by the counsel for the petitioner before the Court is that the petitioner is more meritorious than respondent no. 3 for selection and appointment on the post of Director of the Institute qua respondent no. 3 as such the entire selection done by the selection committee is bad in the eyes of law.

8. Learned Standing Counsel appearing on behalf of state-respondents argued that selection and appointment of the respondent no. 3 on the post of Director of Institute is as per the provisions contained in law. It is further argued that no documents whatsoever have been brought on record in support of the allegations made against the selection of respondent no. 3, as such those allegations can not be looked into by the Court in the absence of supporting material.

9. Heard counsel for the parties and perused the record.

10. It is well settled law that the Court should refuse to consider the allegations of the malafide if supporting documents are not brought on record in this regard. The burden of establishing malafide is very heavy on the person who alleges it. The Court therefore, should be slow to draw dubious inference from incomplete facts placed before it by the petitioner particularly when the imputations are grave and they are made against the holder of an office which has high responsibility in the administration.

11. The Supreme Court in case of **Tara Chand Khatri Vs. Municipal Corporation of Delhi 1997(1) SCC 472,** has observed that no investigation into allegation of malafide can be directed by

the Court if detail of the particulars and supporting documents are not brought on the record by the petitioner.

12. In the case of **Utkal university vs. Dr. Narsinghcharan Sarangi reported in (1999) 2 SCC 193,** the Apex Court has held that: "allegations of bias must be carefully examined before any selection can be set aside. In the first place, it is the joint responsibility of the entire selection committee to select a candidate who is suitable for the post. When experts are appointed to the committee for selection, the selection is not to be lightly set aside unless there is adequate material which would indicate a strong likelihood of bias to show that any member of selection committee had a direct personal interest in appointing any particular candidate."

13. Similar view was again taken by the Supreme Court in case of **Purushottam Kumar Jha Vs. State of Jharkhand and others, (2006) 9 SCC,458.** The relevant part of the order reads as under:-

"It is well settled that whenever allegations as to mala fides have been levelled, sufficient particulars and cogent materials making out prima facie case must be set out in the pleadings. Vague allegation or bald assertion that the action taken was mala fide and malicious is not enough. In absence of material particulars, the court is not expected to make 'fishing' inquiry into the matter. It is equally well-established and needs no authority that the burden of proving mala fides is on the person making the allegations and such burden is 'very heavy'. Malice cannot be inferred or assumed. It has to be remembered that such a charge can easily be 'made than made out' and hence it is necessary for courts to examine it with extreme care, caution and circumspection. It has been rightly described as "the last refuge of a losing litigant."

14. In the case of **M.V. Thimaiah vs. UPSC, (2008) 2 SCC page 119**, the Apex Court has held that "The allegation of mala fide is very easy to be leveled and it is very difficult to substantiate it, specially in the matter of selection or whoever is involved in the decision making process. People are prone to make such allegations but the courts owe a duty to scrutinize the allegation meticulously because the person who is making the allegation of animus does sometimes mala fide due to his non-selection. He has a vested interest. Therefore, unless the allegations are substantiated beyond doubt, till that time the court cannot draw its conclusion."

15. From perusal of the same it is clear that the law is well settled by the Supreme Court that the Court are refrain themselves from expressing opinion on points not raised or not fully and effectively argued by counsel on either side.

16. Applying the aforesaid principle in the present case we find that the petitioner has made wild and reckless allegations of malafides without any particular or materials.

17. The only argument raised by the counsel for the petitioner before the Court is that the petitioner is more meritorious than respondent no. 3 and as such the selection and appointment of respondent no. 3 is bad in the eyes of law.

18. Before we advert to the submissions on the scope of the judicial review in respect of selection and appointment of holder in office which

carries high responsibility in the administration, following legal authorities are relevant in this regard.

19. In the case of **University of Mysore, AIR 1965 SC 491,** the Constitution Bench of the Supreme Court has laid down as under:-

"Boards of appointments are nominated by the universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about malafides against the experts who constituted the present board; and so, we think, it would normally be wise and safe jt-pil-92-96 & wp-1901-10-os--f.doc for the to leave the decisions of academic matters to experts who are more familiar with the problems they face then the courts generally can be".

20. In the cases of **R.S. Dass v. Union of India, AIR 1987 SC 593, National Institution of Mental Health vs. Dr. K. Kalyana Raman AIR 1992 SC 1806** and **UPSC vs. Hiranyalal Dev AIR 1983 SC 1069**, the Apex Court has held that the principles of natural justice do not require an administrative authority or a selection committee or an examiner to record reasons for the selection or non-selection of a person. In the absence of the statutory provision, the administrative authority is under no legal obligation to record reason in support of its decision. It is held that the function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative.

21. In the case of **The Chancellor Vs. Dr. Bijayanand Kar** reported in **(1994) 1 SCC page 169**, the Apex Court has emphasized that the decisions of the academic authorities should not ordinarily be interfered with by the Courts. Whether a candidate fulfills the requisite qualification or not is a matter, which should be entirely left to be decided by the academic bodies and the concern selection committees which invariably consists on the experts of subjects relevant to the selection.

22. In the case of **B.C. Mylarappa vs. Dr. R. Venkatasubbaiah reported in (2008) 14 SCC page 306** the Apex Court has reiterated that: "this court has repeatedly held that the decisions of the academic authorities should not ordinarily be interfered with by the courts. Whether a candidate fulfills the requisite qualifications or not is a matter which should be entirely left to be decided by the academic bodies and the concerned selection committees, which invariably consist of experts on the subjects relevant to the selection."

23. These principles have been again reiterated and reaffirmed by the Apex Court in the case of **Basavaiah (Dr.) Vs. Dr. H.L. Ramesh (2010) 8 SC 372** wherein it is held that: "it is the settled position that the Courts have to show deference and consideration to the recommendation of an expert committee consisting of distinguished experts in the field. In the academic matters, the Courts have a very limited role particularly when no malafides have been alleged against the experts constituting the selection committee. It would normally be prudent, wholesome and safe for the courts to leave the decisions to the academicians and experts. As a matter of principle, the courts should never make an endeavour to sit in appeal over the decisions of the experts. The courts must realize and appreciate its

constraints and limitations in academic matters."

24. In the case of **Transport and Dock Workers Union vs. Mumbai Port Trust reported in (2011) 2 SCC page 575**, the Apex Court has held that "Excessive interference by the judiciary in the functions of the executive is not proper. In several decisions, we have held that there must be judicial restraint in such matters." It was further held that Judges must maintain judicial self-restraint while exercising the powers of judicial review of administrative of judicial decisions. Adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges' preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the filed of administration while the Court does not. In the administrative matters the Court should, therefore, ordinarily defer to the judgment of the administrators unless the decision is clearly violative of some statutes or is shocking arbitrary.

25. From perusal of the aforesaid judgments it is clear that the parameters of the judicial review are therefore well defined and it is well settled that the court cannot sit in appeal over the decision taken by the experts in academic field or interfere with the decision on specious grounds of malafides or bias. Nonetheless, the judicial restraint does not confer unfettered and unbridled powers on the selection committee to act arbitrarily or illegally in total violations of statutory rules. In such situations, it is within the jurisdiction of the Court to scrutinize the decision-making process and test the decision on the touch stone of illegality, irrationality or procedural impropriety. In so far this case is concerned, from perusal of the facts as narrated above, we are of the opinion that no illegality or irregularity whatsoever has been committed by the selection committee in respect of selection and appointment of the respondent no. 3 on the post of Director of the Institution in question. No material whatsoever has been brought on record neither any argument has been made regarding malafide or bias in respect of the selection of the respondent no. 3. In the absence of the same, no relief can be granted to the petitioner, in so far as the present writ petition is concerned.

26. For the reasons mentioned above, we find that the writ petition lacks merit and is liable to be dismissed.

27. Accordingly the writ petition is dismissed.

28. No order as to cost.

(2020)07ILR A243
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.07.2020

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Service Single No. 3922 of 2020

Sanjay Kumar Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gaurav Mehrotra, Shubham Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Government Servant (Discipline and Appeal) Rules, 1999: -

Rule 4; Constitution of India:- Article 226 – Suspension - It is 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 - Petitioner, who was expected to be a responsible government employee, even had powers to look after finances on behalf of State, was suspended on charges of financial irregularity. Thereafter, he approached this Court by attempting to manoeuvre facts/making false statement of facts. Court finds that the petitioner has purposely concealed relevant facts/made false statements before this Court, and therefore, dismissed the present petition. (Para 13, 14)

Writ Petition dismissed. (E-4)

Precedent followed:

1. K.D. Sharma Vs Steel Authority of India Limited . & ors., (2008) 12 SCC 481 (Para 13)

Petition challenges suspension order dated 31.01.2020.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. The case is taken up through Video Conferencing.

2. Heard Mr. Gaurav Mehrotra, learned counsel for petitioner as well as learned Standing Counsel.

3. This writ petition has come along with Writ Petition (S/S) No.6303 of 2020 (Pushpanjali Mitra Gautam Vs. State of U.P. Thru. Prin. Secy. Transport Lko. and Another) challenging the suspension order dated 31.01.2020 whereby two Assistant Transport Officers were suspended, one being Mr. Sanjay Kumar Tiwari Petitioner in the present petition and other Smt. Pushpanjali Mitra Gautam in the connected case. The suspension is on charges of non deposit of certain amounts collected from time to time in the Government treasury from January, 2018 to June, 2018.

4. The facts would be clear from the two orders of this court, first the interim relief order dated 11.02.2020 in the present petition which reads:

" Heard Shri Gaurav Mehrotra and Shri Shubham Tripathi, learned counsels for petitioner and learned State Counsel appearing on behalf of opposite parties.

Petitioner has challenged order dated 31st January 2020 suspending petitioner from service on charges of momentary embezzlement.

Learned counsel for petitioner has submitted that although the period of momentary embezzlement has been indicated in the impugned order as 23rd January 2018 till 07th June 2018 but petitioner was posted in the said District only on 22nd May 2018 as would be evident from the charge certificate which is annexed to petition. It has also been submitted that petitioner in fact was the one who had brought the aforesaid facts to the knowledge of authority by means of his letter dated 17th January 2019 and it was at his instance that the aforesaid momentary embezzlement was taken cognizance of by authority concerned. Learned counsel has also drawn attention to the letter dated 07th February 2019 written by petitioner with regard to aforesaid fact, which has been acknowledged in the order dated 13th June

2019 suspending Shri Tara Chand clerk concerned. Learned counsel has submitted that after completion of inquiry proceedings against the said Shri Tara Chand, he was visited with minor penalty on account of fact that there was no loss to State Exchequer petitioner.

Learned counsel for petitioner as such has submitted that once the main perpetrator has been punished with minor penalty, at best, though not admitting, petitioner would be liable only for negligence in case found guilty for which major penalty cannot be imposed and therefore in such circumstances, suspension cannot be resorted to in terms of Rule 4 of U.P. Government Servant (Discipline and Appeal) Rules 1999.

Prima facie, submission advanced by learned counsel for petitioner has force for which opposite parties are granted four weeks' time to file detailed counter affidavit. List this case in the week commencing 16th March 2020. In the meantime, operation of impugned order darted 31st January 2020 shall remain stayed."

5. In the petition of Pushpanjali Mitra Gautam upon hearing this Court on 03.03.2020 passed the following order:

"Heard learned counsel for the parties.

By means of this petition, the petitioner has assailed the Office Memo dated 31.01.2020, by means of which the petitioner has been placed under suspension.

Learned counsel for the petitioner has contended that the allegations so levelled against the petitioner is that the amount so collected during the period from 23.01.2018 to 07.06.2018 to the tune of Rs. 9,48,049/- has not been deposited in the Government Treasury while the petitioner was discharging on the post of ARTO (Administration) at that point of time.

Learned counsel for the petitioner has drawn attention of this Court towards para 13 of the writ petition which is being reproduced herein below:

"That Shri Sanjay Kumar Tiwari was posted in Raebareli on the post of ARTO (Enforcement) from dated 01.07.2017 to 21.05.2018 hence it is clear that the dated i.e. 23.01.2018, 24.01.2018, 25.01.2018, 27.01.2018, 29.01.2018, 02.04.2018, 16.05.2018 on which amount from the challan compounding fees was realised in the enforcement section, Sri Sanjay Kumar Tiwari in his capacity of supervising enforcement section was primarily responsible to oversee/supervise ***physically*** *whether amount collected by enforcement clerk Sri Tara Chand who himself was cashier also, has been forwarded from enforcement section Almirah to the administration section cash chest or not. He failed to supervise the movement of the compounding fees realised from enforcement challans to the cash chest."*

On the basis of the aforesaid, learned counsel for the petitioner has submitted that as per the procedure the amount is collected by the ARTO (Enforcement) and as soon as, the said amount is provided to the Office of the ARTO (Administration), the same is deposited in the Government Treasury. Since the amount in question has been recovered from the Almirah of the ARTO

(Enforcement), therefore, as per the learned counsel for the petitioner, the said amount could not have been deposited by the office of the petitioner. He has further submitted that the custodian of the said amount at that point of time was Shri Sanjay Kumar Tiwari who has also been placed under suspension on 31.01.2020 and this Court has passed the interim order on 11.02.2020 staying the suspension order to Shri Sanjay Kumar Tiwari.

As per learned counsel for the petitioner, Shri Sanjay Kumar Tiwari while filing Service Single No. 3922 of 2020 has not disclosed in the writ petition that at that point of time he was discharging the functions of ARTO (Enforcement) and his office was custodian of amount in question.

Learned counsel for the petitioner has further submitted that this Court granted the interim order to Shri Sanjay Kumar Tiwari on 11.02.2020 on the point that Shri Tiwari was not serving on the post of ARTO (Administration) at that point of time. Further, this Court has observed that the main culprit was one Tara Chand(Clerk), who has deposited the entire amount in the Government Treasury on 04.02.2019 and there is no loss to the State Exchequer. Besides the said Tara Chand has been awarded minor penalty.

Learned counsel for the petitioner has submitted that since the main culprit Shri Tara Chand(Clerk) has been awarded a minor punishment and the amount in question has already been deposited in public exchequer, therefore, there is no purpose to place the petitioner under suspension. The enquiry may go on and he shall cooperate with the departmental proceedings.

The matter requires consideration.

Let short counter affidavit be filed within a period of ten days indicating the fact as to whether the amount in question has been received in the office of ARTO (Enforcement), when the petitioner was serving on the post of ARTO (Administration) and if yes, what would be the consequences.

Para 13 of the writ petition shall be replied categorically.

List this case on 17.03.2020 as fresh in the additional cause list along with Service Single No. 3922 of 2020.

If the short counter affidavit as directed above is not filed within stipulated time, the interim relief application of the petitioner may be considered on the next date."

6. Today when the case was taken up, it was specifically put to learned counsel for petitioner in the present writ petition, as to why the fact that Mr. Sanjay Tiwari was working as Assistant Regional Transport Officer (Enforcement) (hereinafter referred to as "ARTO (E)") at Raebareli since 1.7.2017 till 21.5.2018 was not mentioned in the writ petition and why it was falsely stated that he joined at Raebareli only on 22.05.2018. Learned counsel for petitioner submits that petitioner had joined as ARTO (A) on 22.05.2018 and the said fact is stated in the writ petition. He further submits that by supplementary affidavit filed thereafter on 17.03.2020, the factual position was clarified.

7. The court is not satisfied with the reply of petitioner. The supplementary affidavit is filed only after another court had pointed out the misstatements of the petitioner. Petitioner in his writ petition no where states that he was already working as

ARTO (E) at Raebareli since 1.7.2017 and worked till 21.5.2018 and on 22.5.2018 he took charge of the post of ARTO(A), which was relevant for the purposes of the present writ petition. Rather Petitioner's writ petition states otherwise. In paragraph 2 of the writ petition, petitioner states:

"The impugned suspension order dated 31.01.2020 has been passed on the incorrect premise that the petitioner while working as ARTO (A), Rae Bareli from 23.01.2018 till 07.06.2018, neither deposited in the State Treasury nor entered in the Cash Book/Main Cash Book an amount of Rs.9,48,049/- (Rupees Nine Lakhs Forty Eight Thousand Forty Nine). The aforementioned impugned order has been passed without verifying the veracity of the facts stated as the petitioner had joined his duty as ARTO (A) at Rae Bareli on 22.05.2018 itself and had only served for 16 days during the alleged period mentioned in the impugned order."

8. In paragraph 6 and 7 of the writ petition further stated: *"That vide order dated 18.05.2018 issued by the respondent No.2 bearing No.95/2018/1768/30-3-18-07GI/2018 the petitioner was posted as Assistant Regional Transport Officer (Administration) at Rae Bareli, complying with the aforementioned order the petitioner joined as Assistant Regional Transport Officer (Administration) at Rae Bareli on 22.05.2018. Copy of the charge certificate of the petitioner bearing No.203/SaPraSha/ARTO/2018 dated 22.05.2018 is being annexed herewith as Annexure No.2 to this writ petition.*

That it is pertinent to mention here that even before the petitioner was transferred to Rae Bareli, *Cashier/Junior Clerk at the Regional Transport Office, Rae Bareli had on multiple occasions committed grave irregularity of not depositing the official cash in the State Treasury. Apparently, first such irregularity was committed on 23.01.2018, when one Smt. Pushpanjali Mitra Gautam, the predecessor of petitioner was posted as ARTO (A), Rae Bareli, after which the Cashier/Junior Clerk namely Sri Tara Chand failed to deposit the cash in the State Treasury on seven other instances before the joining of the petitioner and on two instances after the joining of the petitioner."*

9. In paragraph 10 of the writ petition he further stated ***"It is noteworthy that the petitioner had only joined his duties at Rae Bareli on 22.05.2018."***

10. Similarly ground B taken in the writ petition reads:

"B. Because, the allegation of misappropriation as per the impugned order is from 23.01.2018 till 11.06.2018. ***The petitioner had joined service in Rae Bareli on 22.05.2018.*** *It is apparent from above that once the petitioner joined his duty he put a curb on any such illegal activities immediately, acting in his supervisory capacity. As already mentioned above, the petitioner also conducted an inspection and caught the aforesaid misappropriation and directed necessary action as per the rules."*

11. Thus in the entire writ petition, misstatement is made and court is made to believe that petitioner came to Raebareli and joined for the first time on 22.05.2018, concealing the fact that he was already posted and working at Raebareli as ARTO (E) since 1.7.2017. Mr. Gaurav Mehrotra, learned counsel for petitioner now fairly

concedes before this court that prior to his posting as ARTO(A) petitioner was working as ARTO (E) at Raebareli only since 1.7.2017 and this fact is nowhere stated in the writ petition. He also could not dispute that the same is a relevant fact for the purposes of this case as is noted in the interim order of the connected writ petition.

12. Even otherwise on merits, I find that on 11.06.2018 an amount of Rs.41,200/- along-with an amount of Rs.36,500/- and on 07.07.2018 an amount of Rs. 1,30,400/- was collected and not deposited in the Government Treasury. The said amounts were collected and not deposited after the petitioner had taken charge on the post of ARTO (A) on 22.05.2018. Therefore, complicity of the petitioner in the misappropriation cannot be ruled out and can be decided only in a proper inquiry. There is no explanation in the entire writ petition with regard to the said aspect, though the same is specifically noted in the order dated 13.06.2019 (Annexure-12) to the writ petition and other documents annexed with the writ petition.

13. Be that as it may, from the above this court finds that the petitioner has purposely concealed relevant facts/made false statements before this Court. Supreme Court has deprecated such conducted repeatedly. Suffice would be to refer to the case of ***K.D. Sharma Vs. Steel Authority of India Limited and others (2008) 12 SCC 481.*** The said judgment takes into consideration the earlier long settled law on this issue at length. The relevant paragraphs 34 to 51 of the said judgment reads :

"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.

35. The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of R. v. Kensington Income Tax Commrs1 in the following words:

"... it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it- the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement". (emphasis supplied)

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or

attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

37. In Kensington Income Tax Commissioner, Viscount Reading, C.J. observed: (KB pp. 495-96)

"... Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit". (emphasis supplied)

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".

39. If the primary object as highlighted in Kensington Income Tax Commissioners is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the Court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court.

40. Let us consider some important decisions on the point:

41. In State of Haryana v. Karnal Distillery Co. Ltd.2 almost an agreed order was passed by the Court that on expiry of the licence for manufacturing of liquor on September 6, 1976, the distillery would cease to manufacture liquor under the licence issued in its favour. Then, the Company filed a petition in the High Court for renewal of licence for manufacture of liquor for 1976-77, and the Court granted stay of dispossession. In appeal, the Supreme Court set aside the order granting stay of dispossession on the ground that the petitioner-Company in filing the petition in the High Court had misled it and started the proceedings for oblique and ulterior motive.

42. In Vijay Kumar Kuthuria v. State of Haryana3 it was the case of the petitioners that the provisional admissions granted to them were not cancelled and they were continuing their studies as post-graduate students in Medical College on the relevant date. On the basis of that statement, they obtained an order of status quo. The Supreme Court ordered inquiry and the District Judge was asked to submit his report whether the provisional admissions granted to the petitioners were continued till October 1, 1982 or were cancelled. The report revealed that to the knowledge of the petitioners their provisional admissions were cancelled long before October 1, 1982 and thus, the petitioners had made false representation to the Court and obtained a favourable order.

Dismissing the petition, this Court observed: (SSC p. 334, para 1):-

"1. ...But for the misrepresentation this Court would never have passed the said order. By reason of such conduct they have disentitled themselves from getting any relief or assistance from this Court and the Special Leave Petitions are liable to be dismissed".

43. Deprecating the reprehensible conduct of the petitioners as well as of their counsel, the Court stated: (Vijay Kumar Kathuria case, SCC pp.334-35, para 3)

"3. Before parting with the case, however, we cannot help observing that the conduct or behaviour of the two petitioners as well as their counsel (Dr. A.K. Kapoor who happens to be a medico-legal consultant practising in Courts) is most reprehensible and deserves to be deprecated. The District Judge's report in that behalf is eloquent and most revealing as it points out how the two petitioners and their counsel, (who also gave evidence in support of the petitioner's case before the District Judge) have indulged in telling lies and making reckless allegation of fabrication and manipulation of records against the College Authorities and how in fact the boot is on their leg. It is a sad commentary on the scruples of these three young gentlemen who are on the threshold of their carriers. In fact, at one stage we were inclined to refer the District Judge's report both to the Medical Council as well as the Bar Council for appropriate action but we refrained from doing so as the petitioners' counsel both on behalf of his clients as well as on his own behalf tendered unqualified apology and sought mercy from the Court. We, however, part with the case with a heavy heart expressing our strong disapproval of their conduct and behaviour...." (emphasis supplied)

44. In Welcom Hotel v. State of A.P.4 certain hoteliers filed a petition in this Court under Article 32 of the

Constitution challenging the maximum price of foodstuffs fixed by the Government contending that it was uneconomical and obtained ex parte stay order. The price, however, was fixed as per the agreement between the petitioners and the Government but the said fact was suppressed. Describing the fact as material, the Court said: (SCC pp. 580-81, para 7)

"7. ...Petitioners who have behaved in this manner are not entitled to any consideration at the hands of the Court".

45. In Agricultural & Processed Food Products v. Oswal Agro Furane5 the petitioner filed a petition in the High Court of Punjab and Haryana which was pending. Suppressing that fact, it filed another petition in the High Court of Delhi and obtained an order in its favour. Observing that the petitioner was guilty of suppression of "very important fact", this Court set aside the order of the High Court.

46. In State of Punjab v. Sarav Preet6 A obtained relief from the High Court on her assertion that a test in a particular subject was not conducted by the State. In an appeal by the State, it was stated that not only the requisite test was conducted but the petitioner appeared in the said test and failed. Observing that the petitioner was under an obligation to disclose the said fact before the High Court, this Court dismissed the petition.

47. In Union of India v. Muneesh Suneja7 the detenu challenged an order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) by filing a petition in the High Court of Delhi which was withdrawn. Then he filed a similar petition in the High Court of Punjab & Haryana wherein he did not disclose the fact as to filing of the earlier petition and withdrawal thereof and obtained relief. In an appeal by the Union of India against the order of the High Court, this Court observed that non-disclosure of the fact of filing a similar petition and withdrawal thereof was indeed fatal to the subsequent petition.

48. A special reference may be made to a decision of this Court in All India State Bank Officers Federation v. Union of India8 In that case, promotion policy of the Bank was challenged by the Federation by filing a petition in this Court under Article 32 of the Constitution. It was supported by an affidavit and the contents were affirmed by the President of the Federation to be true to his "personal knowledge". It was stated: (SSC p.337, para2)

"2. ...The petitioners have not filed any other similar writ petition in this Honourable Court or any other High Court".

In the counter-affidavit filed on behalf of the Bank, however, it was asserted that the statement was "false". The Federation had filed a writ petition in the High Court of Andhra Pradesh which was admitted but interim stay was refused. Another petition was also filed in the High Court of Karnataka. It was further pointed out that Promotion Policy was implemented and 58 officers were promoted who were not made parties to the petition. In affidavit-in-rejoinder, once again, the stand taken by the petitioner was sought to be justified. It was stated: "The deponent had no knowledge of the writ petition filed before the High Court of Andhra Pradesh, hence as soon as it came to his knowledge

the same has been withdrawn. Secondly, the petitioners even today do not know the names of all such 58 candidates who have been promoted/favoured". It was contended on behalf of the Bank that even that statement was false. Not only the petitioner- Federation was aware of the names of all the 58 officers who had been promoted to the higher post, but they had been joined as party- respondents in the writ petition filed in the Karnataka High Court, seeking stay of promotion of those respondents. It was, therefore, submitted that the petitioner had not come with clean hands and the petition should be dismissed on that ground alone.

49. "Strongly disapproving" the explanation put forth by the petitioner and describing the tactics adopted by the Federation as "abuse of process of court", this Court observed: (All India Stae Bank Officers Federation Case, SCC pp.340-41, paras 9 & 11)

"9. ... There is no doubt left in our minds that the petitioner has not only suppressed material facts in the petition but has also tried to abuse judicial process. ...

11. Apart from misstatements in the affidavits filed before this Court, the petitioner Federation has clearly resorted to tactics which can only be described as abuse of the process of court. The simultaneous filing of writ petitions in various High Courts on the same issue though purportedly on behalf of different associations of the Officers of the Bank, is a practice which has to be discouraged. Sri Sachhar and Sri Ramamurthy wished to pinpoint the necessity and importance of petitions being filed by different associations in order to discharge satisfactorily their responsibilities towards their respective members. We are not quite able to appreciate such necessity where there is no diversity but only a commonness of interest. All that they had to do was to join forces and demonstrate their unity by filing a petition in a Single Court. It seems the object here in filing different petitions in different Courts was a totally different and not very laudable one".

(emphasis supplied)

50. "Deeply grieved"' by the situation and adversely commenting on the conduct and behaviour of the responsible officers of a Premier Bank of the country, the Court observed; (All India State Bank Officers Federation Case, SCC p.342, para 12)

"12. We have set out the facts in this case at some length and passed a detailed order because we are deeply grieved to come across such conduct on the part of an association, which claims to represent high placed officers of a premier bank of this country. One expects such officers to fight their battles fairly and squarely and not to stoop low to gain, what can only be, temporary victories by keeping away material facts from the court. It is common knowledge that, of late, statements are being made in petitions and affidavits recklessly and without proper verification not to speak of dishonest and deliberate misstatements. We, therefore, take this opportunity to record our strong and emphatic disapproval of the conduct of the petitioners in this ease and hope that this will be a lesson to the present petitioner as well as to other litigants and that at least in future people will act more truthfully and with a greater sense of responsibility. (emphasis supplied)

51. Yet in another case in Vijay Syal v. State of Punjab9 this Court stated: (SCC p. 420, para 24)

"In order to sustain and maintain sanctity and solemnity of the proceedings in

law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters are either mistaken or lightly taken instead of learning proper lesson. Hence there is a compelling need to take serious view in such matters to ensure expected purity and grace in the administration of justice".

14. In view of the aforesaid well settled law, looking to the conduct of the petitioner who is expected to be a responsible government employee, even having powers to look after finances on behalf of State, and has been suspended on charges of financial irregularity and thereafter approached this Court by attempting to manoeuvre facts/making false statement of facts, I find it a fit case to dismiss the petition with costs.

15. The writ petition is ***dismissed*** with exemplary cost of Rs.10,000/-. The cost is to be deposited by the petitioner within a period of one month from today before the Senior Registrar, Lucknow Bench, Lucknow.

16. Interim order, if any, stands vacated.

(2020)07ILR A253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 40517 of 2005

Hasan Tanveer Iqbal ...Petitioner
Versus
State Bank of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava, Sri Sumit Srivastava

Counsel for the Respondents:
S.C., Sri Satish Kishore Kakkar

A. Service Law – Bank – Compassionate Appointment - Compassionate appointment is not a vested right and cannot be claimed as a matter of course. It is not an appointment by succession. The objective of is to provide immediate succour to the family of deceased employee who was sole bread-earner and his sudden death in harness has caused serious financial scarcity and penury to the family. The purpose of compassionate appointment is not for providing a post against post. It is not reservation in service by virtue of succession. (Para 11, 15, 40)

B. Constitution of India:- Article 14, 16 - Factors to be examined and looked into to determine the penurious condition of the family of employee - Indigence of dependents of deceased employee is first precondition to bring a case under scheme of compassionate appointment. If element of indigence and need to provide immediate assistance for relief from financial deprivation, is taken out from scheme of compassionate appointment, it would be taken out to be a result in favour of dependents of an employee who died while in service, which would be directly

in conflict with the idea of equality guaranteed under Article 14 and 16.
(Para 26)

In the present case there is no scheme providing automatic employment on compassionate basis. Competent Authority has to examine financial condition of the family, availability of vacancy etc. to determine whether applicant i.e. petitioner in this case is entitled for compassionate appointment or not. It is an admitted fact that petitioner's family i.e. family of deceased employee is getting monthly pension of Rs. 6533/-. One of the parent i.e. widow of deceased employee is in service getting salary of Rs. 5199/- per month. Besides, family received total amount of Rs. 10.22 lacs as terminal benefits. These facts stated in impugned order are not shown incorrect. Collectively, thus it cannot be said that family is in penurious condition and cannot survive if compassionate appointment is not provided. (Para 30, 31)

C. Supreme Court has held that benefit paid after death (i.e. amount paid towards gratuity, provident fund etc.) can be considered for judging financial hardship for considering application for compassionate appointment. (Para 33)

D. The compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered after a lapse of time and after the crisis is over. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution - Petitioner's father admittedly died on 23.06.2000. Now in 2020, after almost 20 years, it will not be in the interest of justice to pass any order for compassionate appointment to petitioner particularly considering the fact that in 2000 petitioner was 28 years of age, and now would be 48 years of age. The object of compassionate appointment is to provide immediate financial assistance to family to save it from starvation but after 20 years when family has already lived and met its expenses, there is no justification to provide compassionate appointment after such a long time. (Para 38, 40, 42, 51, 54)

Court held that in the present case, direction for compassionate appointment, after almost two decades would neither be legal nor just nor constitutional and consistence with scheme of such appointment. (Para 61)

Writ Petition dismissed. (E-4)

Precedent cited:

1. Vijay Ukarda Athor (Athawale) Vs St. of Mah., (2015) 3 SCC 399 (Para 8)

Precedent followed:

1. Canara Bank and another Vs M. Mahesh Kumar . & ors., (2015) 7 SCC 412 (Para 8)

2. Santosh Kumar Dubey Vs State of U.P. & ors., (2009) 6 SCC 481 (Para 12, 55)

3. I.G. (Karmik) . & ors. Vs Prahalad Mani Tripathi, 2008 (1) ESC 107 (SC) (Para 13)

4. Union of India (UOI) & anr. Vs B. Kishore, 2011 (4) SCALE 308 (Para 14)

5. St. of U.P. . & ors. Vs Pankaj Kumar Vishnoi, (2013) 11 SCC 178, (Para 16)

6. Canara Bank . & ors. Vs M. Mahesh Kumar . & ors., (2015) 7 SCC 412 (Para 17)

7. S.B.I. Vs Rajkumar, (2010) 11 SCC 661 (Para 18, 24)

8. U.O.I. Vs R. Padmanabhan, (2003) 7 SCC 270 (Para 25)

9. U.O.I. and others Vs B. Kishore, (2011) 3 SCC 131 (Para 26)

10. MGB Gramin Bank Vs Chakrawarti Singh, (2014) 13 SCC 583 (Para 27, 58)

11. General Manager (D & PB) . & ors.Vs Kunti Tiwary & anr., (2004) 7 SCC 271 (Para 32)

12. Punjab National Bank . & ors. Vs Ashwani Kumar Taneja, 2004 (7) SCC 265 (Para 33)

13. S.B.I. Vs Jaspal Kaur, (2007) 9 SCC 571 (Para 34)

14. S.B.I. Vs Ajay Kumar, (Special Appeal No. 14 of 2007), decided on 21.11.2017 (Para 35)

15. Punjab National Bank Vs Deepak Pandey, (Special Appeal No. 867 of 2006), decided on 21.11.2013 (Para 36)

16. Union of India Vs Bhagwan, (1995) 6 SCC 436 (Para 42)

17. Haryana State Electricity Board Vs Naresh Tanwar, (1996) 8 SCC 23 (Para 42)

18. Managing Director, MMTC Ltd., New Delhi and anr. Vs Pramoda Dei Alias Nayak, (1997) 11 SCC 390 (Para 43)

19. St.of U.P. & ars. Vs Paras Nath, AIR 1998 SC 2612 (Para 44)

20. Director of Education (Secondary) & anr. Vs Pushpendra Kumar & ors., AIR (1998) SC 2230 (Para 45)

21. S. Mohan Vs Govt. of T.N. & anr., 1999 (I) LLJ 539 (Para 46)

22. Sanjay Kumar Vs The St. of Bihar & Ors., AIR 2000 SC 2782 (Para 47)

23. Haryana State Electricity Board Vs Krishna Devi, JT (2002) 3 SC 485; 2002 (10) SCC 246 (Para 48)

24. P.N.B.. & ors.Vs Ashwani Kumar Taneja, AIR 2004 SC 4155 (Para 49)

25. National Hydroelectric Power Corporation & anr. Vs Nanak Chand & Anr., AIR 2005 SC 106 (Para 50)

26. State of Jammu & Kashmir Vs Sajad Ahmed, AIR 2006 SC 2743, (Para 51)

27. I.G. (Karmik) . & ors.Vs Prahalad Mani Tripathi, (2007) 6 SCC 162 (Para 52)

28. Mumtaz Yunus Mulani Vs St. of Mah. & ors., (2008) 11 SCC 384 (Para 53)

29. M/s Eastern Coalfields Ltd. Vs Anil Badyakar . & ors., (2009) 13 SCC 122; JT (2009) 6 SC 624 (Para 54)

30. Smt. Madhulika Pathak Vs State of U.P. & ors., 2011 (3) ADJ 91 (Para 56)

31. Bhawani Prasad Sonkar Vs U.O.I. . & ors., (2011) 4 SCC 209, (Para 57)

32. U.O.I. Vs VSR. Tripathi, AIR 2019 SC 666 (Para 59)

33. State of Himanchal Pradesh . & ors. Vs Shashi Kumar, (2019) 3 SCC 653 (Para 60)

Petition challenges order dated 04.05.2005, passed by Assistant General Manager, State Bank of India, Region-1, Zonal Office, Bareilly.

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

1. Heard Sri A.K. Srivastava, Advocate, for petitioner. None has appeared on behalf of respondent-Bank despite the case having been called in revise. Hence I proceed to hear and decide this case ex parte, after hearing learned counsel for petitioner.

2. The writ petition is directed against the order dated 04.05.2005 passed by Assistant General Manager, State Bank of India, Region-1, Zonal Office, Bareilly (hereinafter referred to as 'AGM, SBI') rejecting application of petitioner for compassionate appointment on the ground that family of deceased employee is not in penurious condition as per the tests laid down in the "Scheme of Compassionate Appointment applicable to Bank" and, therefore, compassionate appointment of petitioner would not be justified.

3. Facts in brief, giving rise to present writ petition, are that petitioner's father Tasveer Iqbal was working as Branch Manager in State Bank of India (hereinafter referred to as 'S.B.I.') and posted at State Bank of India, Mundia Dhureki Branch, Bisauli, District Budaun. He died in harness on 23.06.2000 leaving following heirs:

(i) Jameel Ahmad, aged about 80 years (father)

(ii) Smt. Bilkuis Fatima, aged about 75 years (mother)

(iii) Smt. Kaneez Fatima, aged about 41 years (widow)

(iv) Hasan Tanveer Iqbal, aged about 28 years (son-petitioner)

(v) Hasan Jamal Iqbal, aged about 26 years (son)

4. At the time of death of petitioner's father, petitioner and his brother, both were married. Petitioner's mother Kaneez Fatima was working as Teacher and receiving salary of Rs. 5,199/- per month. Smt. Kaneez Fatima was step mother of petitioner. She received amount of provident fund, leave encashment, gratuity, etc. It is alleged that she did not provide any financial assistance to petitioner or grandparents. Petitioner's uncle Saghir Iqbal was also bed ridden and his son was paralytic and both were being looked after by petitioner. Saghir Iqbal also died on 31.12.2004 and now his family is being looked after by petitioner. Petitioner's real mother Smt. Shama Tasveer Iqbal also died during life time of petitioner's father, on 21.11.1996. Petitioner's brother had taken loan under Self Employment Scheme but incurred huge losses, closed down the shop and amount of loan and interest due thereon are deducted from the amount of gratuity paid after death of petitioner's father. Family pension is being paid but received by Smt. Kaneez Fatima, step mother and petitioner is not getting any financial assistance from her. Petitioner's father has taken loan of Rs. 2,20,000/- from one Qumar Abbas and mortgaged his house. This amount was repaid by petitioner so as to redeem the house.

5. In these circumstances, petitioner applied for compassionate appointment on 14.07.2000 under the "Scheme For Appointment On Compassionate Ground For Dependent of Deceased Employee/ Employees Retrenched on Medical Grounds" applicable to S.B.I. The said application was rejected by order dated 10.10.2000 passed by Branch Manager of Bank.

6. This order was challenged by petitioner in Writ Petition No. 48935 of 2000 which was allowed vide judgment dated 01.02.2005 and Court found that Branch Manager was not competent to make appointment on Class-III post, therefore, compassionate appointment application could not have been considered by Branch Manager and hence order of rejection was passed by him without any authority. This Court, therefore, directed S.B.I.'s competent authority to consider petitioner's application for compassionate appointment and pass a fresh order.

7. Pursuant to judgment dated 01.02.2005, petitioner submitted a fresh application on 22.02.2005. It has been rejected by order dated 04.05.2005. The competent authority has rejected application by considering the number of

dependents and financial condition of family which has been stated in the impugned order, as under:

A. Dependents of the deceased officer

Name	**Age** As on date of death			**Relationship**	**Marital Status**	**Educational Qualification**	**Vocation**
	YY	MM	DD				-
1. Jamil Ahmad	80			Father	Married	-	-
2. Smt. Bilkis Fatima	70			Mother	Married	-	-
3. Smt. Kaneez Fatima	41			Wife	Widow	Intermediate	Teacher
4. Hasan Tanveer Iqbal (petitioner)	28			Son	Married	Intermediate	Unemployed
5. Hasan Jamal Iqbal	26			Son	Married	Intermediate	Self Employed

All the three daughters of Late Sri Iqbal are married and living separately.

B. Financial condition of the family

ASSETS (Rs. in Lacs)		**LIABILITIES (Rs. in lacs)**
Terminal benefits paid by the Bank		**To Bank Nil**
Provident fund	6.26	
Gratuity	2.64	
Leave Encashment	1.32	
Total	**10.22**	**Total**
Investments		**To outsiders**
NSCs	1.45	Overdraft account
LIC Policies	0.50	
Total	1.95	**Total**

C. Immovable Property Rs. in lacs

1. House 1.50

2. Plot of land value as per asset and 0.90

Liability statement dated 31.03.2000 of
The deceased officer

D. Monthly income of the family from all sources after the death of employee

i. Family Pension (Basic Rs. 3585+D.A. Rs. 2948) : Rs. 6533.00

ii. Assumed interest on 80% of net corpus of terminal : Rs. 5323.00
benefits (Rs. 1.22 lacsX6.25%) (20% of net corpus

ignored for incidental expenses)

iii. Income from investments : Rs. 656.00

(Rs. 1.95 lac-0.69 lac=1.26 lacX6.25%)

iv Income of employed family members (wife) : Rs. 5199.00

Total Monthly income of the family : Rs.17711.00

E. Income of the family immediately prior to death of the employee:

i. Last take home salary of Shri Tasveer Iqbal : Rs. 17108.00

ii. Salary of wife of Shri Tasveer Iqbal : Rs. 5199.00

Total Monthly Income of the family : Rs. 22307.00

8. Learned counsel for petitioner submitted that entire income is being received by petitioner's step mother and, therefore, denial of compassionate appointment to petitioner is wholly arbitrary. He also contended that terminal benefits cannot be treated as a substitute of providing compassionate employment and for this purpose reliance is placed on Supreme Court's judgment in **Canara Bank and another Vs. M. Mahesh Kumar and others (2015) 7 SCC 412 and Vijaya Ukarda Athor (Athawale) vs. State of Maharashtra (2015) 3 SCC 399.**

9. Bank has contested the matter by filing Counter Affidavit, and placing on record, "Scheme of Compassionate Appointment applicable to S.B.I." It is pleaded that as per para-10 thereof, relevant factors for determining financial condition of family necessary to be taken into consideration include the number of dependents, family pension, other terminal benefits and income of family from other sources etc. and pursuant to the aforesaid scheme, matter has been examined whereafter petitioner has not been found entitled for compassionate appointment. It is urged that petitioner's mother (step mother) was admittedly employed as Teacher and that being so, it cannot be said that family was in penury having no source of earning so as to justify compassionate appointment.

10. This Court now has to examine "whether denial of compassionate appointment of petitioner in the above facts and circumstances, is justified or not".

11. It is now well settled that compassionate appointment is not a vested right and cannot be claimed as a matter of course. It is not an appointment by succession. The objective of compassionate appointment is to provide immediate succour to the family of deceased employee who was sole bread-earner and his sudden death in harness has caused serious financial scarcity and penury to the family. To mitigate such sufferance, compassionate appointment is provided.

12. In S**antosh Kumar Dubey Vs. State of U.P. & Ors. 2009 (6) SCC 481,** Court had the occasion to consider Rule 5 of Dying in Harness Rules, 1974 (hereinafter referred to as "Rules, 1974) and said:

"The very concept of giving a compassionate appointment is to tide over the financial difficulties that is faced by the family of the deceased due to the death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints. The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as, the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the

family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in Government service." (emphasis added)

13. In **I.G. (Karmik) and others Vs. Prahalad Mani Tripathi, 2008(1) ESC 107 (SC),** Court said:

"Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."

14. The importance of penury and indigence of the family of deceased employee and need to provide immediate assistance for compassionate appointment has been considered in **Union of India (UOI) & Anr. Vs. B. Kishore 2011 (4) SCALE 30**8. This is relevant to make the provisions for compassionate appointment valid and constitutional else the same would be violative of Articles 14 and 16 of the Constitution of India. The Court said:

"If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution."

15. It is thus clear that rule of compassionate appointment has an object to give immediate relief against destitution. It is not a provision to provide alternate employment or an appointment commensurate with the post held by the deceased employee. It is not by way of giving similarly placed life to the dependants of the deceased. It is not a right reserved to an heir of a deceased employee founded on succession. It is not a vested right but a concession.

16. In **State of U. P. and others Vs. Pankaj Kumar Vishnoi, (2013) 11 SCC 178,** Court observed that compassionate appointment is a concession and not a right. It is traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme.

17. In **Canara Bank and others Vs. M. Mahesh Kumar and others (2015) 7 SCC 412,** Court stressed upon aforesaid recent authorities that every appointment to public office must strictly adhere to the mandatory requirement of Articles 14 and 16 of Constitution of India. Compassionate appointment is an exception so as to provide employment to remove financial constraints suffered by bereft family of a government servant who die in harness and family has lost its bread earner. However, it was held that mere death of a government employee in harness does not entitle the family to claim compassionate appointment.

18. What should be the reckoning point for considering eligibility etc. for

compassionate appointment, is an issue squarely covered by the decision of Supreme Court in **State Bank of India Vs. Rajkumar (2010) 11 SCC 661**. Court observed that claim for compassionate appointment is traceable only to the scheme framed by employer for such employment. There is no right, whatsoever, outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished or withdrawn. When a scheme is abolished, any pending application seeking appointment under the scheme will also cease, unless saved. The mere fact that an application was made when the scheme was in force, will not, by itself, create a right in favour of the applicant. Court also said that, normally, three basic requirements to claim appointment under any scheme for compassionate appointment are: (i) an application by a dependent family member of deceased employee; (ii) fulfilment of eligibility criteria prescribed under the scheme for compassionate appointment; and (iii) availability of posts, for making such appointment.

19. Court also considered, whether death of deceased employee, by itself, results in creating a right, i.e., a vested right in the dependants to claim compassionate appointment or not, and said, that it would depend on the terms of scheme. One of such case is where scheme provides for automatic appointment to a specified family member on the death of any employee without any of the aforesaid three requirements, and, in such a case, it can be said that scheme creates a right in favour of family member for appointment on the date of death of employee. In such a case scheme in force at the time of death would apply.

20. The second category is where scheme provides that on the death of an employee, if a dependent family member is entitled to appointment merely on making of an application, whether any vacancy exists or not, and without the need to fulfil any eligibility criteria, then the scheme creates a right in favour of the applicant, on making application and the scheme, that was in force at the time when application for compassionate appointment was filed, will apply.

21. The third category, where scheme contemplates compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling prescribed eligibility requirements, and subject to availability of a vacancy for making the appointment.

22. The fourth category covers a scheme where the dependant of the deceased employee has only a right to be considered for appointment against a specified quota, even if he fulfils all the eligibility criteria; and the selection is made of the most deserving amongst the several competing applicants, to the limited quota of posts available.

23. In the cases of schemes like that of third and fourth categories, there is a need to verify eligibility and antecedents of the applicant or the financial capacity of the family. There is also a need for the applicant to wait in a queue for a vacancy to arise, or for a selection committee to assess the comparative need of a large number of applicants so as to fill a limited number of earmarked vacancies. In such cases, there can be no immediate or automatic appointment merely on an application. Several circumstances having a bearing on eligibility, and financial

condition, upto the date of consideration may have to be taken into account. In all these cases, it cannot be said that applicant has a vested right. Here such scheme would be applicable which was available and operating when the application is actually considered, and not the scheme that was in force earlier when the application was made. Similarly, if the earlier scheme is abolished and new scheme, which replaces it, if specifically provides that all pending applications will be considered only in terms of the new scheme, then the new scheme alone will apply.

24. Court in S**tate Bank of India Vs. Rajkumar (supra**) also observed that compassionate appointment is a concession and not a right. The employer may wind up the scheme or modify it at any time depending upon its policies, financial capacity and availability of posts.

25. In taking the above view, Court also relied on its earlier decision in **Union of India Vs. R. Padmanabhan 2003 (7) SCC 270.**

26. When a family of employee can be treated to be in penurious condition or not, and what are the factors which are to be examined and looked into has also been considered in different facts and circumstances in various cases and one such case is **Union of India and others Vs. B.Kishore 2011 (13) SCC 131.** Therein, one K. Janaki, working as Senior Accountant in Office of the Directorate of Postal Accounts, Madras died on 01.09.1993. Post death dues paid to her family comprised of Rs.71,000/- towards death-cum-retirement gratuity and Rs.2,998/- per month as family pension. Sri B. Kishore, husband of deceased, submitted an application on 11.01.1994 claiming compassionate appointment. It was rejected by Circle Selection Committee by letter dated 26.02.1998, on the ground that he was not found in indigent circumstances. This letter dated 26.02.1998 was challenged before Tribunal at Madras Bench in O. A. No.610 of 1998, which was dismissed by Tribunal vide judgment and order dated 16.07.1998. However, Madras High Court allowed writ petition filed by Sri B. Kishore holding that scheme of compassionate appointment as applicable when B. Kishore applied for compassionate appointment did not lay emphasis on indigence as criteria for withholding or offering compassionate appointment. This judgment of Madras High Court came up for consideration before Supreme Court. Court firstly held that observation of High Court that indigence was not criteria for withholding or offering compassionate appointment, is misconceived, since, it loses to visualize the very concept of compassionate appointment. Court held that indigence of dependents of deceased employee is first precondition to bring a case under scheme of compassionate appointment. The very purpose and object of scheme is to provide immediate succour to family of deceased employee on his death, which may suddenly find itself in state of destitution. If element of indigence and need to provide immediate assistance for relief from financial deprivation, is taken out from scheme of compassionate appointment, it would be taken out to be a result in favour of dependents of an employee who died while in service, which would be directly in conflict with the idea of equality guaranteed under Article 14 and 16 of the Constitution of India. Supreme Court also took notice of Office Memorandum dated 09.10.1998 issued by Central Government, revising and consolidating instructions in connection

with the scheme of compassionate appointment, and after referring to its various clauses, said :

"The case of the Respondent clearly ***did not come under the revised and consolidated scheme formulated by Office Memorandum dated October 9, 1998, that had come into force when his case came up for consideration before the High Court.*** *Even otherwise and without any reference to the Office Memorandum dated October 9, 1998, the case of the Respondent does not meet or satisfy the basic object and purpose of appointment on compassionate grounds." (emphasis added)*

27. In **MGB Gramin Bank vs. Chakrawarti Singh, 2014 (13) SCC 583**, father of Chakrawarti Singh who was working as a Class III employee in MGB Gramin Bank (hereinafter referred to as 'Bank') died in harness on 19.04.2006. Chakrawarti Singh applied for compassionate appointment on 12.05.2006. When application was pending, a new scheme for compassionate appointment came into force by Circular dated 12.06.2006 with effect from 06.10.2006. Clause 14 of said scheme provided that all applications pending on the date of commencement of the scheme shall be considered for ex-gratia payment to the family instead of compassionate appointment. Consequently, Chakrawarti Singh was denied compassionate appointment. He preferred a writ petition and learned Single Judge took a view that cause of action for compassionate appointment arose to Chakrawarti Singh before the new scheme came into force and, therefore, it should be considered in the light of earlier scheme i.e. 1983 Scheme. Division Bench dismissed Intra Court Appeal preferred by petitioner and that is how the matter reached Supreme Court. Court held that every appointment to public office must be made by strictly adhering to mandatory requirements of Articles 14 and 16 of the Constitution. Compassionate appointment is an exception carved out in order to remove financial constraints on bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. Competent Authority has to examine financial condition of the family of deceased employee and it is only if it is satisfied that without providing employment, family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family and not otherwise. It is also one of the condition that person claiming such appointment must possess required eligibility for the post. Court clearly held as under :

"Consistent view that has been taken by Court is that compassionate employment cannot be claimed as a matter of right as it is not a vested right. Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds."

28. Court also observed that there should be no leniency in the matter of providing compassionate appointment beyond the scheme. An 'ameliorating relief' should not be taken as opening an alternative mode of recruitment to public employment. An application made at belated stage cannot be entertained for the reason that by lapse of time, purpose of making such appointment stands evaporated. It also held that Courts and Tribunals cannot refer benediction impelled by sympathetic considerations to make

appointments on compassionate grounds when the Regulation framed in respect thereof did not cover and contemplate such appointments. Then referring to judgment of **S.B.I. and another Vs. Raj Kumar (supra)** in para 13, Court said as under :

"13. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. ***In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India and Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered."*** *(emphasis added)*

29. Consequently Supreme Court set aside judgment of High Court and directed the matter to be dealt up by the new scheme.

30. Now looking to the matter in question in the light of above exposition of law, I find that there is no scheme providing automatic employment on compassionate basis. Competent Authority has to examine financial condition of the family, availability of vacancy etc. to determine whether applicant i.e. petitioner in this case is entitled for compassionate appointment or not.

31. In the present case, it is an admitted fact that petitioner's family i.e. family of deceased employee is getting monthly pension of Rs. 6533/-. One of the parent i.e. widow of deceased employee is in service getting salary of Rs. 5199/- per month. Besides, family received total amount of Rs. 10.22 lacs as terminal benefits. These facts stated in impugned order are not shown incorrect. Collectively, thus it cannot be said that family is in penurious condition and cannot survive if compassionate appointment is not provided. I find that in similar circumstances denial of compassionate appointment has been resulted on the ground that condition of family cannot be said to be penurious.

32. **General Manager (D & PB) and others Vs. Kunti Tiwary and another (2004) 7 SCC 271** was a case arising in the matter of State Bank of India. The employee Kunti Tiwary died in-harness on 16.01.1998. Application for compassionate appointment was made when deceased's son was minor. He attained majority on 25.02.2000. Thereafter he applied for compassionate appointment. Financial condition of family was examined by Bank and it was found that deceased employee's family was paid Provident Fund of Rs.3,33,410/-, Gratuity of Rs.1,73,987/- and Leave Encashment of Rs. 1,01,344/-. The deceased employee had an investment of Rs. 66,000/- in share of State Bank of India, etc. Family was paid a pension of Rs.5,583/- per month. The application, therefore, was rejected on the ground that possessed assets and monthly income was such as not to hold family in penury condition. The family also consisted of a widow, two sons and a daughter. Rejection of application was challenged in Writ Court and a learned Single Judge dismissed writ petition. In intra Court appeal judgment of learned Single Judge was set aside and direction was issued to Bank to give compassionate appointment. This order

came to be challenged in Supreme Court, who allowed appeal and restored judgment of learned Single Judge.

33. In **Punjab National Bank and others Vs. Ashwani Kumar Taneja 2004 (7) SCC 265**, father of Ashwani Kumar Taneja, a Class IV employee, died in harness on 03.12.1999 leaving behind his mother, widow, two sons and one daughter. Request for compassionate appointment was declined by Bank, whereagainst writ petition was allowed by learned Single Judge of Rajasthan High Court and Letters Patent Appeal was dismissed by Division Bench. The High Court held that for considering application for compassionate appointment, amount paid towards gratuity, provident fund etc. cannot be looked into. The matter went in appeal to Supreme Court and it held that the said amount can be taken into consideration and judgment of High Court was reversed holding that benefit paid after death can be considered for judging financial hardship.

34. In **State Bank of India Vs. Jaspal Kaur (2007) 9 SCC 571,** again a matter relating to State Bank of India, one Sukhbir Inder Singh, husband of Jaspal Kaur died in harness on 01.08.1999 while working as Record Assistant. An application for compassionate appointment of widow was rejected by Bank. In writ petition filed by Jaspal Kaur, High Court directed Bank to reconsider the application, which was again declined. The matter again came to High Court, which took a view that retiral benefits of Rs.4,57,607/- paid to the family as terminal benefits cannot be said to be a sufficient amount to bring away family from financial hardship. Supreme Court found that family of deceased consisted of a widow, two daughters and a son. Terminal benefits were paid as Rs.4,57,607/- and monthly pension was Rs.2,055/- and held that in the above facts and circumstances denial of compassionate appointment on the ground that family was not in penurious condition, was justified.

35. In **State Bank of India Vs. Ajay Kumar (Special Appeal No.14 of 2007),** decided on 21.11.2017 a Division Bench of this Court found that terminal benefits of Rs.3.79 lakhs, Rs.1 lakh from LIC policy and gross monthly income of Rs.4,000/- justify denial of compassionate appointment on the ground that family is not in penurious condition.

36 . Similarly, in **Punjab National Bank Vs. Deepak Pandey (Special Appal No. 867 of 2006),** decided on 21.11.2013, this Court found that family pension of Rs.4,807/- per month after death of deceased employee justify denial of compassionate appointment on the ground that family is not in penurious condition.

37. In view of above exposition of law, I do not find any manifest error in the decision taken by respondent-Bank denying compassionate appointment to petitioner.

38. Now there is another fatal aspect in this case. Petitioner's father admittedly died on On 23.06.2000. Now we are in 2020. After almost 20 years, it will not be in the interest of justice to pass any order for compassionate appointment to petitioner particularly considering the fact that in 2000 petitioner was 28 years of age, and now would be 48 years of age. The object of compassionate appointment is to

provide immediate financial assistance to family to save it from starvation but after 20 years when family has already lived and met its expenses, there is no justification to provide compassionate appointment after such a long time.

39. Moreover, petitioner himself was a married son in 2000. He was maintaining not only himself or his grandparents or others but also his own family. It is well settled that if the family had sufficient means to carry on its affairs for long time, in such a case compassionate appointment cannot be directed. The purpose of compassionate appointment is not to provide employment by succession but it is to meet immediate necessity arrived at due to sudden demise of sole bread earner of the family leaving the legal heirs in penury.

40. The purpose of compassionate appointment is not for providing a post against post. It is not reservation in service by virtue of succession. If the family is not in penury and capable to maintain itself for a long time, no mandamus would be issued after a long time for providing compassionate appointment to a legal heir of the deceased employee.

41. Repeatedly, it has been held that the purpose and object of compassionate appointment is to enable the members of family of the deceased employee in penury, due to sudden demise of the sole breadwinner, get support and succour to sustain themselves and not to face hardship for their bore sustenance.

42. An appointment on compassionate basis claimed after a long time has seriously been deprecated in **Union of India Vs. Bhagwan 1995 (6) SCC 436 and Haryana State Electricity Board Vs. Naresh Tanwar, (1996) 8 SCC 23.** In the later case, Court said:

"compassionate appointment cannot be granted after a long lapse of reasonable period and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the deceased employee. ..... the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years." (emphasis added)

43. In **Managing Director, MMTC Ltd., New Delhi and Anr. Vs. Pramoda Dei Alias Nayak 1997 (11) SCC 390**, Court said:

"As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tied over the sudden financial crises and not to provide employment and that mere death of an employee does not entitle his family to compassionate appointment."

44. In **State of U.P. & Ors. Vs. Paras Nath AIR 1998 SC 2612**, Court said:

"The purpose of providing employment to a dependent of a government servant dying in harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments

are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case." *(emphasis added)*

45. In **Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors. AIR 1998 SC 2230**, Court said:

"The ***object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner*** *which has left the family in penury and without any means of livelihood." (emphasis added)*

46. In **S. Mohan Vs. Government of Tamil Nadu and Anr. 1999 (I) LLJ 539, Supreme Court said:**

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, ***the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."*** *(emphasis added)*

47. In **Sanjay Kumar Vs. The State of Bihar & Ors. AIR 2000 SC 2782,** it was held:

"compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood"

48. In **Haryana State Electricity Board Vs. Krishna Devi JT 2002 (3) SC 485 = 2002 (10) SCC 246,** Court said:

"As the application for employment of her son on compassionate ground was made by the respondent after eight years of death of her husband, we are of the opinion that it was not to meet the immediate financial need of the family ...."

49. In **Punjab National Bank & Ors. Vs. Ashwini Kumar Taneja AIR 2004 SC 4155,** Court said:

"It is to be seen that the ***appointment on compassionate ground is not a source of recruitment*** *but* ***merely an exception*** *to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis." (emphasis added)*

50. In National Hydroelectric Power Corporation & Anr. Vs. Nanak Chand & Anr. AIR 2005 SC 106, Court said:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises."

51. In **State of Jammu & Kashmir Vs. Sajad Ahmed AIR 2006 SC 2743,** Court said:

"Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the set back. ***Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity*** *to say 'goodbye' to normal rule of appointment and to* ***show favour*** *to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution." (emphasis added)*

52. In **I.G. (Karmik) and Ors. v. Prahalad Mani Tripathi 2007 (6) SCC 162,** Court said:

"Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."

53. In **Mumtaz Yunus Mulani Vs. State of Maharashtra & Ors, 2008 (11) SCC 384,** Court held that now a well settled principle of law is that appointment on compassionate ground is not a source of recruitment. The reason for making such a benevolent scheme by the State or public sector undertakings is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over sudden financial crises.

54. Following several earlier authorities, in **M/s Eastern Coalfields Ltd. Vs. Anil Badyakar and others, (2009) 13 SCC 122 = JT 2009 (6) SC 624**, Court said:

"The principles indicated above would give a clear indication that the ***compassionate appointment is not a vested right*** *which can be exercised at any time in future. The compassionate employment cannot be claimed and* ***offered after a lapse of time*** *and after the crisis is over."*
(emphasis added)

55. In **Santosh Kumar Dubey (supra)**, Court considered that father of appellant Santosh Kumar Dubey became untraceable in 1981 and for about 18 years the family could survive and successfully faced and over came the financial difficulties. In these circumstances it further held:

"That being the position, in our considered opinion, this is not a fit case for exercise of our jurisdiction. This is also not a case where any direction could be issued for giving the appellant a compassionate appointment as the prevalent rules

governing the subject do not permit us for issuing any such directions."

56. It is thus clear that rule of compassionate appointment has an object to give relief against destitution and not to provide alternate employment or an appointment commensurate with the post held by the deceased employee. It is not by way of giving similarly placed life to the dependents of the deceased. While considering the provision pertaining to relaxation under Rules, 1974 the very object of compassionate appointment cannot be ignored. This is what has been reiterated by a Division Bench of this Court in **Smt. Madhulika Pathak Vs. State of U.P. & ors. 2011 (3) ADJ 91.**

57. In **Bhawani Prasad Sonkar Vs. Union of India and others (2011) 4 SCC 209,** Court said that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of Constitution of India. No other mode of appointment is permissible. Nevertheless, concept of compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, scheme has to be strictly construed and confined only to the purpose it seeks to achieve.

58. In **MGB Gramin Bank Vs. Chakrawarti Singh (supra)**, Court has said that compassionate appointment cannot be granted as of right and application for compassionate appointment need be decided as expeditiously as possible.

59. In **Union of India Vs. V.R. Tripathi AIR 2019 SC 666**, reiterating the basic principles in regard to grant of compassionate appointment, Court said that object of compassionate appointment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Court further said that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general Rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the Rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis.

60. In **State of Himanchal Pradesh and others Vs. Shashi Kumar (2019) 3 SCC 653**, Court said:

"... it is necessary to bear in mind that compassionate appointment is an exception to the general Rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. Dependants of a deceased employee of the State are made eligible by virtue of the Policy on compassionate appointment. The basis of the policy is that it recognizes that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. Where the authority finds that the financial and other circumstances of the family are such that in the absence of immediate assistance, it would be reduced to being indigent, an application from a dependant member of the family could be considered. The terms on which such applications would be considered are subject to the policy which is framed by the State and must fulfill the terms of the Policy. In that sense, it is a well-settled principle of law that there is no right to compassionate appointment."

61. Hence, looking to the above ocean of binding authorities, I am of the opinion that here is a case where a direction for compassionate appointment after almost two decades would neither be legal nor just nor constitutional and consistence with scheme of such appointment.

62. In view of above exposition of law and in the facts and circumstances of the case, I do not find any merit in the writ petition.

63. Dismissed.

(2020)07ILR A269
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.06.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No. 5448 of 2020

Pramod Kumar Chauhan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Tandon

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Panchayat Raj Act, 1947-Section 95 (1)(g), 12-H & 12-J - The Constitution of India,1950-Article 226 - challenge to-suspension of Village Pradhan and constitution of three member committee to perform administrative and financial powers of Pradhan-no express provision in the Act or the Rules which imposes any obligation upon the District Magistrate to take into consideration the opinion of other elected members of Village Panchayat before constituting the three elected members of the committee-once the electorate of the village has already exercised its franchise and elected members of the Gram Panchayat and it is from those elected members that the three member committee is to be constituted no further ascertainment of views of all elected members of Gram Panchayat for the purpose of appointing the three member committee would be required-in the absence of any credible evidence it would not be open to contend that the exercise of discretion by the District Magistrate would be arbitrary-the Act itself safeguards the democratic principles in appointing three member committee.(Para 5 to 8)

B. If a Pradhan or Up-Pradhan is prima facie found to have committed financial and other

irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions,which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee of three members of Gram Panchayat appointed by the State Government. The power vested in the State to appoint three member committee has now been delegated to the District Magistrate.(Para 3, 4 , 5)

The writ petition is dismissed.
(E-6)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner in the present writ petition is elected member of Gram Panchayat Jungle Nagar Chhapra, Post Nahar Chhapra, Tehsil Padrauna, District Kushinagar. He is aggrieved by an order passed by the District Magistrate Kushinagar, dated 6.1.2020, whereby the District Magistrate has invoked his powers under Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 to suspend the administrative and financial powers of the Village Pradhan and has constituted a three member committee to perform the administrative and financial powers of Pradhan. The challenge to this order is essentially laid on the premise that being an elected office the functions of Pradhan can be performed only by a committee which has the support of all elected members of Panchayat. Contention is that unless views of all elected members are obtained it would not be open for the District Magistrate to nominate elected members of gram panchayat to the three members committee.

2. Sri Vishal Tandon, learned counsel for the petitioner in support of such submission has placed reliance upon a division bench judgment of this Court in Pushpendra Kumar Vs. State of U.P. reported in 2010 (4) ADJ 348, which in turn relies upon a previous Division Bench Judgment of this Court in Udaivir Vs. State Election Commission of U.P. through its Chairman and others reported in 2009 (106) RD 151. The submission in that regard is opposed by the learned State Counsel.

3. In order to consider the respective submissions advanced at the bar it would be appropriate to notice the relevant statutory scheme which operates in the field. Proviso to Section 95(1)(g) empowers the District Magistrate to constitute a three member committee of elected members of village panchayat for exercising administrative and financial powers of the Village Pradhan during the period of his suspension. The proviso to Section 95(1)(g), which is relevant for the present purposes, is extracted hereinafter:-

"[Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.]"

4. Section 95(1)(g) read with its proviso clearly conveys legislative intent of conducting expeditious enquiry against the Village Pradhan into allegations of administrative and financial lapses on his part and to entrust such functions to a committee consisting of three members of the Gram Panchayat. The power vested in

the State to appoint three member committee has now been delegated to the District Magistrate under an appropriate notification which is not in issue.

5. There is no express provision in the Act or the Rules which imposes any obligation upon the District Magistrate to take into consideration the opinion of other elected members of village panchayat before constituting the three elected members to the committee for performing administrative and financial powers of suspended pradhan. The submission on behalf of petitioner to ascertain views of other elected members before appointing the three member committee is based upon the Division Bench Judgments rendered by this Court while interpreting the provisions of Section 12-H and 12-J of the U.P. Panchayat Raj Act, 1947, which are reproduced hereinafter:-

"12-H. Casual Vacancy ? If a vacancy in the office of the Pradhan, Up-Pradhan or a member of a Gram Panchayat arises by reason of his death, removal, resignation, voidance of his election or refusal to take oath of office, it shall be filled before the expiration of a period of six months from the date of such vacancy, for the remainder of his tern in the manner, as far as may be, provided in Sections 11?B, 11-C, or 12, as the case may be :

Provided that if on the date of occurrence of such vacancy the residue of the term of the Gram Panchayat is less than six months, the vacancy shall not be filled.

12-J. Temporary arrangement in certain cases ? Where the office of Pradhan is vacant by reason of death, removal, resignation or otherwise or where the Pradhan is incapable to act by reason of absence, illness or for any reason whatsoever, the prescribed authority shall nominate a member of the Gram Panchayat, to discharge the duties and exercise the powers of Pradhan until such vacancy in the office of Pradhan is filled in, or until such incapacity of Pradhan is removed."

6. Sections 12-H and 12-J of the Act of 1947 regulates filling up casual/temporary vacancy in the office of Pradhan etc. The office of Pradhan is an elected office and the procedure for election is specified under Section 11-B of the Act of 1947. The Pradhan of the Gram Panchayat happens to be the Chairperson of the Gram Panchayat by virtue of Section 11-A(1) of the Act of 1947. Members of the Gram Panchayat are also elected by the electorate consisting of the villagers whose name finds place in the electoral roll prepared for the territorial constituency i.e the Gram Panchayat. The provisions contained in Sections 12-H and 12-J stipulates the manner in which the casual/temporary vacancy in the office of Pradhan is to be filled. For the purpose of filling up such vacancy the provisions as are contemplated under Section 11-B, 11-C or 12, as the case may be, shall be complied with. The office of Pradhan since is an elected office based on democratic principles it is quite obvious that the opinion/wishes of the electorate are taken into consideration even for filling up casual/temporary vacancy in the office of Pradhan. It is for this reason that the subsequent division bench of this Court in the case of Pushpendra Kumar (supra), relying upon the earlier division bench judgment in the case of Udaivir (supra) observed as under in paragraph 9:-

"From a perusal of the provisions mentioned herein above, we are of the considered opinion that Section 12-H and 12-

J have to be read harmoniously. Section 12-H deals with the permanent vacancy which may occur by resignation or otherwise on the post of Pradhan. It provides for filling up the vacancy by way of election as provided under Section 11-B and Section 12 of the Act where the residual term is more than 6 months. However, till the elections are held, a temporary arrangement has to be made taking recourse to the provisions of Section 12-J of the Act and the Prescribed Authority has been given power to nominate a Gram Pradhan to discharge the duty of the Pradhan. The provisions of Section 12-J came up for consideration before a Division Bench in the case of Udaivir (supra) and this Court has held that the Prescribed Authority has to act in accordance with the majority opinion of the Members of the concerned Gram Panchayat while nominating the officiating Pradhan. The law laid down in the aforesaid case is in consonance with the spirit of the provisions of Chapter IX inserted in our Constitution by the Constitution (Seventy third) Amendment Act 1992 which provides for constitution of Panchayats at the village, empowering the villagers to manage their affairs at the local level themselves. The learned counsel for the appellant has not been able to persuade us to take a different view. We are in respectful agreement with the view taken by the coordinate Bench in the case of Udai Veer (supra). In this view of the matter, we are of the considered view that the learned single Judge was right in directing the District Magistrate to ascertain the wishes of the Members of the Gram Panchayat before nominating any person on officiating basis to discharge the duties and functions of the Gram Pradhan."

7. Unlike Section 12-H and 12-J of the Act of 1947 which regulates the manner of filling up of casual/temporary vacancy to the office of elected Pradhan, Section 95(1)(g) merely provides for exercise of administrative and financial powers of Pradhan by a three member committee during the conduct of enquiry against him. The office of Pradhan itself has not fallen vacant. The question of appointing Pradhan against casual/temporary vacancy or ascertaining views of electorate for such purposes does not arise. The exigency which arose before the Division Bench in the case of Pushpendra Kumar (supra) and Udaivir (supra) are entirely distinct and would not arise in the facts of the present case. The Pradhan continues to remain in office in the present case and the object of appointing three member committee is only to secure an expeditious and fair enquiry against the Pradhan. The three members committee consists of elected members of Gram Panchayat. Ordinarily the number of elected members of Panchayat vary from 12 and above. All members of Panchayat are elected persons and in the absence of any express provision in the statute this Court would not be justified in insisting upon the requirement of ascertaining view of all members for the purposes of appointing three member committee. Such a requirement otherwise need not be read in the proviso to Section 95(1)(g) particularly as the object of democratic functioning is amply safeguarded by the appointment of elected members only to the three member committee.

8. The issue needs to be examined from another aspect also. In the event opinion of such elected persons are insisted upon, it would not serve any purpose or objective, inasmuch as, it is quite possible that the elected members may not be unanimous in their views about the elected persons to be appointed to the three member committee. Ultimately, it would be left to the discretion of the District

Magistrate to appoint the elected members to the three member committee. In the absence of any credible material it would not be open to contend that the exercise of discretion by the District Magistrate would be arbitrary. Once the electorate of the village has already exercised its franchise and elected members to the Gram Panchayat and it is from those elected members that the three member committee is to be constituted no further ascertainment of views of all elected members of Gram Panchayat for the purpose of appointing the three member committee would be required. The exigency which was being dealt with by the Division Bench, therefore, is not found to be attracted in the facts of the present case.

9. Though Mr. Tandon has laid much emphasis upon following of democratic principles in appointing the three member committee but the Court finds that the scheme contained in the Act duly safeguards the democratic principles by requiring only elected members of Gram Panchayat to be appointed to the three member committee. I am therefore not inclined to accept the argument advanced on behalf of the petitioners.

10. The writ petition lacks merit and is accordingly dismissed.

(2020)07ILR A273

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.06 2020

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ C No. 6146 of 2020

Krishna Kumar ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Madhup Narain Shukla

Counsel for the Respondents:
C.S.C., Sri Azad Rai, Sri Siddharth Saran

A. Civil Law - Uttar Pradesh Revenue Code, 2006-Section 128 -The Constitution of India,1950-Article 226 - application-cancellation of allotment of Plot –the said allotment was not in accordance with law as per procedure prescribed by UPZA Act, 1950-petitioner did not claim any legal possession over the disputed plots-petitioner is not aggrieved as he is not suffering a legal grievance nor he has wrongly deprived him of something-as the land was recorded as Banzar in the revenue records which had vested in the State Government-eviction of the unauthorized occupant from the land u/s 122-B of the Act ,1950 is not a condition precedent for allotment of any land u/s 195, 197, and 198 of the Act, 1950-therefore proceedings for eviction of the unauthorized occupant would have to be taken after the allotments had been made u/s 198-A of the Act.(Para 3 to 20)

The petitioner alleged that the allotment made in favour of the respondents was made without any resolution by the Land Management Committee and without any public proclamation. The petitioner and certain other villagers had planted their trees on the said plot; thus the plot was not vacant and could not have been allotted u/s 195 of the Act,1950. (Para 3)

The writ petition is dismissed. (E-6)

List of Cases Cited: -

1.Munshi Vs St. Of U.P. & ors. (2012) 117 RD 615

2.Kalika Prasad & ors. Vs Board of Revenue & ors. (2009) 106 RD 39

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard Shri Madhup Narain Shukla, counsel for the petitioner, Shri Azad Rai and Shri Siddharth Saran, counsel for the respondents.

2. The present writ petition has been filed against the order dated 20.11.2017 passed by the Collector, Sant Kabir Nagar in Case No. D 201717650483 registered at the instance of the petitioner under Section 128 of the Uttar Pradesh Revenue Code, 2006 ***(hereinafter referred to as Code, 2006)*** for cancelling the allotment of Plot No. 64 M (0.0126 Hec.) made in favour of respondent nos. 5 & 6 as well as against the order dated 24.10.2019 passed by the Commissioner, Basti Division, Basti rejecting the Revision (Case No.851 of 2017 Computerized Case No.C20171700851) registered under Section 210 of Code, 2006 against the order dated dated 20.11.2017.

3. The petitioner had instituted Case No. D 201717650483 before the Collector, Sant Kabir Nagar alleging that the allotment made in favour of the respondents was made without any resolution by the Land Management Committee and without any public proclamation and was, therefore, not in accordance with law because the procedure as prescribed under the U.P. Zamindari Abolition & Land Reforms Act, 1950 ***(hereinafter referred to as Act, 1950)*** and the Rules made thereunder had not been followed. It was further contended by the petitioner that he and certain other villagers had planted their trees on the said plot which were still there and the petitioner and the said villagers were in possession of the plot and thus the plot was not vacant and, therefore, could not have been allotted under Section 195 of the Act, 1950.

4. During the proceedings in Case No. D 201717650483, the Tahsildar submitted a report 26.9.2017 wherein he admitted that the land was not fit for cultivation and the plot was in the form of grove. The Tahsildar denied the allegation of the petitioner that the allotment was made without following the Rules. The respondents also contested the case of the petitioner and denied all the pleas made by the petitioner in his application registering Case No.D 201717650483.

5. The Collector vide his order dated 20.11.2017 dismissed Case No. D 201717650483. In his order dated 20.11.2017 the Collector held that the allotment had been approved on 3.3.2008 because the respondents were scheduled caste and eligible for allotment under the Act, 1950. In his order dated 20.11.2017, the Collector also held that the petitioner was not an aggrieved person and therefore, the case registered under Section 128 of the Code, 2006 was not maintainable. It also transpires from a reading of the order dated 20.11.2017 that the Collector had himself personally inspected the plot in presence of the parties as well as the local Lekhpal and the Revenue Inspector and found that the respondents were in possession of the plot and were using it for agricultural purposes. The petitioner alleges that the Collector had not inspected the plots and no spot memo was prepared by the Collector. However, because the fact of inspection or preparation of spot memo are not relevant for a decision of the writ petition, therefore, the Court is not entering into the said factual controversy.

6. Against the order passed by the Collector, the petitioner filed a Revision before the Commissioner under Section 210 of Code, 2006. A perusal of

memorandum of revision shows that in the Revision the petitioner did not raise the plea that the allotment was made without any public proclamation or without any resolution by the Land Management Committee. In his revision, the petitioner mainly raised the plea that the respondents were not landless agricultural labourers and that the trees had been planted by the petitioner on the disputed plot, the plot was in the form of grove and in the possession of the petitioner and, therefore, could not be allotted as it was not a vacant land.

7. The Commissioner dismissed the revision filed by the petitioner vide his order dated 24.10.2019.

8. While challenging the impugned orders dated 20.11.2017 and 24.10.2019, the counsel for the petitioner has argued that it was evident from the report dated 26.9.2017 filed by the Tahsildar that Plot No.64 which was allotted to the respondents was not a vacant plot because trees had been planted on it by the petitioner and other villagers and the plot was in the nature of grove land and, therefore, could not be allotted under Section 195 of the Act, 1950. It was further argued by the counsel for the petitioner that the petitioner was in possession of the disputed plots and entitled to retain its possession till evicted in accordance with law and was therefore, also entitled to challenge the allotments made in favour of respondent nos. 5 & 6. It was argued that the opinion of the Collector and the Commissioner that the petitioner was not an aggrieved person is contrary to law and therefore, the impugned orders dated 20.11.2017 and 24.10.2019 are liable to be quashed. In support of his argument, the counsel for the petitioner has relied on the judgments of this Court reported in ***Munshi versus State of U.P and others 2012 (117) RD 615 and Kalika Prasad & others versus Board of Revenue and others 2009 (106) RD 39.***

9. Rebutting the arguments of the counsel for the petitioner, the counsel for the respondents have supported the reasons given by the Collector and the Commissioner in the impugned orders dated 20.11.2017 and 24.10.2019 and have argued that the writ petition was liable to be dismissed.

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

11. In ***Kalika Prasad (Supra),*** the Court in paragraph nos. 10 to 15 of the report held that only a vacant land can be allotted under Sections 195 and 197 of the Act, 1950 and if any person is in unauthorized occupation of the land, even then it cannot be allotted without evicting the unauthroized occupant in accordance with the procedure prescribed under Section 122-B of the Act, 1950. It is relevant to note that in ***Kalika Prasad (Supra),*** the petitioners had pleaded that they were in possession of the disputed plot with the permission of the erstwhile zamindar of the disputed plot. The judgment in ***Kalika Prasad (Supra)*** suggests that a land which is physically occupied by any person, even if unauthorisedly, would not be a vacant land under Section 195(a) of the Act, 1950 and, therefore, cannot be allotted till the authorities get it vacated by resorting to the procedure prescribed in Section 122-B.

12. The allotments in ***Kalika Prasad (Supra)*** were under Section 122-C(2) of the Act, 1950 for purposes of building houses. The allotment in the present case is

under Sections 195 read with Section 198 of the Act, 1950. The judgment in ***Kalika Prasad (Supra)*** does refer to allotments under Section Sections 195 and 197 of the Act, 1950 but does not take note of section 198-A of the Act, 1950. A reading of Section 198-A of the Act, 1950 shows that the legislature had conceived of a situation where land allotted to a villager would be under the unauthorized occupation of some other person and therefore, proceedings for eviction of the unauthorized occupant would have to be taken after the allotments had been made. Section 198-A prescribes the procedure for eviction of the unauthorized occupant and for putting in possession the allottee after allotments have been made under Sections 195, 197 & 198 of the Act, 1950. Section 198-A empowers the Assistant Collector to put the allottee in possession of the allotted land after evicting the unauthorized occupant and and for that purpose, use or cause to be used such force as he considers necessary. The proceedings are summary in nature and the order passed by the Assistant Collector is appealable under Section 198-A (1-B) of the Act, 1950. The existence of the aforesaid provision i.e. Section 198-A of the Act, 1950 clearly indicates that it is not necessary that the land should not be in actual physical occupation of any other person before any allotment is made in favour of any person under Sections 195, 197 and 198 of the Act, 1950. Eviction of the unauthorized occupant from the land under Section 122-B of the Act, 1950 is not a condition precedent for allotment of any land under Sections 195, 197 and 198 of the Act, 1950. Any other interpretation would make Section 198-A redundant. The judgment of this Court in ***Kalika Prasad (Supra)*** does not take note of the said statutory provision. The failure of the Court in ***Kalika Prasad (Supra)*** to notice Section 198-A coupled with the fact that the issue involved in the said case related to allotments under Section 122-C of the Act, 1950 and not to allotments under Sections 195 to 198 of the Act, 1950, the judgment in ***Kalika Prasad (supra)*** does not create a binding precedent for cases relating to allotments under Sections 195 to 198 of the Act, 1950.

13. At this stage, it would be relevant to note that Section 122-D of the Act, 1950 prescribes the procedure for eviction of unauthorized occupants over land allotted under Section122-C of the Act. 1950 and also the procedure to put in possession an allottee under section 122-C. Section 122-D is similar to section 198-A. The Court in ***Kalika Prasad (Supra)*** also did not notice Section 122-D. However, as the present writ petition relates to allotments under Sections 195 to 198 of the Act, 1950 and not to allotment under Section 122-C, therefore, any opinion expressed in the present judgment is restricted to allotments under Sections 195 to 198 of the Act, 1950.

14. The other argument that was raised by the counsel for the petitioner was that the opinion of the Collector and the Commissioner that the petitioner was not an aggrieved person is also contrary to the judgments of this Court reported in ***Kalika Prasad (Supra)*** and ***Munshi (Supra).***

15. A reading of the judgment in ***Kalika Prasad (Supra)*** shows that in the aforesaid case, the petitioners had pleaded that they were in possession of the disputed plots with the permission of the erstwhile zamindar of the plots and had planted trees with the permission of Zamindar. A perusal of the Khatauni of Plot No.64 annexed with the present writ petition shows that the disputed plot was recorded as Banzar in the

revenue records and therefore, did not settle with any tenure holder but had vested in the State Government and consequently in the Gaon Sabha under Section 117 of the Act, 1950. There is nothing on record to show that any application was filed by the petitioner either for correction of the records or any proceedings were instituted by the petitioner claiming title to the disputed plots.

16. A perusal of the application filed by the petitioner registering Case No. D 201717650483 also does not reveal that the petitioner had claimed his possession over the plots to be permissive or claimed any title over the disputed plots. There is nothing on record to show that the petitioner claimed any legal possession over the disputed plots.

17. In ***Munshi (Supra)***, this Court after following the judgments of the Supreme Court held that a person aggrieved must be a man who had suffered a legal grievance. Paragraph-16 of the judgment of this Court in ***Munshi (Supra)*** is relevant for the purpose and is reproduced below:

"Point No. 2:- Though I have already held that the order passed by the learned Member of Board of Revenue is without jurisdiction but assuming for a moment that it was within his competence to maintain the revision and decide the same, even then learned Member has erred in cancelling the lease without assigning any reason. So far as the view taken by the learned Member of Board of Revenue that the respondent no. 6 is an aggrieved person is concerned, controversy in this regard is no more res integra as the Apex Court as well as this Court in a catena of decisions, while considering as to who could be said to be the "person aggrieved", held that although the meaning of expression "person aggrieved" may vary according to the context of the Statute and facts of the case nevertheless ***normally, a person aggrieved must be a man who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongfully refused something, or wrongfully affected his title to someone.***

In M.S. Jayaraj Vs. Commissioner of Excise, Kerala & Ors., (2000) 7 SCC 552, the Supreme Court considered the matter at length and placing reliance upon a large number of its earlier judgments including the Chairman, Railway Board & Ors., Vs. Chandrima Das (Mrs.) & Ors., AIR 2000 SC 988; held that the Court must ***examine the issue of locus standi from all angles and the petitioner should be asked to disclose as what is the legal injury suffered by him.***

The term "person aggrieved" was also considered and defined in Re: Sidebotham, (1880) 14 Ch. D. 458, wherein it has been observed as under :-

"The words ''person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something."

.....

.....

The "person aggrieved" means a person who is wrongfully deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense. (Vide K.N. Lakshminarasimaiah Vs. Secretary, Mysore S.T.A.T., (1966) 2 Mys. L.J. 199).

Whether a person is injured in strict legal sense, must be determined by the nature of the injury considering the facts and circumstances involving in each case. A fanciful or sentimental grievance may not be sufficient to confer a standi to sue upon the individual. There must be injuria or a legal grievance, as the law can appreciate and not a stat pro ratione valuntas reasons.

.....

....."

(emphasis added)

18. The petitioner has not suffered any legal injury by the allotments and the allotments do not affect his title over the plots. Thus, in view of the observations made by this Court in ***Munshi (Supra),*** there is no illegality in the orders of the revenue authorities holding that the the petitioner was not an aggrieved person and had no right to challenge the allotments made in favour of the respondents.

19. There is no illegality in the impugned orders dated 20.11.2017 and 24.10.2019 passed by the Collector and the Commissioner.

20. The writ petition lacks merit and is ***dismissed.***

(2020)07ILR A278
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ C No. 7279 of 2006

D.L.F. Universal Ltd. & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shesh Kumar, Sri Saurabh Srivastava, Sri T.P. Singh, Sri Navin Sinha.

Counsel for the Respondents:
C.S.C., Sri D. Awasthi, Sri V.P. Mathur, Sri Ramendra Pratap Singh.

A. Company Law - Companies Act, 2013 - The Constitution of India,1950-Article 226 - refund of stamp duties-Petitioners contended that denial of refund is illegal but could not dispute that in absence of first proviso, petitioners were not entitled to seek any exemption of stamp duty under notification dated 19.01.2005-Moreover, when exemption notification dated 19.01.2005 came into force, second proviso,denying refund was already existing on the statute book since 10.01. 2005-the contention that refund has been denied to petitioners is discriminatory, is not acceptable. (Para 36)

Petitioners did not present instrument in question either before District Magistrate or General Manager, District Industrial Centre for authentication and confirmation of facts that transfer under lease is covered by the notification. In absence of compliance of all the conditions of notification dated 19.01.2005, Petitioners cannot claim exemption form stamp duty and no remission is permissible. (Para 14)

The writ petition is dismissed.
(E-6)

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

1. Present writ petition under Article 226 of the Constitution of India has been filed by M/s D.L.F. Universal Limited and its Executive Director, Legal and Constituted Attorney, Sri K. Swarup initially, seeking a writ of mandamus commanding respondents to refund stamp duty of Rs.16,91,03,000/- along with interest at the rate of 24% per annum to petitioners realized from them towards stamp duty on the instrument in question though it was not chargeable with any stamp duty. Subsequently, by amendment prayer (d) has been inserted to issue a writ of certioari quashing second proviso of amended notification dated 10.07.2008, issued by U.P. Government (Annexure 1 to the affidavit and Annexure 9 to the writ petition) in so far as it relates to denial of stamp duty already paid.

2. Facts, in brief, giving rise to present petition are that petitioner 1, M/s D.L.F. Universal Ltd., is a company incorporated under Companies Act, 1956 (hereinafter referred to as Act 1956) and continuing as such under the provisions Companies Act, 2013 (hereinafter referred to as "Act, 2013"). Company is dealing in transaction of land, construction of multi-storeyed colonies, commercial complexes etc. New Okhla Industrial Authority (hereinafter referred to as "NOIDA"), a statutory body constituted under U.P. Industrial Development Act, 1976 (hereinafter referred to as "U.P. Act, 1976") invited tenders for allotment of commercial plot no. 003, Block M, Sector 18, NOIDA under the Scheme Commercial Hub, Sector 18 (2003-04). Petitioners' tender was accepted by competent authority and they were allotted aforesaid land which has a total area of 54320.18 sq. meter, at the rate of Rs.31,850/- per sq. meter. Total premium of plot was calculated as Rs.1,73,00,97, 733/- and allotment money as Rs.43,25,24,433.25. Petitioner had already deposited earnest money as Rs.3 crores, hence, after deducting aforesaid amount, petitioner was required to deposit balance amount of Rs.40,25,24,433.25 within 15 days from the date of acceptance of letter and balance premium of Rs.129,75,73,299.75 was payable within 90 days from the date of issue of acceptance letter without interest. The land in dispute was involved in a Public Interest Litigation, i.e., PIL No. 10137 of 2004 filed by one Anil Kumar Srivastava which ultimately was transferred to Supreme Court and decided in Civil Appeal No. 5402 of 2004, vide Judgment dated 20.8.2004 and it was dismissed. Supreme Court permitted petitioners to pay balance amount of 75 per cent within a week. Pursuant thereto, 75 per cent balance amount was paid to NOIDA on 26 August 2004 and request for execution of lease deed and handing over possession was made. Before lease deed could be executed, State Government issued a notification 19.01.2005 modifying its earlier notification dated 31.08.1998 in exercise of powers under clause (a), sub-section (1) of Section 9 of Indian Stamp Act 1899 (hereinafter referred to as Act 1889) as amended from time to time in State of U.P., stating that with effect from the date of notification dated 19.01.2005 instruments as shown in column 4 of the Schedule executed for the purposes provided in paragraphs 4.2.1, 4.2.2 and 4.2.3 and clauses (a) to (f) of paragraph 8.2 of the Industrial and Service Sector Investment Policy, 2004, are exempted

from stamp duty. It also provided that exemption shall be granted only on the first instrument executed for transfer of an immovable property in favour of an enterpreneur. District Magistrate or General Manager, District Industries Centre was to sign such instrument as witnesses for confirming the fact that transfer is being executed under the said policy. Paras 4.2.1, 4.2.2, 4.2.3 and 8.2 (a) to (f) as said in notification read as under:-

Paragraph number of the Industrial and Service Sector Investment Policy, 2004 of the State	*Purpose and other details*	***Extent of remission***	*Nature of investment and Article number of Schedule I-B*
4.2.1	*(a) For setting up of new small scale or Tiny industrial units in 29 district of Purchanchal and in 7 district of Bundelkhand.*	*Full*	*Conveyance Article 23(a)*
	(b) For setting up of New Medium or large industrial units in 29 district of Purchanchal and in 7 districts of Buldelkhand	*Half*	*Conveyance Article 23(a)*
	(c) For setting up of industrial units in rest of the districts of the State	*Half*	*Conveyance Article 23(a)*
4.2.2	*Transfer of land for development of infrastructure facilities viz. for establishing Industrial Estates, Road, Bridges, over-bridges, wholesale market, Transhipment Centre, Integrated Transport and Commercial Centre, Container Depot, Electricity Supply, Water*	*Full*	*Conveyance Article 23(a)*

	Supply, Water drainage, Exhibition Centres, Warehouse.		
4.2.3	*Establishment of Information Technology, Business Process Outsourcing units, Call Centres, Agro-Processing units.*	*Full*	*Conveyance Article 23(a) and Lease Article 35*
8.2 (a)	*Transfer of immovable property for such multi-facility Hospital having an established capacity of minimum 100 beds and having an area which is more than the area for medical purpose as prescribed in the relevant Government order and haring such medical facilities as provided in the relevant Government order.*	*Full*	*Conveyance Article 23(a) and Lease Article 35*
8.2 (b)	*Transfer of immovable property for a Super-speciality Hospital having medical facilities as provided in the relevant Government order*	*Full*	*Conveyance Article 23(a) and Lease Article 35*
8.2 (c)	*Transfer of immovable property for a Hospital established in Block Headquarter (which is different from a Tehsil and District Headquarter) having an established*	*Full*	*Conveyance Article 23(a) and Lease Article 35*

	capacity of minimum 50 beds and having such medical facilities as provided in the relevant Governme nt order.		
8.2 (d)	*Transfer of immovable property for a Hospital established in a village (which is different from a Block Headquart er) having an established capacity of minimum 30 beds and having such medical facilities as provided in the relevant Governme nt order.*	*Full*	*Convey ance Article 23(a) and Lease Article 35*
8.2 (e)	*Transfer of immovable property for a training institute for Technical or Informatio n Technology established in a Block Headquart er (which is different from a District Headquart er) having a minimum 75 students/ trainees and which is running on a syllabus approved by the State Governme nt.*		*Article 23(a) and Lease Article 35*
8.2 (f)	*Transfer of immovable property for a Medical and Dental College or other Educationa l Institutions*, ***Multiplex Cinema***	***Full***	*Convey ance Article 23(a) and Lease Article 35*

	Hall, Shopping Malls, Entertainment Centres in which the cost of construction and machinery is not less than rupees ten crore and which have such facilities and which fulfill the conditions as have been provided in Government order no. 845/5-1-04-(28)/ 2002 dated Febryary 27, 2004 issued by Medical Section-1, Government of Uttar Pradesh orders issued by the related Government Departments from time to time.		

3. Notification also said that immovable property, which was transferred shall not be used for the purpose other than the purpose described in said policy. Explanation in the notification gives details of districts as referred to in aforesaid paragraph 4.2.1 and reads as under:-

"(a) 29 districts of Purvanchal shall comprise of the revenue districts of Faizabad, Sultanpur, Barabanki, Gonda, Bahraich, Basti, Siddharthnagar, Gorakhpur, Maharajganj, Deoria, Kushinagar, Azamgarh, Mau, Ballia, Varanasi, Ghazipur, Jaunpur, Mirzapur, Sonbhadra, Sant Ravidas nagar, Allahabad, Fatehpur, Pratapgarh, Balrampur, Chandauli, Sravasti, Kaushambi, Ambedkarnagar, Sant Kabir Nagar.

(b) 7 districts of Buldelkhand shall comprise of the revenue districts of Jhansi, Jalaun, Lalitpur, Banda, Mahoba, Hamirpur, Chitrakoot.

*(c) Rest of the districts of the State me*ans the districts of the State which are not mentioned in clauses (a) and (b) above."

4. NOIDA required petitioners to execute sale deed on payment of stamp duty of Rs.166,10,300/-. The lease deed was executed on 25th February 2005 between NOIDA and petitioners and registered on the same day in the office of Sub Registrar-II, NOIDA. Copy of lease deed shows that land was allotted to petitioners for the purpose of shopping malls, multiplexes, showrooms, retail outlets, hotels, restaurants, offices and such other commercial usage after constructing building according to setbacks and building

plan approved by lessor. Despite the fact that no stamp duty was payable in terms of paras 8.2(f) notification dated 19.01.2005, in ignorance thereof, NOIDA charged stamp duty upon petitioners for execution of aforesaid lease deed dated 25.2.2005. Petitioners submitted plan for construction of shopping malls etc. which was sanctioned and petitioners started work and the estimated cost of construction is much more than Rs.10 crores. Therefore, all the conditions set out in notification dated 19.01.2005 were satisfied so as to exempt petitioners from payment of stamp duty. Petitioners, therefore, sent letter dated 19.4.2005 requesting Chief Executive Officer, NOIDA to refund stamp duty illegally realized from petitioners.

5. NOIDA officials replied, vide letter dated 16.09.2005 that the matter relating to refund of stamp duty is under the jurisdiction of Tax and Registration Department, U.P. Government. Consequently, petitioners sent representation dated 27.09.2005 requesting District Magistrate/ Collector, Gautam Budh Nagar to refund aforesaid stamp duty which was illegally realised from petitioners. Having received no reply, petitioners sent registered notice dated 19.12.2005 to all concerned authorities, namely, Chief Controlling Revenue Authority, Sub Registrar, District Magistrate and Vice Chairman, NOIDA making demand to refund of stamp duty. This writ petition, therefore, has been filed with a prayer that aforesaid stamp duty should be refunded.

6. During pendency of present writ petition, an amendment has been made in Government Notification dated 31.8.1998, w.e.f 19.01.2005 in exercise of powers under Section 21 of General Clauses Act, 1897 read with Section 9 (1) (a) of Act 1899, by notification dated 10.07.2008, whereby two provisos have been inserted at the end of para 1, which read as under:-

"Provided that where the District Magistrate or the General Manager, District Industries Centre of the concerned District ***could not have signed such instrument as witness due to any procedural omission,*** *the District Magistrate of the concerned district shall issue a certificate to the effect that t****he instrument of transfer has been executed under the aforesaid policy such certificate shall have the same effect as if such instrument were signed as witness by the District Magistrate or the General Manager, District Industries Centre of the concerned district before the registration*** *thereof.*

Provided further that any amount of the duty already paid on such instrument shall not be refunded on the basis of aforesaid certificate issued by the District Magistrate of the concerned district." (emphasis added)

7. Thus, aforesaid amendment denied refund of stamp duty where it has already been paid. This notification has also been challenged on the ground that the amount illegally realized cannot be retained by State and it violates constitutional right of property enshrined under Article 300A of the Constitution. Denial of refund is patently illegal, arbitrary and without any authority of law. An amount realized from any person without any authority of law cannot be retained by State and it cannot deny its refund.

8. Contesting writ petition, a counter affidavit has been filed on behalf of

Respondents-1 and 2, sworn by Sri G.K. Srivastava, Deputy Commissioner (Stamp) Head Quarter Allahabad. It is not disputed that petitioners are lessee of plot no.003 Block M, Sector 18, NOIDA, which was allotted by NOIDA, vide allotment letter dated 12.4.2004. The consideration of premium agreed between parties shown in lease deed was Rs.1,73,00,97,733/- and the term of lease is 90 years from the date of execution of lease, which was executed on 25.2.2005. Thus, the deed in question is an "instrument" within Section 2 (14) of Act 1899, which reads as under:-

"(14) "Instrument" includes ***every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded."*** *(emphasis added)*

9. Instrument is a "lease" under Section 2(16) and it reads as under:-

"(16) "Lease" means a lease of immovable property, and includes also-

(a) a patta;

(b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for, immovable property;

(c) any instrument by which tolls of any description are let;

*(d) any writ*ing on an application for a lease intended to signify that the application is granted."

10. An Instrument of lease, therefore, is chargeable under Section 3(aa) of Act 1899. Section 3(aa) reads as under:-

"3(aa). Every instrument mentioned in Schedule I-A or I-B, which, not having been previously executed by any person, was executed in Uttar Pradesh:

(i) in the case of instruments mentioned in Schedule I-A, on or after the date on which the U.P. Stamp (Amendment) Act, 1948 came into force, and

(ii) in the case of instruments mentioned in Schedule I-B, on or after the date on which the U.P. Stamp (Amendment) Act, 1952 comes into force."

11. Stamp Duty is payable at or at the time of execution of deed as provided in Section 17 of Act 1889. The amount of stamp duty payable under Article 35 (c) (ii) of Schedule 1-B of Act 1899, reads as under:-

Article 35. Lease (including an under lease or sub-lease and any agreement to let or sub-let)	
(a) where by such lease the rent is fixed and no premium is paid or delivered-	The same duty as a Bond (No. 15) for the whole amount payable or delivered under such lease.
(i) where the lease purports to be for a term not exceeding one year;	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.
(ii) where the lease purports to be for a terms exceeding one year but not exceeding five years.	
(iii) where the lease purports to be for a terms exceeding five years but not exceeding ten years.	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount
(iv) where the lease	

purports to be for a term exceeding ten years but not exceeding twenty years.	or value of the average annual rent reserved.
(v) where the lease purports to be for a term exceeding twenty years but not exceeding thirty years.	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.
(vi) where the lease purports to be for a term exceeding thirty years or in perpetuity or does not purport to be for any definite term.	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.
(vii)	
(viii)	
(b) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved-	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal the market value of property which is the subject of the lease.
(i) where the lease purports to be for a term not exceeding thirty years.	
(ii) where the lease purports to be for a term exceeding thirty years.	The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.
(c) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved-	The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the market value of the property which is subject of the lease.
(i) where the lease purports to be for a term not exceeding thirty years.	
(ii) where the lease purports to be for a terms exceeding thirty years.	The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered: Provided that in a case when an agreement to lease is stamped with the ad valorem stamp required for lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed Fifty rupees. The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the market value of the property which is subject of the lease.

12. Petitioners at no point of time, either before execution of deed or after execution thereof, within reasonable time, approached Collector (Stamp) seeking remission of duty in question by making application for remission. In order to justify exemption, the instrument in question has to satisfy the following conditions:-

I. The policy referred in the **notification is the Industrial and Service Sector Investment Policy 2004.**

II. Exemption shall be granted only on the **first instrument executed for transfer for an immovable property in favour of an enterpreneur.**

III. The District Magistrate or General Manager, District Industry Centre

of the concerned district shall sign such instrument as witness for the purpose of confirming the fact that transfer is being executed under the said policy.

IV. The immovable property so transferred shall not be used for the purpose other than the purpose prescribed in the policy.

13. Petitioners claim to fall under clause 8.2 (f) which restrict application of notification to transfer of immovable property for a multiplex/shopping mall for which cost of construction and machinery is not less than 10 crores. Duty is chargeable only on instrument and no transaction. Therefore it was incumbent upon petitioners to mention in the instrument specifically all those factors which affect chargeability of stamp duty under At, 1899. Section 27 of Act 1899 requires disclosure of all such facts and it reads as under:-

"27. Facts affecting duty to be set forth in instrument. *--The consideration (if any) and all other f****acts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it its chargeable, shall be fully and truly set forth therein."*** *(emphasis added)*

14. In the case in hand, lease deed no where mention the relevant facts, which may attract notification dated 19.1.2005 inasmuch as it has no where mentioned that cost of constructions and machinery would be 10 crores and above. Similarly petitioners did not present instrument in question either before District Magistrate or General Manager, District Industrial Centre of Gautam Budh Nagar for authentication and confirmation of facts that transfer under lease is covered by the notification. In absence of compliance of all the conditions of notification dated 19.1.2005, petitioners cannot claim exemption from stamp duty and no remission is permissible. At no point of time, petitioners made any application to District Magistrate intimating the cost of construction for securing remission thereon. Notification dated 19.1.2005 has to be read with notification dated 10 July 2008, which has made amendment with effect from 19.1.2005. In view of second proviso to notification dated 19.1.2005 read with notification dated 10th July 2005, no refund is permissible.

15. Respondents 3 and 4 have also filed separate counter affidavits stating that petitioners never claimed exemption from stamp duty and notification dated 10 July 2008 is within the power of State Government to reduce, remit or compound duties under Section 9 of Act 1899.

16. In the supplementary rejoinder affidavit, petitioners have claimed that notification dated 10th July 2008 is arbitrary and has been issued to frustrate the claim of refund of petitioners.

17. Sri Navin Sinha, learned Senior Advocate assisted by Sri Shesh Kumar, Advocate has appeared for petitioners and learned Standing Counsel as well as Sri Ramendra Pratap Singh, Advocate for respondents.

18. Sri Sinha, submitted that exemption could not be claimed by petitioners at the time of execution of lease deed due to lack of knowledge of Notification dated 19.01.2005 and for that reason petitioners cannot be penalized. He submitted that as soon as petitioners came

to know about said mistake, they sent letters dated 19.04.2005 and 16.09.2005 (Annexures-4 and 5 to writ petition) and thereafter a legal notice dated 19.12.2005. He contended that impugned notification dated 10.07.2008 issued with retrospective effect inserting second proviso, is only to deny refund of stamp duty to petitioners and, therefore, is arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

19. Learned counsel appearing for respondents collectively argued that stamp duty was payable by petitioners and they did not satisfy the conditions provided in Notification dated 19.01.2005 so as to entitle for exemption from stamp duty. In any case Notification dated 10.07.2008 has inserted second proviso in Government Order dated 31.08.1998 w.e.f. 10.01.2005 while exemption was granted by Notification dated 19.01.2005 and hence in law second proviso was existing already on statute book when exemption notification was issued and hence it cannot be said that it is discriminatory. Even otherwise, petitioners have no otherwise legal right to claim refund. Lastly it is contended that with regard to eligibility for exemption etc. the dispute raised by petitioners involve investigation into facts and petitioners have a statutory remedy before Collector, therefore, must avail the same and writ petition should be dismissed.

20. We propose to first consider, whether petitioners are ex facie entitled for exemption from payment of stamp duty and they were covered by para 8.2(f) of notification dated 19.01.2005 for the reason that question of refund will arise only if, this question is answered in favour of petitioners and only then validity of notification dated 10.07.2008 will be necessary to be considered.

21. All the conveyance and instruments transferring immovable property by way of lease in general have not been exempted from stamp duty vide notification dated 19.01.2005. Instead para 8.2(f) is confined to certain conditions if fulfilled only then one can claim exemption from stamp duty under the said notification. These conditions are:

(i) Transfer of immovable property must be for development/ construction of medical and dental college or other educational institutions, multiplexes, cinema halls, shopping malls and entertainment centres.

(ii) The cost of construction and machinery must not be less than Rs. 10 crores.

(iii) Such development/ construction must have such facilities and which fulfill the conditions as provided in Government Order dated 27.02.2004 and other orders issued from time to time.

(iv) The District Magistrate or General Manager, District Industry Centre of concerned District must sign such instrument as witness for the purpose of confirming the fact that transfer is being executed under above policy.

22. We do not find averments and relevant facts in writ petition that these conditions were satisfied by petitioners so as to entitle them for exemption of stamp duty. In fact Government Order dated 27.02.2004 has not even been placed on record by petitioners and there is no

averment whatsoever that the facilities and conditions provided therein were satisfied.

23. Copy of Government Order dated 27.02.2004 has been placed on record by Respondents-1 and 2 as Annexure-CA 3 to their counter affidavit. The aforesaid Government order deals with steps taken to encourage Service Sector in the State of U.P. under Industrial and Service Sector Investment Policy, 2004 and it reads as under:

''प्रेषक,

श्री राकेश कुमार मित्तल,
प्रमुख सचिव,
उ0प्र0 शासन।

सेवा मे,

महानिदेशक,
चिकित्सा एवं स्वास्थ्य,
लखनऊ।

चिकित्सा अनुभाग–1
लखनऊ दिनांक 27.04.2004

विषय– औद्योगिक एवं सेवा क्षेत्र निवेश नीति 2004 के अन्तर्गत सेवा क्षेत्र को प्रोत्साहन दिये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि विगत कुछ

वर्ष से सेवा क्षेत्र का आर्थिक विकास एवं रोजगार सृजन में महत्वपूर्ण स्थान रहा है। तीव्र आर्थिक विकास तथा भूमि पर बढ़ते हुए दबाव को कम करने के लिए सेवा क्षेत्र को प्रोत्साहित किया जाना आवश्यक है। अतः इस नीति के अन्तर्गत सेवा क्षेत्र के विकास पर विशेष बल दिया जायेगा।

2. सेवा क्षेत्र के उपक्रमों यथा–चिकित्सालयों मेडिकल व डेन्टल कालेजों शिक्षण संस्थानों इत्यादि में निजी क्षेत्र के निवेश को प्रोत्साहन दिया जायेगा। इस हेतु विभाग की ओर से अपेक्षित अनापत्ति / अनुज्ञा प्राथमिकता के आधार पर निर्गत की जायेगी।

3. अवस्थापना सुविधाओं के सदृश ही सेवा क्षेत्र के ऐसे उपक्रम जो निम्नलिखित श्रेणी में आच्छज्ञदित हैं, को अचल सम्पत्ति के क्रम अथवा किराये पर लेने पर 100 प्रतिशत स्आम्प डियूटी से छूट और रू0 2 प्रति हजार (अधिकतम रू0 5000) की दर पर निबंधन सुविधा उपलब्ध करायी जायेगीः–

(क) प्रदेश में किसी भी भाग में स्थित निर्धारित सुविधाओं से युक्त ऐसे मल्टी फैसीलिटी चिकित्सालय, जिनकी स्थापित क्षमता न्यूनतम 100 बेड है, और जिनमें चिकित्सा सुविधाओं हेतु प्रयुक्त क्षेत्रफल निर्धारित सीमा से अधिक है।

(ख) प्रदेश में स्थित निर्धरित सुविधाओं से युक्त अति विशिष्टतायुक्त चिकित्सालय।

(ग) विकास खण्ड मुख्यालय (जो जिला व तहसील मुख्यालय से भिन्न हों) पर स्थित निर्धारित सुविधाओं से युक्त ऐसे चिकित्सालय जिनकी स्थापित क्षमता न्यूनतम 50 बेड की हो।

(घ) विकास खण्ड मुख्यालय से नीचे ग्रामीण क्षेत्रों में स्थापित निर्धारित सुविधाओं से युक्त ऐसे चिकित्सालय जिनकी स्थापित क्षमता न्यूनतम 30 बेड हो।

(च) निर्धारित सुविधाओं से युक्त तथा निर्धारित शर्तें पूर्ण करने वाले ऐसे मेडिकल या डेन्टल कालेज, अन्य शिक्षण संस्थाएं जिनमें भवन और मशीनरी में कुल लागत रू0 1000 करोड से कम न हो।

4. उपरोक्त प्रयोजनों हेतु राज्य सरकार द्वारा निम्न शुल्कों से छूट प्रदान की जायेगी।

(1) पूजी निवेश हेतु प्रयुक्त प्लान्ट एवं मशीनरी आदि पर कोई प्रवेश कर देय नहीं होगा।

(2) यदि भूमि का अधिग्रहण राज्य सरकार द्वारा किया जाता है तो अधिग्रहण शुल्क से छूट दी जायेगी।

(3) पूजी निवेश को प्रोत्साहित करने हेतु विकास प्राधिकरणों / स्थानीय निकायों द्वारा लगाये जाने वाले विकास शुल्क, मलवा शुल्क से छूट देने के साथ–साथ 05 वर्षों हेतु हाउस टैक्स, वाटर टैक्स एवं अन्य सभी टैक्सों / शुल्कों से छूट दी जायेगी।

(4) स्थापना की तिथि से 10 वर्ष हेतु इलेक्टिसिटी ड्यूटी से छूट दी जायेगी।

5. इस सम्पूर्ण कार्य को सम्पन्न करने के लिए अधिवासी भारतीयों का विस्तृत सर्वेक्षण कराया जायेगा एवं उनसे सक्रियता से सम्पर्क करके प्रदेश में निवेश के लिए आमन्त्रित किया जायेगा। अधिवासी भारतीयों के देश प्रेम की भावना को दृष्टिगत रखते हुए उन्हें अपने गांव, कस्बे अथवा शहर की स्थानीय सामाजिक अवस्थापना के उच्चीकरण अथवा अन्य समाज सेवा के कार्यों में सहयोग देने के लिए प्रेरित किया जायेगा।

भवदीय,
हस्ताक्षर अपठित
(राकेश कुमार मित्तल)
प्रमुख सचिव।''

24. Learned counsel for petitioners submitted that aforesaid Government Order is not applicable since lease of immovable property executed in favour of petitioners is not for establishment of medical and other institution but for development of land by constructing shopping malls, multiplexes, showrooms, retail outlets, hotels, restaurants, offices and such other commercial usage. Even if it is accepted, still Government Order dated 19.01.2005 will not be attracted unless petitioners demonstrate that condition of cost of construction and machinery is not less than Rs. 10 crores. On this aspect also we do not find any averment and material in writ petition. The only averment which could have been searched out is contained in para 8 and 22 of writ petition, which read as under:

"8. That from the perusal of the said notification, it is clear that the lease of immovable property relating to first transaction is completely exempted from payment of stamp duty in full if cost of construction is ten crores and above. In this regard it is submitted that the petitioner has been allotted land in question for construction of shopping malls and the cost of the said construction would be much more than Rs. 10 crores, therefore, the said notification (Annexure-2) is fully applicable in the facts and circumstances of the present case and the transaction in question was fully exempted from payment of an7 stamp duty."

"22. That from the lease deed, copy of site plan and from the spot is is clear that the land in question is being utilized for construction of shopping malls and the cost of such construction would not be less than Rs. 10 crores and the transaction in question is also a first transaction of immovable property, therefore, all the conditions of the notification are applicable to the facts and circumstances of the present case and the petitioner is lawfully entitled to get exemption from payment of stamp duty and the stamp duty already realized from the petitioner is liable to be refunded forthwith. A true copy of estimated cost is annexed herewith as Annexure-8 to the writ petition."

25. Paragraph 8 has been sworn on the basis of information received from record but no such record is available or placed before this Court.

26. Even letters/ representations claim to have been submitted by petitioners for

refund of stamp duty after execution of lease deed, nowhere states that petitioners satisfy the aforesaid conditions and actual cost of construction and machinery etc. is more than Rs. 10 crores. Copy of said representations is Annexures-4 and 6 to writ petition.

27. Annexure-4 is a letter addressed to Chief Executive Officer, NOIDA and Annexure-6 is a letter sent to District Magistrate/ Collector, Gautambudh Nagar. Nothing has been said in the letter sent to Chief Executive Officer, NOIDA. Letter sent to District Magistrate/ Collector, Gautambudh Nagar also states nothing on this aspect. There is no averment whatsoever that aforesaid conditions are satisfied by petitioners.

28. Learned counsel for petitioners drew out attention to Annexure-8 and averments made in para 22 of writ petition and contended that project's estimated cost is more than Rs. 313 Crores which apparently satisfy the requirement of Government Notification dated 19.01.2005.

29. We have gone through Annexure-8 to the writ petition and find that it does not contain any date and we do not know as to at what stage it was prepared. Moreover, for the purpose of attracting notification dated 19.01.2005 it is not the cost of project but the cost of construction and machinery only which is to be taken into account and question as to what would be included by the term "cost of construction" and "machinery", is a question of fact need to be examined appropriately at appropriate forum. This claim was never made by petitioners before respondents-authorities and from the estimated cost of project, it cannot be said as to what items have to be taken for attracting notification dated 19.01.2005. We, therefore, hold that petitioners have failed to show that they satisfy the conditions precedent for attracting Government Notification dated 19.01.2005 and, therefore, not entitled for exemption.

30. There is one more condition provided in Government Notification dated 19.01.2005 that instrument is the first one executed for transfer of immovable property in favour of an interprenure and secondly that District Magistrate or General Manager, District Industry Centre *(hereinafter referred to as "GM, DIC")* of concerned district shall sign such instrument as a witness for the purpose of confirming the fact that transfer is being executed under the said policy. It appears that petitioners were satisfied that they do not satisfy the aforesaid conditions and, therefore, lease deed executed by petitioners is not witnessed either by District Magistrate or GM, DIC, as contemplated in Government Notification dated 19.01.2005. The two witnesses to the deed are, Subhash Chaudhary and Jasmir Singh. It is not disputed before us that none of them held the office of District Magistrate or GM, DIC at the time of execution of lease deed in District Gautambudh Nagar. Therefore, even this condition remained uncomplied with. Learned counsel for petitioners has not addressed us on the question that aforesaid condition of witnessing the document by District Magistrate or GM, DIC is not a necessary condition for attracting Government Notification dated 19.01.2005.

31. In the alternative, even if we accept the contention of petitioners counsel that Annexure-8 to writ petition read with para 22, the entire cost of project will constitute sufficient satisfaction of

requirement of Rs. 10 crores cost of construction and machinery contemplated in notification dated 19.01.2005, we proceed now to consider whether petitioners can claim refund despite an otherwise provision made by Government Notification dated 10.07.2008.

32. It is not in dispute that when an instrument/ conveyance is executed, it attract stamp duty chargeable under Section 3(aa) read with (in the present case) Schedule I-B of Act, 1899. The document in question, therefore, was chargeable with stamp duty.

33. Section 3, however, states that subject to provisions of Act, 1899 and the exemptions contained in Schedule I, the document shall be chargeable with duty of the amount indicated in Schedule. Section 9 confers power upon Government, by rule or order published in official gazette, to reduce, remit or compound duty prospectively or retrospectively and it reads as under:

9. Power to reduce, remit or compound duties.-- (1) The Government may, by rule or order published in the Official Gazette,--

(a) reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable, and

(b) provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers (where there is a single transferee, whether incorporated or not) of debentures, bonds or other marketable securities.

(2) In this section, the expression "the Government" means,--

(a) in relation to stamp-duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, and in relation to any other stamp-duty chargeable under this Act and falling within entry 96 of List I in the Seventh Schedule to the Constitution, except the subject matters referred to in clause (b) of sub-section (1);

(b) save as aforesaid, the State Government.

34. Section 27 provides that consideration, if any, and all other facts and circumstances affecting chargeability of any instrument with duty or the amount of duty of which it is chargeable, shall be fully and truly set forth in the instrument. It is not disputed that in the entire instrument i.e. lease deed, there is no assertion of facts which may affect chargeability of duty so as to claim exemption or reduction or remission in the amount of stamp duty.

35. Further, the power has been conferred upon Government to reduce, remit or compound duties, which has also been conferred power to do so retrospectively. Notification dated 10.07.2008 has been issued in exercise of power under Section 9(1) of Act, 1899 making amendment in Government Notification dated 31.08.1998 w.e.f. 10.01.2005. It categorically states that amount of duty already paid shall not be

refunded. The first proviso which has been inserted by notification dated 10.07.2008 shows that if lease deed was executed in reference to Industrial and Service Sector Investment Policy, 2004 and District Magistrate or GM, DIC have not signed the instrument as witness, subsequently on an application given by party such a certificate can be issued by District Magistrate or GM, DIC which will have the same effect as if the document was signed and witnessed by District Magistrate or GM, DIC but this validation by way of second proviso will not result in refund of any amount of stamp duty. The power to issue notification under Section 9 with retrospective effect has been validly conferred and it could not be said that notification second proviso is ultra vires. In both the provisos which has been inserted are integrally connected and a lapse which earlier has occurred in lease deeds in order to grant other benefits under industrial policy etc., a method has been provided to do away such flaw but with a condition that amount already paid shall not be refunded. Second proviso is integrally connected with first proviso inasmuch as first proviso applies to the case where its compliance was not earlier done, hence duty exemption could not have been claimed. In order to protect the entrepreneur from other benefits he has been allowed to get such mistake rectified but with condition that no refund of amount already paid shall be made. Therefore, both provisos have to stay either together or not and it cannot be said that first proviso should stay but second proviso must go. When a benefit under such document is claimed, one has to claim as it is in its entirety and not partially.

36. Learned counsel for petitioners contended that denial of refund is illegal but could not dispute that in absence of first proviso, petitioners were not entitled to seek any exemption of stamp duty under Notification dated 19.01.2005. Moreover, exemption has been granted by Notification dated 19.01.2005 which is effective from the date of notification published in official gazette while amendment in Government Notification dated 31.08.1998 has been made by Government Notification dated 10.07.2008 w.e.f. 10.01.2005, meaning thereby when exemption Notification dated 19.01.2005 came into force, second proviso denying refund was already existing on the statute book since 10.01.2005. Hence, it cannot be said that something has been done only to deny benefit to petitioners. Therefore, the contention that refund has been denied to petitioners only by singling out them and it is discriminatory, is not acceptable.

37. No other point has been argued.

38. The writ petition lacks merit. Dismissed accordingly.

(2020)07ILR A293
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.06.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 17554 of 2006

Anoop Rana @ Sattan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhlilesh Srivastava, Sri Saksham Srivastava, Sri Imran Ullah

Counsel for the Respondents:
C.S.C.

A. Civil Law - Arms Act, 1959-Section 17(3) - The Constitution of India,1950-Article 226 - challenge to-cancellation of licence- The Petitioner misused his fire arm and opened fire in the premises in which some persons were seriously injured, resulting into breach of peace, law and order -licensing authority revoked licence as it deems it necessary for the security of public peace or public safety-the authority considered the police report and reply of the show cause notice-the Authority found that the petitioner has long criminal history and he misused the fire arm-this finding has been affirmed by the appellate authority-present proceedings are independent of the earlier proceedings-subject matter of both the notice is different and the earlier order does not come in the way of the authorities in giving further notice and passing order u/s 17(3) of the Arms Act, 1959.(Para 4 to 24)

The writ petition is dismissed. (E-6)

List of Cases Cited:-

1. Mahendra Singh Dhantwal Vs Hindustan Motors Ltd. (1976) 4 SCC 606

2. Ashok Kumar Vs Sita Ram (2001) 4 SCC 478

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

1. Heard Shri Saksham Srivastava, Advocate holding brief of Shri Akhilesh Srivastava, learned counsel for the petitioner and Shri Ajay Kumar Tiwari, learned counsel for the respondents.

2. The petitioner has challenged the order dated 02.09.2004 suspending the petitioner's fire arm license, the order dated 15.07.2005 cancelling his fire arm license and the appellate order dated 20.02.2006 dismissing the petitioner's appeal.

3. The facts of the case are that the petitioner was granted fire arm License No. 198 for DBBL Gun No. 73393 and License No. 36 for Pistol No. 59539 which were renewed from time to time.

4. In view of the police report dated 04.08.2004 of Police Station-Banne Devi the arm license of the petitioner were suspended and a show cause notice dated 02.09.2004 was issued to the petitioner for cancellation of the arm licenses on the ground that on 14.07.2004, the petitioner and others opened fire from their fire arms, in the premises of Tehsil Kaul, in which Shahabudeen and Dinesh Kumar Sharma were seriously injured by bullet in Case Crime Nos. 289 of 2004 and 290 of 2004 under Sections 147, 148, 149 and 307 I.P.C. Police Station-Banne Devi, District-Aligarh were registered against the petitioner. The petitioner misused his fire arms resulting into breach of peace, law and order. Besides, previously, many criminal cases were also registered against the petitioner.

5. The petitioner filed reply to the effect that he was not named in the FIR of the incident dated 14.07.2004 lodged against unknown persons and in the two case crime nos. 289 of 2004 and 290 of 2004 the petitioner was falsely implicated. The petitioner had not misused the fire arms. The petitioner also submitted that previously a showcause notice dated 03.08.2003 for cancellation of the petitioner's fire arm licenses was issued but the same was withdrawn by order dated 28.10.2003 after considering the petitioner's reply. As such, the petitioner submitted that the notice dated 02.09.2004 deserved to be withdrawn.

6. The Licensing Authority/District Magistrate Aligarh after considering the petitioner's reply and the police report but not being satisfied with the reply passed the

order of cancellation on 15.07.2005. The petitioner filed appeal no. 2 under Section 18 of the Indian Arms Act (Anoop Rana @ Sattan versus State of U.P.) which was dismissed by the Commissioner Agra Division, Agra by order dated 20.02.2006.

7. Learned counsel for the petitioner has argued that in the FIR the petitioner was not named and in Case Crime No. 289 of 2004 and 290 of 2004, the petitioner was falsely implicated. He has also submitted that as the previous show cause notice dated 03.08.2003 was withdrawn by order dated 28.10.2003, the present proceedings for cancellation of the petitioner's fire arm licenses could not be initiated and his license could not be cancelled. by the order under challenge.

8. Learned Standing Counsel has submitted that the petitioner has long criminal history. There were several cases registered against him. He was creating nuisance in the society showing power and barrels. The order of cancellation had rightly been passed by the licensing authority in the interest of public security and public safety. The petitioner had misused the fire arm in the incident dated 14.07.2004. Even if the petitioner's name was not in the FIR, his name came to light during investigation and consequently the case crime nos. 289 of 2004 and 290 of 2004 were registered against the petitioner.

9. Learned Standing Counsel has next submitted that the present proceedings were initiated in view of the petitioner's involvement and misuse of fire arm in the incident on 14.07.2004 and with respect to the same two criminal cases were pending against the petitioner. This has nothing to do with the previous show cause notice dated 03.08.2003 and the order dated 28.10.2003. The same would not come in the way of initiation of the present proceedings and in passing of the order of cancellation under challenge.

10. I have considered the submissions advanced by learned counsel for the parties and have perused the material on record.

11. It is necessary to reproduce the provisions of Section 17 of the Arms Act, 1959 as following.

"17. Variation, suspension and revocation of licences.—(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence,—

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the

public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:

Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

12. A bare reading of Section 17(3) of the Arms Act, 1959 makes it clear that licensing authority may by order in writing suspend a license for such period as he thinks fit and revoke the license (b) if the Licensing Authority deems it necessary for the security of public peace or for public safety suspend or revoke a license.

13. It is settled in law that the licensing authority has to satisfy itself that it is necessary for the security of the public peace or for public safety to revoke or cancel the license.

14. The satisfaction of the licensing authority must be based on the material on record. The order of cancellation or revocation must be passed after affording opportunity of hearing to the licensee in consonance with the principle of natural justice.

15. In the present case, the petitioner's license has been cancelled by the licensing authority on its satisfaction that it was necessary for the security of the public peace and public safety that the fire arm license should not continue with the petitioner.

16. In this respect the licensing authority has considered the police report and the reply of the petitioner to the show cause notice and on such consideration the licensing authority found that the petitioner has long criminal history and he misused the fire arm in the incident dated 14.07.2004. Thus, the licensing authority has recorded its satisfaction on the pre requisite under Section 17(3) of the Arms Act for cancellation of the fire arm licenses which is based on material on record. This finding has been affirmed by the appellate authority. The finding thus, is a concurrent finding of fact, the petitioner's counsel has not been able to demonstrate as to how the finding suffers from any illegality or perversity.

17. In the case of ***Mahendra Singh Dhantwal versus Hindustan Motors Ltd. 1976 4 SCC 606*** the Hon'ble Supreme Court in paragraph no. 32 has held as under:-

"It is true that on the face of the order of termination the company invoked clause (1) of the agreement and even so it was open to the tribunal to pierce the veil of the order and have a close look at all the circumstances and come to a decision whether the order was passed on account of certain misconduct. This is a finding of fact which could not be interfered with under Article 226 of the Constitution unless the conclusion is perverse, that is to say, based on no evidence whatsoever. We are, however, unable to say so having regard to the facts and circumstances described by the tribunal in its order."

18. In the case of ***Ashok Kumar versus Sita Ram 2001 4 SCC 478,*** the Hon'ble Supreme Court has held as under in paragraph nos. 10 and 17 which are being reproduced as under.

"10. The position is too well settled to admit of any controversy that the finding of fact recorded by the final Court of fact should not ordinarily be interfered with by the High Court in exercise of writ jurisdiction, unless the Court is satisfied that the finding is vitiated by manifest error of law or is patently perverse. The High Court should not interfere with a finding of fact simply because it feels persuaded to take a different view on the material on record.

17. The question that remains to be considered is whether the High Court in exercise of writ jurisdiction was justified in setting aside the order of the Appellate Authority. The order passed by the Appellate Authority did not suffer from any serious illegality, nor can it be said to have taken a view of the matter which no reasonable person was likely to take. In that view of the matter there was no justification for the High Court to interfere with the order in exercise of its writ jurisdiction . In a matter like the present case where orders passed by the Statutory

Authority vested with power to act quasi-judicially is challenged before the High Court, the role of the Court is supervisory and corrective. In exercise of such jurisdiction the High Court is not expected to interfere with the final order passed by the Statutory Authority unless the order suffers from manifest error and if it is allowed to stand it would amount to perpetuation of grave injustice. The Court should bear in mind that it is not acting as yet another Appellate Court in the matter. We are constrained to observe that in the present case the High Court has failed to keep the salutary principles in mind while deciding the case."

19. Thus, in exercise of writ jurisdiction a finding of fact recorded by the final court of fact or the statutory authority should not ordinarily be interfered with by the High Court unless the court is satisfied that the finding is vitiated by manifest error of law or is patently perverse. The role of the Court is supervisory and corrective. The High Court is not expected to interfere with the final order passed by the statutory authority unless the order suffers from manifest error of law and if it is allowed to stand it would amount to perpetuation of grave injustice. It should also not interfere with the finding of fact simply because on the material on record a different view is also possible. This Court would not act as yet another court of appeal in the matter.

20. The finding recorded by the statutory authority in the present case being based on material on record and also having been recorded after affording opportunity of hearing to the petitioner in consonance with the principle of natural justice, this Court does not find any reason to interfere with the concurrent finding of fact that the continued existence of fire arm license with the petitioner would endanger security of public peace and public safety. Once there is material to support the finding, this Court will also not enter into the aspect of sufficiency of the material for the satisfaction of the licensing authority.

21. The petitioner might not have been named in the FIR and the FIR might have been against unknown persons but it is not denied by the petitioner that the case crime nos. 289 of 2004 and 290 of 2004 under Sections 147, 148, 149 and 307 I.P.C. were registered against the petitioner. The petitioner's name must have appeared and come to light during investigation. For that reason the criminal cases were registered against him. For the purposes of the satisfaction of the licensing authority in terms of Section 17(3) of the Arms Act, 1959 it hardly matters if the licensee is named in the FIR or his name comes to knowledge during investigation, particularly, when after investigation, the criminal cases have been registered finding the involvement of the licensee.

22. The next submission of the petitioner's counsel is that in view of the previous order dated 28.10.2003, by which the earlier show cause notice dated 03.08.2003 was withdrawn and as such the present proceedings for cancellation of the fire arm license could not be initiated by issue of notice dated 29.04.2004 and the impugned order could not be passed, does not appeal to the court and deserves to be rejected.

23. A perusal of the order dated 28.10.2003 shows that the subject matter of the earlier notice dated 03.08.2003 was entirely different than the subject matter of present notice dated 02.09.2004. The

proceedings by notice dated 02.09.2004 were initiated against the petitioner in view of many criminal cases against him as mentioned in the said notice, which was withdrawn by order dated 28.10.2003. In so far as the initiation for proceedings of cancellation by notice dated 02.09.2004 is concerned, the same were initiated on the ground that in the incident dated 14.07.2004, the petitioner misused his fire arm and opened fire in the premises of Tehsil Kaul in which Shahbudeen and Dinesh Kumar Sharma were seriously injured, resulting into breach of peace, law and order and consequently case crime nos. 289 of 2004 and 290 of 2004 were registered against the petitioner. These are the criminal cases registered after the order dated 28.10.2003 and can very well form the basis of initiation of fresh proceedings for cancellation of fire arm license, even if the earlier notice dated 03.08.2003 was withdrawn by order dated 28.10.2003.

24. Mere mention of the earlier criminal cases in the present notice dated 02.09.2004 is not sufficient to quash the impugned order dated 15.07.2005 in as much as the court finds that the same was mentioned only to show the petitioner's criminal history. These cases are not the basis of the initiation of the proceedings nor the impugned order has been passed on the basis of those criminal cases. The present proceedings, the court finds that, are independent of the earlier proceedings. The subject matter of both the notices is different and as such the order dated 28.10.2003 does not come in the way of the authorities in giving notice dated 02.09.2004 and passing the order dated 15.07.2005 under Section 17(3) of the Arms Act, 1959.

25. Thus, considered, I do not find any illegality in the order of cancellation dated 15.07.2005 passed by the licensing authority.

26. The appellate order has also been rightly passed by the appellate authority, affirming the order of the licensing authority.

27. The writ petition lacks merits and is dismissed. No orders as to cost.

(2020)07ILR A299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2020 & 12.05.2020

BEFORE

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

Writ C No. 25221 of 1995
And
CIVIL MISC. CORRECTION NO. 1 of 2020

Motilal Nehru Farmers Training Institute (CORDET) ...Petitioner
Versus
The Presiding Officer & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.R. Agarwal, Sri Piyush Bhargava

Counsel for the Respondents:
C.S.C., Sri K.P. Agarwal, Seema Singh, Ms. Sumati Rani Gupta

A. Labour Law - The Uttar Pradesh Industrial Disputes Act, 1947 – Section 4-K - Validity of Award (Impugned) directing reinstatement with continuity in service and payment of full back-wages –– Reference by state government - Section 2-A – Conciliation - Section 6-N,6-P,6-Q – retrenchment - Labour Court is a Court of referred jurisdiction - derives its jurisdiction to adjudicate a dispute from the terms of the order of reference, under Section 4-K of the Act – Labour Court cannot venture into questions that are not part of the reference or the necessary incidents of it - Issues or questions that are concomitant of the substantial dispute referred, can well be gone into - matters that would give rise to a different

issue or question altogether cannot be examined by a Labour Court, unless referred - award - unlawful - quashed.(Para-22,28)

State Government not at all empowered determined the fact that it is a case of termination, leaving it to the Labour Court to determine the validity - reference made with little or no application of mind by the Authority competent to act for the State Government under Section 4-K - fact of termination becomes a jurisdictional fact - Labour Court cannot go behind that jurisdictional fact - proceeded to record a finding with reference to evidence that it is a case where the services of the workman have been terminated in breach of Section 6-N of the Act - ordered that the respondent-workman be reinstated with continuity in service and full back-wages.(Para - 23,24)

HELD:- Impugned award is held to be without jurisdiction and manifestly illegal - State Government directed to make a fresh reference to the competnt labour court of the industrial dispute on the basis of existing material, particularly the record of the conciliation proceedings between the workman (Respondent-2) and the Employer (Petitioners) - All monies received by the workman in terms of the interim order of this Court, passed in this petition, shall, however, not be recovered from him.(Para-27,28)

Petition allowed (E-7)

List of cases cited:-

1. Sitaram Vishnu Shirodkar Vs The Administrator, Government of Goa & ors. (1985) 1 LLJ 480.

2. Eagle Fashions Vs Secretary (Labour) & ors. (1999) 1 LLJ 232 Delhi

3. Malloys India Agra Vs P.O., Labour Court Agra & anr. Writ -C No. - 14416 of 1998

4. Bhuvnesh Kumar Dwivedi Vs Hindalco Industries Ltd. (2014) 11 SCC 85

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

1. The petitioner has put in issue an award of the Presiding Officer, Labour Court, Allahabad dated 16.02.1995 (published on 20.06.1995) passed in Adjudication Case No. 4 of 1989 **between** Motilal Nehru Farmers Training Institute (CORDET), Phulpur, Allahabad through its Principal **and** Santlal.

2. Admittedly, Motilal Nehru Farmers Training Institute (CORDET), Phulpur, Allahabad through its Principal are the Employers whereas Santlal is their workman between whom an industrial dispute has arisen. The former are the petitioners before this Court and shall hereinafter be referred to as "the Employers'. The latter, that is to say, Santlal, is arrayed as respondent no. 3 to this petition. He will henceforth be called "the workman'.

3. At the instance of the workman, an industrial dispute under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 (for short, "the Act') was referred by the State Government to the adjudication of the Presiding Officer, Labour Court, Allahabad in the following terms:

"क्या सेवायोजक द्वारा अपने श्रमिक संत लाल श्री मेवा लल पद "मजदूर" की सेवाएं दिनांक 21.03.1988 से समाप्त किया जाना उचित तथा/ अथवा वैधानिक है? यदि नहीं, तो सम्बंधित श्रमिक क्या लाभ/ अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किन विवरण सहित?"

4. The Labour Court, Allahabad found for the workman and made an award holding that termination of services of the workman with effect from 21.03.1988 was one in breach of the provisions of Section 6-N of the Act, and, therefore, unlawful. It

was ordered that the respondent-workman be reinstated with continuity in service and full back-wages. Cost of Rs.100/- were also awarded. The award aforesaid, details of which have been indicated hereinbefore, shall hereinafter be called "the impugned award'.

5. This petition was filed on 05.09.1995. It was admitted to hearing on 12.09.1995 and by a separate order passed on the stay application, it was ordered that operation of the award, insofar as it directs payment of back wages, shall remain stayed, provided the respondent-workman is reinstated forthwith and paid wages from 16.02.1995 till the date of reinstatement. In addition, it was directed that future wages post-reinstatement would be paid as and when they fall due.

6. A stay vacation application along with a counter affidavit was filed on 12th October, 1995 on behalf of the workman. The Employers filed a rejoinder affidavit on 11.08.1997. The stay matter along with the workman's stay vacation application came up before this Court for orders on 15.11.2008. By an order of the last mentioned date, the stay order dated 12.09.1995 was confirmed and the stay vacation application was rejected. This petition was ordered to be listed for hearing on 08.12.2008. A supplementary affidavit was filed on behalf of the Employers on 13th April, 2012. In the midst of hearing, on the request of learned counsel for the Employer, a second supplementary affidavit was permitted to be filed on 14.05.2019 after withdrawing the case from hearing. A supplementary counter affidavit in answer to the second supplementary affidavit on behalf of the Employer, was filed on the behalf of the workman on 15.05.2019. A supplementary rejoinder affidavit was filed on behalf of the Employer on 20.05.2019. This makes for the entire pleadings of the parties before this Court.

7. It appears that the workman moved the Conciliation Officer, Allahabad under Section 2-A of the Act seeking conciliation of the industrial dispute between the Employers and the workman, set out in his application dated 08.04.1988. The case before the Conciliation Officer that was registered on his file as C.P. Case No. 46 of 1988, was to the effect that the workman was employed in the Employers establishment since the month of December, 1976. He was retained on the post of a labourer on a permanent basis. The workman's services were terminated with effect from 21.03.1988 by the Employers without any prior notice and without compliance with the provisions of the Act relating to retrenchment, embodied in Section 6-N, 6-P and 6-Q. It was also claimed that a demand was made by the workman on 30.03.1988 in writing, asking the Employers to settle the matter amicably but the Employers did not respond. It was requested that through conciliation proceedings the workman be extended relief of reinstatement with continuity in service, together with backwages since 31.03.1988 till his reinstatement. The Employers appear to have put in their written statement dated 05.05.1988 before the Conciliation Officer, in substance, taking a categorical stand that they never terminated the services of the workman. Rather, it was the workman who absented from his duties with effect from 21st March, 1988. Dilating on this stand of theirs, the Employers asserted that due to losses in the Fisheries Department where the workman was engaged at the relevant time, the workman was asked to render

service in the crop fields which he refused. It was the Employers further stand in their written statement that the workman, in case he wanted to work, could join duties in the crop files rightaway.

8. The conciliation proceedings failed and a reference was made to the adjudication of the Labour Court, in terms already set out hereinbefore. Before the Labour Court, the case was registered as Adjudication Case No. 4 of 1989 and notice was issued to parties. The workman put in his written statement dated 2nd May, 1989 where he asserted that he was appointed in the capacity of a labourer (Mazdoor) on a permanent post in the month of December, 1976 by the Employers. He continued in uninterrupted service of the Employers from December, 1976 to 20.02.1988. The workman had worked for more than 240 days in the Employers' harness. His services were terminated by the Employers, with effect from 21.03.1988, illegally. There has been no complaint against him and he had an unblemished service record to his credit. It was further averred that the workman's services were terminated without the service of a chargesheet or affording him opportunity of being heard. No domestic inquiry was ever held and that his services have been terminated in violation of principles of natural justice. It was more particularly averred that the workman has not been served with a month's notice in writing, indicating the reasons for his retrenchment. Also, the workman has not been paid wages in lieu of notice or has he been paid retrenchment compensation. The termination was claimed by the workman to be in breach of the provisions of Section 6-N, 6-P and 6-Q of the Act, besides Section 25-F of the Industrial Disputes Act, 1947. It was also specifically averred that the work that afforded employment to the workman was still available and juniors to the workman have been retained by the Employers.

9. The Employers filed a written statement and a rejoinder statement. The written statement of the Employers is not on record. Nevertheless, from a perusal of the impugned award, it appears that the written statement of the Employers was filed before the Labour Court, bearing Paper No. 4A. There, the Employers have disputed the fact that the workman was retained in the month of December, 1976. Instead it appears to be their case that the workman was employed from time to time according to the exigencies of work. There is then that specific case of the Employers that they never terminated the workman's services but the workman, of his volition, stopped reporting to duty with effect from 21.03.1988. It is also their case noticed in the impugned award that the workman was taken off roster from the Fisheries Department and detailed to work in the crop fields; but, he refused to work there and ceased to report for duty since 21.03.1988.

10. The workman in his rejoinder statement has said that he was appointed in the establishment of the IFFCO, Phulpur Farm Project in the month of December, 1976. This project was transferred to the Employers by IFFCO. It was in the aforesaid manner that the workman continued in the services of the Employers. The workman was appointed on a permanent post, and that he never refused to work in the fields. The Employers in the rejoinder statement dated 29th June, 1988, which is on record as Annexure-6 to the writ petition, have reiterated their substantial case in paragraph-4 thereof; it is quoted in extenso:

"4. That the contents of paragraph 3 are wrong and denied. The employer never terminated the services of the concerned workman, but he is himself absenting in his duties from 21-3-88. The concerned workman was asked to work in crop fields instead of fisheries but the concerned workman refused to work there."

11. The workman applied to the Labour Court to summon certain documents through his application numbered Paper No. 6D which included the attendance register from the month of December, 1976 to March, 1988 and the annual report of the Employers' establishment from the month of December, 1976 to March, 1988. A further application was made to summon the records of C.P. Case No. 46 of 1988 from the Conciliation Officer. The Labour Court allowed the petitioner's application bearing Paper No. 6D, ordering the Employers to produce documents sought to be summoned, vide order dated 07.09.1990. The Employers filed four documents through a list bearing Paper No. 11/B-1. This list carried at serial No. 1, 2 and 3 the monthly progress report relating to the Employers' establishment and at serial no. 4, the muster roll from the month of December, 1986 to 31.06.1988. The Presiding Officer passed an order on the list of documents submitted by the Employers to the effect that the required documents have not been produced and, therefore, the workman was at liberty to produce secondary evidence. The workman, availing that opportunity, filed eight documents through a list bearing Paper No. 12B-2. The documents produced by the workman were marked as Exhibit Nos. WW/2 to WW10. The parties also led oral evidence. The workman supported his case by entering the witness box and deposed before the Labour Court as WW1. Likewise, the Employers also supported their case by oral evidence with the Principal of the Employers' establishment at the relevant time, Laxman Singh, entering the witness box to testify as EW-1.

12. This Court has carefully perused the impugned award and the evidence of parties brought on record through affidavits.

13. Heard Sri Piyush Bhargava, learned counsel for the Employer (petitioner) and Ms. Sumati Rani Gupta, learned counsel appearing for the workman (respondent no.2).

14. It appears on a perusal of the impugned award that before the Labour Court, the Employers' plea, that consistently figures in the conciliation proceedings and in the written statement filed before the Labour Court to the effect that the Employers never terminated the workman's services but the workman of his own accord absented from work, was taken note of. The Labour Court has pointedly noticed the Employers' case that the reference made by the State Government is fallacious and that no industrial dispute exists between parties, requiring adjudication. In order to decide the industrial dispute, the Labour Court has posed unto itself the following question that, in its perception, fell to be decided (translated into English from Hindi vernacular):

"Whether the claimant workman, Santlal's services have been terminated with effect from 21.03.88 without any justifiable cause or the workman has of his volition stopped reporting for work with effect from 21.03.88."

15. The Labour Court has proceeded to answer the aforesaid question, in substance, holding that the Employers' case about the workman not reporting to duty cannot be said to be established. A case of unlawful termination from service has been held in favour of the workman on account of breach of the provisions of Section 6-N of the Act. It has also been remarked as one of the foundations for these findings that the fact that the workman is a casual labourer, has not been proved by the Employers. It is on the basis of these findings that the impugned award has been entered.

16. Sri Piyush Bhargava, learned counsel for the Employer submits that the impugned award is without jurisdiction inasmuch as it is founded on a reference that does not encapsulate the substance of the dispute between parties. It is emphasised by him that the Labour Court, in considering evidence, could not have travelled beyond the reference which in this case it has decidedly done. It is his submission that the terms of reference being limited to a question about termination of the workman's services, the Labour Court could not have gone into the issue about the workman's voluntarily not reporting to duty. He submits that, in fact, the reference is bad because it thrusts upon the Labour Court a case of termination from service whereas on the parties' case that was well disclosed in conciliation proceedings, it is evident that the Employers' stand was that they never terminated the workman's services. The Employers had disclosed their stand before the Conciliation Officer that it was the workman who had refrained from reporting for duty with effect from 21.03.88. Therefore, according to learned Counsel for the Employers, the dispute between the parties is whether the workman voluntarily refrained from reporting to work on and after 21.03.88 and not whether his services were terminated. In the event, on the evidence led by parties in an adjudication founded on a reference about the workman abstaining from joining duties, the answer went in favour of workman, the dispute would be competently decided, entitling the workman to relief. In that event, according to learned counsel that question about the Employer preventing the workman from joining duties, as he claims, could well be gone into. This, according to learned counsel, is particularly so as the Employers case is that they never terminated the workman's services. He emphasises that there being no acknowledgment of the fact by the Employer that the workman's services were ever terminated, a reference about the legality of the workman's termination from service is manifestly illegal. The order of reference, according to Sri Bhargava, has been made without application of mind by the State Government to the substance of the dispute between parties. No valid adjudication, according to learned counsel, could, therefore, be founded on it.

17. In support of his contention, learned counsel for the petitioner has placed reliance on the decision of the Bombay High Court in **Sitaram Vishnu Shirodkar vs. The Administrator, Government of Goa and others,** reported in **1985 (1) LLJ 480**. Learned counsel for the petitioner has drawn the attention of the Court to paragraph 8 of the report in **Shirodkar** (supra) where M.R.Waikar, J. speaking for the Division Bench held:

"8. We are in respectful agreement with the above observations of the Full Bench of the Delhi High Court. In

the instant case also the real dispute was whether the services of the respondent No. 4 were terminated or he had voluntarily abandoned the services and the reference that was made to this effect.

"Whether the action of the Management of M/s. Hotel Cafe Real, Panaji in terminating the services of Shri Shanu Mango Kunkolienkar, with effect from 1st March, 1978 is legal and justified. If the answer be in the negative, to what relief, if any, is the aforementioned workman entitled to?"

The Tribunal **could not travel beyond the reference and decide the question whether the respondent No. 4 had abandoned his services. That the petitioner had terminated the services of the respondent No. 4 was an act fastened on the petitioner by this reference and the only question left open for decision was whether the termination was legal and proper. In this view of the matter, in our opinion, the reference itself was bad and has to be quashed....."**

(emphasis by Court)

18. Sri Bhargava has further placed reliance upon the decision of a Division Bench of the Delhi High Court in **Eagle Fashions vs. Secretary (Labour) & Others reported in 1999 (1) LLJ 232 Delhi**. In **Eagle Fashions (supra)** it has been held:

"....The principal ground on which challenge has been laid on the order of reference is that the terms of reference presume employment of Respondents 2 to 8 having been terminated and seeks adjudication on whether such termination was illegal or unjustified on the part of the Management. It is submitted by the learned counsel for the Petitioner that there was no material available with the appropriate Government for arriving at a finding of the employment of Respondents 2 to 8 having been terminated and as such the question of seeking adjudication on the legality or the justness thereof did not arise.

2. The learned counsel for Respondents 2 to 8 has supported the order of reference including the terms thereof.

3. Having heard the learned counsel for the parties and having perused the material brought on record, we are satisfied that the terms of reference have not been properly drawn up and therefore the order of reference is vitiated. The Full Bench decision of this Court in India Tourism Development Corporation v. Delhi Administration, 1982 LIC 1309 is an authority for the proposition that the terms of reference should clearly spell out the real dispute between the parties and if that be not so, the order of reference would be liable to be interfered with in exercise of writ jurisdiction of this Court as the Labour Court would not travel beyond the reference and decide the real question in dispute.

4. **When the factum of employment and termination itself were in dispute, the terms of reference could not have been so framed as to presume the employment and its termination and confining the reference merely to adjudication of illegality or unjustness thereof.** We are of the opinion that the order of reference has been drawn up without application of mind and hence is vitiated. (emphasis by Court)

19. Learned counsel for the Employer has also to the same end reposed faith in a

decision of this Court in **Malloys India Agra vs. Presiding Officer Labour Court Agra and Another, Writ -C No. - 14416 of 1998, decided on 14th March, 2019. In Malloys India Agra** (supra), it has been held by B. Amit Sthalekar, J.:

"In my opinion, the submission of the learned counsel for the respondents is absolutely misconceived. When a reference is made by the State Government to the Labour Court, the Labour Court is bound to decide only that dispute which is referred to it and it cannot travel beyond the scope of the reference. The Labour Court itself is a creature of the reference and cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of the reference. The law in this regard is well settled."

20. Ms. Sumati Rani Gupta, learned counsel appearing for the workman submits, repelling the petitioners contention on this count, that the reference is appropriately made so as to carry the substance of the industrial dispute between parties. She submits that the petitioner's case that the services of the workman were never terminated but that he abstained of his volition, is no more than the Employers' defence. The factum of termination claimed by the workman, according to Ms. Gupta, is the substance of dispute. In judging the validity of the Employers' action in terminating the workman's services, their case about non termination, could well be determined. According to the learned counsel for the workman, what substantially has to be decided by the Labour Court is whether the workman's services have been illegally dispensed with by the Employers. The Labour Court while going into this question, would be competent to examine the Employer's case which is no more than their defence that the workman has abandoned employment. In judging the validity of the termination, it is implicit that the Labour Court would have to go into to the question whether, in fact, the workman's services have been determined by the Employers. It is only in the event that the Labour Court finds it for a fact that the workman's services have been terminated that it would go into its validity. In case, the Labour Court were to find that the Employers never terminated the workman's services, the reference would have to be answered that way entitling the workman to continue. In short, according to learned Counsel for the workman, the terms of reference are appositely framed and empower the Labour Court to well examine the Employers case that they never terminated the workman's services. It cannot, therefore, be said, according to learned Counsel for the workman, that the reference does not clothe the Labour Court with jurisdiction to examine the industrial dispute involved.

21. Away from the point of jurisdiction on the reference made, learned Counsel for the workman submits that the Labour Court has appreciated relevant evidence and come to the categorical conclusion that the workman has been illegally retrenched, in violation of Section 6-N of the Act. It is submitted further that this Court cannot look into the correctness of findings of fact recorded by the Labour Court unless they are manifestly illegal, without jurisdiction or based on irrelevant evidence. Learned counsel for the respondent has placed reliance upon the decision of the Supreme Court in **Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014) 11 SCC 85.** On this score, she has drawn the attention of the Court to paragraph 22 of the report in

Bhuvnesh Kumar Dwivedi (supra), where it has been held by their Lordships thus:

22. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court grating contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer Point (I) in favour of the appellant."

22. There is little doubt about the principle that the Labour Court is a Court of referred jurisdiction. It derives its jurisdiction to adjudicate a dispute from the terms of the order of reference, under Section 4-K of the Act. There can be little quarrel, again for a principle, that the Labour Court cannot venture into questions that are not part of the reference or the necessary incidents of it. Issues or questions that are concomitant of the substantial dispute referred, can well be gone into. But matters that would give rise to a different issue or question altogether cannot be examined by a Labour Court, unless referred. An intrinsically different dispute, though very proximate to the one referred, cannot be adjudicated upon by the Labour Court, in the absence of a reference clearly incorporating or carrying that dispute.

23. The question that then arises here is, whether the order of reference postulates a dispute about abandonment of or forsaking his employment by the workman. Learned Counsel for the workman submits that it is implicit in the idea of termination and is to be examined on the basis of evidence with the Employer urging it for a defence. This Court does not think so. The order of reference once it speaks about the validity of termination from service with effect from 21.03.88 binds the Labour Court to assume that the services of the workman were terminated. The Labour Court is left only to adjudge whether that termination is lawful or not; and if not, to what relief the workman is entitled. Nothing more or nothing less has been referred to the Labour Court. Here is a case where the State Government have for themselves determined the fact that it is a case of termination, leaving it to the Labour Court to determine the validity. The State Government is not at all empowered to decide or determine that it is a case of termination of services. Apparently, the reference has been made with little or no application of mind by the Authority competent to act for the State Government under Section 4-K. An appropriately drawn up reference would have clearly referred the dispute about the workman having abandoned services voluntarily and further the dispute that if it be not abandonment, termination from service is lawful or not. Then, of course, there would be a specific reference to the relief, if any.

24. The order of reference here, as already said, proceeds on a premise that the workman's services have been terminated. This being the scope and content of the reference made to the Labour Court, the fact of termination becomes a jurisdictional fact. The Labour Court cannot go behind that jurisdictional fact to hold that in fact it is a case where the workman has voluntarily forsaken or abandoned employment or he has not done so. The Labour Court has gone into the question of

the workman voluntarily staying away from work after 21.03.88 and held for a fact on the basis of evidence that he did not do so. He has then proceeded to record a finding with reference to evidence that it is a case where the services of the workman have been terminated in breach of Section 6-N of the Act. Clearly, the Labour Court had no jurisdiction to decide the emergent industrial dispute, in the absence of the order of reference carrying clear terms, asking it to examine the issue whether the workman had voluntarily stayed away from work or abandoned employment with effect from 21.03.88.

25. The view that this Court takes finds particular support in the decision of the Bombay High Court in **Sitaram Vishnu Shirodkar** (supra), where the Division Bench held to like effect on principle in a case with very similar facts. The principle on which this Court has proceeded also has endorsement of the decisions of the Delhi High Court in **Eagle Fashions** (supra) besides this Court in **Malloys India Agra** (supra).

26. Learned counsel for the Employer and workman have exchanged further pleadings by way of supplementary affidavits, including a supplementary counter and a supplementary rejoinder, where the Employer has tried to demonstrate that the workman was reinstated in service in compliance with the interim order passed by this Court and paid wages as directed. Later on, he again abandoned employment and took up work with the Employers as a contractor. Learned counsel for the Employer has pointed out, on the basis of some of the contracts annexed, that the workman found opting out of employment and to work as a contractor for the Employer more lucrative. Ms. Sumati Rani Gupta has asserted that the contracts have been forced upon the workman in order to get rid of obligations that the Employers would owe him, if he were to continue as their employee. It is also emphasised on the basis of facts and figures disclosed in the supplementary counter affidavit that the contracts yield lesser advantage to the workman that what he would get in remuneration as an employee. It is not for this Court to go into this post award event. It does not arise either on the reference made or on the terms of the impugned award. In the event, the workman post reinstatement in terms of the award passed by this Court, has left employment and has some grievance about it, it would be a fresh transaction that may give rise to a fresh industrial dispute. It has nothing to do with the industrial dispute that is subject matter of the impugned award.

27. In view of what has been said above, the impugned award is held to be without jurisdiction and, therefore, manifestly illegal. The State Government shall, however, make a fresh reference of the industrial dispute between the Employer and the workman, appropriately drawn up bearing in mind what has been said in this judgment. This reference shall be made by the State Government on the basis of existing material, particularly the record of the conciliation proceedings between the workman and the Employer. The reference, as above indicated, shall be made within three months next to the competent Labour Court for adjudication in accordance with law. Any sum of money that the workman has received under interim orders of this Court, shall not be recovered from him bearing in mind the fact that the workman has rendered service for a substantial period of time in terms of

the award impugned, the interim order passed here and also the totality of circumstances obtaining.

28. In the result, this petition succeeds and is **allowed.** The impugned award dated 16.02.1995 (published on 20.06.1995) passed by the Presiding Officer, Labour Court, Allahabad in Adjudication Case No. 4 of 1989, is hereby **quashed**. The State Government shall make reference afresh, within three months next, to the competent Labour Court bearing in mind what has been said in this judgment. All monies received by the workman in terms of the interim order of this Court, passed in this petition, shall, however, not be recovered from him. Costs easy.

(2020)07ILR A309
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No. 25519 of 2016

Smt. Vimla Devi ...Petitioner
Versus

Commissioner Vindhyachal Division Mirzapur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Dubey, Sr Narendra Deo Upahdayay, Sri Santosh Kumar Tiwari, Sri Vinay Bhushan Upadhyay, Sri Virandra Singh.

Counsel for the Respondents:
C.S.C., Sri Bhoop Nath Yadav, Sri H.K Asthana, Sri Om Singh Rathaur, Sri Ram Babu Yadav

A. Civil Law - U.P. Land Revenue Act, 1901 - Section 202 - Object and Binding effect of compromise/family settlement - - Correction of error or omission – courts would lean in favour of family settlement unless it is unfair, tainted by fraud or lacks bona fide - binding effect of compromise cannot be avoided in proceedings for correction of records on the ground that devolution of estate is contrary to course contemplated in law - No specific case of error or omission - appellate court and revisional court - correctly rejected the application filed by the present petitioner under Section 202 of the L.R. Act, 1901 - fair settlement for devolution of property from the mother to her three daughters has been agreed upon in the family settlement/compromise, which has also been given effect to .(Para-13,15,18)

Parties to dispute - three real sisters - inherited agricultural land and Abadi from their mother - initially agreed for the property to be settled in a manner such that each party got a fair share - also executed/signed a family settlement/compromise before the Tehsildar, which was acted upon and mutation was carried out in the revenue records in terms of the compromise - However, greed on part of one of the daughters (Petitioner), later, led to filing of an application for correction in the revenue records, notwithstanding the compromise, leading to filing of the present writ petition. (Para-1)

HELD:- The effect of compromise, therefore, cannot be nullified in the garb of proceedings initiated for correction in records under Section 202 of the Land Revenue Act, 1901. (Para-17)

Petition dismissed. (E-7)

List of cases cited: -

1. Arjan Singh Vs Punit Ahluwalia & ors. (2009) 107 RD 259

2. Ram Abhilakh & ors. Vs D.D. C. & ors. (2017) 135 RD 605

3. Kale & ors. Vs Deputy Director of Consolidation, AIR (1976) SC 807

(Delivered by Hon'ble Ashwani Kumar Misha, J.)

1. Somewhat peculiar facts have given rise to filing of the present writ petition. The parties to dispute herein are three real sisters who have inherited agricultural land and Abadi from their mother. They initially agreed for the property to be settled in a manner such that each party got a fair share and also executed/signed a family settlement/compromise before the Tehsildar, which was acted upon and mutation was carried out in the revenue records in terms of the compromise. However, greed on part of one of the daughters, later, led to filing of an application for correction in the revenue records, notwithstanding the compromise, leading to filing of the present writ petition.

2. Late Patiraji Devi was the owner in possession of 5.344 hectares of agricultural land alongwith certain Abadi etc. situated in Mauja Saraeegarh & Aamdeeh, Pargana Vijaygarh, Tehsil Robertsganj, District Sonbhadra. She died on 1.11.2011 leaving behind three married daughters namely Smt. Vimla Devi, Smt. Nirmala Devi and Smt. Pramila Devi. During her lifetime she extended two registered deeds i.e. a will on 30.3.2011, bequeathing her agricultural estate amongst the three daughters such that a slightly larger share come to the youngest daughter Smt. Pramila Devi and remaining land getting equally divided in the two elder daughters. The second instrument is a registered gift executed 09 days prior to her death i.e. 21.10.2011, giving 1.9696 hectares of agricultural land exclusively to the eldest daughter Smt. Vimla Devi, the petitioner before this Court. Soon after her death a family settlement/compromise was acted upon amongst the three daughters and it was also reduced in writing and presented before the Tehsildar in mutation proceedings. As per the compromise/settlement the three sisters resolved their differences and were also put in possession over their respective share, as per the compromise. This compromise has been accepted by the competent authority and names of three sisters got mutated over the land left behind by Late Patiraji Devi in terms of the compromise. The compromise filed before the revenue authorities in mutation proceedings has not been challenged. However, Smt. Vimla Devi, the eldest daughter later moved an application for correction of records under Section 202 of the U.P. Land Revenue Act, 1901, on the ground that mutation entry in the revenue record is contrary to the intent expressed by the testator in the two registered deeds and so the revenue records be corrected, accordingly. This application was allowed by the Naib Tehsildar. An appeal filed against it by the two younger sisters came to be allowed and the revision filed against it has also been dismissed thereby restoring the mutation entry in terms of the family settlement/compromise. Aggrieved by the orders passed in appeal/revision in proceedings under Section 202 of the Land Revenue Act, 1901 the eldest sister Smt. Vimla Devi has filed this writ petition.

3. The execution of abovenoted registered deeds by Smt. Patiraji Devi is not specifically challenged. The registered will is on record of writ proceedings as Annexure CA-1. At page 28 of the counter affidavit the testament provides for carving of three equal shares between the daughters with Smt. Pramila Devi, the youngest daughter getting an additional 0.253 hectares land over Plot No.2002.

4. It transpires that after the death of Smt. Patiraji Devi on 1.11.2011, the three

daughters moved applications for mutating their names over the land left behind by their mother. The eldest daughter Smt. Vimla Devi apparently filed application claiming exclusive share over the property gifted to her on 21st October, 2011 and also claimed 1/3rd share as per will over the remaining agricultural property. The two younger sisters also applied for mutation as per the will. It is at this stage that good sense appears to have prevailed upon the sisters and instead of challenging the gift deed on the plaussible grounds that it was obtained by exercising undue influence, they agreed to appropriate the property in following manner:-

(i). Land admeasuring 1.9696 hectares given to Smt. Vimla Devi by way of gift would go to her and she will also be entitled to 1/3rd share over Abadi and Appurtenant land of Plot No.125-B.

(ii) The remaining agricultural land left behind by Smt. Patiraji Devi would be divided as per the will amongst the two remaining daughters with some extra land going to the youngest daughter in terms of the will. Smt. Vimla Devi agreed to give up her share over the remaining land on the basis of will. Based upon such family settlement/compromise the sisters were put in possession over their respective shares and an order to that effect was passed in mutation proceedings by the Revenue Inspector on 4.11.2011. A joint compromise affidavit was also signed and presented by the three sisters on 19.12.2011 before the Tehsildar acknowledging the family settlement/compromise. The affidavit clearly disclosed that sisters were satisfied with the order passed in the mutation proceedings on 4.11.2011. Tehsildar, consequently, passed orders on 19.12.2011 and 31.1.2012 directing the names of three sisters to be recorded in terms of settlement/compromise.

5. It would be worth noticing, at this stage, that in mutation proceedings statement of Smt. Vimla Devi was also recorded as per which she voluntarily agreed to give up her remaining share over the agricultural land left behind by the mother under will in case her exclusive share over the agricultural land given to her by way of gift is accepted by the two sisters. The orders passed in mutation proceedings, based upon family settlement/compromise, is not assailed. The effect of family settlement/compromise was that out of agricultural estate left behind by Smt. Patiraji Devi measuring 5.3440 hectares, the eldest daughter got 1.9696 hectare land, which was a little more than 1/3rd share. The second daughter Smt. Nirmala Devi (respondent no.6) got 1.8853 hectare land, whereas the youngest daughter Smt. Pramila Devi (respondent no.7) apart from her 1/3rd share admeasuring 1.8853 hectare also got exclusive additional land over Plot No.2002, admeasuring 0.2530 hectares, taking her share in the agricultural land as 2.1383 hectares. So far as Abadi and Appurtenant land is concerned, all three sisters were given equal shares.

6. Records reveal that though the family settlement/compromise and the consequential orders of mutation were not challenged but an application under Section 202 of the U.P. Land Revenue Act, 1901 came to be filed on 30.8.2012 for correcting the revenue records on the ground that mutation entries were contrary to the express intent of the testator. The application filed under Section 202 of the L.R. Act, 1901 is not annexed with the writ proceedings. However, objections filed

against it are on record as Annexure-8 to the counter affidavit. As per the objection there is no error or omission in the mutation order/records, and therefore, the plea of correction is misconceived. In para 12 of the objection it is pleaded that the gift deed allegedly executed on 21.10.2011 is fraudulently procured, by impersonation, and while the two younger sisters were preparing/contemplating to challenge it, Smt. Vimla Devi came forward with the proposal to amicably resolve the issue, and based upon such representation the compromise was arrived at resulting in passing of the mutation orders. It is also urged that filing of application for correction under Section 202 of the L.R. Act, 1901 is clearly barred by limitation and is otherwise unsustainable in law.

7. The Naib Tehsildar allowed the application filed under Section 202 of the L.R. Act, 1901 vide his order dated 20.12.2013 on the ground that specific intent of testator in the registered gift and will could not be varied on the basis of family settlement/compromise. This order has, however, been reversed in appeal by the Sub-Divisional Officer on 11.4.2014 and the revision filed against it has also been dismissed by the Commissioner on 28.4.2016. Aggrieved by the orders dated 11.4.2014 and 28.4.2016 the eldest daughter has filed the present writ petition.

8. Learned counsel for the petitioner submits that the registered will and the gift deed have not been challenged by anyone, and therefore, the wish of testator must be respected and orders of mutation ought to be strictly as per it notwithstanding the alleged compromise by the parties. Reliance is placed upon a judgment of the Apex Court in Arjan Singh Vs. Punit Ahluwalia and others, reported in 2009 (107) RD 259 to submit that the compromise since is contrary to law, as such, it is liable to be ignored. Reliance is also placed upon a judgment of this Court in Ram Abhilakh and others Vs. D.D. C. and others, reported in 2017 (135) RD 605, wherein it is held that co-tenancy cannot be granted on the basis of an admission by the parties.

9. Per contra, Sri H.K. Asthana appearing for the respondents submits that gift is not executed by mother and is actually a sham document but before it could be challenged the petitioner herself proposed amicable resolution of dispute, which was accepted by the parties, and was given effect to on the spot and also in the revenue records. It is contended that gift deed was accepted only in view of petitioner's statement not to claim any further land on the basis of will. Submission is that petitioner is estopped from changing her stand, particularly as she has availed benefit of the compromise. It is also argued that application filed under Section 202 L.R. Act, 1901 lacks merit, as there is no error or omission which may require correction and the courts below have rightly rejected petitioner's application in that regard.

10. I have heard Sri Narendra Deo Upahdayay, learned counsel for the petitioner, and Sri H.K. Asthana, learned counsel for the respondents and have perused the materials brought on record.

11. Facts relevant for the present controversy have already been noticed, and therefore, need not be reiterated. There is no issue on facts about execution of two registered deeds, as also the date of death of the mother. The gift has been executed merely 09 days prior to death of the

mother. It appears that the gift was not acceptable to the two younger sisters but the need to challenge it was obviated on account of amicable settlement having been worked out between the parties. Admittedly the mother died on 1.11.2011 and soon thereafter the settlement was worked out resulting in passing of an order by the Revenue Inspector on 4.12.2011. This settlement has been acknowledged in the compromise filed before the Tehsildar on 19.12.2011, duly signed by the three sisters on affidavit. An equitable arrangement for devolution of mother's estate has been worked out in the compromise. Based upon it orders of mutation were passed on 19.12.2011 and 31.1.2012 by the competent authorities. This Court finds substance in the contention advanced on behalf of respondents that the gift deed was accepted by the two younger daughters only on account of the compromise. The petitioner has taken advantage of the compromise, inasmuch as the transfer of land in her favour by virtue of gift has been accepted by the other two sisters only on account of compromise/settlement. The compromise itself is not challenged. The question is as to whether the petitioner having entered into a family settlement/compromise with her younger sisters and having secured an order of mutation in her favour of the land given in gift to her can be permitted to indirectly question it, subsequently, by seeking correction in the revenue records? The other question which arises for consideration in the facts of the present case is as to whether the compromise worked out between the parties is contrary to law and can be quashed in proceedings of correction of records under Section 202 of the L.R. Act, 1901?

12. The law relating to sanctity of compromise in such matters came to be examined by the Supreme Court in Kale and others Vs. Deputy Director of Consolidation, reported in AIR 1976 SC 807, and is consistently followed in subsequent decisions of the Supreme Court and this Court. The object of family settlement and the binding effect which it carries have been eloquently summed up in following words:-

"Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus;

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honesty made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to that their

rights actually are, or of the points On which their rights actually depend."

The object of the arrangement is to protect the family from long drawn litigation cr perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administrating of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving-its honour.

The agreement may be implied from a long course. Of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections- to the binding effect of family arrangements".

In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter

may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence:

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum pre pared after the family arrangement had already been made either for the purpose of the record or for in formation of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of s. 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole 9 owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, ...

.....

.... Even bona fide dispute present or possible, which may not involve legal claims would be sufficient. Members of a joint Hindu family may to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the courts would more readily give assent to such an agreement than to avoid it."

Thus it would appear from a review of the decisions analysed above that the Courts have taken a very liberal and broad view of the validity of the family settlement and have always tried to uphold it and maintain it. The central idea in the approach made by the Courts is that if by consent of parties a matter has been settled, it should not be allowed to be re-opened by the parties to the agreement on frivolous or untenable grounds."

The Supreme Court further observed that a family arrangement being binding on the parties to the arrangement clearly operates as a estoppel against the one who has taken advantage under the settlement/compromise from revoking or challenging the same. Observations in that regard are apposite and consequently reproduced hereinafter:-

"This Court has also clearly laid down that a family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same. ....."

13. It is by now well settled in law that courts would lean in favour of family settlement unless it is unfair, tainted by fraud or lacks bona fide. The object clearly being that if dispute between the parties is resolved by consent then such settlement must not be reopened unless one of the abovenoted mischiefs is pleaded and proved in the facts of the case.

14. Before proceeding further it would be necessary to take note of para 12 of the objection filed by the respondents to the application for correction filed under Section 202 of the L.R. Act, 1901. Para 12 is extracted hereinafter:-

ष12. यह कि वास्तव में विमला देवी का कोई लगाव मु0 पतिराजी के जीवनकाल में मु0 पतिराजी से नही था बल्कि मु0 पतिराजी की सेवा टहल केवल हम आपत्तिकर्तागण ही करती रही। विमला देवी व उसके पति शशिकान्त सिंह ने मु0 पतिराजी के नाजानकारी में किसी दीगर महिला को उसके स्थान पर खड़ा करके एक जाली–फर्जी व दिखावटी बक्शीशनामा दिनांक 21.10.2011 ई0 को तैयार करा लिया है और जब हम आपत्तिकर्तागण ने उक्त जाली व फर्जी बक्शीशनामा को चुनौती देने व विधिक कार्यवाही करने का प्रयास किया तो विमला देवी व उसके पति शशिकान्त सिंह ने आपत्तिकर्तागण से इज्जत की बार–बार दुहाई देने लगे और जायदाद निजाई से अपना सभी अधिकार ;त्पहीज ंदक बसंपउद्ध समाप्त करने का बचन दिये, जिससे हम आपत्तिकर्तागण ने तत्समय व तत्काल कोई विधिक कार्यवाही विमला देवी व उसके पति शशिकान्त व उसके सहयोगियों के विरूद्ध नही किये और तत्क्रम में विमला देवी ने न्यायालय श्रीमान जी समक्ष स्वंय उपस्थित आकर जा0 नि0 के सम्बन्ध में सुलहनामा व सशपथ बयान न्यायालय में अंकित कराकर अपना अधिकार समाप्त कर केवल हम आपत्तिकर्तीगण का ही जायदाद निजाई पर नाम अंकित कराने का निवेदन किया तद्नुसार न्यायालय द्वारा नामान्तरण आदेश दिनांक 31.01.2012 ही पारित हुआ था। किन्तु अब विमला देवी व उसके पति शशिकान्त सिंह ने पुनः दुनियावी लालच में पडकर वर्तमान प्रार्थना पत्र न्यायालय श्रीमान्जी समक्ष प्रस्तुत किया है जो कत्तई ग्राह्य योग्य नहीं है। ष

15. The family settlement/compromise arrived at between the parties appears to be fair, inasmuch as a reasonable share of the property left behind by the mother in agricultural land goes to the three daughters. The Abadi has been equally distributed amongst the three daughters in terms of the will. From the perusal of abovenoted objection it is apparent that the two younger sisters were not satisfied with the gift but the deed was not challenged in view of settlement/compromise arrived at between the three sisters. The petitioner has herself taken advantage of the settlement and her name has been mutated on the basis of gift relying upon the settlement/compromise. Having taken advantage of the settlement/compromise the petitioner cannot be permitted to subsequently turn around and question the effect of compromise in the garb of initiating proceedings for correction in the revenue records. Law is otherwise settled that where the parties intend to assail the

settlement/compromise they must specifically plead and prove the circumstances, on the basis of which such settlement is sought to be challenged. In the facts of the present case the petitioner has not specifically challenged the compromise/family settlement and her attempt to question it without specifying grounds of challenge, in proceedings for correction of records, cannot be sustained. The parties will have to be held bound by the compromise/family settlement entered into and acted upon by them. Compromise/settlement amongst the family members for inheriting the property left behind by the common ancestor may contain terms at variance with what is otherwise envisioned in the rules of succession/testament, unless it is found to be unfair or obtained by collusion, fraud or misrepresentation etc. Such family arrangement/compromise cannot be treated as being contrary to law. The judgment of Apex Court in Arjan Singh (supra) will, therefore, have no applicability in the facts of the present case. The judgment of this Court in Ram Abhilakh (supra) also will have no applicability. The petitioner Smt. Vimla Devi could clearly give up her right to claim land under the will in order to persuade the sisters to accept the gift and such settlement cannot be opened at the instance of the present petitioner, as she has taken benefit of it. Her plea to question the settlement is impermissible in view of the equitable principle of estoppel. The binding effect of compromise also cannot be avoided in proceedings for correction of records on the ground that devolution of estate is contrary to course contemplated in law. Special equity governing family settlement will be enforced, when honestly made, even if it is based on ignorance of fact as to the rights in law. The intent of testator cannot be pressed into service to question the compromise voluntarily entered into by the petitioner in the facts of the present case.

16. The petitioner having taken advantage of the compromise is otherwise estopped from challenging the compromise, particularly when there is no challenge to the compromise on any of the grounds permissible in law. Proceedings in the present case have been initiated by filing an application under Section 202 of the U.P. Land Revenue Act, 1901, which is reproduced hereinafter:-

"202. Correction of error or omission.- Any Court or officer by whom an order has been passed in any proceeding under this Act may, within ninety days of such order, either of his own motion or on the application if a party, correct any error or omission, not affecting a material part of the case, after such notice to the parties as may be necessary."

17. Section 202 of the L.R. Act, 1901 permits filing of an application for correcting any error or omission in an order not affecting a material part of the case, after notice to the parties, within a period of 90 days. No specific case of error or omission is pleaded or substantiated in the facts of the present case. The grounds which are set out in this case for invoking jurisdiction under Section 202 of the L.R. Act, 1901 clearly go beyond the scope of proceedings for correcting any error or omission in the order or proceedings of revenue authorities. The appellate court and revisional court have, therefore, correctly rejected the application filed by the present petitioner under Section 202 of the L.R. Act, 1901. It has already been noticed that a fair settlement for devolution of property from the mother to her three daughters has

been agreed upon in the family settlement/compromise, which has also been given effect to. The compromise is not under challenge on any of the grounds permitted in law. The effect of compromise, therefore, cannot be nullified in the garb of proceedings initiated for correction in records under Section 202 of the Land Revenue Act, 1901.

18. Writ petition, accordingly, is dismissed. Parties to bear their own costs.

(2020)07ILR A318
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 39872 of 2018

Brij Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bidhan Chandra Rai, Sri M.C. Chaturvedi

Counsel for the Respondents:
C.S.C., Sri Krishna Mohan Asthana, Sri Satish Chaturvedi, Sri Mohanji Srivastava, Mrs. S.Rathi

A. Civil Law - Urban Land (Ceiling and Regulation) Act, 1976(Principal act) - Urban land (Ceiling and Regulation Repeal) Act 1999 – Section 3 ,Section 4, Section 7, Section 8, Section 9, Section 10 - Possession of surplus land - - kind of possession contemplated u/s 3 & 4 of the Repeal Act, 1999 - actual physical possession of the surplus land - not a mere paper possession - neither having been delivered to the Government voluntarily - nor taken forcefully by the Government - if the possession of the petitioner's land which was declared surplus land stood vested in the State Government u/s 10 (3) of the principal Act was not taken and no proceedings u/s 11, 12, 13 and 14 of the principal Act were pending on the date of coming into force of the Repeal Act, 1999 - petitioner entitled to the benefit of the Repeal Act, 1999.(Para-28,35)

Petitioner's plot declared surplus under the Urban Land (Ceiling and Regulation) Act, 1976 – interim order –petitioner will not be dispossessed – meantime – Principal Act repealed - Division Bench - abated the proceedings under the principal Act - authorities found that petitioner is not in physical possession – writ petition - disposed of - no consequential steps were taken by the respondents on the representation of the petitioner . (Para-3)

HELD:- Actual physical possession of the petitioner's surplus land was never taken by the State Government from the petitioner and the petitioner stood in possession of the land in question on the date of the coming into force of the Repeal Act, 1999 - direction issued to the authorites to expunge the name of respondent-State from the revenue record and to restore that of the petitioner who is the owner of the land in question. (Para-37,39)

Petition allowed. (E-7)

List of cases cited: -

1. Devaki Nandan Prasad Vs St. of Bihar (1983) Law Suit SC 129

2. St. of U.P. Vs Hari Ram (2013) 4 SCC 280

3. Lalla Vs. St. of U.P. (2014) 9 ADJ 524

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

1. Heard Sri B.C. Rai, learned counsel for the petitioner, Sri M.C. Chaturvedi, learned Additional Advocate General, U.P. assisted by Sri Mohanji Srivastava, learned

counsel for respondent nos. 1, 2 and 3 and Mrs. S. Rathi, learned counsel for respondent no. 4.

2. This writ petition has been filed by the petitioner with the following prayer to :-

i. issue a writ of certiorari to quash the impugned order dated 06.08.2018 as contained in Annexure No. 17 passed by the Principal Secretary, Avas Evam Sahari Niyojan Anubhag-6, Lucknow/ Respondent No. 1 and E-tender notice dated 11.10.2018 as contained in Annexure No. 19 issued by the Moradabad Development Authority, Moradabad/Respondent no. 4 inviting bid for development of a residential colony over Gata No. 02 (2A and 2B) situated at village- Shahpur Tigri, Tehsil and District- Moradabad;

ii. issue a writ, order or direction in the nature of writ of mandamus directing the Competent Authority, Urban Land Ceiling, Moradabad to restore the entry of the name of the petitioner in revenue records in respect to Gata Nos. 2A (area 40523.93 sq. metres) and 2B (area 2063.97 sq. metres), total area 42587.96 square metres situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District- Moradabad;

iii. issue a writ, order or direction in the nature of writ of mandamus commanding the respondents not to interfere in the actual physical possession of the petitioner over the Gata Nos. 2A & 2B situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District- Moradabad;

iv. issue such other and further writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case; and

v. award the cost of the writ petition.

3. Briefly stated the facts of this case are that the petitioner's plot namely Gata Nos. 2A (area 40523.93 sq. metres) and 2B (area 2063.97 sq. metres), total area 42587.96 square metres situated in revenue village- Shahpur, Tigri, Tehsil- Moradabad, District- Moradabad (hereinafter referred to as the 'land in question') was declared surplus under the Urban Land (Ceiling and Regulation) Act, 1976, hereinafter referred to as the 'principal Act'. He challenged the proceeding by means of Writ Petition No. 19264 of 1993 wherein this Court on 7.6.1993 passed an interim order that the petitioner will not be dispossessed from the land in question. Vide order dated 14.10.1993, the said interim order was continued. In the meantime, the principal Act was repealed. In view of the said fact, a Division Bench of this Court vide its judgement dated 21.9.2001 abated the proceedings under the principal Act and in view of the said fact, the writ petition was disposed of. It appears that inspite of the said judgement, no consequential steps were taken by the respondents on the representation of the petitioner. Therefore, the petitioner preferred a Writ Petition No. 4085 of 2006 in which this Court found that a short question was required to be decided whether actual physical possession was or was not taken in the proceedings under the principal Act. Pursuant to the order of Division Bench dated 23.1.2006, a decision was taken by respondent no. 1 on 9.5.2007 wherein the authorities found that the petitioner is not in physical possession.

4. Dissatisfied with the order dated 9.5.2007, the petitioner again approached this Court by way of filing Writ Petition No. 28150 of 2007. The said writ petition

was allowed with the following observation :-

"Possession on paper is a symbolic possession and word 'possession' used in Clause (a) of Section (2) of Section 3 of the Act mean actual physical possession and not the symbolic possession.

After the repealing of the Urban Land (Ceiling & Regulation Repeal) Act 1976 by Act No. 15 of 1999 Urban land (Ceiling and Regulation Repeal) Act 1999 the petitioners are entitled to the benefit of Section 3 of the Act No. 15 of 1999. The petitioner's land shall not be treated to have been declared as vacant land under the repeal Act.

For the reasons recorded above, the instant writ petition is allowed.

No orders as to cost."

5. The Moradabad Development Authority aggrieved by the said order preferred a Special Leave Petition No. 12283 of 2012 wherein initially status quo order was passed. Later on, the Hon'ble Supreme Court directed the District Judge, Moradabad to submit a report after inspection of the land in question regarding the physical possession of the land in question. The District Judge in its report found that the petitioner is in physical and cultivated possession. The District Judge submitted a report. The relevant part of the report of the District Judge reads as under:-

"Later on, A visit has also been made at Gata No.2A and 2B measuring 42587.93 Sq. M. situated at village Shahpur Tigri, District Moradabad. All the aforesaid officers and Sri Brij Kumar Singh were present there. In this gata number, there is no development or construction/residential colony. The total land is lying vacant in the shape of cultivated land and there is no crop standing on the said disputed land as shown in the map prepared by Amin as Annexure No. 4."

6. The Supreme Court upon considering the said report dismissed the special leave petition No. 30659 of 2010 of the Moradabad Development Authority with the following observations:-

"Be it noted, in the report, it has been clearly stated that the plots in respect of which possession has not been taken over, the same shall remain in possession of the persons who are already in possession."

7. The aforesaid facts clearly demonstrate that the findings recorded by this Court in Writ Petition No. 28150 of 2007 quoted herein above had not been set aside by the Supreme Court. The said fact leaves no room for any doubt that the petitioner is in possession over the land in question. It appears that inspite of the aforesaid judgements when no consequential steps were taken by the respondents, the petitioner again approached this Court by means of a Writ Petition No. 8789 of 2018. This Court without expressing any opinion on merits observed as under:-

"Accordingly, we direct the respondents No.1, 2 and 3 to consider the application of the petitioner for recording his name over the land in dispute in accordance with law after hearing the petitioner as well as the Moradabad

Development Authority as expeditiously as possible, preferably within a period of three months."

8. In compliance of the said order the respondent no.1, Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, passed the impugned order dated 06.8.2018 referring the opinion of the D.G.C. (Civil). In the said report, the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has held that Moradabad Development Authority is in possession of the land and he has referred some documents.

9. It appears that the coordinate Bench of this Court took note of the fact that the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow while passing the impugned order dated 06.08.2018 had ignored the judgement of the Hon'ble Supreme Court and this Court where categorical findings were recorded that the petitioner was in possession of the disputed plot and had placed its conclusion on the report of the D.G.C. and directed the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow to file his personal affidavit.

10. The Moradabad Development Authority filed Civil Appeal No. 3242 of 2019 arising out of SLP (C) No. 2900/2019 before the Hon'ble Apex Court challenging the interim order dated 18.12.2018 which was finally disposed of by the order of Hon'ble Supreme Court passed on 27.03.2019 which runs as hereunder :-

Leave granted.

1. The appellants are aggrieved by the observations made in the interim order passed by the High Court on 18.12.2018.

2. Mainly, according to Shri Rakesh U. Upadhyay, learned counsel for the appellants, the High Court ought not to have observed "that the Principal Secretary, Awas Evam Shahri Niyojan, Government of U.P., Lucknow, should not have ignored the judgement of the Supreme Court and this Court where clear finding has been recorded regarding the possession of the petitioner". According to the appellants this Court vide order dated 04.01.2017 passed in SLP (C) Nos. 30658-30659/2010 and connected matter recorded a specific finding about possession i.e., whether it is with the petitioner(s) or with the respondent(s). We find that the submission of Shri Upadhyay in this regard is correct.

3. Shri M.L. Lahoty, learned counsel for the respondents pointed out that there is reference to the possession being with the respondents in the High Court's order dated 19.08.2019. This however, is countered by Shri Upadhyay by submitting that the possession referred to in the High Court's order is symbolic possession and not actual possession. It is not necessary for us to render any finding on possession, particularly, since these appeals are only against an interim order. We, however, feel that the observations in the order of the High Court were not necessary for the purpose of the interim order and the matter needs a final decision on the entire dispute in Writ C No. 39872/2018, pending before the High Court.

4. We accordingly, set aside the impugned order and request the High Court to dispose of Writ C No. 39872/2018 as early as possible, preferably not later than one year.

5. The appeals are disposed of accordingly.

6. Shri M.L. Lahoty seeks permission to withdraw Contempt Petition No. 4646 of 2018 in view of the above order.

7. Ordered accordingly.

8. In view of the order passed in the above appeals, these appeals are also disposed of.

11. We therefore, proceed to decide this matter finally on merits in pursuance of the direction issued by the Apex Court vide order dated 27.03.2019.

12. It is urged by the learned counsel for the petitioner that the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has tried to over reach the order of the Supreme Court. Once the matter was settled by this Court against which S.L.P. was dismissed, the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow, has no business to pass a contrary order. He has referred a judgment of the Supreme Court in the case of ***Devaki Nandan Prasad Vs. State of Bihar*** reported in ***1983 Law Suit (SC) 129***. He further urged that in fact the order of the Principal Secretary, Awas Evam Sahari Niyojan, Government of U.P., Lucknow is contemptuous, perverse and not warranted by any material on record.

13. Per contra Sri M.C. Chaturvedi, learned Additional Advocate General, U.P. assisted by Sri Mohanji Srivastava, learned counsel for respondent nos. 1, 2 and 3 and Mrs. S. Rathi, learned counsel for respondent no. 4 made a feeble attempt to defend the impugned order and submitted that the material on record indicates that the possession of the land in question was transferred by the respondent nos. 1 to 3 to respondent no. 4 and hence, the impugned order which is based upon relevant consideration and supported by cogent reasons warrants no interference by this Court. This writ petition lacks merit and is liable to be dismissed.

14. We have heard learned counsel for the parties and perused the material brought on record including the original record pertaining to the proceedings taken under the principal Act in respect of the petitioner's land which was produced before us by the learned counsel appearing for the respondent nos. 1 to 3.

15. The twin questions which arise for our consideration in this writ petition inter-alia are that whether on the date of the coming into force of the Repeal Act, 1999, actual physical possession of the disputed land was with the petitioner or the same stood delivered to the State and; whether the petitioner is entitled to the benefit of the Repeal Act ?

16. In order to examine the aforesaid questions, it would be useful to reproduce the provisions of the principal Act and The Urban Land (Ceiling and Regulation) Repeal Act, 1999 which are relevant for our purpose :-

6. Persons holding vacant land in excess of ceiling limit to file statement-

(1) Every person holding vacant land in excess of the ceiling limit at the commencement of this Act shall, within such period as may be prescribed, file a statement before the competent authority having Jurisdiction specifying the location, extent, value and such other particulars as may be prescribed of all vacant land and of

any other land on which there is a building, whether or not with a dwelling unit therein, held by him (including the nature of his right, title or interest therein) and also specifying the vacant land within the ceiling limit which he desires to retain: Provided that in relation to any State to which this Act applies in the first instance, the provisions of this sub-section shall have effect as if for the words "Every person holding vacant land in excess of the ceiling limit and the commencement of this Act", the words, figures and letters "Every person who held vacant land in excess of the ceiling limit on or after the 17th day of February, 1975 and before the commencement of this Act and every person holding vacant land in excess of the ceiling limit at such commencement" had been substituted. Explanation.--In this section, "commencement of this Act" means,--

(i) the date on which this Act comes into force in any State;

(ii) where any land, not being vacant land, situated in a State in which this Act is in force has become vacant land by any reason whatsoever, the date on which such land becomes vacant land;

(iii) where any notification has been issued under clause (n) of section 2 in respect of any area in a State in which this Act is in force, the date of publication of such notification.

(2) If the competent authority is of opinion that--

(a) in any State to which this Act applies in the first instance, any person held on or after the 17th day of February, 1975 and before the commencement of this Act or holds at such commencement; or

(b) in any State which adopts this Act under clause (1) of article 252 of the Constitution, any person holds at the commencement of this Act, vacant land in excess of the ceiling limit, then, notwithstanding anything contained in sub-section (1), it may serve a notice upon such person requiring him to file, within such period as may be specified in the notice, the statement referred to in sub-section (1).

(3) The competent authority may, if it is satisfied that it is necessary so to do, extend the date for filing the statement under this section by such further period or periods as it may think fit; so, however, that the period or the aggregate of the periods of such extension shall not exceed three months.

(4) The statement under this section shall be filed,--

(a) in the case of an individual, by the individual himself; where the individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf;

(b) in the case of a family, by the husband or wife and where the husband or wife is absent from India or is mentally incapacitated from attending to his or her affairs, by the husband or wife who is not so absent or mentally incapacitated and where both the husband and the wife are absent from India or are mentally

incapacitated from attending to their affairs, by any other person competent to act on behalf on the husband or wife or both;

(c) in the case of a company, by the principal officer thereof;

(d) in the case of a firm, by any partner thereof;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by a person competent to act on his behalf. Explanation.--For the purposes of this sub-section, "principal officer"--

(i) in relation to a company, means the secretary, manager or managing-director of the company;

(ii) in relation to any association, means the secretary, treasurer, manager or agent of the association, and includes any person connected with the management of the affairs of the company or the association, as the case may be, upon whom the competent authority has served a notice of his intention of treating his as the principal officer thereof.

7. Filing of statement in cases where vacant land held by a person is situated within the jurisdiction of two or more competent authorities.--

(1) Where a person holds vacant land situated within the jurisdiction of two or more competent authorities, whether in the same State or in two or more States to which this Act applies, then, he shall file his statement under sub-section (1) of section 6 before the competent authority within the jurisdiction of which the major part thereof is situated and thereafter all subsequent proceedings shall be taken before that competent authority to the exclusion of the other competent authority or authorities concerned and the competent authority, before which the statement is filed, shall send intimation thereof to the other competent authority or authorities concerned.

(2) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities within the same State to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the State Government and thereupon, the State Government shall, by order, determine the competent authority before which all subsequent proceedings under this Act shall be taken to the exclusion of the other competent authority or authorities and communicate that order to such person and the competent authorities concerned.

(3) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities in two or more States to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the Central Government and thereupon, the Central Government shall, by order, determine the competent authority before which all subsequent proceedings shall betaken to the exclusion of the other competent authority

or authorities and communicate that order to such person, the State Governments and the competent authorities concerned.

8. Preparation of draft statement as regards vacant land held in excess of ceiling limit-

(1) On the basis of the statement filed under section 6 and after such inquiry as the competent authority may deem fit to make the competent authority shall prepare a draft statement in respect of the person who has filed the statement under section 6.

(2) Every statement prepared under sub-section (1) shall contain the following particulars, namely:--

(i) the name and address of the person;

(ii) the particulars of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by such person;

(iii) the particulars of the vacant lands which such person desires to retain within the ceiling limit;

(iv) the particulars of the right, title or interest of the person in the vacant land; and

(v) such other particulars as may be prescribed.

(3) The draft statement shall be served in such manner as may be prescribed on the person concerned together with a notice stating that any objection to the draft statement shall be preferred within thirty days of the service thereof.

(4) The competent authority shall duly consider any objection received, within the period specified in the notice referred to in sub-section (3) or within such further period as may be specified by the competent authority for any good and sufficient reason, from the person whom a copy of the draft statement has been served under that sub-section and the competent authority shall, after giving the objector a reasonable opportunity of being heard, pass such orders as it deems fit.

9. Final Statement.--After the disposal of the objections, if any, received under sub-section (4) of section 8, the competent authority shall make the necessary alterations in the draft statement in accordance with the orders passed on the objections aforesaid and shall determine the vacant land held by the person concerned in excess of the ceiling limit and cause a copy of the draft statement as so altered to be served in the manner referred to in sub-section (3) of section 8 on the person concerned and where such vacant land is held under a lease, or a mortgage, or a hire-purchase agreement, or an irrevocable power of attorney, also on the owner of such vacant land.

10. Acquisition of vacant land in excess of ceiling limit-

(1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that--

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all person interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1) the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)--

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary. Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government.

Section 3 and 4 of the Repeal Act, 1999 are as hereunder :-

3. Saving.--

(1) The repeal of the principal Act shall not affect--

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings.--All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate: Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

17. From the perusal of the aforesaid provisions of the principal Act, it transpires that Section 6 provides that every person holding vacant land in excess of the ceiling limit was required to file a statement before the competent authority having jurisdiction specifying the location, extent, value and such other prescribed particulars of the vacant land and of any other land on which there was a building, whether or not with a dwelling unit therein, held by him.

18. Section 7 provides the procedure for filing of statement in cases where vacant land held by a person was situated within the jurisdiction of two or more competent authorities.

19. Section 8 provides that on the basis of the statement filed u/s 6 and after such inquiry as the competent authority may deem fit to make, the competent authority shall prepare the draft statement.

20. Section 8 (3) stipulates that the draft statement prepared u/s 8 shall be served on the person concerned together with a notice stating that any objection to the draft statement shall be prepared within 30 days of the service thereof.

21. Section 9 provides that after disposal of the objections, if any, received under sub-section (4) of Section 8, the

competent authority shall prepare the final statement.

22. Section 10 (1) provides that after the service of the statement u/s 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit to be published in the Official Gazette of the State concerned for the information of the general public.

23. Section 10 (2) empowers the competent authority to decide the claims of the persons interested in the vacant land filed in pursuance of the notification published under sub-section (1).

24. Section 10 (3) provides that the competent authority concerned may, by notification published in the Official Gazette of the State concerned, anytime after the publication of the notification under sub-section (1) declare that excess vacant land referred to in the notification published under sub-section (1) with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government. Such land shall be deemed to have vested absolutely in the State Government free from all encumbrances.

25. Section 10 (4) prohibits transfer by way of sale, mortgage, gift, lease or otherwise by any person any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

26. Section 10 (5) empowers the competent authority to order any person by notice in writing who is in possession of any vacant land vested in the State Government under sub-section (3) to surrender or deliver possession thereof to State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

27. Section 10 (6) states where any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorized by such State Government in this behalf and may for that purpose use such force as may be necessary.

28. The kind of possession contemplated u/s 3 & 4 of the Repeal Act, 1999, in our opinion, is actual possession and not a mere paper possession and if the possession of the petitioner's land which was declared surplus land stood vested in the State Government u/s 10 (3) of the principal Act was not taken and no proceedings u/s 11, 12, 13 and 14 of the principal Act were pending on the date of coming into force of the Repeal Act, 1999, the petitioner is entitled to the benefit of the Repeal Act, 1999.

29. From the perusal of the original record, notification u/s 10 (3) of the principal Act in respect of the land in question was published on 28.02.1986 while notice u/s 10 (5) of the principal Act was issued on 25.05.1990 and published in the official gazette on 28.07.1990. There is also a possession memo dated 13.11.1992, copy whereof has been brought on record as Annexure No. C.A.-4 to the counter affidavit filed on behalf of the respondent no. 4 in the writ petition, by which the possession of the land in question was

purported to have been taken by the respondent no. 2. The possession memo neither contains name of the person from whom respondent no. 2 had obtained the actual physical possession of the land in question nor the said document has been signed by the petitioner.

30. It is also not the case of the respondents that after publication of the notice u/s 10 (5) of the principal Act in the official gazette, the petitioner had delivered the physical possession of his surplus land to the respondent nos. 1 to 3.

31. We have very carefully scanned the original record and we are constrained to observe that there is no material on record indicating that forcible possession of the land in question was taken by the respondents from the petitioner u/s 10 (6) of the principal Act. The possession memo dated 13.04.1992 appears to be a sham document and there is nothing which may persuade us into holding that either the possession of the land in question was peacefully delivered by the petitioner to the respondents after the publication of the notice u/s 10 (5) of the principal Act or the respondent no. 2 had taken forcible possession of the land in question from the petitioner.

32. Thus, we have no hesitation in holding that the petitioner was in possession of the land in question on the date on which the Repeal Act, 1999 came into force. Even otherwise the Hon'ble Apex Court as well as this Court have recorded categorical findings of fact in their judgements that the possession of the land in question was with the petitioner.

33. In **State of U.P. v. Hari Ram, reported in (2013) 4 SCC 280**, the Apex Court observed that what is required for a land to come out from the purview of Repeal Act is that it should be a case of forceful dispossession in the event of there being no peaceful dispossession. The peaceful dispossession is related to proceedings u/s 10 (5) of the principal Act, whereas, the forceful dispossession is related to proceedings u/s 10 (6) of the principal Act vide paragraph 39 of **Hari Ram (supra)**, the Court concluded thus :-

"39. Above-mentioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, it the land owner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, u/s 10 (5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land." (emphasis added)

34. There is another document on record showing that the State Government had allegedly delivered the possession of the land in question to the respondent no. 4 on 30.03.1993, copy whereof has been brought on record as Annexure No. C.A.- 5 to the counter affidavit filed on behalf of respondent no. 4 in the writ petition.

35. We are of the considered view that the actual physical possession of the surplus land neither having been delivered to the Government voluntarily nor taken forcefully by the Government, any transfer of possession of the surplus land by the Government in favour of respondent no. 4 on paper, in pursuance of the Government orders as mentioned therein, is of no relevance or consequence. Such a paper transaction in favour of respondent no. 4 by the State Government to defeat the rights of the petitioner is not recognized under law.

36. In **Lalla Vs. State of U.P.** reported in **2014 (9) ADJ 524,** this Court in paragraph 11 of the judgement has held as hereunder :-

"The law does not contemplate transfer of possession by Government orders. It needs to be clarified that the land for the purposes of management would vest in the local authorities/development authorities only when the State came in valid possession over land, pursuant to lawful proceedings under Section 10 (5) or 10 (6) of the Act. The local authorities/development authorities merely steps into shoes of the State Government. If the State Government through the Collector/District Magistrate has not taken possession over the land in question, as contemplated by law, the transfer of possession in favour of the local authorities/development authorities cannot be presumed under Government order. If the possession of land has not been taken by the State, as per the procedure already determined by the Apex Court, the local authorities//development authorities cannot claim independent right over the land merely on the strength of the Government order."

37. Thus, we find that actual physical possession of the petitioner's surplus land was never taken by the State Government from the petitioner and the petitioner stood in possession of the land in question on the date of the coming into force of the Repeal Act, 1999. This writ petition deserves to be allowed.

38. Accordingly, the writ petition is **allowed.**

39. The impugned order dated 06.08.2018 is hereby quashed. A further direction is issued to the respondents to expunge the name of respondent-State from the revenue record and to restore that of the petitioner who is the owner of the land in question.

(2020)07ILR A330
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. 40425 of 2018

K. Ragupathi ...Petitioner
Versus
Bachchu Singh & Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
Sri Rahul Agarwal, Sri Ashutosh Mishra, C.S.C.

A. Civil Law - The Uttar Pradesh Gautam Buddha University Act, 2002 - Section 13 (1) - Quo warranto to the Registrar holding an independent substantive public statutory office - - Registrar shall be appointed by the Chancellor - The Uttar Pradesh Gautam Buddha University (Amendment) Act, 2008 - Section 13 sub-section (1) of the Act amended by Section 3 sub-section (1) - power of appointing Registrar conferred on the Board of Management - Section 10 (5) and Section 47 - writ of quo warranto can only be issued when the appointment is contrary to statutory rules - appointment of Registrar adjudged to be illegal and dehors the provisions of the Act - writ of Quo Warranto issued - appointment of Registrar quashed. (Para-35,38,39)

The respondent no.1 has been appointed as Registrar of the University by the State Government i.e respondent no. 2 - The

appointment of respondent, as per the petitioner is not in consonance with the provisions of the Act, 2002 as amended and as such he is a usurper of the office concerned.(Para – 3,5)

HELD:- The appointment of Registrar in the University has been made by an Authority which had no power under the Act to appoint him. Since his appointment dehors the provisions of Section 13 sub-section (1) of the Act, the same cannot be sustained and is liable to be quashed. (Para-37)

Petition allowed. (E-7)

List of cases cited: -

1. B. Srinivasa Reddy Vs Karnataka Urban Water Supply and Drainage Board Employees' Assc. & ors. (2006) 11 SCC 731 (II)

2. A.N. Sashtri Vs St. of Punjab & ors. (1988) Supp SCC 127

3. Dr. Kashinath G. Jalmi & anr. Vs The Speaker & ors. (1993) 2 SCC 703

4. N. Kannadasan Vs Ajoy Khose & ors. (2009) 7 SCC 1

5. R.K. Jain Vs U.I.O. & ors. (1993) 4 SCC 119

6. Mor Modern Coop. Transport Society Ltd Vs Financial Commr. & Secy. (2002) 6 SCC 269

7. High Court of Gujarat & ors. Vs. Guj. Kishan Mazdoor Panchayat & ors. (2003) 4 SCC 712

8. Mor Modern Cooperative Transport Society Ltd. Vs Financial Commissioner & Secretary to Govt. of Haryana & anr. MANU/SC/0574/2002MANU/SC/0574/2002: (2002) SUPP1SCR87

9. Rajesh Awasthi Vs Nand Lal Jaiswal & ors. (2013)1 SCC 501

10. Mor Modern Coop. Transport Coop. Transport Society Ltd. Vs Govt. of Haryana (2002) 6 SCC 269

(Delivered by Hon'ble Sri Bala Krishna Narayana &
Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri K. Raghupathi, the petitioner in person, Sri Ashutosh Mishra, learned counsel for respondent no.1, Sri Suresh Singh, learned Additional Chief Standing Counsel for respondent no.2 and Sri Rahul Agarwal, learned counsel for respondent no.3.

2. This writ petition has been filed by the petitioner with the following prayers to issue :-

"a) A Writ, order, declaration or direction in the name or form and nature of Quo warranto to the Respondent to show cause on what rights he is holding an independent substantive public statutory office of Registrar of State.

b) A writ, order or direction as this Hon'ble Court may deem fit and proper to grant interim relief to the effect that the Respondent be restrained not to participate in any decision or policy making processes concerning any of the academic and research activities and administration of the University until the pendency of this present writ petition,

c) Any other writ, order, declaration or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case to meet the ends of justice; and

d) Award cost of the petition to petitioner."

3. Following order was passed in this writ petition by another coordinate Bench of this Court on 5.3.2019 :-

"The case of the petitioner is that though as per Section 13 of the Uttar Pradesh Gautam Buddha University Act, 2002, as amended, the Registrar shall be appointed by the Board of Management of the University in such manner and on such terms and conditions as may be prescribed, but by the order impugned dated 24.8.2018, the respondent, Shri Bachchu Singh has been appointed as Registrar of the University by the State Government. The appointment of respondent, Shri Bachchu Singh as per the petitioner is not in consonance with the provisions of the Act, 2002 as amended and as such he is a usurper of the office concerned. It is also brought to our notice that by filing Writ-A No.12027 of 2018, the petitioner assailed the validity of appointments made to the post of Vice Chancellor, Registrar and the Finance Officer, but that petition for writ was dismissed on 07.12.2018. In the petition aforesaid, the appointment of Vice Chancellor was not interfered by the Court as the same was in officiating capacity. With regard to appointments to the post of Registrar and Finance Officer, the court held that the petitioner failed to show as to how the appointments on the posts aforesaid are illegal. The Court also observed that nothing has been disclosed in the petition for writ about deficiencies in the appointments concerned. Reference of the case aforesaid is also given in the petition for writ.

A co-ordinate bench of this Court vide order dated 10.12.2018 issued notice to the respondent, Shri.Bachchu Singh and thereafter under an order dated 13.2.2019, the petitioner was permitted to implead the State of U.P. as party respondent.

We are of the considered opinion that for appropriate adjudication of the issue involved in the petition for writ, Gautam Buddha University, Greater Noida, Gautam Buddh Nagar is also a party necessary to the writ proceedings. The petitioner is permitted to implead the Gautam Buddha University, Greater Noida, Gautam Buddh Nagar also as party respondent.

The amended cause title is required to be filed by the petitioner by tomorrow.

The notice issued to respondent, Shri.Bachchu Singh has not yet been served.

Let a fresh notice be issued to the respondent, Shri.Bachchu Singh and the same be given Dasti by the learned counsel for the petitioner with liberty to remit the same through Registered Post Acknowledgement Due. A notice be also issued to the newly impleaded Gautam Buddha University, Greater Noida,Gautam Buddh Nagar.

Learned Standing Counsel on behalf of the Government of Uttar Pradesh wants sometime to complete the instructions and also to file a short counter affidavit to the petition for writ, if required to satisfy the court as to how the order dated 24.8.2018 has been passed by the Joint Secretary to the Government of Uttar Pradesh, Department of Appointment, Section-2 giving appointment to the respondent, Shri.Bachchu Singh as Registrar of the Gautam Buddha University, Greater Noida, Gautam Buddh Nagar.

Let this petition for writ be listed on 02.4.2019."

4. In view of the aforesaid order, the learned counsel for respondent nos. 1 and 3 have filed their counter affidavits to which the petitioner has filed his rejoinder affidavit. Despite order passed in this case on 4.12.2019, no counter affidavit has been filed by respondent no.2. However, when this matter was taken up today, Sri Suresh Singh, learned Additional Chief Standing Counsel appearing for respondent no.2 produced before us the written instructions which are in the form of a written narrative received by him from respondent no.2, which have been taken on record.

5. Facts of the case as stated in the writ petition are that the petitioner is an Indian citizen, independent legal researcher and a public spirited person who was in the service of Gautam Buddha University, Uttar Pradesh as Senior Scientific Officer until 12.8.2014 (hereinafter referred to as "the University"). While in service of the University, the petitioner was allotted official residence at D-2, Type-V, Faculty Housing, Gautam Buddha University, Greater Noida, Gautam Buddh Nagar, District Uttar Pradesh, which he continued to occupy till 2018 on which date, he and his family were forcibly and illegally evicted by the illegally appointed officers of the University without following due procedures and observing principles of natural justice and apart from that, the University also took physical possession of the properties of the petitioner including case files documents, valuables primarily to frustrate Writ Petition (C) No. 51962 of 2014 filed by the petitioner wherein the petitioner had challenged the order of termination dated 12.8.2014 passed by the University by which the University had refused to extend the contract of his service. The aforesaid writ petition was eventually dismissed by this Court vide order dated 23.5.2018. Bachchu Singh, respondent no.1 in this writ petition, was appointed as Registrar of the University by respondent no.2 on 24.8.2018. Copy of his appointment order has been brought on record as Annexure-2 to this writ petition. The petitioner alleges that the University was established under The Uttar Pradesh Gautam Buddha University Act, 2002 (hereinafter referred to as "the Act"). Section 13 (1) of the Act before its amendment in the year 2008, provided that the Registrar shall be appointed by the Chancellor in such manner and on such terms and conditions as may be prescribed. Section 13 sub-section (1) of the Act was amended by Section 3 sub-section (1) of The Uttar Pradesh Gautam Buddha University (Amendment) Act, 2008 (U.P. Act No.21 of 2008) by which the power of appointing Registrar was conferred on the Board of Management in such manner and on such terms and conditions as may be prescribed.

6. Respondent no. 1 Bachchu Singh in the counter affidavit filed by him has taken the stand that he was appointed by the Vice-Chancellor of the University in the exercise of his powers under Section 10 sub-section (5) of the Act and his appointment was subsequently approved by the Board of Management and hence, it cannot be said that the respondent no.1 was appointed by an Authority not competent.

7. As regards the respondent no.3, the stand taken is that the conduct of the petitioner disentitles him to maintain this writ petition. In the counter affidavit, it has been stated that before filing the present quo-warranto petition, the petitioner had filed three writ petitions namely, Writ Petition Nos.54883 of 2014, 63625 of 2014 and 12027 of 2018.

8. Writ Petition (PIL) No. 54883 of 2014 was filed by the petitioner challenging the order of appointment of Sri Pushyapati Saxena, the then Registrar of the University, which was dismissed as withdrawn by the petitioner as the Officer stood transferred.

9. Writ - A No. 63625 of 2014 was filed by the petitioner assailing the removal of Dr. J.P. Sharma, the then Vice-Chancellor of the University, which was dismissed by this Court by an order dated 26.11.2014 with cost of Rs.5,000/- upon the petitioner.

10. Writ - A No. 12027 of 2018 was filed by the petitioner challenging the appointment of the then acting Vice-Chancellor, the Registrar and the Finance Officer which was dismissed by order dated 7.12.2018 with cost of Rs.5,000/- upon the petitioner.

11. In the counter affidavit of respondent no.3, it has also been averred that since during the pendency of the three writ petitions before this Court, which were filed by the petitioner challenging the refusal of the University to extend the term of his contractual appointment, the University had not dispossessed him from his official residence in view of the oral undertaking given by the counsel for the respondent no.3 before this Court in this regard, he kept quiet of the dismissal of the successive writ petitions filed by him before this Court but when dispossessed from his official residence, he has filed the instant writ petition. It is apparent that the filing of this writ petition is motivated by malice and vendetta and hence the writ petition is liable to be dismissed on that ground alone. Moreover, the issuance of quo warranto being discriminatory, considering the conduct of the petitioner, the same is liable to be dismissed.

12. It has further been stated in the counter affidavit that in case this Court eventually comes to a conclusion quashing the appointment of respondent no.1, in that case, this Court keeping in view the interest of the University, allow respondent no.1-Bachchu Singh, to function as Registrar of the University till a regular appointment is made.

13. It is contended by the learned counsel for the petitioner that the appointment of respondent no.2 in the University as Registrar has been made dehors the provisions of The Uttar Pradesh Gautam Buddha University (Amendment) Act, 2008 (U.P. Act No.21 of 2008), hence, a writ of Quo Warranto be issued quashing his appointment and restraining him from functioning as Registrar of the University.

14. Sri Suresh Singh, Additional Chief Standing Counsel appearing for the respondent no.2 has submitted that since the order passed by the State Government appointing respondent no.1 as the Registrar of the University has been ratified by the Board of Management of the University, it will be deemed to be an appointment made by the Board of Management and not by the State Government. In case the Board of Management of the University was not inclined to accept the appointment of respondent no.1 as the Registrar of the University, it could have refused to ratify the appointment of respondent no.1 and this having not been done, respondent no.1 by fiction of law, shall be deemed to be appointed by the Board of Management. He has referred to Section 47 of the Act.

15. Sri Rahul Agarwal, learned counsel for respondent no.3 made his submissions supporting the appointment of respondent no.1 as Registrar in the University and raised a preliminary objection regarding the maintainability of this writ petition at the behest of the petitioner on account of his conduct which disentitles him from grant of any relief by this Court.

16. We have heard learned counsel for the parties and perused the pleadings.

17. Before proceeding to examine the contention of the petitioner on merits, we proceed to examine the matter on maintainability. The preliminary objection raised by Sri Rahul Agarwal, learned counsel for respondent no.3 that this writ petition is liable to be dismissed on the ground of the same being not bonafide exercise, but vitiated by malice and vendetta. In support of his contention ***Sri Rahul Agarwal has placed reliance upon the judgement of the Apex Court in the case of B. Srinivasa Reddy vs. Karnataka Urban Water Supply and Drainage Board Employees' Association and others (2006) 11 SCC 731 (II)*** in which the Apex Court while dealing with the challenge to the orders passed by the learned Single Judge, quashed the orders passed by the High Court holding that the writ petition filed by the Employees' Union and the President of the Union Halakatte was absolutely lacking in bonafides. Paragraphs 52 and 53 of the aforesaid judgement which are relevant for our purpose are being reproduced hereinbelow :-

"52. The judgment impugned in this appeal not only exceeds the limit of Quo Warranto but has not properly appreciated the fact that writ petition filed by the Employees' Union and the President of the Union Halakatte was absolutely lacking in bonafides. In the instant case, the motive of the second respondent Halakatte is very clear and the Court might in its discretion declined to grant a Quo Warranto.

53. This Court in A.N. Sashtri vs. State of Punjab and Others, (1988) Supp SCC 127 held that the Writ of Quo Warranto should be refused where it is an outcome of malice or ill-will. The High Court failed to appreciate that on 18.01.2003 the appellant filed a criminal complaint against the second respondent Halakatte that cognizance was taken by the criminal court in CC No. 4152 of 2003 by the jurisdictional magistrate on 24.02.2003, process was issued to the second respondent who was enlarged on bail on 12.06.2003 and the trial is in progress. That apart, the second respondent has made successive complaints to the Lokayukta against the appellant which were all held to be baseless and false. This factual background which was not disputed coupled with the fact that the second respondent Halakatte initiated the writ petition as President of the 1st respondent Union which had ceased to be a registered trade union as early as on 02.11.1992 suppressing the material fact of its registration having been cancelled, making allegations against the appellant which were no more than the contents of the complaints filed by him before the Authorities which had been found to be false after thorough investigation by the Karnataka Lokayukta would unmistakably establish that the writ petition initiated by the respondent Nos. 1 and 2 lacked in bona fides and it was the outcome of the malice and ill-will the 2nd respondent nurses against the appellant. Having regard to this

aspect of the matter, the High Court ought to have dismissed the writ petition on that ground alone and at any event should have refused to issue a Quo Warranto which is purely discretionary. It is no doubt true that the strict rules of locus standi is relaxed to an extent in a Quo Warranto proceedings. Nonetheless an imposture coming before the Court invoking public law remedy at the hands of a Constitutional Court suppressing material facts has to be dealt with firmly."

18. Per contra, refuting the contention of Sri Rahul Agarwal, learned counsel for respondent no. 3, the petitioner submitted that where it is found that the appointment of a public servant is wholly dehors the rules, irrespective of the conduct of the person challenging the said appointment, a writ of quo warranto has to be issued by this Court. In support of his contention, he has relied upon **Dr. Kashinath G. Jalmi and another vs. The Speaker and others (1993) 2 SCC 703 and N. Kannadasan vs. Ajoy Khose and others (2009) 7 SCC 1** and submitted that in a writ of quo warranto proceedings, the conduct and motive of the petitioner is wholly irrelevant.

19. Paragraphs 134 and 136 of ***N. Kannadasan (supra)*** which are relevant for our purpose, are being reproduced hereinbelow :-

"134. Indisputably a writ of Quo Warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this Court in High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, (supra) and R.K. Jain v. Union of India and , [(1993) 4 SCC 119]. See also Mor Modern Coop. Transport Society Ltd. v. Financial Commr. & Secy. [(2002) 6 SCC 269].

136. In Dr. Kashinath G. Jalmi (supra), it was held that even the motive or conduct of the appellants may be relevant only for denying them the costs even if their claim succeeds but it cannot be a justification to refuse to examine the merits of the question raised therein, since that is a matter of public concern and relates to good governance of the State. "

20. Paragaph 34, 35 and 36 of **Dr. Kashinath G. Jalmi and another (supra)** which are also relevant for our purpose are being extracted hereinbelow :-

"34. In our opinion the exercise of discretion by the court even where the application is delayed, is to be governed by the objective of promoting public interest and good administration; and on that basis it cannot be said that discretion would not be exercised in favour of interference where it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality.

35. We may also advert to a related aspect. Learned counsel for the respondents were unable to dispute, that any other member of the public, to whom the oblique motives and conduct alleged against the appellants in the present case could not be attributed, could file such a writ petition even now for the same relief, since the alleged usurpation of the office is continuing, and this disability on the ground of oblique motives and conduct would not attach to him. This being so, the relief claimed by the appellants in their writ petitions filed in the High Court being in the nature of a class action, without seeking any relief personal to them, should not have been dismissed merely on the ground of laches. The motive or conduct of the appellants, as alleged by the

respondents, in such a situation can be relevant only for denying them the costs even if their claim succeeds, but it cannot be a justification to refuse to examine the merits of the question raised therein, since that is a matter of public concern and relates to the good governance of the State itself.

36. Shri R.K. Garg submitted that laches of the appellants can not legitimise usurpation of office by Ravi S. Naik, Chopdekar and Bandekar; and Shri Jethmalani submitted that manifest illegatlity will not be sustained solely on the ground of laches when it results in continuance in a public office of a person without lawful authority. The fact that the situation continues unaltered, since these persons continue to hold the public offices, to which they are alleged to be disentitled, is in our opinion sufficient to hold that the writ petitions ought not to have been dismissed merely on the ground of laches at the admission stage, without examining the contention on merits that these offices including that of the Chief Minister of the State, are being held by persons without any lawful authority. The dismissal of the writ petitions by the High Court merely on this ground can not, therefore, be sustained."

21. It is relevant to note that the judgement relied upon by Sri Rahul Agarwal is a judgement of Division Bench while the judgement on which the petitioner has placed reliance in ***Dr. Kashinath G. Jalmi and another (supra)*** has been rendered by a Bench of three Judges.

22. Thus, upon a careful reading of the law reports cited by the learned counsel for the parties, we find that although in the case of ***B. Srinivasa Reddy (supra)***, the Apex Court held that where the filing of a quo warranto petition is not bona fide, the Court may refuse to issue writ of quo warranto. However, in the two judgements which have been cited by the petitioner, it has been categorically held that a writ of quo warranto can be issued when the appointment is contrary to the statutory rules and motive or conduct of the person challenging such appointment may be relevant only for denying them the costs even if their claims succeeds, but it cannot be a justification to refuse to examine the merits of the question raised by them since that is the matter of public concern and relates to the good governance of the State.

23. In view of above, we do not find any merit in the preliminary objection raised by Sri Rahul Agarwal, learned counsel for respondent no.3 and hence, we proceed to examine the matter on merits.

24. In order to appreciate respective submissions made by learned counsel for the parties, it would be appropriate to extract unamended Section 13 (1), amended Section 3, Section 10 (5) and Section 47 of the Act.

25. Section 13 (1) of the Act reads as hereunder:-

"13(1) The Registrar shall be appointed by the Chancellor in such manner and on such terms and conditions as may be prescribed."

26. Section 3 (1) of The Uttar Pradesh Gautam Buddha University (Amendment) Act, 2008 (U.P. Act No.21 of 2008) reads hereinunder:-

"3(1) The Registrar shall be appointed by the Board of Management in such manner and on such terms and conditions as may be prescribed."

27. Section 10(5) of the Act reads hereinunder :-

"10(5) Where any matter other than the appointment of a teacher is of urgent nature requiring immediate action and the same could not be immediately dealt with this Act to deal with by any officer or the authority or other body of the University empowered by or under this Act to deal with it, the Vice-Chancellor may take such action as he may deem fit and shall forthwith report the action taken by him to the Chancellor and also to the officer, authority, or other body who or which in the ordinary course, would have dealt with the matter."

28. Section 47 of the Act reads hereinunder :-

"47. The State Government shall have the following powers also, namely :-

(a) to issue direction with respect to any matter required to be done by the University by or under this Act or the rules, the Statutes or the Ordinances made thereunder; and

(b) to order framing of Statutes on any subject."

29. There is no dispute about the fact that when respondent no.1 was appointed as Registrar on 21.4.2018, the original Section 13 (1) of the Act stood amended and under the amended Section 3 (1) of the Act, it is Board of Management of the University which alone has the power to appoint the Registrar of the University.

30. Learned counsel for respondent no.1 made a feeble attempt to save the appointment of respondent no.1 by referring to and placing reliance upon Section 10 (5) of the Act, whereas Sri Suresh Singh, learned Additional Chief Standing Counsel for respondent no.2 has endeavoured to defend the action of the State by placing reliance upon Section 47 of the Act.

31. As far as sub-section (5) of Section 10 of the Act is concerned, we do not find that the same is of any help to the respondents. It merely stipulates that where any matter other than the appointment of a teacher is of urgent nature, requiring immediate action and the same could not be immediately dealt with this Act to deal with by any officer or the authority or other body of the University empowered by or under this Act to deal with it, the Vice-Chancellor may take such action as he may deem fit and shall forthwith report the action taken by him to the Chancellor and also to the officer, authority, or other body who or which in the ordinary course, would have dealt with the matter. The second proviso to sub-section (5) of Section 10 states that the Vice-Chancellor shall immediately seek the approval of any such decision taken by him from Chancellor and Chancellor may either confirm the action taken by the Vice-Chancellor or annul the same or modify it in such manner, as he thinks fit.

32. Respondent no. 1 has tried to impress upon us that in the instant case, the appointment of respondent no.1 has not been made by the State Government but by the Vice-Chancellor and he has invited our attention to Annexure-3 of the writ petition, which is an office order issued by the Vice-Chancellor. However, after going through the office order dated 25th March, 2019, we do not find any merit in the submission of the learned counsel for respondent no.1

for the reason that the appointment of the respondent was made on 24th August, 2018. The office order dated 25th March, 2019, in our opinion is of no help to the respondent no.1. The Vice-Chancellor of the University issued the aforesaid order on 25th March, in purported exercise of his power under Section 10 (5) of the Act, apparently as an afterthought and after almost ten months from the date of the appointment of respondent no.1 as Registrar and his assuming the charge of the office of the Registrar. Even from the bare perusal of the office order dated 25.3.2019, it is crystal clear that the appointment of respondent no.1 was made by the State Government.

33. Now coming to the submission made by learned Additional Chief Standing Counsel that the appointment of respondent no.1 has been made by the State Government in exercise of its powers under section 47 of the Act which confers power on the State to issue directions with respect to any matter required to be done by the University by or under this Act or the rules, the Statutes or the Ordinances made thereunder; and to order framing of Statues on any subject. The learned Standing Counsel has failed to demonstrate that the impugned appointment of respondent no.1 was made under Section 47 of the Act. There is nothing under Section 47 of the Act which may even remotely indicate that the State Government could have appointed the Registrar of the University and forwarded the information about his appointment to the Board of Management for ratification. Learned Additional Chief Standing Counsel has also failed to bring to our notice any provision under the Act providing that where any appointment which the Board of Management alone is empowered to make, can be made by the State Government and if the Board of Management ratifies the same, the defect, if any, in the appointment which should have been made under the provisions of the Act, is made by any other authority or the State, stands cured.

34. Hon'ble the Apex Court in the case of The University of Masore and Others Vs. C.D. Govinda Rao and others AIR 1965 SC 491 Paragraphs 7 and 8 held as under :

"7.As Halsbury has observed :

"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, 'franchise, or liberty, to, inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined:"

8. Broadly stated, the quo warranto proceeding affords a judicial remedy by which any person, who holds an inde- pendent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the Executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be

seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not.

35. In High Court of Gujarat and others Vs. Gujarat Kishan Mazdoor Panchayat and others reported in (2003)4 SCC 712 the Hon'ble Supreme Court in paragraph No.24 held as under:

"A writ of quo warranto can only be issued when the appointmen is contrary to statutory rules. [See Mor Modern Cooperative Transport Society Ltd. v. Financial Commissioner & Secretary to Govt. of Haryana and Anr. MANU/SC/0574/2002MANU/SC/0574/2002: [2002]SUPP1SCR87]

36. Similarly in **Rajesh Awasthi Vs. Nand Lal Jaiswal and others (2013)1 SCC 501** the Hon'ble Supreme Court in paragraph No.16 held as under :

16. A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. This Court in Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana (2002) 6 SCC 269 held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In B. Srinivasa Reddy (supra), this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in Hari Bans Lal (supra) wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.

37. Thus, in view of the foregoing discussion, we have no hesitation in holding that the appointment of respondent no.1 - Bachchu Singh as Registrar in the University has been made by an Authority which had no power under the Act to appoint him. Since his appointment is dehors the provisions of Section 13 sub-section (1) of the Act, the same cannot be sustained and is liable to be quashed.

38. We accordingly, issue a writ of Quo Warranto and allow this writ petition quashing the appointment of respondent no.1 as Registrar.

39. This order, however, shall not preclude the Vice-Chancellor of the University from exercising his powers under Section 10(5) of the Act or any other provision of the Act to meet the vacuum created in the University on account of the appointment of Registrar respondent no.1 having been adjudged to be illegal and dehors the provisions of the Act.

40. Since we have been informed that although the Gautam Buddha University, Greater Noida, Gautam Buddh Nagar was created in the year 2002 but no rules or ordinances have been framed till date by the University, it will be desirable if the University acts promptly in this matter and frames requisite statutes, rules and regulations.

41. There shall be however, no order as to costs.

(2020)07ILR A341
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 1262 of 2020

Manish Kumar Yadav & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amit Dagga, Sri Anshul Kumar Singhal

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Sections 202, 482 - Challenge to summoning order – Magistrate relied upon doctor's statement and injury report – No mechanism at the stage of summoning to check veracity of injury report / documentary evidence – Facts corroborated prosecution story – Detailed reason not required at the stage of summoning – Held – Magistrate has enquired into and passed sufficiently reasonable summoning order.

Application dismissed. (E-2)

List of cases cited:-

1. National Bank of Oman Vs Barakara Abdul Ajiz & ors. (2013) 2 SCC page 288.

2. Ram Dev Food Products Pvt. Ltd. Vs St. of Guj. 2015 ACC 90 page 53.

3. Birla Corp. Ltd. Vs Adventz Investments and Holdings Ltd. & ors. Cr. appeal no. 875 2019 decided on 9th May 2019. Paragraph no. 82 and 83.

4. Mahmud-Ul-Rahman & ors. Vs Khazir Md. Tunda, AIR 2015 SC 2195.

5. Vijay Dhanuka Vs Najima Mamtaz AIR 2014 SC (suppli;), 756.

6. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr. (2017) 3 SC, 528.

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

1. Heard Sri Amit Daga, Advocate assisted by Sri Anshul Kumar Singhal, learned counsel for the applicants, at length, learned AGA for the State and perused the record.

2. On the preliminary submissions raised by learned counsel for the applicants based on solitary legal issue as to whether the summoning order dated 24.10.2019 is in consonance with the mandate of law required u/s 202(1) Cr.P.C. or not? This Court, with the assistance of learned A.G.A., finds it fit to adjudicate the present 482 application at the threshold/admission stage itself.

3. By means of the present application the applicants have conjured for invoking extra-ordinary jurisdiction of this Court under Section 482 Cr.P.C. against order dated 31.05.2019 passed by the learned Additional Sessions Judge, Saharanpur whereby the lower Revisional court, while allowing Criminal Revision No.231 of 2018 (Pradeep Yadav v. Manish Kumar Yadav and others) has set aside the order dated 09.08.2018 passed by the Chief Judicial Magistrate, Saharanpur in Criminal Complaint No. 4578 of 2018. It has further remanded the case to the court concerned with the direction to pass a fresh order after holding requisite enquiry, as per the requirement enunciated under the provisions of Section 202(1) Cr.P.C. Taking into account the aforesaid direction, the learned Magisterial court, proceeded with the case afresh, recorded statements of the required witnesses and summoned the applicants under Sections 323, 324, 307 and 506 I.P.C., vide order dated 24.10.2019.

4. Basic punch of the argument advanced by learned counsel for the applicants is that while passing the subsequent summoning order dated 24.10.2019, learned Chief Judicial Magistrate, Saharanpur has not adhered to the mandatory requirements of law as contemplated under Section 202(1) Cr.P.C i.e,. neither he has enquired into the case for himself nor directed the police to investigate into the matter so as to record his prima facie satisfaction and sufficiency of grounds for the summoning of the accused persons. This solitary legal submission beseeched by the learned counsel for the applicants has to be xrayed by this court.

5. After hearing the rival submissions, keenly perusing the orders under challenge and the relevant documents filed in support of instant 482 application, submitted by counsel for the applicants, it is imperative to pandect facts of the case :-

1. Applicant no. 1 is the son of applicant no. 2, got married with the daughter of opposite party no. 2, thus basically and primarily it is a matrimonial dispute.

2. The daughter of opposite party no. 2, Ms. Niharika got married with applicant no. 1 on 03.03.2014. Admittedly contesting parties are permanent resident of New Delhi and the said marriage too was solemnized in New Delhi. Due to misfortune, the conjugal relationship got sour and strained and there arose rift between husband and wife, resultantly, as a natural corollary, there were number of civil as well as criminal litigations against each other, including proceedings of The Hindu Marriage Act, The Protection of Women from Domestic Violence Act 2005, Maintenance under Section 125 Cr.P.C. so on and so forth, details of which has been annexed as Annexure No.7 to the petition. Needless to mention here that all these proceedings are pending in different forums at New Delhi.

3. An unfortunate incident took place on 25.12.2016 at Saharanpur of which an application u/s 156(3) Cr.P.C was filed before Chief Judicial Magistrate, Saharanpur by opposite party no. 2 on 03.01.2017 with the prayer ; to direct the police to register FIR under Section 307, 308,323,324,504,506 I.P.C., consequently Case Crime No. 141 of 2017 was registered at Police Station Sadar Bazar, Saharanpur on 23.3.2017 under the aforementioned sections of I.P.C. However, the police after investigation submitted its 'closure report' on 24.8.2017. The said closure report was protested by opposite party no.2 on 11.01.2018 and learned Magistrate vide order dated 16.3.2018 has converted the aforesaid protest petition as complaint case and ordered to proceed with the case in accordance with Chapter-XV Cr.P.C and the learned Magistrate after recording statements u/s 200 and 202 Cr.P.C of Puneet Kumar, Satendra Singh and Dr. B.D. Sharma on 22.05.2018, 14.06.2018 and 05.07.2018 respectively, passed summoning order on 09.08.2018 summoning upon the applicants to face the prosecution. In paragraph no. 20 of the petition, it has been alleged that the learned Magistrate has given a complete go-by to the mandatory provisions of Section 202(1) Cr.P.C, as he without holding any enquiry or investigation envisaged under Section 202 Cr.P.C and without recording any reason, in a mechanical fashion, summoned the applicants to face the prosecution under Section 323,324,506 IPC,dropping rest of the sections.

4. Aggrieved by this order of summoning dated 09.08.2018, the applicants preferred Criminal Misc. Application bearing No.2275/2018 whereby the Coordinate bench of this Court, vide judgment and order dated 27.9.2018 quashed the summoning order dated 09.08.2018 and remanded the matter for fresh consideration.

5. On the other hand, aggrieved by the summoning order dated 09.08.2018, whereby the applicants were summoned only under sections 323, 324, 506 I.P.C., the opposite party no.2 preferred Criminal Revision No. 231 of 2018 in the court of the Additional Sessions Judge, Saharanpur.

6. It is argued by the learned counsel for the applicants that while the aforementioned Criminal Revision was pending in the court of the Additional Sessions Judge, Saharanpur, Criminal Misc. Application No. 32275 of 2018 (Manish Kumar Yadav and another v. State of U.P. and others) under section 482 Cr.P.C. was filed by the applicants before coordinate Bench of this Court, which was allowed and the summoning order dated 09.08.2018 was quashed with further direction to the court below for passing order afresh in the matter vide Court's order dated 27.09.2018. Learned counsel for the applicants, however, this fact could not brought to the knowledge of the learned lower revisional court and the learned revisional court too allowed the criminal revision so preferred by the opposite party no.2 vide its order dated 31.05.2019 and the matter was remanded back for fresh consideration in the light of provisions U/s 202(1) & (2) Cr.P.C. The lower revisional court has directed to summon all the witnesses and pass a fresh order.

6. However, pursuant to the directions of High Court, a fresh summoning order was passed by learned C.J.M. Saharanpur on 24.10.2019 summonsing the applicants under sections 323, 324, 307, 506 I.P.C., which is under challenge by means of instant 482 Application.

7. From the perusal of subsequent summoning order dated 24.10.2019, it is evident that the learned C.J.M. Saharanpur has carefully scrutinized the statements of Dr. B.D. Sharma/PW-3, whereby he has stated that injury no.1 over the injured was bone deep injury over the scalp and the nature of injury is quite serious which may lead to death of injured, if the treatment is not given within time.

8. Thus, on the above factual aspect of the issue, it was argued by the learned counsel for applicants(I) that the Magistrate did not hold any enquiry or investigation as contemplated U/s 202(1) Cr.P.C. Neither the complainant nor the witnesses or the other evidences are available on the record. In order to buttress his contentions the learned counsel for the applicants relied upon the judgment of the Hon'ble Apex Court in the case of ***National Bank of Oman V. Barakara Abdul Ajiz and others 2013(2) SCC page 288*** and ***Ram Dev Food Products Pvt. Ltd. Vs. State of Gujrat 2015 ACC 90 page 53.*** Besides this, it was also argued that both the parties are permanent resident of Delhi, the marriage was solemnized in Delhi, almost all the civil as well as criminal proceedings are pending before different forums at Delhi, therefore, initiation of present proceedings at Saharanpur is nothing but arm twisting and only for the purposes of harassment of the applicants. The learned Magistrate before passing the impugned summoning order ought to have strictly adhered to the

provisions u/S 202 (1) Cr.P.C. Secondly, it is further contended by the learned counsel for the applicants in para 35 of the petition that the alleged injury report of injured is a forged document and veracity as well as validity of Annexure 20 (injury report) was seriously questioned on the ground that the police while investigating into the matter has discarded this document and eventually submitted the closure report.

9. These are the primary grounds of assailing the impugned summoning order dated 24.10.2019.

10. I have carefully gone through the impugned summoning order date 24.10.2019 as well as judgment of learned Lower Revisional Court dated 31.05.2019.

11. Before coming to the merits of case, it is mandatory to spell out the limits of jurisdiction of section 482 Cr.P.C attributed to the High Court and Hon'ble Apex Court in a most lucid terms spelled out it in the judgment of **BIRLA CORP. LTD. V. ADVENTZ INVESTMENTS AND HOLDINGS LTD. AND OTHERS Cr. appeal no. 875 2019 decided on 9th May 2019**. Paragraph no. 82 and 83 of this judgment is quoted herein below ;

*"**Para 82.** Exercise of power under Section 482 Cr.P.C. envisages three circumstances in which the inherent jurisdiction may be exercised namely:- (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Inherent jurisdiction under Section 482 Cr.P.C though wide has to be exercised sparingly, carefully and with caution.*

***Para 83 :** It is well settled that the inherent jurisdiction under Section 482 Cr.P.C is designed to achieve a salutary purpose and that the criminal proceedings ought not to be permitted to degenerate into a weapon of harassment. When the Court is satisfied that the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the accused, in exercise of the inherent powers, such proceedings can be quashed. In S**mt. Nagawwa V. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736,** the Supreme Court reviewed the earlier decisions and summarized the principles as to when the issue of process can be quashed and held as under :-*

Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These consideration, in our opinion, totally foreign to the scope and ambit of an inquiry under Section 202 of the Cr.P.C. which culminates into an order under Section 204 of the Code. Thus, it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:-

(1) where the allegation made in complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and

inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

12. Taking guidance from the aforesaid authority whereby it has been clearly mentioned that once the Magistrate has exercised his discretion, it is not for the High Courts to substitute its own decision for that of the Magistrate or to examine the case on merits with a view to find out whether or not, the allegation in complaint, if true, would ultimately end in conviction of the accused. This consideration is totally foreign to the scope and ambit of Section 202 Cr.P.C. There are only rare cases counted on the fingertips where High Courts should exercise its power under Section 482 Cr.P.C viz;(i) the allegations made in the complaint are the statements recorded in its support, if taken on its face value make out absolutely no case against the accused. (ii) the allegations made in the complaint are patently absurd or inherently improbable and no prudent person could ever reach on a conclusion that there is sufficient ground against the accused. (iii) the discretion exercised by the Magistrate in issuing process is either capricious and arbitrary, based on no evidence or material which solely irrelevant and inadmissible and lastly: (iv) complaint suffers from fundamental legal sanction or absence of complaint by a legally competent authority.

13. Thus this court has to examine the argument advanced by the counsel for the applicants and prayer sought within the four corners of above mentioned guidelines:

14. Before analyzing the entire incident, it is imperative to spell out Section 202(1) Cr.P.C.;

*"**202(1) : Postponement of issue of process** - Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, (and shall, in a case where the accused is residing at a place beyond the area in which he exercise his jurisdiction,) postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.*

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200."

15. In the case of ***Mahmud-Ul-Rahman and others V. Khazir Md. Tunda,***

AIR 2015 SC 2195, it has been explicitly mentioned by Hon'ble Apex Court that the steps taken by ld. Magistrate U/s 190(1) (a) of Cr.P.C followed by Section 204 Cr.P.C. should reflect that the learned Magistrate has applied his judicial mind to the facts, statements of the witnesses and he is satisfied that there is grounds for proceed further in the matter by asking the persons against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaints would constitute an offence and when considered alongwith statements recorded would prima facie makes the accused answerable. The Magistrate should not act as a post office in taking cognizance in each and ever complaint filed before him and issue process as a matter of a course. There must be a sufficient indication in the order passed by Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered alongwith the statements recorded and in result of enquiry or report of investigation U/s 202 of Cr.P.C, if any, the accused is answerable before the court there is ground for proceeding against the accused U/s 204 Cr.P.C by issuing processes for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where Magistrate is proceeding U/s 190/204 Cr.P.C the High Court U/s 482 Cr.P.C is bound to invoke its inherent powers to prevent the abuse of powers of the Criminal Courts to call an accused, is a serious matter affecting one's dignity self-esteem and respect hence the process of Crl. Court should not be make weapon of harassment.

16. On the similar pattern in the case of ***Vijay Dhanuka V. Najima Mamtaz AIR 2014 SC (suppli;), 756***, the relevant paragraph no. 12 is quoted herein below :

*"**12:-** The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word shall is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word shall in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression shall and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate. In view of the decision of this Court in the case of **Udai Shankar Awasthi V. State of U.P. (2013) 2 SCC 435,** this point need not detain us any further as in the said case, this Court has clearly held that provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment.*

40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202, Cr.P.C, thought the appellants were outside his territorial jurisdiction. The provisions of Section 202, Cr.P.C. were amended vide the Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in a area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from

being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other persons as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

17. The next question for consideration is, what does "enquiry" means. The expression has been defined in Section 2(g) of the Code, which means, every enquiry, other than trial, under this code by a Magistrate or "Court." It is evident from the aforesaid provision, every enquiry other than trial conducted by Magistrate or a court is an enquiry, no specific mode or manner is provided viz; 201(1) Cr.P.C. The enquiry envisage U/s 202 Cr.P.C., the witnesses are examined whereas U/s 200 Cr.P.C. examination of complainant is necessary with the option of examining of witnesses present, if any. This exercise by the Magistrate with the sole objective and purpose for deciding whether or not there is sufficient grounds for proceeding against an accused, is nothing but an enquiry envisage U/s 202 Cr.P.C. The under-line idea is that, before exercising power U/s 203/204 Cr.P.C. it is incumbent upon the Magistrate to took into the allegations made in the complaint, statements recorded U/s 200, 202 Cr.P.C. and if there are witnesses to the incident, then take the help of those witnesses while arriving to a particular conclusion. There cannot be a straight jacketed design or formula in holding the enquiry.

18. In the instant case, if the court compares the summoning order, it is evident that the learned Magistrate has relied upon the statement of Dr. B.D. Sharma/P.W.-3, whereby it has been opined by him that the proposed accused has inflicted weapon upon the head, causing a head injury which may lead to demise of the injured Pradeep Kumar Yadav. The learned counsel for the applicants has seriously questioned the validity of injury report issued by District Hospital, Saharanpur (Annexure No.20 of the petition). From the injury report, it is clear that on 25.12.2016 at 8.40 A.M., the injured was admitted in the hospital and at 9.10 P.M. he was discharged. It was strenuously asserted by learned counsel for the applicants that in this short span of time injuries of Section 307 I.P.C. cannot be examined. I am afraid to accept this contention of learned counsel. For assessing the gravity of any injury the weapon used, seat of injury, its dimension are relevant. Time of dressing is not at all relevant. Even a lethal blow could be inflicted by an article on the vital part of body which could be dressed within short span of time. It would not mitigate the gravity of offence. On this premises alone I do not find any irregularity or abnormality in the injury report. However, the learned Magistrate has got no mechanism at the stage of summoning to check the veracity of a particular document/injury report. The fact finds force when the Dr. B.D. Sharma/PW-3 in no uncertain terms in his deposition as PW-3 categorically opined that the injured has sustained a lacerated wound of 2.5 x 0.5 c.m. bone deep over the skull, above the right ear and the blood was oozing out in the said injury and was advised X-ray. Secondly, red abrasion measuring 5.0 x 2.0 cm over the right chest and according to doctor, all the injuries would be sustained by a iron rod or saria. The injury no.1 could be caused by some sharp edged weapon or iron rod or saria, rest of the injuries were simple in nature.

This fact fully corroborates the prosecution story. Needless to mention here that the learned lower revisional court while allowing the revision dated 31.05.2019, has directed the learned Magistrate to record the deposition of all the witnesses and accordingly, the statement of Youddhvir Singh as PW-4 and Sushil Jain as PW-5 were penned down. It is contended that the statements of these two persons surfaced for the first time in second innings and prior to that there was no whisper regarding their presence over the site. No doubt that for the offences triable by the Sessions, the requirement of law is to summon all the prosecution witnesses to examine in the court. The presence of these witnesses could be disputed during trial and this ground is not sufficient to upset the summoning order.

19. The learned A.G.A. again has drawn the attention of the Court in the judgment of **ABHIJIT PAWAR VS. HEMANT MADHUKAR NIMBALKAR AND ANOTHER (2017) (3) SC, 528**, which too has toe the chain of earlier judgments. As mentioned above, no specific mode and manner is prescribed to conduct the enquiry by the Magistrate. If the Magistrate after holding this matter of exercise is prima-facie satisfy that the accused/applicants are committed the offence punishable U/s 323, 324, 307, 506 I.P.C. and for issuing summons U/s 204 Cr.P.C. and while doing so he has spelled out the reasons for his satisfaction/conclusion relying upon the statements of the doctor. The prosecution case, whereby the accused persons were assailants who caused the lethal and grievous injuries over the skull of the injured, which could have caused his death, if the timely treatment was not given. I find that the learned Magistrate has achieved the target and the order impugned is a well reasoned order whereby he has spelled out the reasons of satisfaction, which corroborates the prosecution story. At the stage of summoning he is not required to give sound and detailed reason and the depositions of thrashing each and every prosecution witness in depth. In my opinion, the learned Magistrate has 'enquired' into the matter as contemplated in Section 202(1) Cr.P.C. and passed sufficiently reasonable summoning order. For the aforesaid reasons and circumstances, the present 482 application falls flat and do not warrant any interference U/s 482 Cr.P.C. and accordingly dismissed.

20. It is given to understand that the applicants have not surrendered till date. The applicants are directed to appear before the court concerned on or before 30th July, 2020 and seek bail, during this period no coercive action shall be taken against them

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(2020)07ILR A348
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE MANJU RANI CHAUHAN, J.

Application U/S 482 No. 3431 of 2020

Udai Sengar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Yogendra Kumar Srivastava, Sri Jitendra Kumar Rawat, Sri Himanshi Srivastava, Smt. Anita Srivastava.

Counsel for the Opposite Parties:

A.G.A.

Civil Law- Negotiable Instrument Act, 1881- Section 138 read with Criminal Procedure Court – Section 482 - Dishonour of cheque – Summoning order issued – Criminal Revision against order – Allowed on the ground that complaint time barred – Cause of action to prosecute arises after laps of time period in proviso to section 138 of N.I. Act – As date of receipt omf notice not mentioned in complaint therefore cause of action arises after 45 days from the date of legal notice was sent. Held – Complaint was well within time – Revisional order set aside – Matter remanded to be decided in the light of Apex Court judgment within six months.

Application allowed. (E-2)

List of cases cited:-

1. Yogendra Pratap Singh Vs Savitri Pandey & anr., (2014) 10 SCC 713.

2. Shakti Travels & Tours Vs St. of Bihar, (2002) 9 SCC 415.

3. Deepak Kumar & anr. Vs St. of U.P. & anr., 2006 (8) ADJ 427.

(Delivered by Hon'ble Manju Rani Chauhan, J.)

1. Heard Sri Jitendra Kumar Rawat holding brief of Sri Yogendra Kumar Srivastava, learned counsel for the applicant, Sri Amit Singh Chauhan, learned A.G.A. for the State and perused the entire record.

2. This application under Section 482 Cr.P.C. has been filed with a prayer to quash the impugned order dated 22.10.2019 passed by Additional District & Sessions Judge, Court No.5, Etawah passed in Criminal Revision No.18 of 2019 (Satyajeet Singh Bhadauria Vs. State of U.P. & another), under Section 138 of Negotiable Instrument Act (in short " N.I. Act").

3. Brief facts of the case are that the applicant has filed a complaint No.451 of 2017 on 10.08.2017 under Section 138 of Negotiable Instrument Act against the opposite party no.2 stating therein that Rs.1 lac was taken by opposite party no.2 from the applicant (complainant) with the assurance that the same will be returned in six months. After expiry of the aforesaid period when the demand was raised to return the said money, a cheque no.269466 was issued on 11.05.2017 by the opposite party no.2 and when the applicant presented the cheque for the payment, the same was dishonored on account of "insufficient fund" on 12.05.2017. The legal notice was given on 03.06.2017 and when the opposite party no.2 did not pay any dues, the present complaint was filed.

4. Learned Judicial Magistrate vide order dated 18.01.2018 summoned the opposite party no.2 against which a Criminal Revision No.18 of 2019 was preferred by the opposite party no.2. The revisional court vide order dated 22.10.2019 allowed the revision by setting aside the order dated 18.01.2018 stating therein that the complaint was time barred.

5. Learned counsel for the applicant (complainant) states that Section 138 of N.I. Act is a penal provision, it must, therefore, be construed strictly. Section 138 (2) of N.I. Act enacting part of the provision makes it abundantly clear that what constitutes an offence punishable with imprisonment and/or fine is the dishonour of a cheque for insufficiency of funds, etc in the account maintained by the drawer with the bank for discharge of a debt or other liability whether in full or part. The language used in the provision is unambiguous and the ingredients of the offence clearly discernible namely (a) cheque is drawn by the accused on an account maintained by him with a banker,

(b) the cheque amount is in discharge of a debt or liability, and (c) the cheque is returned unpaid for insufficiency of funds or that the amount exceeds the arrangement made with the bank. Any dishonour falling within the four corners of the enacting provision would be punishable.

6. Section 138 is arranged in two parts, the primary and the provisory. The contents of the proviso place conditions on the operation of the main provision, while it does not form a constituent of the crime itself, it modulates or regulates the crime in circumstances where, unless its provisions are complied with, the already committed crime remains impervious to prosecution. Section 142 employs the term "cause of action" as compliance with the three factors contained in the proviso are essential for the cognizance of the offence, even though they are not part of the action constituting the crime, therefore, so far as the offence itself, proviso has no role to play.

7. The proviso that comprises the second part of the provision, the following would constitute "cause of action" referred to in sub-clause (b) above:

(a) The complainant has presented the cheque for payment within the period of six months from the date of the issue thereof;

(b) The complainant has demanded the payment of the cheque amount from the drawer by issuing a written notice within thirty days of receipt of information by him from the bank regarding the dishonour;

(c) The drawer has failed to pay the cheque amount within fifteen days of the receipt of the notice.

8. From the above, it is clear that the cause of action for prosecution will arise only when the period stipulated in the proviso elapses without payment.

9. It has been submitted by learned counsel for the applicant that in the present case the applicant (complainant) filed a complaint on 10.08.2017 regarding cheque no.267466 which was returned on 12.05.2017 due to insufficient funds. On 03.06.2017 the legal notice was given by the applicant to opposite party no.2 and since the date of receipt of notice is not mentioned in the complaint, therefore, as per law laid down in the case of Y**ogendra Pratap Singh Vs. Savitri Pandey & Another, reported in 2014 (10) SCC 713**, the cause of action will arise after 45 days of the date when the legal notice was sent. Para 42 of the aforesaid judgment states as follows :-

"42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due course of the

cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly."

10. Learned counsel for the applicant has also relied upon the judgment of Apex Court in the case of S**hakti Travels & Tours Vs. State of Bihar, 2002(9) SCC 415**, wherein the Apex Court has very categorically held that complaint is maintainable under Section 138 of N.I. Act only when it is filed after due service of notice as contemplated under Section 138 of N.I. Act. In another case of **Deepak Kumar and another Vs. State of U.P. and another, 2006 (8) ADJ 427**, this court has very categorically held that service of notice is pre-condition to maintain a complaint under Section 138 of N.I. Act. Considering in detail meaning of effective service of notice prescribed as pre-condition to maintain the complaint, the Court vide para 9 and 10 held thus :-

"9. Pondering over the rival contentions, I find that there is substance in the submissions raised by the counsel for the applicant. As a fact, neither in the complaint, nor in statement under Section 200, Cr. P.C. nor in the counter-affidavit any date of service on notice demanding repayment of cheque money from the applicants is mentioned. No document was also appended along with the complaint so as to indicate the said date. Even during the course of argument, the counsel for the respondent-complainant could not point out the date of service of such notice. Thus, in the total absence of date of service of notice demanding payment of the cheque amount, no offence is made out against the applicants. Moreover, it cannot be said that any such notice was ever served on the applicants and consequently fifteen days period for making the payment of the cheque money cannot be counted and unless that is done no offence is made out against the applicants. The contention of respondent-complainant that the service is to be presumed as also cannot be accepted because Section 27 of General Clauses Act does not take into its purview service by private courier. For a proper understanding of this submission Section 27 of the General Clauses Act is quoted below:--

"Meaning of Service by post-- Where any (Central Act) or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at

the time at which the letter would be delivered in the ordinary course of post."

10. Thus, the wordings of Section 27 of the General Clauses Act clearly indicates that this section deals only with service by "Post' and that too "registered service" when such a service is contemplated by the Act itself. Attour. no other mode of service is embraced in Section 27. The condition precedent for the applicability of this section are firstly, that the service must be provided by the Act itself and secondly, that such "service shall be deemed to be affected by properly addressing, pre-paying and posting by registered post" (Emphasis mine). Unless the twin conditions are satisfied Section 27 of the General Clauses Act will not apply. In the present case the second condition is not satisfied and therefore the service of notice on the applicants cannot be presumed. Since the legislature has kept service by private courier outside the purview of the Section 27 of the General Clauses Act, therefore the Courts cannot implant such presumption of service into that section and rightly so because private courier services are privately run businesses without any authenticity of service. (Emphasis mine) consequently, the contention of the learned counsel for the applicant that the service should be presumed in the present case cannot be accepted as it does not hold good on the provision of the statute itself and has to be rejected. Resultantly, the submission of the counsel for the applicant that in the present case no offence is made out holds good and deserves to be accepted and I hold so."

Countering the argument, learned counsel for opposite party no.2 has submitted that condition of service of notice virtually stands complied with in view of the fact that the postal letter which was sent had come back with note "left", meaning thereby service was made effective. He further contends that the applicant having provided two different addresses, main address being of the firm and notice could have been sent only on that address, therefore, if the postmand could not meet the applicant on the said address, it cannot be said service has not been effected upon. Learned counsel for the opposite party no. 2 has further relied upon the judgment of Single Judge of this Court in the case of Chand Mohd v. State of U.P, Laws (All) 2017 5 308, in which this Court vide paragraphs 19 and 20 has held thus:

19. Perusal of Section 27 of the General Clauses Act, as aforequoted clearly indicates that there is a presumption of service by registered post. The provisions of the aforesaid Section 27 of the Act regarding presumption of service has been interpreted by Hon'ble Supreme Court and it has been held that there is a rebuttable presumption of service by registered post. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of Gujarat Electricity Board v. Atmaram Sungomal Poshani12; Commissioner of Income Tax (Adm.), Bengal v. V.K. Gururaj and Ors.13, State of U.P. v. T.P. Lal Srivastava14; Adavala Suthaiah and Ors. Special Deputy Collector, Land Acquisition and Ors. Anr.15 and Shimla Development Authority and Ors. v. Santosh Sharma (Smt.) and Anr., (1997) 2 SCC 637.

20. It has also been well settled by Hon'ble Supreme Court that when notice is sent at the correct address by registered post and neither acknowledgment nor undelivered registered cover is received back then there is presumption of service

although rebuttable. The burden to rebut presumption lies on the party challenging the factum of service. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in the case of Indian Bank v. Datla Venkata Chinna Krishnam Raju; Ram Chandra Verma v. Jagat Singh Singhi and others; ATTABIRA Regulated Market Committee v. Ganesh Rice Mills; Union of India v. Ujagar Lal; C.C. Alavi Haji v. Palapetty Muhammed (Paras 10 & 15) and Sunil Kumar Shambhudayal Gupta (DR) and others v. State of Maharashtra (Paras 53 to 56).

11. Countering the argument, learned A.G.A. for the State has submitted that condition of service of notice virtually stands complied with in view of the fact that the postal letter which was sent and had come back with note "left", meaning thereby service was made effective.

12. Banking upon the judgment, learned counsel for the applicant submits that the complaint was ultimately maintainable and it cannot be said that mandatory requirement of law was not fulfilled.

13. Having heard the arguments advanced by both the parties, I find that the complaint was well within time taking into consideration the judgment of **Yogendra Pratap Singh (supra).** Therefore, the revisional order dated 22.10.2019 is set aside. The matter is remitted back to the court concerned to decide the same afresh by passing a speaking and reasoned order in accordance with law in the light of the judgment of Apex Court in the case of **Yogendra Pratap Singh (supra)** within a period of six months from the date of production of certified copy of this order.

14. The application stands **allowed.**

(2020)07ILR A353
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.02.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 4191 of 2020

Sachin Dahiya & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Naveen Tiwari, Sti Prashant Manchand, Sri Prshant Vikram Singh

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Sections 202, 482 - Challenge to summoning order - Challenge to summoning order– Territorial jurisdiction – No enquiry / investigation under section 202 by Magistrate before passing summoning order – Order is also non-speaking and does not reflect application of mind – Impugned order quashed – Matter remanded for fresh consideration de-novo.

Application disposed of. (E-2)

List of cases cited:-

1. Vijay Dhanuka & ors. Vs Najima Mamtaj & ors., (2014) 14 SCC, 638.

2. Abhijit Pawar Vs Hemant Madhukar Nimalkar (2017) III SCC, 528.
3. Mahmood- Ul-Rehman Vs Khazir Mohd Tunda (Para 20 and 22) (2016) 1 SCC (Crl) 124.

4. Vinay Kumar @ Kallu & anr. Vs St. Of U.P. & anr. in Criminal Misc. Application (482) No. 23895/2018.

5. Mahboob & ors. Vs St. of U.P. & anr. 2017(2) JIC 320 (All) (LB).

6. Smt. Shiv Kumar & ors. Vs St. of U.P. & anr.2017 (2) JIC 589 (All) (LB).

7. Hariram Verma & 4 ors. Vs St. of U.P. & anr. reported in 2017 (99) All CC 104.

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

[1] Heard Shri Naveen Tiwari and Sri Prashant Manchanda, learned counsels for the applicants and learned A.G.A. and perused the record.

[2] This is an application under section 482 Cr.P.C. filed by learned Counsels for the applicants. After hearing the arguments at length, learned counsel has raised certain vital legal issues emanating from perusal of the impugned summoning order dated 02.05.2019 passed by learned Additional Chief Judicial Magistrate, Room No. 12, Baghpat in Complaint Case No. 710/2018 U/s 406 I.P.C.

[3] Learned counsel for the applicant has pointed out serious legal fallacy and flaws in the impugned summoning order dated 02.05.2019 as the same is in direct and stark defiance of the true spirit of Section 202(1) of Cr.P.C., thus, the Court proposes to evaluate the submissions of learned counsel for the applicant and decide the issue at the admission stage itself.

[4] Before discussing the legal aspect of the issue, it is imperative to give a brief factual insight of the case so as to appreciate the controversy involved in its correct legal perspective;

[5] The applicants have invoked extraordinary jurisdiction of this Court under section 482 Cr.P.C., by challenging summoning order dated 02.05.2019 passed by the Additional Chief Judicial Magistrate, Room No. 12, Baghpat in Complaint case filed by opposite party no.2 In re: Sureshwati Vs. Kadam Singh Dahiya and others in Complaint Case No. 710/2018 U/s 406 I.P.C., Police Station Binolli, District Baghpat and the entire proceeding of Complaint Case including the non-bailable-warrants dated 02.01.2020 against the accused/applicants procuring their attendance to face the prosecution under section 406 IPC.

[6] Applicant no.1, Sachin Dahiya is the husband of Ms. Priya (hence deceased) and applicant nos.2 and 3 are the father-in-law and mother-in-law respectively of the deceased daughter-in-law. From the title of the case, it is explicitly clear that all the applicants permanently reside at D-41, Ashoka Road, Adarsh Nagar, Delhi. During their stay at Delhi, applicant no. 1 got married with daughter of opposite party no.2 on 28.11.2014 at Delhi itself.

[7] Learned counsel for the applicants submits that after camouflaging her real address, opposite party no.2 initiated the present criminal case at Baghpat, projecting that she is permanent resident of District Baghpat and this manipulation was done by her, just to harass the applicants and torpedo the applicants with number of criminal cases against them at different places. It is asserted by the learned counsel for the applicants that the real and permanent address of opposite party no.2 is RZ-C 109, Vinodpuri, Vijay Enclave, Palam Davari Road, Delhi but she has obscured her true and permanent address and just to create the territorial jurisdiction at Baghpat, managed to get the complaint filed at Baghpat judgeship.

[8] After the marriage, the husband and wife started residing at Delhi where the marriage was solemnized but on account of

providence on 15.10.2015, Ms. Priya (the wife) under suspicious circumstances queerly died not only untimely but also unnaturally at the residence occupied by applicant no.1. On the same day a first information report No. 654/2015 was got registered under sections 498A, 304B and 34 I.P.C. at Police Station Adarsh Nagar, Delhi and police too after investigation, has submitted its report under section 173(2) Cr.P.C. under the aforementioned sections of Penal Code.

[9] Contentions raised by counsel for the applicants are that neither in the first information report nor during investigation there was any whisper regarding criminal breach of trust or misappropriation of valuable belongings of Ms. Priya, ergo, the police submitted its report under the aforementioned sections of Penal Code. The contention was also raised, that since there was unnatural demise of Ms. Priya, during investigation, the police has also sealed the residential premises, where the said unfortunate incident took place. The applicants are facing prosecution in competent court at Delhi and the trial of the case is at advance stage. It is further contended by the counsel for the applicants that during the trial, on 29.03.2017 the prosecution sought permission of the court, conceding upon which, the apartment was de-sealed and the police, after preparing the inventory of articles, handed over those articles/belongings to deceased's brother.

[10] It is next contended that when the trial is at advance stage, in order to multiply the cases against the applicants and just for the sake of harassment, on 20.12.2018, opposite party no.2 filed present complaint case before the competent Magistrate at Baghpat and in this process to boil up the filth, opposite party no.2 has annexed her old voter I.D. card issued to her in year 1995 to manipulate territorial jurisdiction at Baghpat.

[11] The learned counsel for the applicants has drawn attention of the court to the testimony of opposite party no.2 recorded as PW-18 before Sri Ramesh Kumar, Additional Sessions Judge, Court No.5 (North), Rohini Court, Delhi during the trial of FIR No. 654/2018, In re: State Vs. Sachin. While giving her deposition as PW-18, she introduced herself as Smt. Sureshwati wife of late Shri Raj Kumar Rana resident of RZ-C, 109, Vinodpuri, Palam, Vijay Enclave, Delhi. Thus contended that in the present complaint case, she has mislead the court, by demonstrating wrong address at village Dhanora, Silvar Nagar Police Station Vinolli, Baghpat U.P. for that purpose and it is vigorously contended that the learned Magistrate has probably overlooked this legal fallacy and entertained the said complaint case filed by complainant Ms. Sureshwati, without verifying her correct proper address. Besides this, it is also canvassed that daughter of opposite party no.2 had initiated proceeding before Crime Against Women Cell, (CAW Cell), Delhi in year 2015 wherein a list of articles were furnished by opposite party no.2 and responding to that list, the applicants have already handed over those articles, lying in the sealed flat, during course of trial at Delhi. The learned counsel for the applicants in paragraph no. 18 of the petition has prepared a comparative chart, trying to impress upon the Court, the shifting stands of opposite party no.2. Contentions raised, that before every upcoming forum, she painted new picture and new list of the articles.

[12] This Court while entertaining the instant 482 application ex-parte, is not in position to adjudicate anything on factual merits of the case, with regard to submission advanced by the learned counsel for the applicants with regard to alleged discrepancies in the list of articles but certainly the Court can arbitrate and gauge the territorial jurisdiction of the court and the process adopted by the learned Magistrate while passing the cognizance order dated 02.05.2019 for the offence under section 406 IPC while summoning the applicants.

[13] Contention raised by the counsel for the applicants that the learned Magistrate lacks territorial jurisdiction to entertain the instant complaint case on the ground that- contesting parties are permanent residents of Delhi; the marriage was solemnized at Delhi; unfortunate incident of demise of daughter of opposite party no.2 took place at Delhi and the applicants are facing prosecution under section 304B I.P.C. and allied sections pending before the competent Sessions Judge at Rohini Court, Delhi. Concealing all these material facts, opposite party no.2 projected herself to be permanent resident of Baghpat demonstrating old voter I.D. Card of 1995. The concerned Magistrate, and after recording the statements under section 200 and 202 Cr.P.C., passed a mechanical cognizance order dated 02.05.2019, which is annexed as annexure 10 to the petition.

Learned counsel for the applicants drew attention of the court to the legal proposition contained under section 202(1) Cr.P.C. which reads thus:-

202.(**Postponement of issue of process**-(1) Any Magistrate, on receipt of a compliant of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit and shall, **in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction} postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding;**

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the compliant has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

[14] The underlying object of this Amendment of 2005 is to save the applicants from the false complaints against the persons, who reside at far off places simply to harass them but after this amendment, it is made obligatory upon the Magistrate that before summoning the applicants reside beyond his jurisdiction, he must enquire into the case either himself or direct the investigation to be made by police officer or by such person as he deem fit, so as to ascertain as to whether or not there was sufficient grounds for proceeding against the proposed accused persons.

[15] In order to buttress his contention, the learned counsel for the applicants has cited 2 citations; **(I) VIJAY**

DHANUKA AND OTHERS VS. NAJIMA MAMTAJ AND OTHERS, 2014 (14) SCC, 638, (ii) ABHIJIT PAWAR VS. HEMANT MADHUKAR NIMALKAR 2017(III) SCC, 528 paragraph nos. 23 and 24; which are as under:-

(23). Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process. Section 202 Cr.P.C. was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22.06.2006 by adding the words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction". There is a vital purpose or objective behind this amendment, namely; to ward off false complaints against such persons residing at a far-off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proceeding the said amendment.

24. The essence and purpose of this amendment has been captured by this court in Vijay Dhanuka Vs. Najima Mamtaj in the following words: (SCC P.644, paras 11 – 12).

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, where inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23.06.2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:-

"False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it

can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

[16] Thus, from the aforesaid, it is crystal clear that the amended provision casts an obligation on a Magistrate, in order to save the innocents from unwarranted harassment by unscrupulous complaint by file a fake complaint against the proposed accused, who reside beyond the territorial limits. This legal plug was inserted by the legislation as it is not an ornamental amendment but has got legal significance, just to safeguard the interest of proposed accused, who reside beyond the territorial limits of the Magistrate. It is incumbent upon the Magistrate as the word "Shall" reflects that under this extraordinary situation, where proposed accused reside beyond this territorial limit, before issuing summons, calling upon them to face the prosecution, postpone this exercise of issuing summons and either inquire into the case for himself or direct the police to hold proper investigation with the object as to whether or not there is sufficient ground for proceeding. This is not a mere formality but it carries significance. A Magistrate is not supposed to act as post office or act as a ministerial job or is not a vending machine. Summoning a person for an offence is not for the purposes of amendment but casts/reflects upon the carrier/character of the person summoned. Thus, it must be exercised diligently with utmost care and only after duly satisfying. The order of summoning must reflect that this exercise has been duly conducted by the Magistrate before passing the summoning order.

[17] The steps taken by Magistrate under section 190(1)(a) of Cr.P.C. followed by Section 204 Cr.P.C. shall reflect that Magistrate has applied his judicial mind to the facts and statements and he satisfied himself that the grounds proceeding further in the matter by asking the person against whom the volition of law is alleged to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in complaint would constitute an offence and when considered along with the statements recorded, would prima facie make the accused answerable to the court. The Code of Criminal Procedure requires speaking order. As mentioned earlier, a Magistrate is not to act as post office or a vending machine while taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be a sufficient indication in the order passed by the Magistrate that he satisfied that allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of enquiry or report of investigation under section 202 Cr.P.C., if any, the accused is answerable before the criminal court. There is ground for proceeding against accused under Section 204 Cr.P.C. by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction.

[18] If there is no such indication in the case, when the Magistrate proceeds under sections 190/204 Cr.P.C. the High

Court is perfectly justified in upsetting such order in exercise of its extraordinary inherent process under section 482 Cr.P.C. to prevent court. To be summoned to appear before the criminal court as an accused, is a serious matter affecting ones dignity, self respect and image in the society. Hence the process of criminal court shall not be made a weapon of harassment or arm twisting or equate the pending equations.

[19] From the title of the case as mentioned above, applicants are permanent resident of Delhi and in fact the opposite party no.2 is also permanent resident of Delhi but she hide and concealed her identity as alleged by the counsel for the applicants and succeeded in getting her compliant entertained. There is no such inquiry/investigation as contemplated under section 202(1) Cr.P.C. and the learned Magistrate which, in fact obligatory on his part, before issuing the process against the accused/applicants, in most casual or cryptic moments.

[20] I have keenly perused the order impugned dated 02.05.2019 and this court afraid to mention that the order impugned is well short of the standard setup by Hon'ble Apex Court in the case of **Vijay Dhanuka(supra) and Abhijit Pawar (supra), Mahmood- -Ul-Rehman Vs. Khazir Mohd Tunda (Para 20 and 22)** reported in **2016(1) SCC (Crl) 124** and thus this court has got no hesitation in quashing the impugned summoning order dated 02.05.2019.

[21] Learned counsel for the applicants has canvassed yet another legal issue, while assailing the order of summoning dated 02.05.2019 by mentioning therein that order impugned is non-speaking order and nowhere reflects the application of mind or recording his satisfaction.

[22] Hillocking his submissions, learned counsel for the applicants relied upon another judgment of coordinate bench of this court in the case of **VINAY KUMAR @ KALLU AND ANOTHER VS. STATE OF U.P. AND ANOTHER** in Criminal Misc. Application (482) No. 23895/2018 decided on 02.08.2018 whereas the coordinate bench of this court while relying upon the judgments of **Mahboob and others Vs. State of U.P. and another 2017(2) JIC 320 (All) (LB) and Smt. Shiv Kumar and others Vs. State of U.P. and another reported in year 2017 (2) JIC 589 (All) (LB) and Hariram Verma and 4 others Vs. State of U.P. and Another reported in 2017 (99) All CC 104**. The paragraph no. 8 of this judgment is quoted herein below: -

8. But in the impugned order there is nothing which may indicate that learned Magistrate had even considered facts of the case in hand before passing the summoning order. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence of law. Therefore, it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law.

[23] The coordinate bench of this court repeatedly reiterated that the summoning order must reflective of

application of judicial discretion, mind and reason has to be recorded before issuing process against the accused/applicants. If the court would compare the impugned order dated 02.05.2019 with the requirement of law mentioned under Section 202 Cr.P.C. and elaborated by the celebrated judgments of Hon'ble Apex Court and coordinate benches of this court mentioned above, this court is of considered view that the impugned order only narrates the statement of complainant and the witnesses and also certain documents/notice and nothing more. I am afraid to gather even a whisper of satisfaction of Magistrate concern, in the impugned summoning order.

[24] On a bare perusal of the order impugned, without having any shadow of doubt, is cryptic and it is quite evident that the learned Magistrate has acted in a most perfunctory and casual manner. FIRSTLY; Despite the fact, that applicants are permanent residents of Delhi, he has not held any inquiry for himself or directed the police to hold investigation, as contemplated under section 202(1) Cr.P.C. and SECONDLY; The order impugned is simply a bald narration of complaint case and numbers of supporting witnesses and documents. Accordingly, in exercise of power under section 482 Cr.P.C. this court sets-aside the impugned summoning order dated 02.05.2019 passed by Additional Chief Judicial Magistrate, Room No. 12, Baghpat and remands the matter back for fresh consideration de-novo.

[25] While remanding the matter afresh, this Court expects from learned Magistrate to hold an enquiry/investigation afresh, as contemplated under section 202 (1) Cr.P.C. It is rather impossible to spell out the form and shape of such a proposed enquiry/investigation, but certainly all those areas, which are enumerated in the judgement, must be properly filtered before recording his satisfaction by speaking order and issuing any summon (if at all, he so decides) and pass appropriate order within ten weeks from the date of production of a certified copy of this order.

[26] With the above observation, present 482 application stands disposed-off.

(2020)07ILR A360
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 5705 of 2006

Sanjay Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ram Babu Sharma

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

Criminal Procedure court – Section 202, 482 - Challenge to summoning order – Only material witnesses refused to be examined by complainant to make out a prima facie case – Consequence of non-examination of to be considered by Magistrate at the trial and not at the stage of issuing summoning order – Magistrate is only required to see of sufficient ground made out to proved against accused. Non-examination of all witnesses not material – No error in procedure adopted.

Application rejected. (E-2)

List of cases cited:-

1. Ranjit Singh Vs St.of Pepsu (now Punjab), AIR 6 1959 SC 843.

2. Rosy & ors. Vs St. of Kerala & ors., (2000) 2 SCC 230.

3. Satyadeo Pandey & ors. Vs St. of U. P. & anr., 1987 (1) AWC 572.

4. Chhotey Lal Vs St. of U. P., 2006 CRI.L.J. 2265,

5. Kallu Pal & ors. Vs St.of U. P. & anr., 2008 CRI.L.J. 3229 (Allahabad).

6. Dudh Nath Mishra & ors. Vs St. of U. P. & 9 anr., 2003 CRI.L.J.1087 (Allahabad).

7. Gopal Singh Vs Dhanraji Devi & anr., 1994 CRI.L.J. 1652 (Allahabad).

8. Abdul Hamidkhan Pathan & ors. Vs St. of Gujrat & ors., 1989 CRI.L.J. 468 (DB).

9. Shivjee Singh Vs Nagendra Tiwary & ors., (2010) 7 SCC 578.

10. Chandra Deo Singh Vs Prokash Chandra Bose @ Chabi Bose & anr, AIR 1963 SC 1430.

11. Kewal Krishan Vs Suraj Bhan & anr., AIR 1980 SC 1780.

12. Mohinder Singh Vs Gulwant Singh & ors., (1992) 2 SCC 213.

13. M. Govindaraja Pillai Vs Thangavelu Pillai 1983 CriLJ 917

14. Vijay Dhanuka Etc Vs Najima Mamtaj Etc, (2014) 14 SCC 638.

15. Abhijit Pawar Vs Hemant Maudhukar Nimbalkar & anr., (2017) 3 SCC 528.

16. Application under Section 482 Cr.P.C. No. 4419 of 2004 (Shiv Poojan & ors. Vs St. of U.P. & ors.).

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

1. Heard Sri Ram Babu Sharma, learned counsel for applicants and learned A.G.A. for State.

2. This application under Section 482 Cr.P.C. has been filed praying for quashing summoning order dated 25.03.2006 as well as further proceedings of Complaint Case No. 1018 of 2005, under Sections 323, 324, 294, 504, 506, 427 IPC and Sections 3(1)(10) SC/ST Act, Police Station-Narora, District- Bulandshahar and also order dated 09.05.2006 passed by learned Sessions Judge, Bulandshahar in Criminal Revision No. 270 of 2006.

3. The only argument advanced by learned counsel for applicants is that there is no compliance of mandatory provision as provided in Section 202 Cr.P.C., inasmuch as, all complainant's witnesses have not been examined.

4. Here, I find that if Complainant wanted to examine only three witnesses in support of complaint and on that Magistrate was satisfied, it cannot be said that unless all persons named in complaint are examined as witnesses, no order of summoning could have been passed by Magistrate.

5. From perusal of complaint and statements of complainant and witnesses recorded under Section 200 and 202 Cr. P. C., respectively, it cannot be said that no prima facie case relating to offences in which applicants have been summoned, is made out.

6. Before considering arguments advanced by learned counsel for applicants it would be appropriate to examine scheme of Cr.P.C. when a Magistrate proceeds on

complaint, particularly when it is a case exclusively triable by Court of Sessions.

7. Chapter XIV, Cr.P.C. deals with subject of power of taking cognizance of offence and conditions for the same. Section 190 Cr.P.C. specifies power of Magistrate to take cognizance of offence. Three sources are indicated therein which are of distinct nature. What is material in taking cognizance is the phrase "Upon receiving a complaint on facts which constitutes such offence". The purpose of taking cognizance of offence implicits an exercise to decide whether process should be issued to the accused or not. Section 204 Cr.P.C. envisages issue of process and it means only issuing either summons or warrant for the purpose of bringing the accused before Magistrate. It says that summons or warrants need be issued only if Magistrate is of the opinion that their exists sufficient ground for proceeding. Sub Section 3 of Section 204 Cr.P.C. only contemplates that proceeding if instituted of complaint made in writing, summons or warrants issued shall be accompanied by a copy of such complaint. Before issue of process which is part of Chapter XVI, there are four provisions in Chapter XV, i.e. Sections 200, 201, 202 and 203 Cr.P.C. Section 200 Cr.P.C. deals with examination of Complainant, Section 201 Cr.P.C. provides procedure by Magistrate not competent to take cognizance of the case and Section 202 Cr.P.C. provides postponement of issue of process. Lastly, Section 203 Cr.P.C. confers power upon Magistrate that if offence is not sufficient to make out for proceeding, he shall dismiss the complaint after recording his reasons briefly. I may reproduce Sections 200 to 203 Cr.P.C. as under :

"200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

"201. Procedure by Magistrate not competent to take cognizance of the case. If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,-

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court."

"202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192,

may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."

"203. Dismissal of complaint.-If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

8. A cumulative and in depth reading of aforesaid provisions would show that Section 200 requires Magistrate for taking cognizance of an offence on a complaint, to examine upon oath the complainant and the witnesses present, if any. When a complaint is made in writing, proviso to Section 200 provides that it would not be necessary for Magistrate to examine complainant and witnesses if complainant is a public servant, acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or if Magistrate makes over a case for enquiry or trail to another Magistrate under Section 192. Second proviso takes care when a Magistrate makes over the case to another Magistrate under Section 192 after examining complainant and witnesses and provides that latter Magistrate need not re-examine them. Section 201 is not necessary to be discussed for the issue in question and I straight way come to Section 202.

9. Before discussing Section 202 of Cr.P.C., it would also be necessary to mention that a Magistrate when satisfied that there is sufficient ground for proceeding, he can straight way issue notice and at this stage he has three options : (i) Straight way issue process; (ii) he can postpone the issue of process for having holding an enquiry; and (iii) he can direct an investigation to be made. If the offence is triable by Court of Sessions, it is impermissible for the Magistrate to direct investigation. In such a case, Magistrate not only has discretion but compelling duty to comply with requirements of Section 202 (2) Cr.P.C. and record statements of all

witnesses. In other words, if Magistrate decides to hold inquiry, proviso of Section (2) of Section 202, would come into picture and where the offence is triable exclusively by Court of Sessions, Magistrate himself has to hold inquiry and no direction for investigation by police shall then be made. Inquiry can be held by recording evidence on oath and if Magistrate thinks fit, Section 202 (2) gives discretion to Magistrate to take evidence of witness on oath. Thereafter, the next stage where Magistrate would pass order of dismissal of complaint or issue process, in effect is, when a complaint is received, Magistrate by following procedure prescribed under Section 200 may issue process against accused or dismiss the complaint. Section 203 specifically provides that after considering statement on oath, if any, of complainant and witnesses and the result of enquiry of investigation, if any, under Section 202 Cr. P.C., if Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. Section 204 provides that no summons or warrants are to be issued against accused until a list of prosecution witnesses has been filed. The object and purpose of holding enquiry or investigation under Section 202 Cr.P.C. is to find out whether there exists sufficient ground for proceeding against accused or not. Holding of enquiry or investigation is not an indispensable force before issue of process against accused or dismissal of the complaint. It is a enabling provision to form an opinion whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of complaint and the consideration of complaint's evidence on oath.

10. In Ranjit Singh Vs. State of Pepsu (now Punjab), AIR 1959 SC 843, similar argument was raised that Magistrate did not hold inquiry as required under Section 200 and 202 Cr.P.C. Court negated the contention and said as under :

"that contention is equally untenable because under Section 200, proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained."

11. In Rosy and others vs. State of Kerala and others, 2000 (2) SCC 230, Hon'ble M. B. Shah, J (another opinion by Hon'ble K. T. Thomas, J) recorded a separate but concurrent judgment and said as under :

"It is settled law that the inquiry under Section 202 is of limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. the accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to

book a person or persons against whom grave allegations are made."

(emphasis added)

12. In para 20 of Rosy and others vs. State of Kerala (supra), Hon'ble M. B. Shah, J. deduced certain principles as under :

I. (a) Under Section 200 Magistrate has the jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present.

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant under Section 204 (2) before issuance of the process,

(c) The irregularity or non-compliance therewith would not vitiate further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

13. Thus, evidently statement recorded under Section 202 Cr.P.C. is not for punishing the accused. The purpose of Section 202 Cr.P.C. is that Magistrate has not to ascertain truth or falsehood of complaint as in old Code, but to decide whether or not there is sufficient ground for proceeding. Issue of process should not be mechanical and it should be based on some material.

14. The words "all his witnesses" contained in Sub sec (2), proviso to Section 202 Cr.P. C. cannot be read as "all witnesses". It has been held in Satyadeo Pandey and others v. State of U. P. and another, 1987 (1) AWC 572 that words "all his witnesses" connote that all the witnesses of the complainant, associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case, must be examined. The words "all his witnesses" under proviso

to Section 202 Cr.P.C. do not refer literally to all prosecution witnesses in number rather all his witnesses (i.e. of complainant) and to whom he considers material to prove his case.

15. In Chhotey Lal v. State of U. P., 2006 CRI.L.J. 2265, Court held that all the witnesses in Sub Sec (2) Proviso to Section 202 Cr. P. C. do not mean "all the witnesses" named by complainant but all the witnesses which complainant chooses to examine.

16. In Kallu Pal and others v. State of U. P. and Anr., 2008 CRI.L.J. 3229 (Allahabad), this Court said that formal witnesses like Doctor, Investigating Officer etc. are not under the command of the complainant and they are not the witnesses of complainant's confidence, therefore, they cannot be termed as "his witnesses" and are not covered by proviso to Section 202 (2) Cr.P.C.

17. In Dudh Nath Mishra and others v. State of U. P. and another, 2003 CRI.L.J.1087 (Allahabad), Court said that it is not necessary to examine all the witnesses who are named in complaint petition.

18. In Gopal Singh v. Dhanraji Devi and another, 1994 CRI.L.J. 1652 (Allahabad), this Court said that it is discretion of complainant to examine some witnesses and give up rest of the witnesses. Even when all the witnesses are not examined in a case when it is exclusively triable by Court of Sessions it has been held that process issued by Magistrate to accused is not per se illegal. This is what has also been held in *Abdul Hamidkhan Pathan and others v. State of Gujrat and others, 1989 CRI.L.J. 468 (DB).

19. The issue raised in this application also came up for consideration in Shivjee Singh vs. Nagendra Tiwary and others, 2010 (7) SCC 578. The question up for consideration formulated by Court in the judgment reads as under :

"Whether examination of all witnesses cited in the complaint is sine qua non for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions?"

20. In the above case noticing that there is a serious illegality, a Single Judge of Patna High Court remitted the matter to Chief Judicial Magistrate with a direction to make further enquiry and pass appropriate order in the light of proviso to Section 202 (2) Cr. P. C. Supreme Court said that Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word `shall'. After referring to Sections 190, 192, 200 to 209 Cr.P.C. Court said that the object of examining complainant and witnesses is to ascertain the truth or falsehood of complaint and determine whether there is a prima facie case against the person who, according to the complainant, has committed an offence. If upon examination of complainant and/or witnesses, Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence, then he is required to issue process.

21. In Chandra Deo Singh vs Prokash Chandra Bose alias Chabi Bose & Anr,

AIR 1963 SC 1430, Court held, that where there is prima facie evidence, Magistrate was bound to issue process, even though the person charged of an offence in the compliant might have a defence, such defence has to be taken into consideration and left to be decided by appropriate forum at an appropriate stage. At the stage of issue of process, Magistrate can refuse to issue process only when he finds that evidence led by complainant is self contradictory or intrinsically untrustworthy.

22. In Kewal Krishan Vs. Suraj Bhan and another, AIR 1980 SC 1780, scheme of Sections 200 to 204 Cr.P.C. was examined and Court said :

"At the stage of Section 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges." (emphasis added)

23. In Mohinder Singh vs Gulwant Singh And Others, 1992 (2) SCC 213, Court said that the scope of inquiry under Section 202 Cr.P.C. is extremely restricted. It is only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 Cr.P.C. or whether the complaint should be dismissed by resorting to Section 203 Cr.P.C. on the footing that there is no sufficient ground for proceeding on the basis of the statements of complainant and his witnesses, if any. But the enquiry at this stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 Cr.P.C. calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question, whether evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of enquiry contemplated under Section 202 Cr.P.C. To say in other words, during the course of enquiry under Section 202 of Cr.P.C., Magistrate has to satisfy himself simply on the evidence adduced by prosecution, whether prima facie case has been made out so as to put the proposed accused on a regular trial. At that stage no detailed enquiry is called for.

24. Considering the word "shall" in proviso to Section 202 (2) Cr. P.C., Supreme Court in Shivjee Singh (supra) Court said :

"The use of the word 'shall' in the proviso to Section 202 (2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Section 226 and 227 and Section 465 would show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided

he is satisfied that prima facie case is made out for doing so." (emphasis added)

25. In Shivjee Singh (supra) Court further said that in proviso to Section 202 (2) word `all' is qualified by the word "his". This implies that complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say, whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against accused. In taking above view, Court has followed and relied its earlier decisions in Rosy and others vs. State of Kerala (supra), Chandra Deo Singh (supra) and Kewal Krishan (supra). Court also approved judgment of Madras High Court in M. Govindaraja Pillai v. Thangavelu Pillai 1983 CriLJ 917, and approved the ratio that Section 202 is an enabling provision. Court pointed out divergent two opinions expressed by Hon'ble Justice M. B. Shah and Hon'ble Justice K. T. Thomas in two separate but concurrent judgments in Rosy and others vs. State of Kerala (supra) and then in para 30 said as under :

"30. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202 (2) but there is no discord between them that non-examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202 (2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance with the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202(2)." (emphasis added)

26. Similar view has been taken in Vijay Dhanuka Etc vs Najima Mamtaj Etc, 2014 (14) SCC 638 which has been followed in Abhijit Pawar Vs. Hemant Maudhukar Nimbalkar and Another, 2017 (3) SCC 528.

27. Recently, this aspect has been considered by this Court in Application under Section 482 Cr.P.C. No. 4419 of 2004 (Shiv Poojan and Others Vs. State of U.P. and Others) decided on 04.07.2019.

28. In view of above discussions, I am clearly of the view that even though in complaint, several persons were named as witnesses but only three persons were examined under Section 202 Cr.P.C. and consequently, process was issued, the procedure adopted by Court below cannot

be said to be vitiated in law and submission to that effect is clearly erroneous and contrary to above discussions, hence, rejected.

29. Application has no merit. Dismissed accordingly.

30. Interim order, if any, stands discharged.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2019

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 41494 of 2019

Azim Qazi & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri V.M. Zaidi, Sri M.J. Akhtar

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

Evidence Law - Indian Evidence Act, 1872- Section 40-43 read with Criminal Procedure court – Section 482 -For quashing charge sheet – Maintainability of second application seeking same prayer, but at different stage – liable to be rejected plea of acquitted of co-accused – Held not material in criminal trial held – concealment of facts by applicants and failure to comply with earlier direction of Court – Applicants have not come with clean hands before the Court – Application dismissed – Court concerned directed to ensure presence of applicants within one month.

Application dismissed. (E-2)

List of cases cited:-

1. Arasmeta Captive Power Company Pvt. Ltd. Vs Lafarge India Pvt. Ltd. (2014) AIR-SC 525.

2. St. of A.P. Vs A.P. Jaiswal (2001) AIR SC 499.

3. Ramhit @ Hittu Vs St. of U.P. & ors. decided on 32.2.2011 while deciding the Crl. Case No. 3951 of 2010.

4. K.K. Prem Shankar Vs Inspector Of Police & ors., (2001) JIC (SC) 206.

5. M.S. Shariff & ors. Vs St. of Madras & ors., AIR (1954) (SC) 397.

6. Karan Singh Vs St. of M.P. AIR (1965)(SC) 1037.

7. Rajan Rai Vs St. of Bihar (2006)1 SCC 191.

8. Kumar Rinki Vs St. of U.P. & ors. (2008) (3) JIC 267 Alld.

9. Yanav Sheikh @ Gagu Vs St. of W.B. (2013) (6) SCC 428.

10. Dalvir Singh Vs St. of Haryana in Crl. Misc.No. M- 4096 of 2011 decided on 09.05.2011.

11. Anil Khandelwal Vs St. of NCT of Delhi (2019) AIR SC 3583

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

1. Heard Sri V.M. Zaidi, Senior Counsel, assisted by Sri M.J. Akhtar, Advocates for applicants and learned AGA for the State, perused the records.

2. Learned Senior Counsel at the very inception, raised certain legal aspects of the issue which touches core issue for adjudication of present 482 application and has insisted to decide the same at the admission stage itself.

3. Before coming to the merits of the case, the office report reveals certain

glaring misadventure committed by the applicants. In fact this is the second 482 application, seeking same prayer, though at different stage. The applicants have unambiguously flouted directions of Coordinate Bench of this court with vengeance and now they are invoking this equitable jurisdiction under Section 482 Cr.P.C. for this second innings. This court has got an opportunity to compare the prayer section of both the 482 applications i.e., Crl. Misc. Application no. 30075 of 2015 and present 482 application. The only difference is that in earlier 482 application, there were four applicants including the present applicants and in the instant 482 application there are only two, out of the four applicants.

4. The prayers sought in the present 482 application is -

5. To allow the present 482 application.

(1.) Quash the charge sheet dated 30.11.2014.

(2.) Quash the entire proceeding of Criminal Case No. 1492 of 2015(State Vs. Aslam Qazi and others), arising out of case crime no. of 2013 under Sections 147,148,149,307,323,504,506 IPC and under Section 3(2) V of SC/ST Act Police Station, Dibai District Bulandshahar.

6. This prayer is akin to the prayer sought in Criminal Misc. No. 30075 of 2015 which was disposed off with regard to present applicants vide order dated 7.10.2015 and when this order was challenged before Hon'ble Apex Court by means of SLP(Crl) No. 10622 of 2015, the counsel for applicants has sought permission to withdraw his petition and accordingly the aforesaid SLP was dismissed. After the dismissal of S.L.P.. The applicants are under legal obligation to comply with the direction of this court's order dated, dated 7.10.2015 but instead complying the same, the daring applicants, as mentioned above, unequivocally flouted the directions of this court with vengeance and filed present 482 application in succession, though at different stages. The police has submitted charge sheet against the applicants way back on 30.11.2014 and since then they are roaming scot free throwing an open challenge to the majesty and to the rule of law purportedly on the alleged fresh grounds i.e., informant as well as injured witnesses have not supported the prosecution case in a parallel prosecution and trial of co-accused of Aslam Qazi in ST No. 1670 of 2016 (State Vs. Aslam Qazi) which was resulted into his (Aslam Qazi's) acquittal vide judgment and order date 13.8.2019. Thus, a primary and only plank for assailing the entire proceeding of the case No. 1492 of 2015 is that when the first informant as well as the injured witnesses of the incident have disowned the entire case in their respective depositions/testimonies before learned Trial Court in ST No. 1670 of 2017 and the learned Trial Court has recorded acquittal order of the co-accused-Aslam Qazi, therefore the applicants are now claiming that testimonies of the witnesses and the judgement of acquittal and, its benefit may also be extended to the applicants and pending proceedings should be dropped (Para nos. 23 and 25 of the petition). In fact the **"Principle of Stare Deices"** has been agitated by the applicants to adjudicate the present case.

Facts of the case :-

7. Before addressing the merits of the case, it is imperative to spell out the skelton facts of the case which would be helpful in adjudication of the present case.

8. The Opposite Party No. 2 lodged an FIR on 04.07.2013 at 12:30 pm for the incident, said to have taken place on 02.07.2013 at 5:30 pm, which was registered as Case Crime No. 229 of 2013 under Section 147,148,149,307,323,304,306 IPC and under Section 3(2) V Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act against (i) Ibrahim son of Abdul Salam (ii) Abdul Rahim son of Abdul Salam (iii) Aslam Qazi son of Abdullah Qazi (iv) Azim Qazi son of Abdullah Qazi (v) Shamim Qazi son of Abdullah Qazi with the allegation that all the assailants armed with lathi-danda and country made pistol raided the premises of opposite party no. 2 and assaulted upon informant's son. In this process, Ibrahim Qazi and Abdul Rahman attributed the role of exhortation, whereas rest of the accused persons have brutally assaulted, causing injuries to Trilok Raj and Man Singh. This incident took place on account of alleged transaction of certain landed property between them. Both the injured persons were medically examined on the same day i.e., 02.07.2013 and their injury reports are annexed as Annexure No. 2 to the petition.

9. Since the matter relates to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the Circle Officer, Dibai has conducted threadbare investigation and submitted report under Section 173(2) Cr.P.C. against all the accused persons but the police submitted charge sheet against Azim Qazi and Shamim Qazi in the column of "absconder".

10. After submission of charge sheet, the learned Magistrate 1.8.2015 took cognizance of the offence and issued processes against all the accused persons.

11. Instead surrendering before the court (1) Qazi Ibrahim@ Ibrahim (2) Qazi Abdul Rahman (3) Azim Qazi (A-1) and Shamim Qazi (A-2) approached this court by means of 482 application no. 30075 of 2015 whereby the coordinate bench of this court vide order dated 07.10.2015 though protected the interest of Qazi Ibrahim and Qazi Abdul Rahman by issuing notices to opposite party no. 2 but this court declined to grant any relief to present applicants and directed that they will have to surrender before the court concern within three weeks from the date of passing of this order.

12. Instead surrendering and complying with the directions of the court, the applicants preferred a SLP (Crl) No. 10622 of 2015 but it seems that after certain arguments the counsel for applicants thought it proper to withdraw the aforesaid SLP and accordingly on 4.1.2016 the aforesaid SLP was dismissed accordingly. This is most astonishing feature of the case that the applicants have tried their level best to conceal this fact from this court in their present petition. The SLP was dismissed in the month of January, 2016 and in all fairness the applicants ought to have apprise this court by annexing the orders in the present petition filed in the year 2019 but for the reasons best known to them the applicants have put the cards in their sleeves with purpose, so that, this court should not gather adverse inference against them. This court is of the considered opinion that the applicants have tried their level best to dupe and ditch this court and have not

come with clean hands in the present petition which was filed on 30.9.2019.

13. Meanwhile the trial of arrested co-accused person- Aslam Qazi was separated and was put to trial by means of ST No. 1670 of 2016. Contentions raised by the Senior Counsel that since PW-1, PW-2, PW-3, PW-4 and PW-5 have not supported the prosecution case and as such the aforesaid trial has ended into acquittal of co-accused Aslam Qazi vide judgment and order dated 13.8.2019. Since the aforesaid judgment was never challenged and therefore aforesaid judgment of acquittal has attained the finality. In para no. 16 of the petition it has been mentioned that in view of the fact the applicants are also entitle to get the benefit of aforesaid statements of witnesses and the order passed by learned Trial Court in the case of (State Vs. Aslam Qazi) should be taken into account to establish innocence of the present applicants.

14. This is the long and short of the entire case and has to be adjudged at this stage.

15. The star legal question involved in the present controversy is as to whether the acquittal of the co-accused would play an exclusive role in quashing the charge sheet and entire proceedings with regard to remaining co-accused persons and the entire proceeding qua there should be quashed in exercise of powers under Section 482 Cr.P.C.?

16. First and foremost, learned Senior Counsel for the applicants has drawn the attention of the court to section 40,41,42 and 43 of the Indian Evidence Act under the heading "judgments of the court of justice when relevant." For the sake of brevity the text of the aforesaid provisions reads thus.

Section 40 of the Evidence Act- *Previous judgments relevant to bar a second suit or trial-the existence of any judgment, order or decree which by law prevents any courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit, or to hold such trial.*

Section 41 of the Evidence Act- *A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant. Such judgment order or decree is conclusive proof - that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment (order or decree) declares it to have accrued to that person that any legal character which it takes away from any such person ceased at the time from which such judgment (order or decree) declared that it had ceased or should cease. (Order or decree) declared that it had ceased or should cease, and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment declares that it had been or should be his property.*

Section 42 of the Evidence Act- *Relevancy and effect of judgments, order or decree, other than those mentioned in Section 41.*

Section 43 of the Evidence Act - *Judgments orders or decree other than those mentioned in section 40,41 and 42 are relevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Act.*

17. Besides this, the learned Counsel for the applicants raised upon the judgment of the Hon'ble Apex Court in **ARASMETA CAPTIVE POWER COMPANY Pvt. Ltd. Vs. LAFARGE India Pvt. Ltd. (2014) AIR-SC 525**, whereby the Hon'ble Apex Court *while deciding the principle of Stare Deices, has opined that the*

"....consistency in the cornerstone of administration and justice, it is consistency which creates confidence in the system. This consistency can never be achieve without respect to the rule of finality. It is with view to achieve consistency in the judicial pronouncement, the courts have evolved the rule of precedence principle of Stare Deices etc., and these rules and principles are based on public also."

18. Besides this, learned Senior Counsel for the applicants has cited plethora of relevant cases of Hon'ble Apex Court as well as this Court viz; The principle of Stare Deices is a legal principle by which the judges are obligated to respect the precedent established by the prior decisions. The words originated from the phrasing of the principles in Latin; Manim "Stare Deices at court non-quieta mobere" to stand by the decision and not disturb the undisturbed. In the legal context this means the court should abide by the precedent and not disturb the settled matters. This principle can be decided into two components(1) a decision made by superior court or by the same court in an earlier decision is binding precedent that the court itself and all its inferior courts must follow (2) the court may overturn its own precedent but should do only if the strong reasons exists to do so and even in that case should be guided by principle from superior-lateral and inferior courts.

19. Similarly in the case of State of **Andhra Pradesh Vs. A.P. Jaiswal (2001) AIR SC 499,** the similar principle was underlined by the Hon'ble Apex Court.

20. On the other hand, learned AGA has drawn attention of the court in the judgment of **Allahabad High Court RAMHIT @ HITTU Vs. State of U.P. and others decided on 32.2.2011 while deciding the Crl. Case No. 3951 of 2010** under Section 482 Cr.P.C. whereby dealing with the identical issue the learned Single Judge has explicitly and elaborately considered the principle of Stare Deices after considering number of judgment of Hon'ble Supreme Court in this regard:-

Black's Laws Dictionary defines Stare Deices as under;

Para 1-

Under the doctrine a deliberator or solemn decision of court made after argument of question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court or in other courts of equal or lower rank in subsequent

cases where the very point is again in the controversy. Doctrine is one of the policy, grounded on theory that security and certainly require that accepted and established legal principle, under which rights may accrue, be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court's discretion under circumstances of case before it. When point of law has been settled by decision, it forms precedent from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicated plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless consideration of public policy demand it. The doctrine is limited to actual determination in respect to litigated necessarily decided questions and is not applicable to dicta or obiter dicta.

21. The Hon'ble Apex Court has got an opportunity to analyze the applicability of above mentioned principles of Stare Deices in dispensing the criminal judicial system in number of cases. The Hon'ble Apex Court in the case of **K.K. PREM SHANKAR Vs. INSPECTOR OF POLICE AND OTHERS, (2001) JIC (SC) 206,** has considered the relevancy of the judgment in the light of provisions of section 41 to 43 of Indian Evidence Act relying upon its earlier case M.S. Shariff and others Vs. State of Madras and others, AIR (1954) (SC) 397 and gave a conclusive opinion as under.

"Para 26:-

What emerges from the aforesaid discussion is-(1) the previous judgment which is final can be relied upon as provided under Section 40 to 43 of the Indian Evidence Act; (2) in civil Suits between the same parties, principle of res-judicata may apply: (3) in a criminal case Section 300 Cr.P.C. makes provision that once a person is convicted or acquitted he may not be tried again for the same offence if the conditions mentioned there in satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of the Section 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein...."

22. Similarly in yet an another case of ***Karan Singh Vs. State of M.P. AIR (1965)(SC) 1037***, the Hon'ble Apex Court considered the same question and has given its candid opinion in para no. 6, which reads thus :-

6. "We are therefore of opinion that the judgment in Krishna Govind Patil's case, AIR 1963 SC 1413 does not assist the appellant at all. On the other hand we think that the judgments earlier referred to on which the High Court relied, clearly justify the view that in spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis - of course if the evidence warrants it - that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the later case that the person tried in it was guilty of an offence under Section 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of Sambasivam's

case, 1950 AC 458 has no application here because the two cases we are concerned with are against two different persons though for the commission of the same offence. Furthermore, as we have already said, each case has to be decided on the evidence led in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case."

23. In the case of ***Rajan Rai Vs. State of Bihar(2006)1 SCC 191,*** the import of this principle in the applicability of Criminal Courts has been explicitly detected the aforesaid principles.

"The police after registering the case took up the investigation and on completion thereof has submitted charge sheet against all the six accused persons. On the receipt where of, cognizance was taken against all of them and were called to the Court of Sessions to face the trial. As one of the accused was absconding, his trial was separated from those of other accused persons, out of which one died, after commitment of the trial, as such, the trial proceeded against remaining four accused persons and all were convicted." Against the said judgment they preferred an appeal. During the course of pendency of appeal, the other one co-accused was apprehended, put to trial and ultimately the Trial Court also convicted him. He also filed an appeal before High Court. The appeals preferred by other convicted 4 accused persons challenging their convictions were decided by the High Court and same were allowed and their conviction and sentences were set-aside. The appeal filed by other co-accused person was taken up later, the High Court upheld it's sentence and conviction, then he preferred SLP before Hon'ble Apex Court, to attack the impugned judgment on three grounds. The basic thrust of the argument was that High Court has acquitted the other four accused persons on merits and therefore, it is no permissible for it to uphold the conviction of appellants on the basis of same witnesses examined during the course of trial of the appellants. In considering the case, Hon'ble Apex Court has cited the provisions of 40, 41, 42, 43 and 44 of the Indian Evidence Act which are under the heading of "judgments of courts of justice when relevant" and found that it has not been so that judgment of acquittal rendered by High Court in appeals arising out of earlier session trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could have not been taken into consideration by the High Court while passing the impugned judgment. The Hon'ble Apex Court has also considered the other judgments rendered in the trial and ultimately formulated following opinions :-

".....We are clearly of the view that the judgment of the acquittal rendered in the trials of the four accused persons is wholly irrelevant in the appeal arising out of trial of the appellants ***Rajan Rai,*** *as the said judgment was not admissible under the provisions of Section 40 to 44 of the Indian Evidence Act." Every case has to be considered on the evidence adduced therein. The case of four acquitted persons was ended on the basis of evidence led their, while the case of present appellant has to be decided only on the basis of evidence adduced during course of trial..."*

24. Thus, from the above golden parameters led by Hon'ble Apex Court this court cannot assume or presume that when the appellants were put to trial, PW-1, PW-

2, PW-4 and PW-5 would again get hostile. The applicants named above, charge sheeted accused in year 2014 as absconders, who have not even surrendered before the majesty of law, are invoking this equitable jurisdiction time and again, with the sole motive that though they are charge sheeted, this court in exercise of powers under Sections 482 Cr.P.C. taking the testimonry/judgment of co-accused would drop the criminal prosecution against them. I think this is not the mandate of law, else, it would be lead a catastrophic consequences over the criminal trial which need not be explained in the henious and serious offences. The main author of the offence masterminds of the offences or key conspirator would go scot free even without surrendering before the authority of the concerned Court and facing the trial. Submission made by counsel that testimony given by these prosecution witnesses(where they turned hostile) in Aslam Qazi's case would be taken into account, and applicant's be acquitted without facing trial?. Considering the decisions Division Bench of this court in the case of ***Kumar Rinki Vs. State of U.P. and others (2008) (3) JIC 267 Alld.*** has concluded its opinion on this point.

13. "The inference that is deducible from discussion of the above decisions that the judgment of acquittal rendered in the trial of the other co-accused is wholly irrelevant as the said judgment would not be admissible under the provisions of Section 40 to 44 of the Evidence Act. It also leaves no manner of doubt that every case has to be decided on the evidence adduced therein and therefore, the case of the petitioner has to be decided on the basis of evidence which may be adduced during the course of trial."

14. "The principles that are distilled from the discussion of the above decisions are:

(i) the acquittal of a co-accused in a separate trial cannot be made basis for quashing the proceedings against another co-accused who is being separately tried on the principle that each case has to be decided on the evidence adduced in that case;

(ii) Judgment of acquittal rendered in one case is not relevant in the case of co-accused separately tried inasmuch as Sections 40 to 44 of the evidence Act deal with relevancy of certain judgments in probate, matrimonial, admiralty and insolvency jurisdiction and therefore, inapplicable to a criminal case.

In the light of the discussions made by this Court as well as the Hon'ble Supreme Court on the point in issue, this Court is of the view that the proceeding in question does not warrant interference by this Court in light of the decision rendered in the earlier trial being sessions trial no. 73/2004. Therefore, the petition is dismissed.

25. Similarly the Hon'ble Apex Court in the case ***Yanav Sheikh@ Gagu Vs. State of West Bengal (2013) (6) SCC 428 and Dalvir Singh Vs. State of Haryana in*** Crl. Misc.No. M- 4096 of 2011 decided on 09.05.2011 has also followed and reiterated the same principles of law.

26. In view of the above discussions, it is amply clear that the judgment of acquittal of co-accused Aslam Qazi, in ST No. 1670 of 2016 decided on 13.8.2019 have no bearing in the present case in the

light of provisions under Section 40 to 44 of Indian Evidence Act and the ratio laid down by Hon'ble Apex Court in this regard. The aforesaid judgment would not render any help or assistance to a person who is an absconder and has flouted the directions of the courts in its impugnity and vengeance. It is simply strange and surprisingly that the absconders are seeking parallel with that co-accused (Aslam Qazi), forced the trial and by end of the stand acquitted. The applicants who are charge sheeted accused, is having audacity who wants to get acquitted without facing trial with the held of judgment of co-accused. The judgment in the parties cannot be justified the invocation of doctrine of Stare Deices in the present set of circumstances.

27. Lastly, to save the applicants from the wrath of the court, the learned Sr. Counsel for the applicants has cited a recent judgment of Hon'ble Apex Court in the case of ***Anil Khandelwal Vs. State of NCT of Delhi (2019) AIR SC 3583,*** whereby the Division Bench of Hon'ble Apex Court has opined that successive 482 applications under the changed circumstances is maintainable and dismissal of earlier 482 applications has no bar to the same.

28. This case relates to the quashing of the proceedings u/S 142 read with section 138 N.I. Act whereby quashing of summons issued in the complaint case was dismissed. The subsequent 482 application was filed with the same prayer, which was result of second application on the ground of dismissal of first complaint of same relief. The Hon'ble Apex Court has permitted for filing the second 482 application on the changed circumstances. The Form no. 32 issued by registrar of companies under the companies act, 1956 shows the proof of resignation by the Director prior to issuance of cheques. The difference between earlier applications in as much as statutory Form No. 32 did not fall for consideration by the earlier court. Thus, the second application cannot be said to a repeated application squarely under the same facts and circumstances.

29. I have carefully perused the judgments of ***Anil Khandelwal's*** case and I am afraid that aforesaid judgment would not come to any assistance to the applicants. In that case there was a changed circumstance with regard to applicant himself. But in the instant case from 2015 (1.8.2015) when the learned Magistrate has taken cognizance of the offence, the applicants are on run, they approach this court and this court vide judgment dated 7.10.2015 has granted liberty to get themselves surrender before the court concern and seek bail. Thereafter they approached the Hon'ble Apex Court by means of SLP No. 10622 of 2015 which was dismissed as withdrawn on 4.1.2016 and thus, in all fairness they ought to have abided by the order of court while surrendering but the stubborn applicants in utter disregard to this court's order did not surrender and waited for the acquittal of co-accused Aslam Qazi and now in the garb of changed circumstances they are again knocking the doors of this court for challenging the charge sheet and entire proceedings including non-bailable-warrants. This court is of the considered opinion that there is no change in the circumstance qua the applicants. There is only change in the stage of trial and present is second 482 application with same prayer deserves to be rejected. The court concern is directed to take all the possible coercive steps to ensure the presence of applicants within a month from the production of certified copy of the order.

30. The office the directed to remit the copy of this order to the court concern within a week by a fastest mode of services. The above 482 applicants falls flat and accordingly dismissed

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(2020)07ILR A378
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 70447 of 2009

M/S Kamla Cold Storage ...Petitioner
Versus
Madhyanchal Vidhut Vittran Nigam Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri B.C. Rai, Sri Deepak Kumar Pandey

Counsel for the Respondents:
Sri H.P. Dube, Sri Shivam Yadav, Sri M.K. Yadav.

Civil Law-Electricity Act, 2003-Section 62 (6)-Petitioner claims interest over excess amount towards the electricity charges-he himself demanded supply from rural feeder while he was being supplied from the urban feeder-sudden change delayed the rebate process-no malice-rebate cannot be equated to excessive tarrif charged-therefore this case do not falls u/s 62 (6) of the Electricity Act,2003.

Held, the rebate itself is a part of the tariff order, of which percentage has been changed from time to time and once the petitioner has been given the due rebate, we do not think that the petitioner is entitled for any further interest, over and above, the amount adjusted against the electricity dues. (Para 20)

Writ Petition dismissed. (E-9)

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

1. Heard Sri B.C. Rai, learned counsel for the petitioners and Sri Shivam Yadav, learned counsel for the respondents. Perused the record.

2. By means of this petition under Article 226 of the Constitution of India, the petitioner has made three prayers claiming substantial relief in the matter, reproduced hereunder:

"i. issue a writ order or direction in the nature of certiorari quashing the impugned order dated 05.09.2009 and order dated 05.08.2009 in so far it refused to allow electricity connection from town feeder (Annexure Nos.6 and 5 to the writ petition), passed by the Executive Engineer;

ii. issue a writ order or direction in the nature of mandamus restraining the respondents from disconnecting electric supply till the final adjustment of amount found refundable to the petitioner;

iii. issue a writ order or direction in the nature of mandamus directing the Executive Engineer to allow interest on the amount found refundable to the petitioner along with rebates provided in the tariffs' order and further to allow revision of electricity bill under Non-Continuous Process Industry;"

3. Initially when the writ petition was entertained this Court has been pleased to pass the following order on 22.12.2009:

"Heard Sri B.C. Rai for the petitioner and Sri S.K. Dubey for respondents.

From the perusal of the letter dated 5.8.2009 along with statement of account, it appears that a huge amount has already been deposited by the petitioner in excess yet without adjusting the same, a sum of Rs. 1,16,470/- has been demanded by means of the letter dated 5.9.2009 and the Executive Engineer has not adjusted the amount already paid by the petitioner in excess. Learned counsel for the petitioner submitted that earlier the petitioner was getting the supply from urban feeder but by means of the letter dated 5.9.2009, the Executive Engineer has not directed for supply to the petitioner from rural feeder.

Learned counsel for the respondents prays for and is allowed one month time to file counter affidavit. Petitioner will have three weeks thereafter to file rejoinder affidavit.

Until further orders, the demand pursuant to the letter dated 5.9.2009 (Annexure 6 to the writ petition) as well operation of the order dated 5.9.2009 (Annexure 7 to the writ petition) shall remain stayed."

4. Today now when after the exchange of pleadings the matter has come up at admission stage, learned counsel for the parties agreed that the case can be decided finally at this stage.

5. At the very outset, learned counsel for the petitioner submits that he is not pressing prayer no.1 and 2 of the writ petition and to that extent, therefore, the writ petition may be dismissed as withdrawn.

6. Hence, the petition is dismissed as withdrawn without any further liberty, in respect of prayer no.1 and 2 of the writ petition.

7. In so far as the prayer no.3 is concerned, learned counsel for the petitioner has argued that in view of the statutory provision as contained under Sub-Section 6 of Section 62 of the Electricity Act, 2003, the petitioner has become entitled for an interest over and above an amount of Rs.3,98,033.4/-, in the face of the fact that the Executive Engineer, Electricity Distribution Division-3rd, Madhyanchal Vidyut Vitran Nigam Limited, Bisauli, Budaun, namely, respondent no.2 has admitted to have charged excess amount towards the electricity charges from the petitioner and which was liable to be adjusted from the future running electricity bills against consumption. It has been argued by learned counsel for the petitioner that since the Electricity Regulatory Commission has been notifying tariff from time to time, the respondents are entitled to charge electricity charges on the basis of the tariff order. He submits that in the year 2002, there was difference between the tariff order relating to the electricity supply from rural feeder than from the town feeder and there was 10 % rebate prescribed for on the demand of charge and energy charge. He argues that the tariff is nothing but a charge against the electricity per unit consumption which is issued under the tariff order. He submits that the tariff orders are issued by the Regulatory Commission from time to time and until year 2006 there was a difference between the urban schedule and rural schedule. However, later on, it came to be crystallized in the form of rebate only. He submits that once the respondents have supplied electricity to the petitioner's cold storage from the rural feeder instead of a town feeder despite the petitioner's cold storage being a continuous process industry, the charges levied by the respondents on the electricity consumption

would amount to be a charge in derogation to the tariff order notified by the Electricity Regulatory Commission from time to time and, therefore, such an action would come within the ambit and scope of Sub-Section 6 of Section 62 of the Electricity Act, 2003.

8. *Per contra*, it has been argued by learned counsel for the contesting respondents that the petitioner has only been granted rebate in terms of the tariff orders issued from time to time as the supply was being made from the rural feeder, the grant of rebate would not amount to an act of admission that the petitioner was being charged higher tariff than the one provided under the tariff order. He submits that the electricity charges are made on the basis of the consumption and except in cases of continuous process industry the petitioner was entitled to the exemption under Clause 10 of the notification issued under Section 22B of the Indian Electricity Act, 1910. It has been further argued that the petitioner's cold storage as of now is not in operation, inasmuch as the petitioner was provided with the supply from the rural feeder on his own request and, therefore, the petitioner now cannot be permitted to take a 'U'-turn that the petitioner be given rebate as the supply was made from rural feeder instead of urban feeder.

9.. Specific averment to the above effect has been made in paragraph nos.3, 4, 7, 8 & 9 of the counter affidavit and reply to which made in the rejoinder affidavit, it is alleged is quite evasive. The petitioner does not dispute in the rejoinder affidavit the two basic facts: firstly, that the petitioner's industry is not a continuous process industry; and secondly that supply of electricity to the petitioner's cold storage was from rural feeder on the request being made by the petitioner himself.

10. It has been urged by learned counsel for the respondents that the petitioner since has been offered rebate as per tariff order itself, the petitioner is not entitled for any interest. He further submits that there is no charge of higher tariff being charged in the matter. The rebate is an ex gracia policy of the commission in framing the tariff order and there is nothing in law which entitles the petitioner to have interest over and above such rebate. He submits that if it is a charge for the electricity, it has to be charged accordingly. The benefit of rebate is offered as in the present facts and circumstances, is covered under the tariff order and it is that benefit that has been given to the petitioner.

11. Having heard learned counsel for the parties and having perused the record and the provisions specifically dealing with interest under Sub-Section 6 of Section 62 of the Electricity Act, 2003 (for short Act, 2003), we find that the undisputed position is that if the charge exceeding the tariff determined, then under the Section, excess amount is recoverable by a person who has paid such charge alongwith interest to the bank rate. The question, therefore, is now as to what is the situation or a contingency where the department can be saddled with the statutory liability to pay interest.

12. The word 'tariff' has not been defined under the Act, 2003, however, U.P. Electricity Supply Code, 2005 (Code, 2005) vide clause 2.2 (yy) defines 'tarrif order' as under:

'Tariff Order' in respect of a Licensee means order issued by the Commission for that Licensee indicating the rates to be charged by the Licensee from various categories of consumers for the supply of electrical energy and services.

13. Code, 2005 vide clause 2.2 (zz) also defines 'tarrif schedule' as under:

'Tarrif Schedule' is the most recent schedule of charges for supply of electricity and services issued by the Licensee as per the provisions of the Tariff order for that Licensee.

14. The above definitions are clearly indicative of tarrif means rates of electricity supplied, to be charged by the licensee and schedule prescribed of such charges to be levied by the licensee. Clause 2.2 of Chapter 2 (Definitions) of Code, 2005 defines the word 'energy charge' and 'fixed charges'. Clause 2.2 (z) (dd) defines energy charge as well as fixed charges. While the "energy charge" is defined as *"a charge levied on the consumer for each unit of the electricity supplied as per the tariff order of the Commission"*, the "fixed charges" shall be as per provisions of the tariff order. Clause 2.2 (u) defines demand charge as 'a charge levied on the consumer based on maximum demand or as per the tariff order'. Clause 2.2 (z) defines energy charges as *'a charge levied on the consumer for each unit of electricity supplied as per tarrif order of the Commission'*. The maximum demand has been defined under Clause 2.2 (ll) as 'the average amount of KW or KVA, as the case may be, delivered at the point of supply of the consumer and recorded during a 30 minute period of maximum use in the billing period'.

15. So from the above we find that the demand charge is a kind of charge for the electricity supply to be either as per the tariff order or as per the billing status of the average amount at the time of maximum use in that period of billing. The energy charge is the charge for the consumption per unit and this is also to be provided under the tariff order and the fixed charges are also as per the tariff order.

16. Section 62 of the Act, 2003 provides for the determination of tariff which runs as under:

"Section 62. (Determination of tariff)*: --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -*

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as

may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

17. Section 62 says that the tariff shall be determined in accordance with the provisions of this Act for the supply of electricity, transmission of electricity, billing of electricity, retail sale of electricity.

18. In the present case, we are concerned with the retail sale of the electricity. Since the tariff itself has not been defined, it would be taken to be a charge for the supply in different heads like fixed charges, electricity charges etc. As different tariff orders have been placed before us it is very much clear and explicit from a bare reading of the same that different kind of charges have been provided and have been amended from time to time. But the question is as to whether the petitioner has been charged with more tariff than the prescribed one. From close scrutiny of the order impugned and the billing chart that has been provided to the petitioner alongwith the order, it is clearly revealed that the fixed charges have remained as per the supply to the cold storage, prescribed under the Rules and since the tariff order provided for rebate, the rebate has been granted to the petitioner. It, therefore, can be safely concluded that the petitioner has not been levied with any excessive tariff than the prescribed one. However, the rebate that has been offered to the petitioner finally, it can be said to have been offered by the respondents on the basis of calculation qua regular entitlement for supply of electricity in the past. It is this much of inaction for quite sometime or delayed action consequently is claimed to be an act of admission on the part of respondents to bind them to pay interest in the matter.

19. The distinction between the demand raised as per tarrif order and rebate is that licensee shall calculate the energy charges, fixed charges etc. as per the tarrif order whereas the tarrif order also provides for rebate over and above such charges in

the form of certain percentage to deduct the amount from the demand raised. So both in case of computation as per tarrif order and rebate on the basis of tarrif order to make the demand an actual demand have inbuilt mechanism for calculation on the basis of same tarrif order, to wit:fixed rate of electricity supplied and rate of electricity per unit consumed. Rebate thus is a concession not on the tarrif chargeable but on the bill generated to make it finally a demand to be raised and to be paid by the consumer. It, therefore, cannot be equated to a case where higher tarrif is charged than the prescribed one in a bill to make a consumer entitled to refund with interest as per Sub Section (6) of Section 62 of the Act, 2003.

20. In the facts and circumstances of this case where there is a clear admission on the part of the petitioner, we find merit in the submission of learned counsel for the respondent that the petitioner has not denied fact averred in relevant paragraphs of counter affidavit that petitioner himself demanded supply from the rural feeder while he was being supplied from the urban feeder. This sudden change would have delayed the rebate process and therefore, no malice in law detected in the matter at the end of the respondent authorities. The claim of interest is a kind of penalty in law for unjust enrichment either by denying a person the money to which he was entitled or, something more has been extracted beyond the lawful authority. The rebate, therefore, cannot be equated to excessive tariff charged so as to bring it within the ambit of Sub-Section 6 of Section 62 of the Electricity Act, 2003. The rebate itself is a part of the tariff order, of which percentage has been changed from time to time and once the petitioner has been given the due rebate, we do not think that the petitioner is entitled for any further interest, over and above, the amount adjusted against the electricity dues.

21. The writ petition lacks merit and is, accordingly, dismissed.

22. Interim order, if any, stands discharged.

(2020)07ILR A383
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2020

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.

Writ C No. 2229 of 2020

Triveni Engineering & Industries Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Sri Bhupendra Nath Singh, Sri Parmendra Nath Singh

Civil Law-Service of Respondent no.3 terminated-industrial dispute arose-High Court directed labour Court-to decide whether appellant is workman or not-before deciding case on merit-several dates fixed-Petitioners were given impression -that arguments would take place only w.r.t. the direction of the High Court-no issues framed-therefore no leave was sought to lead evidence-The labour court answered the reference and framed the issues simultaneoulsy-no proper opportunity given to the parties to lead evidence.

Held, a perusal of the award of the Labour Court definitely shows that after hearing was concluded on 17.9.2019, the Labour Court had

answered the Reference on merits and in the award itself, issues were also framed. The proper course for the Labour Court ought to have been that it should have earlier framed issues and thereafter it should have directed the parties to make their submissions. (Para 9)

o far as the question with regard to mentioning about an opportunity in the Written Statement is concerned, suffice it to say that no adjudication in that regard was essential at this point of time. Before finding that the domestic enquiry was erroneous the Court ought to have heard the parties on that issue and, thereafter, if the enquiry was found defective the question of leading evidence on the charges would have arisen (Para 10)

Writ Petition partly allowed. (E-9)

List of Cases cited:-

1. Karnataka State Road Transport Corporation Vs Laxmidevamma & anr.,(2001) 5 SCC 433

2.Divyash Pandit Vs Management NCCBM, (2005) 2 SCC 684

3.M.L. Singla Vs P.N.B. & anr. (2018) 18 SCC 21

4. Hindustan Tin Works Vs Its employees , 1978 Labour & Industrial Cases 1667

(Delivered by Hon'ble Siddharth Varma, J.)

1. This writ petition has been filed against the award dated 4.10.2019. When the services of respondent no.3-Jagdish Singh were terminated on 17.5.2005, then an industrial dispute was raised and the appropriate State Government, on 31.12.2005, made the following Reference :

"क्या सेवायोजकों द्वारा अपने कर्मचारी श्री जगदीश सिंह पुत्र श्री रतन सिंह, वरिष्ठ गन्ना अधिकारी की सेवायें दिनांक 17.5.2005 से समाप्त किया जाना उचित एवं अवैद्यानिक है। यदि नहीं तो संबंधित कर्मचारी क्या हितलाभ/अनुतोष पाने का अधिकारी है एवं अन्य किस विवरण सहित?

2. The petitioner at the stage of conciliation filed detailed objections on 12.7.2005 stating that the respondent no.3 was not a workman and, therefore, the Reference, as was made, itself was not maintainable. Against the Reference dated 31.12.2005, the petitioner filed a writ petition being Writ Petition No.17456 of 2006. The writ petition was entertained and an interim order was also passed by which the Reference order dated 31.12.2005 was stayed and on 1.12.2011 this Court allowed the writ petition. The operative portion of the order dated 1.12.2011 was as follows:-

"The writ petition accordingly succeeds and is allowed. The impugned order of reference dated 31.12.2005 passed by Deputy Labour Commissioner, Saharanpur is hereby quashed.

The matter is remitted back to the Deputy Labour Commissioner, Saharanpur-respondent no.2 with a direction him to pass a fresh order in the matter in accordance with law and in the light of the observations made hereinabove within a period of one month from the date of production of certified copy of this order before him."

3. The judgment and order dated 1.12.2011 was challenged by means of a Special Appeal being Special Appeal No.66 of 2012 wherein on 16.1.2012 it was decided by a Division Bench of this Court that the matter might not go back to the Deputy Labour Commissioner as per the High Court's order dated 1.12.2011 but the Labour Court itself could, before deciding the matter on merits, decide the question as to whether the appellant was a workman. The order passed in the Special Appeal is being reproduced here as under :-

"The order of the single Judge is set aside. The parties may appear before the Labour Court on 12.3.2012 and thereafter the Labour Court may decide the case. **It is made clear that the Labour Court, before deciding the case on merit, will decide the question whether the appellant is workman or not**. Needless to say that the Labour Court may decide the case expeditiously."

4. In pursuance of the order dated 16.1.2012, again pleadings were exchanged between the parties, documents etc. as were required to be filed, were filed. However, when thereafter the impugned award dated 4.10.2019 was passed the instant writ petition was filed.

5. Learned counsel for the petitioner has made the following submissions :-

(i) After the order in the Special Appeal No.66 of 2012 was passed on 16.1.2012, it was incumbent upon the Labour Court to have first arrived at a conclusion as to whether the respondent no.3 was a workman. Thereafter, it has been submitted by the learned counsel for the petitioner, separate issues ought to have been framed and parties should have been allowed to lead their evidence.

(ii) Learned counsel has submitted that the respondent no.3 himself on 3.4.2019 had filed an application which was numbered as Paper No.29-D by which it had been prayed that as per the order of the High Court, the initial issue with regard to the fact as to whether the respondent no.3 was a workman or not had to be initially decided. On 3.4.2019, learned counsel for the petitioner pointed out from the order-sheet of the Case as had been filed with the writ petition that the Presiding Officer had passed the following order :-

'पुकार पर पक्षकार उपस्थित आए। श्रमिक का प्रार्थनापत्र 29–डी आया। माननीय उच्च न्यायालय के आदेश दिनांक 16.01.2012 के अनुपालन में सर्वप्रथम यह देखना है कि वादी श्रमिक की श्रेणी में आता है कि नहीं। आदेश हेतु वाद दिनांक 7.5.2019 को पेश हो।'

6. It was, therefore, submitted that the petitioner was all the time under the impression that a decision would initially be arrived at by the Labour Court with regard to the Application No.29-D as had been filed by respondent no.3 and thereafter the case would proceed. After 3.4.2019, dates were fixed on 7.5.2019, 14.5.2019, 17.5.2019, 27.5.2019, 9.7.2019, 6.8.2019 and 17.9.2019 and on all dates the petitioner was always given the impression that arguments would take place only with regard to the direction as had been given by the High Court on 16.1.2012 with regard to the fact as to whether the respondent no.3 was a workman at all.

(iii) Learned counsel for the petitioner submitted that as per Rule 12 of the U.P. Industrial Disputes Rules, 1957, the Labour Court or Tribunal, as the case was, would ordinarily fix a date for the first hearing of the dispute which was referred to it within six weeks of its reference and thereafter the Court (or the Tribunal) would for reasons to be recorded in writing fix a later date for disposal of the dispute. Learned counsel, therefore, submitted that when the first date was fixed as per Rule 12, the Tribunal ought to have culled out the issues which it had to decide viz-a-viz the contesting parties and thereafter the award should have been passed. Learned counsel further submitted that before the award was passed, the parties ought to have

been afforded an opportunity to lead evidence on the merits of the case. Learned counsel, therefore, submitted that when the award itself was giving out the issues for the first time, then the issues, it could be said, were only a guidance for the Labour Court to pass the award and not an intimation to the parties to lead evidence or to place their arguments.

(iv) Learned counsel for the petitioner submitted that the award, after having held that the respondent no.3 was a workman, had also as per the issue no.2 which was for the first time struck in the award itself, decided that against the respondent no.3 no proper domestic enquiry was held which had resulted in the order of termination dated 17.5.2005 and, therefore, the learned counsel submitted that the award itself had to be set-aside. Learned counsel for the petitioner relying upon **(2001) 5 SCC 433** : **Karnataka State Road Transport Corporation vs. Laxmidevamma & Anr.** submitted that had the proceedings before the Labour Court proceeded after a proper intimation to the employer that hearing would take place viz-a-viz. issue no.2, then the petitioner would have led evidence with regard to the fact that the respondent no.3 was granted various opportunities to face the charges at the time of the domestic enquiry. Learned counsel submitted that since there was an order of the Labour Court itself dated 3.4.2019 that initially it had to be seen as to whether the respondent no.3 was a workman or not and since no issue had been framed, the petitioner had not sought leave of the Court/Tribunal to lead additional evidence to support its domestic enquiry. Learned counsel submitted that even if the petitioner/employer had not sought leave in the written statement to lead additional evidence to support its action in the event the enquiry was held to be bad then there were no fetters on the powers of the Tribunal to allow the petitioner to lead additional evidence after holding as to whether the respondent no.3 was a workman. In any view of the matter before holding that the enquiry was erroneous an opportunity to the petitioner was a must. Learned counsel for the petitioner relied upon paragraph 45 of the judgment of the Supreme Court reported in (**2001) 5 SCC 433** and, therefore, the same is being reproduced here as under :-

"It is consistently held and accepted that strict rules of evidence are not applicable to the proceedings before the Labour Court/Tribunal but essentially the rules of natural justice are to be observed in such proceedings. Labour Courts/Tribunals have the power to call for any evidence at any stage of the proceedings if the facts and circumstances of the case demand the same to meet the ends of justice in a given situation. We reiterate that in order to avoid unnecessary delay and multiplicity of proceedings, the management has to seek leave of the court/tribunal in the written statement itself to lead additional evidence to support its action in the alternative and without prejudice to its rights and contentions. But this should not be understood as placing fetters on the powers of the court/tribunal requiring or directing parties to lead additional evidence including production of documents at any stage of the proceedings before they are concluded if on facts and circumstances of the case it is deemed just and necessary in the interest of justice."

(v) Learned counsel for the petitioner submitted that the Supreme Court in (**2005) 2 SCC 684 : Divyash Pandit vs.**

Management NCCBM had held that the petitioner should have been allowed the opportunity to lead evidence to support its domestic enquiry after holding whether the respondent no.3 was a workman. Still further, learned counsel for the petitioner relied upon **(2018) 18 SCC 21 : M.L. Singla vs. Punjab National Bank & Anr.** and submitted that in the interest of justice at any point of time, both the employer and the employee could raise any question which went to the root of the matter. He submitted that before the case was concluded, parties could always adduce such evidence which could have bearing on the decision of the case. In the instant case, therefore, learned counsel for the petitioner submitted that, when after the Labour Court had decided as to whether the respondent no.3 was a workman, it ought to have allowed the parties to lead further evidence as to whether the domestic enquiry was properly conducted or not and, therefore, he submits that since there was no opportunity granted to the petitioner to lead evidence as to whether the domestic enquiry was properly conducted, the award deserves to be set-aside.

7. Learned counsel appearing for respondent no.3 has submitted his Written Arguments and made the following submissions :-

(i) Learned counsel for the respondent no.3 submitted that it was open for the Labour Court to have given its decision on merits after having found that the respondent no.3 was a workman. Learned counsel relying upon Rules 18, 19, 25, 30 and 32 of "The Industrial Tribunal and Labour Courts Rules of Procedure, 1967" submitted that Rules 18 and 19 had provided the stage when the issues could be framed and when documents could be filed. He, however, submitted that the framing of issues was not essential for the Labour Court and only as per the law laid down in 1**978 Labour & Industrial Cases 1667 : Hindustan Tin Works vs. Its employees** additional issues could be framed. Since, learned counsel for respondent no.3 had heavily relied upon Rules 18, 19, 25, 30 and 32 of the 1967 Rules, the same are being reproduced here as under :-

"**18. Issues.**--After the written statements and rejoinders (if any), of both the parties are filed and after examination of parties (if any), the Industrial Tribunal or Labour Court may frame such other issues, if any, as may arise from the pleadings.

19. Documentary evidence.--Parties and/or their authorised representatives shall produce at the time of filing rejoinder and/or on the date of the issues of the documentary evidence in their possession on which they intend to rely and which had not already been filed earlier, and such other documents as ordered by the Industrial Tribunal or Labour Court or the Arbitrator. The documents shall be accompanied by an accurate list thereof. Except with the special leave of the Industrial Tribunal or the Labour Court, as the case may be, no document shall be allowed to be filed afterwards.

25. Hearing..--Where on any date to which the hearing has been adjourned the parties or any of them fail to appear (irrespective of the fact as to on whose motion the last hearing was adjourned) the Tribunal or the Labour Court may proceed to dispose of the dispute on merits.

30. Recording of oral evidence.--Oral evidence shall be recorded in a

narrative form but the Industrial Tribunal or Labour Court may order any portion of the evidence to be recorded in the form of question and answer.

32. Rights to argue.--After the close of evidence normally the party who led evidence shall first argue the opposite party may reply and thereafter the former party may further reply."

(ii) Learned counsel appearing for respondent no.3 thereafter drew the attention of the Court to the various pleadings which were exchanged between the parties and submitted that at no point of time the petitioner/employer had made any application for an opportunity to lead evidence or to prove the charges against the respondent no.3. Learned counsel also submitted that the Special Appellate Court which had passed the order dated 16.1.2012 had at no point of time forbidden the Tribunal to decide the Reference along with the decision of the issue with regard to the fact as to whether the respondent no.3 was a workman. Still further, learned counsel for respondent no.3 submitted that the Labour Court, in the fitness of things, had framed issues while passing the award which definitely guided it to come to a proper conclusion.

(iii) In the end, learned counsel for respondent no.3 submitted that the petitioner/employer at no point of time had prayed that it be allowed to lead evidence to prove the charges against the respondent no.3.

8. Having heard learned counsel for the petitioner and the learned counsel for the respondent no.3, the Court finds that admittedly the Special Appellate Court had passed an order by which it had directed the Labour Court to first ascertain as to whether the respondent no.3 was a workman. Still further, the Court finds that on 3.4.2019, the Labour Court had framed an issue by which it had concluded that initially before answering the Reference, it had to be seen as to whether respondent no.3 was a workman. Thereafter the Court finds that on various dates when the case was fixed i.e. on 7.5.2019, 14.5.2019, 17.5.2019, 27.5.2019, 9.7.2019, 6.8.2019 and 17.9.2019 nowhere did the Labour Court insist on the parties to make submissions with regard to the merits of the case. The Court finds that only on the last date i.e. on 17.9.2019, the Labour Court had observed that in the presence of the parties, arguments were heard. It is not clear as to whether arguments were heard on the preliminary issue with regard to the fact as to whether the respondent no.3 was a workman or whether arguments were heard on the merits of the Reference also. The order-sheet as has been annexed in the writ petition also does not show that issues were framed by the Labour Court before the award was passed and it is definitely not clear that the parties were made aware as to which of the issues would have to be addressed by the parties. When a matter is referred to a Labour Court by means of a Reference, the parties are aware as to what has to be adjudicated upon in the case. However, when only the issue with regard to the determination of the fact as to whether respondent no.3 was a workman was being decided, it cannot be gleaned from the proceedings that the parties were ever made aware of the fact as to whether they were to address the Labour Court on merits also. Had the Court after ascertaining as to whether the respondent no.3 was a workman directed the parties to make their submissions on merits, then no fault could have been found. However, in

the instant case, the Court found that on 3.4.2019, the issue with regard to the fact as to whether the respondent no.3 was a workman was framed and parties were required to make their submissions with regard to it alone. Thereafter various dates were fixed and it was expected that the parties would make submissions on the issue framed on 3.4.2019 first. Still further, the Court finds that nowhere in the order-sheet the issues as had been enumerated in the award were framed and, therefore, it cannot be concluded that the parties had sufficient notice as to in what regard they had to address the Labour Court.

9. A perusal of the award of the Labour Court definitely shows that after hearing was concluded on 17.9.2019, the Labour Court had answered the Reference on merits and in the award itself, issues were also framed. The proper course for the Labour Court ought to have been that it should have earlier framed issues and thereafter it should have directed the parties to make their submissions.

10. So far as the question with regard to mentioning about an opportunity in the Written Statement is concerned, suffice it to say that no adjudication in that regard was essential at this point of time. Before finding that the domestic enquiry was erroneous the Court ought to have heard the parties on that issue and, thereafter, if the enquiry was found defective the question of leading evidence on the charges would have arisen.

11. Under such circumstances, the award dated 4.10.2019, so far as it decides the Reference, cannot be sustained in the eyes of law and it is, accordingly, set aside. The finding with regard to the fact that the respondent no.3 was a workman, however, as was arrived at after a full-fledged argument and has not also been assailed by the petitioner, would remain.

12. The Labour Court would now hear the petitioner and the respondent no.3 on merits viz-a-viz. issue nos.2 and 3 as can be found in the award. The Labour Court shall permit the parties to lead evidence, documentary as also oral and thereafter answer the Reference. This exercise shall be concluded within two months from the date of presentation of a certified copy of this order.

13. The writ petition is, accordingly, partly allowed.

(2020)07ILR A389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 3175 of 2020

Jugal Kishore Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta

Counsel for the Respondents:
C.S.C.

Civil Law-The Uttar Oradesh excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Sixteenth Amendment) Rules, 2019-Rule 8 (d) (iii) -Pendency of a Criminal Case-sufficient to deny issue of a character certificate.

Held, a person against whom a criminal case is pending, cannot be said to be a person having no criminal background. If the character certificate is issued despite pendency of a criminal case, because there is yet no conviction, and on the basis thereof the petitioner applies for the grant of license of

foreign liquor shop, the same would not be in consonance with the eligibility conditions as prescribed under Rule 8 (d)(iii) of the Rules, 2019. (Para 29)

Writ Petition dismissed. (E-9)

List of Cases cited:-

1. Vijay Prakash Pandey Vs District Magistrate and others [Writ Petition No.328/2009(M/s) decided on 8.7.2009]

2.Krishna Pal Singh Chauhan Vs D.M., Haridwar . & ors. [Writ Petition No.1176 of 2014 (M/s) decided on 27.5.2014]

3.Dharam Pal Singh Vs St. of Raj. [Civil Special Appeal (Writ) Nos. 893, 948, 956, 895 and 1025 of 1998 decided on 10.3.2000]

4. Rajnath Singh Vs State of U.P. . &2 ors. [Writ – C No.34480 of 2014 (D.B.)

5. Nilgiris Bar Association Vs T.K. Mahalingam (1998) 1 SCC 550

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

1. We have heard Sri Rohan Gupta, learned counsel for the petitioner and learned Standing Counsel for respondent nos.1 and 2 and have perused the material brought on record.

2. The petitioner has filed the present petition for the following reliefs :-

"a. Issue an appropriate writ, order or direction in the nature of certiorari quashing the impugned order dated 22.1.2020 passed by the District Magistrate Rampur,

b. Issue an appropriate writ, order or direction in the nature of mandamus, directing the Respondents to permit the petitioner to participate in the tender (lottery) process for the renewal of his license, scheduled to be held from 28.1.2020 to 3.2.2020, for the allotment of liquor shop for the year 2020-21, in accordance with law,

c. Issue any other suitable writ, order or direction which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

d. Award costs of the writ petition to the petitioner throughout."

3. The facts of the case as disclosed in the writ petition are that the First Information Report in Case Crime No.223 of 2017 under Sections 147/149/353/332/504/506 and 323 of the Indian Penal Code (IPC) was registered at Police Station Shahabad, District Rampur, against the petitioner on 15.4.2017 in which a charge sheet dated 30.5.2017 was filed against the petitioner but after further investigation under the orders of the Superintendent of Police, Rampur, a final report dated 10.1.2018 was submitted. However, at the instance of informant/respondent no.3, further investigation was directed and thereafter, a charge sheet dated 8.1.2019 was filed against the petitioner. The petitioner challenged the said charge sheet by way of filing Criminal Misc. Application No.10944 of 2019 (Smt. Akhtari and 5 others v. State of U.P. And Another) under Section 482 Cr.P.C., in which this Court by interim order dated 8.8.2019, provided inter alia, that no coercive measures shall be taken against the petitioner. It is stated that in pursuance of the interim order dated 8.8.2019, the process issued against the petitioner in Case No.18 of 2019 (State v. Rafeeq and others) arising out of Case Crime No.223/2017, were recalled by the Additional Chief Judicial Magistrate-II, Rampur by order dated 19.8.2019.

4. The petitioner was issued a character certificate by the District Magistrate/Collector, Rampur on 19.4.2018 despite the F.I.R. dated 15.4.2017. The said

certificate was cancelled by order dated 22.6.2019 without affording any opportunity of hearing to the petitioner. Consequently, the petitioner filed Writ - C No.21242 of 2019 (Jugal Kishore v. State of U.P. And 2 others) which was disposed of by this Court by order dated 4.7.2019 with the direction to the District Magistrate/Collector, Rampur, to pass a fresh order in accordance with law, after giving opportunity of hearing to the petitioner. The petitioner filed an application to restore his character certificate but the same was rejected by order dated 22.1.2020 passed by the District Magistrate, Rampur.

5. The petitioner has also stated that he continued to run his allotted liquor shop for the year 2019-20, but in view of the cancellation of the petitioner's character certificate by order dated 22.1.2020, the petitioner would be deprived of participating in the tender proceedings (lottery) for the renewal/allotment of liquor shop for the year 2020-21 scheduled to be held from 28.1.2020 to 3.2.2020 inasmuch as one of the tender conditions is that the applicant for the liquor shop must have a valid character certificate issued by the District Magistrate of the concerned district.

6. It is in the background of the aforesaid facts that the petitioner has prayed for the reliefs mentioned hereinabove for quashing of the order dated 22.1.2020 and for direction to the respondents to permit the petitioner to participate in the process for allotment /renewal of liquor shop.

7. Learned counsel for the petitioner has submitted that on the ground of pendency of the criminal case, the petitioner's character certificate could not be cancelled. He has further submitted that the character certificate was granted on 19.4.2018 when the F.I.R. dated 15.4.2017 had already been lodged. He has next submitted that a reasonable opportunity of hearing was not afforded to the petitioner before cancellation of the character certificate inasmuch as a copy of the complaint, upon which the proceedings were initiated, was not provided to him. His further submission is that the order of cancellation of the character certificate is also contrary to the provisions of the Uttar Pradesh Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Sixteenth Amendment) Rules, 2019, which according to him, under Rule 8(d)(iii), requires the applicant to furnish a notarized affidavit of being of good moral character and not having been convicted. His submission is that the criteria for cancellation of character certificate which decides the eligibility for participating in the tender/e-lottery proceedings should be in terms of the conditions of the eligibility and cannot be based on the guidelines in deviation therefrom.

8. Learned counsel for the petitioner has relied upon the judgements of the High Court of Uttarakhand in the cases of **Vijay Prakash Pandey v. District Magistrate and others [**Writ Petition No.328/2009(M/s) decided on 8.7.2009]; **Krishna Pal Singh Chauhan v. District Magistrate, Haridwar & others** [Writ Petition No.1176 of 2014 (M/s) decided on 27.5.2014] and the Full Bench Judgement of the High Court of Rajasthan in the case of **Dharam Pal Singh v. State of Rajasthan** [Civil Special Appeal (Writ) Nos. 893, 948, 956, 895 and 1025 of 1998 decided on 10.3.2000] paragraphs 145-149.

9. Learned Standing Counsel has supported the order dated 22.1.2020 as having been passed after affording opportunity of hearing to the petitioner. He has submitted that the order dated 22.1.2020 does not suffer from any illegality inasmuch as the same has been passed after it was found that the criminal case was pending against the petitioner at the time of grant of character certificate but this fact was suppressed. He has next submitted that the petitioner's character certificate having been cancelled, he is not eligible to participate in the proceedings for renewal/allotment of the liquor shop.

10. We have considered the submissions advanced by learned counsel for the parties.

11. It is not in dispute that the F.I.R. in Case Crime No.223/2017 under Sections 147/149/353/332/504/506 and 323 of the Indian Penal Code (IPC) dated 15.4.2017 was lodged in which the petitioner is one of the accused. The character certificate was issued by the District Magistrate, Rampur on 19.4.2018.

12. A perusal of the character certificate shows that in Clause (7), relating to the particulars of the criminal cases, it is written "none". Clause (7) is being reproduced as under :-

7. अपराधिक मुकदमों का विवरण–कोई नहीं

13ण प्ज पे ंसेव तमसमअंदज जव तमचतवकनबम ब्संनेम ;8द्ध वि जीम बींतंबजमत बमतजपपिबंजमण्पबी पें नदकमत रू.

8. सामान्य ख्याति :– पुलिस अधीक्षक, रामपुर के पी0वी0आर0 सं0 73/2018 दिनांक 07–03–2018 के अनुसार स्थानीय थाना व एल0आई0यू0 के अभिलेखों में इनके विरूद्ध कोई प्रतिकूल प्रविष्टि नहीं पाई गई।"

14. Further, note nos.1 to 3 in the character certificate itself provided as under :-

"नोटः– यह प्रमाण पत्र पुलिस अधीक्षक रामपुर द्वारा निर्गत चरित्र प्रमाण पत्र सख्या पी0वी0आर0 73/2018 दिनांक 07.03.2018 एवं उप जिला मजिस्ट्रेट शाहबाद की आख्यां दिनांक 03.04.2018 के आधार निर्गत किया गया है।

2– यह प्रमाण पत्र सामान्यतः दो वर्ष के लिए मान्य होगा यदि इससे पूर्व कोई अपराधिक घटना होती है अथवा प्रार्थी के विरूद्ध कोई अपराधिक मुकदमा आदि दर्ज होती है या वह किसी संगठित अपराध में या माफिया गतिविधियों में या आसामाजिक गतिविधियों में पकड़ा जाता है तो पुलिस विभाग का यह उत्तरदायित्व होगा कि इसकी सूचना वह जिला मजिस्ट्रेट/कलेक्टर तथा सम्बन्धित विभाग के अधिकारियों को देगा और प्रमाण पत्र तत्काल निरस्त किया जायेगा।"

3– इस प्रमाण पत्र के निर्गत करने अथवा निरस्त करने के सम्बन्ध में अंतिम निर्णय सम्बन्धित जिला मजिस्ट्रेट/कलेक्टर का होगा।

15. Thus, it is evident from perusal of the character certificate issued to the petitioner that the same was issued on account of suppression of the material fact of pendency of the criminal case against the petitioner. However, the certificate itself provided that in case any criminal incident or registration of criminal case or the involvement of the holder of the certificate, in any of the criminal case/activities e.g. organized crime, mafia activities or anti-social activities, it shall be the responsibility of the police authorities to give information to that effect to the District Magistrate/Collector and then the character certificate shall be cancelled and the decision of the District Magistrate shall be final.

16. The impugned order dated 22.1.2020 has been passed stating specifically that the petitioner concealed the material fact of pendency of criminal case no.223/2017 under Sections 147/149/353/332/504/506 and 323 of the Indian Penal Code (IPC) against him in which the charge sheet no.6/2019 has been filed on 8.1.2019. This ground of cancellation and its correctness is not in dispute and has not been denied by the petitioner.

17. In the case of **Rajnath Singh v. State of U.P. and 2 others [Writ - C No.34480 of 2014** (D.B.) decided on 11.7.2014], wherein also the applicant/petitioner therein did not disclose the pendency of the criminal case when he applied for the character certificate and on this ground of suppression of the criminal case, the District Magistrate cancelled his character certificate, this Court upheld the order of cancellation, and held as under :-

"The admitted facts before the Court are that the earlier character certificate was valid until 11 August 2013. Thereafter the petitioner was required to apply afresh for the grant of a character certificate. During the period of the earlier character certificate, a show cause notice was issued to the petitioner but based on the interim order passed by a learned Single Judge of this Court on an application under section 482, the term of the certificate which was to expire on 11 August 2013 was allowed to continue. When the petitioner applied afresh, it was his bounden duty to disclose the pendency of the criminal case. In a public office where the District Magistrate has to dispose of administrative and quasi-judicial work relating to a large body of persons in society, it cannot be assumed that he would continue to have knowledge of a disclosure which was made in pursuance of a notice to show cause issued in August 2012 in relation to the grant of the earlier character certificate. When a new character certificate was sought, all material facts were required to be disclosed and it cannot be postulated that the District Magistrate would have constructive notice of developments which had come on the record when the earlier character certificate held the field. The petitioner has specifically admitted that he had not disclosed the pendency of the criminal case. The District Magistrate cannot be regarded as being in error or having acted with any perversity in holding that there was suppression of fact by the petitioner and that the interim order passed by the Court did not obliterate the pendency of the criminal case.

In this view of the matter, we do not find that within the four corners of the parameters of the jurisdiction under Article 226 of the Constitution any case for interference has been made out."

18. In the case of ***Rajnath Singh (supra)***, the proceedings of the criminal case pending in the Court of Chief Judicial Magistrate were stayed. This Court held that the interim order passed by this Court did not obliterate the pendency of the criminal case. As such, in the present case also, the pendency of Criminal Case No.223 of 2017 against the petitioner, is not obliterated because of the interim order dated 8.8.2019 passed by this Court in application under Section 482 No.10944 of 2019 filed by the present petitioner, alongwith others, which provided that no coercive measures shall be taken against the petitioner. The contention of the petitioner's counsel based on the interim

order dated 8.8.2019 and the order passed by the A.C.J.M.-II, Rampur dated 19.8.2019 withdrawing the process issued to the petitioner, pursuant to the interim order dated 8.8.2019, that the character certificate could not be cancelled on mere pendency of the criminal case has no substance and does not appeal us.

19. In the case of ***Vijay Prakash Pandey (supra)***, relied upon by the petitioner's counsel, we find that the petitioner therein was convicted about 20 years back and was released on probation of good conduct in exercise of the powers under Section 360 Cr.P.C. and these facts were not taken into consideration while refusing to issue character certificate by the District Magistrate. The present is the case of suppression of pendency of criminal case by the present petitioner and as such, the case of ***Vijay Prakash Pandey (supra)*** is of no help to the petitioner.

20. In the case of ***Krishna Pal Singh Chauhan (supra)*** relied upon by the petitioner's counsel, the application for issue of character certificate was rejected in view of pendency of criminal case, whereas on earlier occasions, character certificates were being issued from time to time. Besides, this does not appear to be a case of suppression of fact of pendency of the criminal case. In ***Krishna Pal Singh Chauhan (supra)*** it was held that the offences therein did not involve moral turpitude. In the present case, the petitioner's counsel has not been able to show us that the character certificate could not be cancelled on the ground of the pendency of the criminal case unless the offences involved moral turpitude. As such, the question of the offences involving moral turpitude to be the basis of cancellation of character certificate does not arise at all. The Krishna Pal Singh Chauhan (supra) in our view, is of no help to the petitioner.

21. In view of the judgement of our own High Court in the case of ***Rajnath Singh (supra)*** we are not inclined to rely upon the judgement of the High Court of Uttarakhand in the cases of ***Vijay Prakash Pandey (supra),*** and ***Krishna Pal Singh Chauhan (supra),*** which in our view, do not apply to the facts of the present case as well.

22. In the case of ***Dharam Pal Singh v. State of Rajasthan*** [Civil Special Appeal (Writ) No.893/98] ***(supra),*** relied upon the petitioner's counsel, Dharam Pal Singh was denied employment on the post of Constable in the Rajasthan Police Subordinate Services as he had suppressed the information that the F.I.R. was lodged against him for the offences under Section 323 and 34 IPC and had not disclosed this fact in his application form. The following questions were referred to the Full Bench :-

"(1) Whether the fact that a candidate was prosecuted or subjected to investigation on a criminal charge is a material fact, suppression of which would entitle an employer to deny employment to a candidate on that ground?

(2) Whether the ultimate acquittal of a candidate who was prosecuted on a criminal charge would condone or wash out the consequences or suppression of the fact that he was prosecuted?

(3) Whether the suppression of the material fact would not by itself disentitle a candidate from being appointed in service?"

23. The full Bench answered the above questions as under :-

"1. That a candidate was prosecuted or subjected to investigation on a criminal charge is a material fact, suppression of which would entitle an employer to deny employment to a candidate on that ground.

2. That ultimate acquittal of a candidate who was prosecuted on a criminal charge would not condone or wash out the consequences or suppression of the fact that he was prosecuted.

3. That suppression of the material fact would by itself disentitle a candidate from being appointed in service."

24. If we apply the principles of law laid down in ***Dharam Pal Singh (supra)*** which is a case of denial of employment to the person, to the case of cancellation of character certificate, the impugned order dated 22.1.2020 is perfectly justified as suppression of material fact of pendency of a criminal case by itself disentitled the petitioner to have the character certificate.

25. The petitioner's counsel has relied upon relevant paragraphs 145 to 149 of the case of ***Dharam Pal Singh (supra).*** In paragraph 145, the case of one Om Prakash (appellant in Civil Special Appeal No.956/98) was being dealt with, who had not suppressed any material information and as per paragraph 146, the only question to be decided, with respect to Om Prakash, was whether the commission of offence under Section 379 IPC could be treated as an index of such deficiency of character so as to deny him the appointment to the post of constable, particularly when the offence was committed before he attained the age of 18 years and was given the benefit of Probation of Offenders Act. The Full Bench of the Rajasthan High Court considered Rule 13 of the Rajasthan Police Subordinate Service Rules, 1989, which provided as under, as regards character :-

"13. Character. - The Character of a candidate for direct recruitment must be such as to qualify him for employment in the Service. He must produce a certificate of good character from the Principal Academic Officer of the University or College or School in which he was last educated and two such certificates, written not more than six months prior to the date of application, from two responsible persons not connected with his School or College or University and not related to him.

Notes.- (1) A conviction by a Court of Law need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account and if they involve no moral turpitude or association with crimes of violence or with a movement, which has its object to overthrow by violent means a Government as established by law, the mere conviction need not be regarded as a disqualification."

26. The reading of Rule 13 note (1) makes it very clear that the Rule itself provided that a conviction by a Court of Law need not by itself involve the refusal of good character. It was in the background of the above facts, i.e. no suppression of material information and the law i.e. Rule 13 r/w note (1), it was held that denial of appointment merely on the ground of conviction was unjustified and also that mere submission of the charge sheet in respect of any offence by itself was not

sufficient to disqualify that person. In the present case, there was suppression of material fact of pendency of the criminal case against the petitioner. Further, the petitioner's counsel has not been able to place before us any such Rule that mere pendency of a criminal case by itself would not involve cancellation of the character certificate.

27. Now, we proceed to consider the next submission of the learned counsel for the petitioner that the order of cancellation of the character certificate is contrary to The Uttar Pradesh excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Sixteenth Amendment) Rules, 2019. He submitted that the license of a liquor shop may be cancelled only if the holder thereof is convicted of any offence punishable under the Act of 1910 or any other law for the time being in force. The Rules 2019 also require filing a notarized affidavit of good moral character and of not having been convicted. The submission is that the character certificate could not be cancelled on the ground of pendency of the criminal case but could be cancelled only on the ground of conviction in a criminal case, as on this ground, the liquor license may also be cancelled.

28. It is relevant to reproduce Rule 8(d)(iii) of the Rules, 2019, for our purpose on which reliance has been placed :-

"**8. Eligibility conditions for applicant.** - Eligibility Applicants for licence of a Retail foreign liquor shop must fulfil following conditions namely:-

(a) to (c) -------.

(d) submit an affidavit duly verified by public notary as proof of the following namely:-

(i) and (ii) ----------.

(iii) that he and his family members possess good moral character and have no criminal background nor have been convicted of any offence punishable under the United Provinces Excise Act, 1910 or the Narcotics Drugs and Psychotropic Substances Act, 1985 or any other cognizable and nonbailable offence.

(iv) to (xi) -------."

29. A bare perusal of Rule 8 (d) (iii) of the Rules 2019 shows that the applicant for the license of a retail foreign liquor shop, shall submit an affidavit duly verified by public notary as proof of the fact that he and his family members possess good moral character and have no criminal background nor have been convicted of any offence punishable under the United Provinces Excise Act, 1910 or the Narcotics Drugs and Psychotropic Substances Act, 1985 or any other cognizable and non-bailable offence. It specifically provides that the applicant for the license of a retail foreign liquor shop must have no criminal background. If the applicant has a criminal background, then also, he does not fulfil the eligibility conditions, as in such a case, he cannot file an affidavit duly verified by a public notary in terms of Clause (d) (iii) of Rule 8 of the Rules 2019. The conviction in a criminal case is not must for being ineligible as provided under Rule 8. The pendency of a criminal case would be sufficient to deny issue of the character certificate or for its cancellation, and particularly where

pendency of such case was supressed at the time of issue of the character certificate. A person against whom a criminal case is pending, cannot be said to be a person having no criminal background. If the character certificate is issued despite pendency of a criminal case, because there is yet no conviction, and on the basis thereof the petitioner applies for the grant of license of foreign liquor shop, the same would not be in consonance with the eligibility conditions as prescribed under Rule 8 (d)(iii) of the Rules, 2019. As such we find that the impugned order dated 22.1.2020 cannot be said to be contrary to the provisions of the Rules, 2019.

30. *"Character"* means "an attribute, quality, esp, a trait or characteristic which serves as an index to the essential or intrinsic nature of a person"; reputation, repute; as a man's character for truth and veracity, a description, delineation, or detailed account of the qualities or peculiarities of a person." (Webster's New International Dictionary)

31. According to Law Lexicon, "character" means "estimation of a person by his community; particular qualities impressed by nature or habit on a person which distinguish him from others". Character lies in the man, it is the mark of what he is, it shows itself on all occasions, reputation depends upon others; and it is what they think of him. According to Oxford Dictionary "character" means "collective peculiarities, sort, style, reputation, description of person's qualities, testimonial, status".

32. In the case of ***Nilgiris Bar Association v. T.K. Mahalingam (1998) 1 SCC 550,*** paragraph 10, the Hon'ble Apex Court has held as under :-

"The word "character" is not defined in the Act. Hence, it must be given the ordinary meaning. According to Webster's New International Dictionary "character" means "an attribute, or quality especially a trait or characteristics which serves as an index to the essential or intrinsic nature of a person". In Black's Law Dictionary "character" is defined as "the aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguished attributes". The celebrated lexicographer has at the same time pointed out the following aspects also about the subject:

"Although character and reputation are often used synonymously, the terms are distinguishable. `Character's is what a man is, `reputation' is what he is supposed to be in what people say he is, `Character' depends on attributes possessed and `reputation' on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present."

33. Thus, the term "character" is of very wide import and it comprehends all those traits, dispositions, habits, ways of acting and inter acting in certain situations which give an idea of the personality and enable others to form an opinion and a reasonable degree of expectations as to how the person would conduct himself in the situation in respect of which his characteristics are visible or otherwise known. As such, the character certificate must reflect the true character of the person holding that certificate to enable others to form an opinion and a reasonable degree of expectation as to how that person would conduct himself in certain situations. The

public at large must not be misled by wrong issue of the character certificate.

34. We also do not find force in the submission of learned counsel for the petitioner that the impugned order dated 22.1.2020 suffers from violation of the principles of natural justice for non-supply of a copy of the complaint to the petitioner which was filed by respondent no.3 before District Magistrate/respondent no.2 inasmuch as the ground of cancellation of the character certificate i.e. the pendency of the criminal case against the petitioner and its suppression by the petitioner, is not in dispute. The petitioner was afforded opportunity of hearing and was heard before passing the order dated 22.1.2020.

35. Thus, we do not find any illegality in the impugned order dated 22.1.2020 passed by the District Magistrate.

36 . The writ petition lacks merit and is hereby dismissed. No order as to costs.

(2020)07ILR A398
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE ASHWINI KUMAR MISHRA, J.

Writ C No. 1671 of 2020

Dheeru Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anoop Trivedi, Sri Vibhu Rai, Sri Abhinav

Counsel for the Respondents:
C.S.C., Sri Rohit Pandey

Civil Law-U.P. Anusuchit Jati Aur Anusuchit Janjati Dashmottar Chatravritty Yojna Niyamawali, 2012-Petitioners have not qualified the Joint Enterance Exam-admitted directly-are lower in merit than management quota/spot counselling-cannot seek parity -rightly denied scholorship-falls under exempted category.

Held, the position otherwise appears to have been further clarified by the State vide Government Order dated 14.10.2019 as per which the entitlement to receive scholarship to the students belonging to management quota has entirely been done away with. Even otherwise, petitioners have not secured admission on the strength of their merit to be determined in the Joint Entrance Examination result. In such circumstances, if the State has denied consideration to petitioners' claim for grant of scholarship, no exception can be taken to it. (Para 15)

Writ Petition dismissed. (E-9)

List of Cases cited:-

1. Modern Dental College & Research Centre . & ors. Vs St. of M.P. . & ors., (2010) 14 SCC 186.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioners, who are five in number, have approached this Court for a direction upon the State authorities to release scholarship to them for the academic sessions 2018-19 and 2019-20 in accordance with Uttar Pradesh Anusuchit Jati Aur Anusuchit Janjati Dashmottar Chatravritty Yojna Niyamawali, 2012 (hereinafter referred to as 'Rules of 2012') and to continue to release the same in subsequent academic sessions of B.Tech course.

2. A perusal of record would go to show that the petitioners have been denied scholarship under the Rules of 2012 as they

have not qualified the joint entrance examination and are consequently treated in the exempted category of students like those belonging to the management quota or spot counseling etc. It is urged on behalf of the petitioners that the State Government has already framed the Rules of 2012 for payment of fee reimbursement/scholarship to the students which does not contain any clause exempting them from the grant of benefit of scholarship. The Rules of 2012 is contained in Annexure-1 to the writ petition. It is urged with reference to the provisions of Rules of 2012 that there is no stipulation for denying scholarship to students who have been admitted without qualifying the Joint Entrance Examination, and therefore, a condition not stipulated in the rules cannot be made the basis for denying consideration to petitioners' claim for payment of scholarship.

3. While taking note of such submissions this Court had passed following orders on 13.2.2020:-

"As per the instructions received by learned Standing Counsel, petitioners' claim for grant of scholarship under the scheme of the State is not liable to be entertained as the petitioners have been admitted under management quota.

Sri Anoop Trivedi, learned Senior Counsel for the petitioners states that petitioners in fact have not been admitted in the management quota but have been admitted against left over counseling seats as per the instructions issued by the University contained in circular dated 6th July, 2018. It is stated that petitioners got themselves registered as per the procedure laid down in the notice dated 6th July, 2018 and their admission cannot be treated to be that of management quota. Learned Senior Counsel also places reliance upon a communication sent by the University to the Director, Samaj Kalyan dated 6.2.2019, according to which the petitioners, who have been admitted against left over counseling seats, are entitled to payment of scholarship under the scheme of the State.

Learned Standing Counsel as also Sri Rohit Pandey who appears for the University will obtain instructions and place before the Court relevant Government Orders, as per which petitioners' admission is being treated as one under the management quota. Post as fresh, once again, on 25.2.2020."

4. Learned Standing Counsel has obtained instructions, according to which the scholarship scheme formulated in the year 2012 has been modified vide Government Orders dated 16.1.2018 and 26.6.2018, as also a clarificatory letter issued by the Director, Department of Social Welfare on 30.10.2019. It is stated that the scheme contemplates payment of fee reimbursement/scholarship to those students who have been admitted as per procedure laid down for admission i.e. passing of entrance examination etc. and the category of students like management quota and spot admissions have clearly been excluded from the benefit of scholarship under the scheme. It is also sought to be urged that petitioners have not participated in the counselling and having been directly admitted by the management they fall in the category of students who are excluded from the purview of scholarship scheme. It is also submitted that petitioners having been directly admitted by the college cannot assert any higher priority than the students admitted in management quota, particularly as those students (management quota and spot counselling)

have atleast cleared the joint entrance test whereas petitioners have not.

5. Learned Senior Counsel for the petitioners submits that the management quota has already been specified in the Government Order dated 26.6.2018 and that petitioners cannot be treated to be falling in that category. Learned Senior Counsel has further invited attention of the Court to a notice published by the University on 6.7.2018, which refers to the Government Order dated 16.1.2018. The notice, as also the Government Order dated 16.1.2018, makes it explicit that all admissions are to be made in the affiliated colleges only pursuant to their registration in the University and no admission could be offered to a student unless he has got himself registered on the website created for the purpose by the University. It is contended that petitioners have been admitted after following the procedure laid down in the notice dated 6.7.2018 and is otherwise in accordance with Government Order dated 16.1.2018. Submission is that a new category cannot be carved out by the State, at this stage, to deny benefit of scholarship to petitioners, particularly when such a contemplation otherwise neither existed in the Rules of 2012 nor in any Government Order.

6. I have heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Vibhu Rai for the petitioners, Sri Rohit Pandey, learned counsel appearing for the respondent University and learned Standing Counsel for the State authorities.

7. I have examined the rival contentions raised by the parties and have also perused the materials placed on record before me, including the Government Orders dated 16.1.2018 and 26.6.2018. The scheme for payment of scholarship was notified by the State Government in the year 2012 vide Rules of 2012 and the entitlement to receive benefit of fee reimbursement has been enumerated therein. The Rules of 2012 have not been issued under any statutory provision and is in effect in the nature of administrative instruction/ Government Order dated 26.9.2012. The scholarship scheme contained in the Rules of 2012 has been modified from time to time by issuing subsequent Government Orders/instructions. It regulates the payment of scholarship to students and various provisions have been introduced from time to time, specifying the category of students who would not be entitled to fee reimbursement.

8. The admission to B.Tech. Course in various engineering colleges in the State of Uttar Pradesh is regulated by the State Government by issuing Government Orders from time to time. Ordinarily, such government orders are issued for each academic year. So far as admission to B.Tech course in academic session 2018-19 is concerned, it is regulated by the Government Order dated 16.1.2018. This Government Order substantially retains the admission procedure laid down for the previous academic sessions. The admission is to be offered in the engineering colleges as per the merit of a candidate in the joint entrance test to be conducted by the concerned University as per counselling in order to maintain transparency and fairness in the process of admission itself. The seats for admission are offered strictly based on merits, as per the criteria laid down in the Government Order dated 16.1.2018. Clause 2 of the Government Order is relevant for the present purpose and is reproduced hereinafter:-

ष्2. ष्डा0 ए0पी0जे0 अब्दुल कलाम प्राविधिक विश्वविद्यालय, उ0प्र0 लखनऊ के नियंत्रणाधीन डिग्री स्तरीय अभियंत्रण/व्यवसायिक संस्थाओं में शैक्षिक सत्र 2018–19 में निम्नवत प्रकिया निर्धारित की जाती हैः–

1: प;कद्ध शासकीय अनदानित अभियंत्रण संस्थानों, विश्वविद्यालय क घटक/सहयुक्त संस्थानों वास्तुकला संकाय आदि समस्त संस्थानों में प्रवेश के सम्बन्ध में पूर्व निर्धारित प्रकिया यथावत रहेगी।

;खद्ध शासकीय वित्त पोषित/अनुदानित अभियंत्रण संस्थाओं में काउन्सिलिंग के उपरान्त रिक्त सीटों पर छात्रों के प्रवेश हेतु शैक्षिक सत्र 2018–19 में स्पाट काउन्सिलिंग कराये जाने सम्बंधी स्पाट काउन्सिलिंग को शुचितापूर्ण एंव पारदर्शी कराये जाने के उद्देश्य से निम्नलिखित प्राविधानों का अनुपालन सुनिश्चित किया जायेगा।

;।द्ध विश्वविद्यालय द्वारा निर्धारित अन्तिम चरण की काउन्सिलिंग के पश्चात सभी शासकीय संस्थानों में रिक्त सीटों पर काउन्सिलिंग द्वारा पाये गये छात्रों को आन्तरिक ब्रांच परिवर्तन का अवसर प्रदान किया जाय ऐव उसके पश्चात रिक्त रह गई सीटों का विवरण किसी भी दशा में दिनांक 30.07.2018 तक विश्वविद्यालय को उपलब्ध कर दिया जाय।

;ठद्ध प्रवेश परीक्षा की रैंक के आधार पर मेरिट लिस्ट तैयार करते हुए स्पष्ट काउन्सिलिंग आनलाइन सम्पादित की जायेगी।

;ब्द्ध शासकीय/शासकीय अनुदानित संस्थानों में अन्तिम रूप से रिक्त सीटों पर केवल उन्ही अर्ह छात्र/छात्राओं को मौका दिया जाय, जिसे किसी कारण वश काउन्सिलिंग में कोई सीट आवंटित न हुई हो अथवा जिस छात्र/छात्रा ने प्रवेश परीक्षा उत्तीर्ण कर रैंक प्राप्त की हो और काउन्सिलिंग में प्रतिभाग न कर सका/सकी हो, अर्थात स्पष्ट काउन्सिलिंग में इण्टरनल शिफ्टिं के पश्चात रिक्त बची सीटों पर वही छात्र/छात्राये प्रवेश हेतु अर्ह होगें, जिन्हें काउन्सिलिंग द्वारा कोई सीट आवंटित न हुई हो अथवा जिनके द्वारा सीट आवंटन के पश्चात नियम समय अवधि में ूपजीकतूंस कर लिय गया हो।

;पपद्ध यू0पी0 डोमिसाइल ;प्रदेश के अभ्यर्थीद्ध

निजी डिग्री स्तरीय अभियंत्रण व्यवसायिक संस्थाओं में कुल 75 प्रतिशत सीटें यूपीएसईई–2018 द्वारा यूपी डोमिसाइल आवेदकों से भरी जायेगी।

;पपपद्ध नान यू0पी0 डोमिसाइल ;प्रदेश के बाहर के अभ्यर्थीद्ध

निजी डिग्री स्तरीय अभियंत्रण /व्यवसायिक संस्थाओं में 10 प्रतिशत सीटें ए0आई0ई0ई0ई0 ;जेईई मेन्सद्ध अथवा यूपीएसईई–2018 के माध्यम से नान यूपी डोमिसाइल आवेदकों से भरी जायेगी।

;पअद्ध मैनेजमेन्ट/एन0आर0आई0 कोटाः–

निजी डिग्री स्तरीय अभियंत्रण /व्यवसायिक संस्थाओं में 15 प्रतिशत सीटे मैनेजमेन्ट/एन0आर0आई0 कोटा प्रदेश के अथवा प्रदेश के बाहर के छात्रों से यूपीएसईई अथवा एआईईई ;जेईई मेन्सद्ध के आधार पर भरी जायेंगी।

;अद्ध काउन्सिलिंग के उपरान्त निजी क्षेत्र में सीिपत संस्थाओं में रिक्त बची सीटों के प्रवेश हेतु संस्था स्तर पर अभ्यर्थियों को प्रवेश हेतु निम्नानुसार मेरिट के आधार पर वरीयता प्रदाने की जायेंगीः–

1 विश्वविद्यालय से सम्बद्ध सभी निजी अभियंत्रण एंव व्यवसायिक संस्थानों में यूपीएसईई–2018, जेईई मेन्स, किसी राज्य सरकार अथवा राष्ट्रीय स्तर पर आयोजित प्रवेश परीक्षा में उत्तीर्ण।

2 अखिल भारतीय तकनीकी शिक्षा परिषद, नई दिल्ली द्वारा समय≤ पर विभिन्न पाठ्यक्रमों में प्रवेश हेतु यथा निर्धारित अद्यतन प्रभावी अर्हता ;अनुलग्नक–एद्ध के आधार पर।

उक्त प्रयोजन हेतु विश्वविद्यालय द्वारा एक पोर्टल ओपेन किया जायेगा, जिसमे उपरोक्तानुसार उत्तीर्ण छात्र/छात्राओं से प्राप्तांको के आधार पर आवेदन प्राप्त किया जायेगा एंव उनकी वरीयता सूची विश्वविद्यालय के वेबसाइट पर प्रदर्शित की जोयेगी। सम्बद्ध समस्त निजी

अभियंत्रण एंव व्यवसायिक संस्थाओं द्वारा उक्त प्रदर्शित वरीयता सूची मे से रिक्त बची सीटों पर प्रवेश अनुमन्य किया जायेगा।ष

9. The counselling process also includes admission by the concerned colleges on the basis of management/NRI quota for which 15% seats have been specifically reserved. The 15% management/NRI quota seats can be offered to students who are not domiciled in the State of Uttar Pradesh and have passed UPSEE or AIEEE (JEE Mains) Examination. Spot counselling is also allowed only for such students who have cleared the Joint Entrance Test but have not been able to secure admission on merits. It is only after exhausting all seats available for admission pursuant to counselling of students who have qualified Joint Entrance Test that admission is made permissible for the students who have not qualified Joint Entrance Test or other entrance examination. The seats which are still left after exhausting all rounds of counselling can be offered to students as per their merits if they have got themselves registered on the website of University concerned. Preference is required to be given to those students who have passed UPSEE Examination-2018, JEE examination or any other entrance examination conducted by national or any other state level agency. So far as regulating the admission on left over seats is concerned, a clear contemplation has been made that such seats cannot be offered unless the candidate gets himself registered on the website of University concerned. The object of registration with the University is to retain some control by the University with regard to identity of students and to rule out any undesirable act on part of the college in ignoring merit for the purposes of grant of admission. The registration of students with the University for admission has apparently no concern with the determination of merit or payment of scholarship which is regulated by the Rules of 2012.

10. The State Government has also issued a subsequent Government Order on 26.6.2018 amending the Rules of 2012 vide Seventh Amendment Rules, 2018. 'Fee' as is defined in clause 5(xvii) of the Rules of 2012 has been amended in following terms:-

ष्ठ;गअपपद्ध. ष्शुल्कष् का तात्पर्य ऐसी अनिवार्य धनराशि से है, जो अभ्यर्थियों द्वारा संस्थान या विश्वविद्यालय अथवा बोर्ड को भुगतान किया जाता है, तथापि जमानतों जमा राशि जैसी वापस की जाने वाली धनराशि इसमें शामिल नहीं होगी। शुल्क के अन्तर्गत प्रवेश/पंजीकरण, परीक्षा, शिक्षा, खेल, यूनियन, लाइब्रेरी, पत्रिका, चिकित्सा जांच और ऐसे अन्य अनिवार्य व वापस न की जाने वाली शुल्क आदि, जो सक्षम स्तर से अनुमन्य हों, शामिल होगी। छात्रावास/मेस शुल्क जैसे शल्क इसमें सम्मिलित नहीं होगें।

नोटः– 1 राजकीय व निजी क्षेत्र के शिक्षण संस्थानों में एक पाठ्यक्रम में एक ही बार में सम्पूर्ण शुल्क की अनुमति समस्त धनराशि भुगतान किये जाने पर छात्र/छात्राएं इस योजना में अपात्र होगें।

नोटः– 2 किसी विश्वविद्यालय य शिक्षण संस्थान मे प्रबन्धकीय कोटा सीट,स्पाट ;चवजद्ध प्रवेश सीट के सापेक्ष प्रवेशित छात्र/छात्राओं द्वारा दावा किये गये शुल्क की प्रतिपूर्ति अनुमान्य नहीं होगीःष

11. Second note added to clause 5(xvii) clearly excludes a student admitted in the management quota or spot counselling from the benefit of fee reimbursement under the Rules of 2012. The second note contained in the Government Order dated 26.6.2018 is not

under challenge. The interpretation of this clause is warranted in the facts of the present case as the petitioners contend that this note will not be attracted upon them inasmuch as their admission is neither in the management quota nor in the spot admission category.

12. The Government Order dated 16.1.2018 which lays down the procedure for admission, will have to be analyzed in accordance with the Rules of 2012, as amended vide Government Order dated 26.6.2018, in order to appreciate the controversy raised in the matter. It is apparent that the admission process contemplates grant of admission to students based upon their merit determined in the Joint Entrance Examination. The students belonging to scheduled caste and scheduled tribe category, who are offered admission in the academic session 2018-19 as per their merit determined in Joint Entrance Text, followed by their admission in the counselling alone are entitled to payment of scholarship as per the amended Rules of 2012. The Rules of 2012, as amended on 26.6.2018 is not under challenge. The admissions offered to students in the management quota or spot counselling have been denied benefit of fee reimbursement under the Rules of 2012 for the academic session 2018-19. The object behind denial of scholarship to students admitted in the management quota or in the spot admission category is apparently to restrict the benefit of scholarship to such students who have competed in their category and have secured admission based on merits. The scholarship scheme has been envisaged by the State with the object of facilitating and encouraging grant of higher education to the students belonging to scheduled caste and scheduled tribe category who are otherwise meritorious and are not able to pursue their studies only because of lack of funds/means. The scheme, therefore, clearly makes out a distinction between those who have been admitted purely on the basis of their merits and those who have been admitted in management quota/spot counselling. A higher fee is otherwise payable to the educational institution by the students admitted in the management quota and the object is to facilitate generation of funds by private colleges to meet its requirements. Admission in management quota has otherwise been made permissible by the Apex Court in various judgements including Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others, (2010) 14 SCC 186. The distinction carved out by the State in the matter of payment of scholarship under the Rules of 2012, based on merits of the students determined in the Joint Entrance Test and the consequential process of admission by way of counselling has an intelligible differentia and a definite object to achieve which cannot be termed as arbitrary.

13. The petitioners cannot arrogate to themselves a higher status/merit than the students admitted in the management quota or spot counselling round. Petitioners have admittedly not qualified the Joint Entrance Examination and have been admitted only against the seats left vacant after exhausting the counselling process (including management quota and spot counselling). It is already noticed that students admitted in management quota or spot counselling have to pass the Joint Entrance Examination and their merit would have to be treated higher than the students who are directly offered admission against the left over seats like the petitioners. The mere fact that petitioners got themselves registered with the

University for admission will not enhance their merits.

14. The payment of scholarship as per the Rules of 2012 is not a matter of right and ultimately remains to be considered in accordance with the scheme. Once the scheme itself makes a conscious distinction between those who are admitted on the strength of their merits in the Joint Entrance Examination followed by counselling, vis-a-vis those who have secured admission under management quota or spot admission category, no claim of parity can be sought. The petitioners contend that they do not belong to management quota and are also not in the category of spot admission in the counselling. Petitioners' merit based on the nature of admission offered to them places them in a category inferior to that of a student admitted in management quota/spot counselling category. Since the Rules of 2012, as amended on 26.6.2018, excludes the students placed in management quota/spot counselling from the benefit of fee reimbursement under the Rules of 2012, the petitioners, placed lower in merit, cannot claim payment of scholarship under the Rules of 2012. In case the argument of Sri Trivedi is accepted then it would result in an arbitrary situation where students placed lower in merit will be entitled to payment of scholarship while students higher in merit placed in management quota/spot counselling will be denied such benefit. The claim of petitioners, therefore, must fail.

15. The position otherwise appears to have been further clarified by the State vide Government Order dated 14.10.2019 as per which the entitlement to receive scholarship to the students belonging to management quota has entirely been done away with. Even otherwise, petitioners have not secured admission on the strength of their merit to be determined in the Joint Entrance Examination result. In such circumstances, if the State has denied consideration to petitioners' claim for grant of scholarship, no exception can be taken to it.

16. Writ petitioner, therefore, lacks merit and is dismissed.

(2020)07ILR A404
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ A No. 4087 of 2020

Ramhari Gurjar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Seemant Singh, Sri Pankaj Kumar Ojha

Counsel for the Respondents:
C.S.C.

Constitution of India - Article 16 - Recruitment - Examination - Rectification of error - whiling filling online examination form - petitioner not filled column-10 of the form regarding Viklangta/Vishesh Arakshan (Handicapped/Special Reservation) - On qualifying eligibility test, petitioner prayed to permit him to make correction in the form & make claim regarding Special Reservation/Handicapped Category - *Held* -once benefit of horizontal reservation under the Physically Handicapped Quota not claimed at the initial stage, column for which always existed in recruitment process, petitioner cannot be permitted to claim reservation

under the special category at subsequent stage - On merits, Disability Certificate issued after about 6 months from date of appearance in the Written Examination - Rectification cannot be allowed (Para 9, 11) **Dismissed.** (E-5)

List of cases cited :

1. Raghvendra Pratap Singh Vs St. of U.P. & ors. Special Appeal No.156 of 2019 06.05.2020

2. Ashutosh Kumar Srivastava Vs St. of U.P. & ors.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State of U.P.

2. Present petition has been filed with the following prayer:-

"Issue writ, order or direction in the nature of Mandamus directing the Secretary, U.P. Basic Education Board, Prayagraj to consider the selection of the petitioner in reference to selection on 69000 posts of Assistant Teacher to be appointed in different Primary Schools of different districts of the State of Uttar Pradesh under Physically Handicapped Quota of OBC Category initiated vide Government Order dated 13.05.2020 issued by Special Secretary, Government of U.P., Lucknow within stipulated period of time as fixed by this Hon'ble Court."

3. The petitioner has appeared in the examination conducted by the State Government being Assistant Teacher Recruitment Examination, 2019 (hereinafter referred to as ATRE-2019). The petitioner had filled up the application form, wherein admittedly he had not disclosed any kind of reservation insofar as his present claim regarding horizontal reservation in the Handicapped Quota is concerned.

4. Learned counsel for the petitioner has admitted this fact that he has not filled up column-10 of the form for appearing in the ATRE-2019 which is regarding Viklangta/Vishesh Arakshan (Handicapped/Special Reservation). Admittedly, by not filing up this column, no reservation was claimed in this category by the petitioner. This fact is admitted to learned counsel for the petitioner. He was issued Admit Card for appearing in the ATRE-2019 (Annexure-2 to the Writ Petition). A perusal of the aforesaid Admit Card clearly discloses the date of Written Examination as 06.01.2019.

5. Learned counsel for the petitioner has further admitted that the application form for appearing in the aforesaid examination was filled up by the petitioner prior to 22nd December, 2018. It is also admitted that the petitioner has obtained Disability Certificate from the Office of Chief Medical Officer, Mathura on 08.07.2019, whereby he has been shown to be suffering from 42% permanent physical impairment due to accidental injury. Clearly, this Certificate was obtained after about 8 months from the date of filing of the application form for appearing in the ATRE-2019, wherein the petitioner has admittedly not claimed any reservation in Handicapped Quota/Special Reservation. This Disability Certificate has been issued after about 6 months from date of appearance in the Written Examination. Pursuant to the issuance of Government Order dated 13.05.2020, recruitment process was started and the Secretary U.P. Basic Education Board, Prayagraj also issued a Notification dated 16.05.2020

allowing the qualified candidates to submit their online application form from 18.05.2020 to 26.05.2020, which is Annexure-8 to the Writ Petition.

6. Submission of learned counsel for the petitioner is that no option is made available to the petitioner for correcting the Special Category/Reservation i.e. physically Handicapped Category in this online application form. It has been categorically stated by learned counsel for the petitioner that in this application form (Annexure-9 to the Writ Petition), columns 1-13 are identical as existed in the application form (which is not annexed with the petition) which was filled by the petitioner at the time of applying for online application for appearing in the ATRE-2019. He further submits that earlier he has admittedly not claimed any reservation in column-10 of the said application form that he is a physically handicapped person or is claiming any special reservation and since there was no modification in the application form, therefore, he has been deprived of making claim regarding Special Reservation/Handicapped Category. He submits that the claim of the petitioner is liable to be considered and he is liable to be permitted to make correction in the form and to make claim regarding his Special Reservation/Handicapped Category. He further submits that there are two stages of the entire exercise and both the stages are entirely different. One is the stage of the Eligibility Test for which he has filled up the online form for appearing before the Examination Authority and second stage is the recruitment process, therefore, he is liable to be permitted to make correction in the form for special reservation being extended to him. Learned counsel for the petitioner has placed reliance on the judgment of Hon'ble Division Bench of this Court dated 06.05.2020 in Special Appeal No.156 of 2019 (Raghvendra Pratap Singh Vs. State of U.P. And others) along with other connected Special Appeals. He has drawn attention to the paragraphs 65-69 of the Judgment. Submission, therefore, is that such benefit is to be extended in the light of the observation made by Hon'ble Division Bench at the stage of recruitment process.

7. Per contra, learned Standing Counsel submits that it is a continuous process and in continuation of process of recruitment, online applications were invited for appearing in the ATRE-2019. He submits that it is only for this purpose and reason, the identical forms were provided and the Quality Point Marks are fixed on the basis of that result of the ATRE-2019 only. Therefore, there can be no doubt that it is a continuous process. He further submits that on the facts of the present case also, the petitioner is not entitled for consideration of his claim. Learned Standing Counsel further submits that the arguments of the petitioner that the petitioner is entitled for correction of the details and claim cannot be considered as it was never claimed earlier and the identical arguments of learned counsel for the petitioner have already been rejected by this Court in Ashutosh Kumar Srivastava Vs. State of U.P. And others.

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

9. On perusal of record, I find that admittedly, the petitioner has filled up his application form for appearing in the Sahayak Adhyapak Bharti Pariksha-2019 i.e. Assistant Teacher Recruitment Examination-2019 (ATRE-2019). He has also appeared in the Written Examination

held on 06.01.2019. It is admitted to the learned counsel for the petitioner and also as reflected from perusal of paragraph-2 of the writ petition, the petitioner, although, has claimed reservation in the category of OBC as disclosed in column-9 of the application form as reflected on Annexure-9 at page 83 of the Writ Petition, but column-10 regarding Special Reservation was not filled up. It is admitted to the petitioner that the columns no.1-13 are identical in nature as given at page 83 (after issuance of the Notification dated 16.05.2020) and the details as given which were required to be filled up at the time of applying for ATRE-2019. In column-10 of the application form the petitioner had never claimed Special Reservation under the Handicapped Quota at the time of applying for ATRE-2019. Therefore, it is clear that petitioner has claimed vertical reservation in the OBC category, however, he has not claimed any horizontal reservation of the Physically Handicapped Quota in the selection process of 69,000 posts of Assistant Teacher. It is not in dispute that Quality Point Marks were fixed as per the ATRE-2019. Further, heading of the application form (Annexure-9) at page 83 clearly mentions that this is an application form to be filled up by the candidates who have cleared ATRE-2019. It also mentions the number of candidates i.e. 1,46,060 candidates. The heading is "Parishadiya Prathmik Vidyalyayee 69000 Sahayak Adhyapako Ki Bharti Hetu Aayojit Likhit Pariksha me Uttirna 146060 Abhyarthiyo ke Niyukti Hetu Aavedan Patra ka Print." It, therefore, cannot be disputed that it is a continuous process which started with the filling up application form for appearing in the ATRE-2019 and petitioner had not claimed any horizontal reservation in Handicapped Quota at the time of filing of the application form. Insofar as the case of the petitioner is concerned, it is also pertinent to note that admittedly, he filled up the online application form prior to 22nd December, 2018. He was issued Admit Card which discloses the date of Written Examination as 06.01.2019. However, his Disability Certificate was issued by the Office of Chief Medical Officer, Mathura, U.P. on 08.07.2019, which admittedly, was issued for the first time after about 6 months from the date of his appearance in the Written Examination. Therefore, on merits also, the claim of the petitioner for incorporation of his claim for Special Reservation under the Physically Handicapped Quota cannot be permitted to be agitated at this stage. In Writ-A No.4070 of 2020 (Ashutosh Kumar Srivastava Vs. State of U.P. And others), the similar arguments regarding permitting corrections were considered and prayer for such correction has already been rejected by this Court.

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 Mitras 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.

12. The petition is devoid of merits and is, accordingly, **dismissed.**

(2020)07ILR A408
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.06.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Service Single No. 9690 of 2020

Munna Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ravi Singh

Counsel for the Respondents:
C.S.C.

Service Matter - Transfer - Petitioner working as Assistant Clerk in the office of C.M.O. transferred from Lakhimpur Kheri to Pilibhit - as a matter of policy, persons working for more than 25 years were transfered out - *Held* - petitioner having already served in Lakhimpur Kheri for about 28 years, cannot be permitted to continue in the same Division as per the policy & in public interest - no illegality or irrationality in the transfer order (Para 13)

Dismissed. (E-5)

List of cases cited

1. Tushar D Bhatt Vs St. of Guj & anr. (2009) 11 SCC 678

2. Kendriya Vidyalaya Sangathan Vs Damodar Prasad Pandey & ors. (2004) 12 SCC 299

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard learned counsel for the petitioner as well as learned counsel for the respondents.

2. By means of the present writ petition, the petitioner has assailed the order dated 11.03.2020 as well as the impugned transfer order dated 29.06.2019 passed by the opposite party No.2 in respect of the petitioner. The petitioner is working on the post of Assistant Clerk in the office of Chief Medical Officer, Lakhimpur Kheri and has been transferred from Lakhimpur Kheri to Pilibhit.

3. Learned counsel for the petitioner has submitted that he has preferred a writ petition being writ petition No. 36805 (SS) of 2019 challenging the aforesaid order and by means of order dated 03.01.2020 this Court was pleased to disposed of the writ petition by passing following order:-

"Considering the innocuous prayer being made by learned counsel for the petitioner and without entering into the merits of the case, the opposite party No.2, i.e. Director (Administration) Directorate of Director General, Medical & Health Services, U.P. Lucknow is directed to decide the representation dated 1st July, 2019 by reasoned and speaking order within with period of three weeks from the date a copy of this order is produced before him. Final decision by the authority concerned may be taken keeping in view the recommendations made by Chief Medical Officer, Lakhimpur Kheri vide letter dated 1st July, 2019."

4. In pursuance to the direction of this Court, the representation was duly considered and a finding was recorded that petitioner has been posted in the Division since 24.08.1989 and therefore he has been transferred out from the Division and his representation was accordingly rejected.

5. The petitioner again approached this Court by filing a writ petition being writ petition No. 2082 (SS) of 2020 challenging the rejection order dated 15.01.2020 and this Court by means of order dated 28.01.2020 passed the following order:-

"The petitioner is given liberty to prefer a fresh representation taking all pleas and grounds available to him enclosing therewith copies of relevant documents, which are necessary for disposal of the representation along with certified copy of the order of this Court for perusal and necessary orders."

6. The grievance in the present writ petition is that by means of the impugned order dated 11.03.2020 the case of the petitioner has been examined by the respondents again and has been rejected. By means of the impugned order dated 11.03.2020 it has been categorically stated

that petitioner worked from 24.08.1989 to 14.09.2015 in District Lakhimpur Kheri and from 15.09.2015 to 03.07.2017 in District Saharanpur and again since 04.07.2017 till his present transfer was working in District Lakhimpur Kheri and therefore till date he has worked for around 28 years in the said Division, while persons who have worked over 25 years have been transferred out.

7. The petitioner has assailed the rejection order on various grounds including that there is no mention in the transfer order that whether it has been passed in public interest or on the administrative grounds. It has also been submitted that the period of stay in Lakhimpur has been incorrectly recorded as on the aforesaid ground submitted that he should be allowed to continue at Lakhimpur Kheri.

8. Learned Additional Chief Standing Counsel on the other hand submits that petitioner is liable to be transferred any where in State of U.P. and it is clear from a perusal of various orders passed in pursuance to the direction issued in this Court that he has served in Lakhimpur Kheri for over 28 years and as a matter of policy person working for more than 25 years have been transfered out of the State and accordingly the petitioner has also been transferred out.

9. He further submits that petitioner does not have any right to stay at Lakhimpur Kheri and there is no violation of any statute or any law in passing of the transfer order and even otherwise on the direction of this Court the authorities have duly considered the case of the petitioner twice already and all aspects have been duly considered and therefore the petition lacks merit and deserves to be rejected.

10. I have heard the learned counsel for the parties and perused the record.

11. The law with regard to the transfer has been made abundantly clear from the Hon'ble Apex Court rendered in the Case of ***Tushar D Bhatt Vs. State of Gujarat and another (2009) 11 SCC 678*** held as under:-

*"17. In the instant case the entire tenure of more than 18 years, the appellant was only transferred twice. The appellant's transfer order cannot be termed as mala fide. The appellant was not justified in defying the transfer order and to level allegations against his superiors and remaining unauthorisedly absent from official duties from 11.10.1999 to 27.04.2000 i.e. more than six months. In the interest of discipline of any institution or org*anization such an approach and attitude of the employees cannot be countenanced.

18. In Gujarat Electricity Board Vs. Atmaram Sungomal Poshani this Court had an occasion to examined the case of almost similar nature. This Court observed as under:

"4. ....."Transfer from one place to another is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or

cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

19. In Mithilesh Singh v. Union of India and Others, AIR 2003 SC 1724, the settled legal position has been reiterated. The court held that absence from duty without proper intimation is indicated to be a grave offence warranting removal from service"

12. Further the Hon'ble Apex Court in the Case of **Kendriya Vidyalaya Sangathan Vs. Damodar Prasad Pandey and others (2004) 12 SCC 299** held as under:-

"4. Transfer which is an incidence of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by malafide or infraction of any prescribed norms of principles governing the transfer (see Ambani Kanta Ray vs. State of Orissa, (Suppl) 4 SCC 169). Unless the order of transfer is vitiated by malafide or is made in violation of operative guidelines, the Court cannot interfere with it. (see Union of India vs. S.L. Abbas 1993 AIR(SC) 2444. Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by malafide or is made in violation of operative any guidelines or rules the courts should not ordinarily interfere with it. In Union of India & Ors. Janardan Debanath & Anr. 2004 (4) SCC 245 it was observed as follows:

"No government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to another is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in National Hydroelectric Power Corpn. Ltd. vs. Shri Bhagwan (2001) 8 SCC 574".

13. The petitioner on two earlier occasions had approached this Court, whereby a direction was given to the authorities to consider his representation. The authorities have passed a reasoned and speaking order and rejected the representation of the petitioner. The petitioner having already served in Lakhimpur Kheri for about 28 years, cannot be permitted to continue in the same Division as per the policy of the

respondents and the public interest is self evident from the facts of the case as well as the orders passed by the respondents.

14. In the instant case the matter has been thoroughly examined by this Court as well as the respondent authorities.

15. I am of the considered opinion that there is no illegality or irrationality in the impugned transfer order dated 29.06.2019 as well as the impugned order of rejection of the representation of petitioner dated 11.03.2020. The respondents have duly considered the case of the petitioner and gave adequate reasons for the same. It is also surprising that the petitioner having been transferred in June, 2019 is still continuing at Lakhimpur Kheri without there being any interim order in his favour.

16. Considering the totality of the facts and circumstances of the case, no interference in the case is called for.

17. The petition lacks merit and is hereby ***dismissed***. The respondents are expected to relieve the petitioner immediately so that he can join at transferred place of posting.

18. However, it is provided that in case petitioner joins to his the transferred place of posting within a period of two weeks from the date of production of a certified copy of this order, then no coercive action shall be taken against him.

(2020)07ILR A412
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 753 of 1993

Ram Ji ...Appellant(In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
S.P. Shukla, Sri Rakesh Dubey

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

Indian Penal Code, 1860-Section 324, 307/34-challenge to-appellant remaining part of his sentence-All the witnesses of fact PW1 ,PW2 and PW4 clearly specify the role of the appellant-medical report corroborated with the oral testimony of the PW1 and PW2-their evidence has a ring of truth-Hence, trial court rightly convicted the appellant u/s 324 IPC-since incident occurred more than 33 year ago-presently appellant is aged about 60 years and during intervening period, he had not indulged into any criminal activity nor he had any criminal background-submission for showing leniency regarding sentence of the appellant at this stage, is liable to be accepted.(Para 2 to 20)

The appeal is dismissed. (E-6)

List of Cases Cited:

1. Dalip Singh & ors Vs St. of Punj., (1953) AIR SC 364

2. Masalti & ors Vs St. of U.P., (1965) AIR SC 202

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This appeal has been preferred against the judgement and order passed by Vth Additional Sessions Judge, Kanpur Nagar dated 28.4.1993, in Sessions Trial No. 567 of 1991 convicting and sentencing the appellant u/s 324 IPC to undergo two

years R.I. And a fine of Rs. 10,000/- in default payment of fine one years R.I. all the sentences shall run concurrently.

2. Brief facts of this case are that the complainant's cousin Mohd. Haroon s/o Abdul Lateef R/o 44/33 Ajeetganj Colony, P.S. Babupurva Kanpur has a shop of repairing of interlocking machine situated at House No. 109/198 Mohalla Jawahar Nagar, P.S. Nazirabad. On 6.4.1987, complainant was present in the shop of his brother Mohd. Haroon and talking with him; at 7:30 pm, Ramji Nai, House No. 109/91 Resident of Mohalla Jawahar Nagar and his brother in law, Ram Chandar and two unknown people came to the shop armed with countrymade pistol, threatened and said to make arrangement of Rs. 1,000/- till tomorrow, otherwise, you will be no left alive and also said that immediately give him Rs. 100/- for wine then Mohd. Haroon tell him that he had no money. On this, the companion of Ramji Nai abusing him said that he would not give such money, kill him today. On this pretext Ramji Nai fired by countrymade pistol on Mohd. Haroon with intention of killing him. This bullet hits on left hand of Mohd. Haroon when both of us shouted then all the miscreants fled from the spot. Due to terror of this miscreants, panic caused among the shopkeepers and they started closing their shop quickly.

3. On this allegation injured as well as complainant rushed to the police station and lodge the written report (Exhibit Ka 1) against Ramji Nai, Ram Chandar and two unknown miscreants. Chik FIR (Exhibit Ka 2) registered at 8:05 pm under Section 307 IPC. The case was entered by means of General Diary. By Head Constable Moharir Shiv Awtar Pandey who proved the chik FIR as Exhibit Ka 2 and G.D. Srl. No. 61 at 8:05 pm is proved as Exhibit Ka 3.

4. On the request letter of the S.H.O. Nazirabad, Mohd. Haroon was examined by the Doctor G.V. Saxena (PW-4) who has medically examined Mohd. Haroon.

On medical examination following injuries were found on PW 2 Mohd. Haroom:-

Lacerated wound 4cmX2cmX muscle deep, bone exposed on left hand and wrist back. Bleeding profusely.

Injury kept under observation. Advised x-ray, caused by hard and blunt object, Duration about fresh.

PW 4 proved the injury report as Exhibit Ka 4.

5. Investigation of this case is conducted by Investigating Officer during investigation, the investigating officer recorded the statement of witness and also prepared site plan and collect the injury report and collect the relevant papers. Investigating officer was not examined by prosecution during trial. During trial, learned counsel for the appellant accepted the genuineness of the police papers under Section 294 Cr.P.C. viz charge sheet against Prem Shankar as Exhibit Ka 5 and Ramji Nai & Ram Chandra as Exhibit Ka 6. Recovery memo of Blood Stained & Plain Cemented Floor as Exhibit Ka 7, Spot map as Exhibit Ka 8.

6. After conclusion of the investigation, charge sheet submitted

against Ramji Nai, Ram Chandar and Mohd. Hasoon under Section 307 IPC. The charge framed against Ram Chandar, Prem Shankar on 12.9.1991 under Section 307/34 and against Ramji Nai under Section 307 IPC on 12.9.1991 charge read over and explained to the accused in hindi. They pleaded not guilty and claims to be tried.

7. In order to substantiate the charge levelled against the appellant, prosecution examined four witnesses PW 1, Abdul Jabbar complainant of this case and cousin of the injured. PW 2 Mohd. Haroon injured, PW 3 Shiv Autar Pandey, Head Constable and PW-4 Dr. G.V. Saxena.

8. After the conclusion of trial statement of appellants was recorded under Section 313 Cr.P.C. in which he has stated that witnesses giving false statement due to enmity. No defence witness was examined by appellant.

9. Learned trial court after hearing both the parties acquitted Prem Shanker and Ram Chandar against the charge levelled u/s 307/34 IPC. Only Ramji Nai is convicted under Section 324 IPC as aforesaid.

10. Being aggrieved with the order of sessions court, sole appellant Ram Ji Nai preferred this appeal. No appeal preferred by the prosecution against the acquittal of accused Ram Chandar and Prem Shankar.

11. I have heard learned counsel for the appellant, Sri J.P. Tripathi the learned AGA for the State-respondent and perused the record.

12. Learned counsel for the appellant submitted that the incident took place in crowded place in Kanpur city but no any independent witness examined by the prosecution only interested and related witnesses were produced by the prosecution which belies the prosecution case and further submitted that the witness PW 1 and PW 2 examined before the court below, in which, PW 2 injured witness declared hostile and learned trial court without appreciating the evidence in proper perspective, wrongly convicted the appellant and it is also submitted that as per medical report Exhibit Ka 4, Doctor clearly opined that the single injury which is caused by hard and blunt object which means a case of the prosecution is shattered as per injury report no gun shot injury found on the hand of the injured Mohd. Haroon. Lastly, the appellant counsel submitted that the date of incident is 6.4.1987. More than 33 years had already been elapsed in such a long time, no useful purpose shall be served to again sending the appellant to serve out the sentence.

13. Learned AGA submitted that the witness produced by the prosecution clearly established the case against the appellant. Doctor G.V. Saxena (PW 4) in his statement clearly stated that the injury inflicted to the injured Mohd. Haroon may also be caused by gun shot injury. Although, the doctor was not assured about the nature of injury but PW 4 in his statement clearly deposed that it could not be said that this injury is not inflicted by fire arm. This is a clear cut bullet injury and injured witness is most reliable witness and the testimony of the injured witness PW 2 cannot be doubted at strech of imagination. Statement of PW 2 regarding implication of appellant is clear and cogent. Prosecution has established its case beyond any shadow of doubt against the appellant as such appeal is liable to be dismissed.

14. On perusal of the case, it transpires that the FIR is very prompt and there is no delay in lodging the FIR which already strengthen the case of the prosecution and due to spontaneity, there is no occasion of any embellishment or due deliberation. So the prosecution case in this aspect is credible and believable.

15. One of the argument of the learned counsel for the appellant is that no independent witness examined by the prosecution and only related & interested witnesses were examined by the prosecution so no reliance has been placed on the testimony of these two witnesses.

16. As far as evidentiary value of and interested witnesses are concerned, in the case of ***Dalip Singh and others vs. State of Punjab, (AIR 1953 SC 364)***, it has been laid down as under by the Hon'ble Apex Court:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts."

In the case of ***Masalti and others vs. State of U.P., (A.I.R. 1965 SC 202),*** it transpires that the evidence of related witness could not be rejected on the sole ground of interested or related witness. In this case, evidence of the interested and related witness shall be scrutinized with due care and caution.

17. Learned counsel for the applicant submitted that the PW-1 in his cross examination stated that he could not see the face of the assailant-accused due to darkness around the spot. In this regard, the statement of the PW 1 firstly examined on 6.1.1992 but on the second day when he cross examined then he take U-turn and stated that he could not see the occurrence. But after perusing the entire statement, it is clearly established that the PW-1 was present on the spot. In his statement, he fully narrated the version of the prosecution, injured witness (PW 2) corroborated the version of the FIR but he clearly denied the role of the co-accused Ram Chandra, on this point, he already declared hostile and on the basis of this statement, Ram Chandra was acquitted by the learned trial court but with regard to the evidence against Ram Ji Nai, concerned PW 2 clearly shows that Ram Ji Nai inflicted injury by firing gun shot by countrymade pistol. Although, the medical examination report does not fully corroborate the oral evidence of PW 1 and PW 2 but during examination of PW 4, he clearly stated that if the bullet hit on hand then such type of injury may also occur so it cannot be said that injury inflicted on the hand of the injured witness did not cause by the countrymade pistol.

18. So after considering rival submissions of the parties and perusal of the record, identity of the appellant could not be disputed. Role of the appellant is clearly established. All the witnesses of fact

PW 1 and PW 2 clearly specify the role of the appellant. Presence of the appellant is fully established. Medical report corroborated with the oral testimony of the PW 1 and PW 2. Their evidence has a ring of truth. Hence, learned trial court rightly convicted the appellant under Section 324 IPC resultantly, conviction of the appellant under Section 324 IPC is hereby affirmed. Coming to the sentence to be imposed on the appellant since incident occurred more than 33 years ago and presently, the appellant is aged about 60 years and during intervening period, he had not indulged into any criminal activity nor he had any criminal background and presently, appellant is well rooted in society. Submission of the learned counsel for the appellant for showing leniency in this matter regarding sentence, is liable to be acceptable.

19. Considering the entire possible conspectus of circumstances, in my opinion sending appellant back to serve out remaining part of his sentence will not be in the interest of justice. It is also pertinent to mention that during trial appellant was in jail for more than 9 months so the end of justice would be served, if the appellant is sentenced for period undergone by him and fine enhanced from Rs. 10,000/- to 20,000/-. Out of which, the compensation of Rs. 15,000/- is awarded to the injured Mohd. Haroon, in case of his death, to the legal heirs of the injured Mohd. Haroon. The appellant is permitted to deposit the fine within period of one month from the date of the judgement. Failing to deposit the same, appellant shall surrender or he be taken in custody to serve out one year rigorous imprisonment as default sentence.

20. So the appeal is '***dismissed'*** on the point of conviction and partly allowed on the point of sentence as above. Appellant is already on bail. He need not to surrender but his personal and surety bond shall be discharged only after he had deposited the fine or has been arrested to serve out the default sentence imposed hereinabove.

21. Let a copy of this judgement and order be sent to the learned trial court alongwith the lower court record, for its intimation and compliance.

(2020)07ILR A416
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2020

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE PANKAJ BHATIA, J.

Criminal Appeal No.1748 of 1991

Harnam Singh & Ors. ...Appellants(In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri K.D.Tripathi, Sri Rakesh Pati Tiwari

Counsel for the Opposite Party:
G.A.

A. Indian Penal Code, 1860- Sections 302/149, 307/149 and 148-the testimony of PW1 attributing specific role to all the five appellants, it was duly established that the accused constituted an unlawful assembly whose object was to finish off the victims and with that avowed object they open indiscriminate fire at the deceased, PW1 and PW2-hence, prosecution has been successful in establishing the charges against the

accused-appellants beyond the pale of doubt.(Para 50 to 52)

B. Non-examination of any independent witness does not dent the prosecution case because the incident took place on the outskirts of the village, near the jungle. At such a place, absence of an independent witness is quite natural. moreover, since one of the survivors of the incident is a person who received gunshot injuries consistently supported the prosecution case and his testimony is corroborated by medical evidence and there was no effort made by the defence to discredit the prosecution case.(Para 49)

The appeal is dismissed. (E-6)

List of Cases Cited:-

1. Hari Obula Reddy & ors. Vs St. of A.P.,(1981) 3 SCC 675

2. Jalpat Rai & ors. Vs St. of Hary.,(2011) 14 SCC 208

3. Raju @ Balachandran & ors. Vs St. of T.N.,(2012) 12 SCC 701

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

1. The present appeal has been filed by as many as five appellants against the judgement and order dated 10.9.1991 passed by the Sessions Judge, Pilibhit in Sessions Trial No. 210 of 1983, whereby the appellants were convicted under: Sections 302/149 ; 307/149; and 148 I.P.C. and punished as under: life imprisonment under Sections 302/149 I.P.C.; 5 years R.I. under Sections 307/149 I.P.C.; and 3 years R.I. under Section 148 I.P.C. with direction that all the sentences shall run concurrently.

2. During the pendency of the appeal, Appellant No.1 (Harnam Singh); Appellant No.2 (Babu Singh); Appellant No.3 (Nathu Singh); and Appellant No.4 (Surajpal Singh) died. Hence, their appeal was abated vide order dated 29.01.2019. The appeal of Appellant No.5 (Jogendra Singh) survives.

3. The prosecution case in the first information report (F.I.R.) was that around four years ago, Puttu Singh and Rakshpal Singh (also known as Mula Thakur), relatives of the appellants, were murdered, in which nine persons were made accused. The informant (Ram Bhajan - PW2) and his brother Nand Lal (PW1) were also accused in that case. However, the informant and three other persons were acquitted whereas Nand Lal (PW1) and five others were convicted in that case. Since then there had been strong enmity between the family of the accused-appellants and the informant. After narrating the above background, it is stated that on 28.5.1983, the informant (PW2); his uncle Kallu (the deceased); and Nand Lal (PW-1) had gone to jungle to collect thatch material for the "Chhappar'. While they were on their way back, at about sun-set, near Barhepura canal, the accused Harnam Singh (Appellant No.1) armed with rifle; and Surajpal Singh (Appellant No.4), both sons of Puttu Singh, armed with S.B.B.L. gun emerged from the bushes on the north side of the canal, near the culvert of the Barhepura canal, whereas, from the southern side bushes, Nathu Singh and Babu Singh, both sons of Umrai Singh, armed with S.B.B.L. Guns, and surviving appellant - Jogender Singh, son of Puttu Singh, armed with Tamancha, came out and challenged the informant (PW2), Kallu (deceased) and Nand Lal (PW1) saying that today they would take revenge for the death of Puttu and Mula. It was alleged that all the five persons with an intent to kill fired, in which, Kallu (the deceased) sustained 3 to 4 gun-shots and Nand Lal (PW1) sustained two gun-shot injuries. It was alleged that Kallu fell down

and slipped into the canal whereas Nand Lal (PW1) and the informant (PW2) managed to jump into the canal and they ran in opposite directions to save their lives. It was stated that Nand Lal (PW-1) waded across the canal and ran away towards the sugar-cane field and was chased by the accused and a shot also hit him on the back but by running into the sugar-cane field he could save his life. On the other hand, the informant (PW-2) saved his life by running towards the village Orajhar where he came to the house of Nathu Lal Gangwar and requested him to accompany him to the police station to lodge the F.I.R., however, as it had turn dark, on account of fear, they could not muster courage to immediately lodge the report. It is stated in the FIR that in the morning when it was revealed by the villagers of Orajhar that the brother of the informant, namely, Nand Lal (PW1) is alive and hiding in the sugar-cane fields in an injured condition, Nand Lal was brought from the sugar-cane field to the village and there they were told that the body of Kallu was lying tagged on a "Khunta' towards south of the culvert. Where after, the body was taken out and kept on the western Patri of the canal. The FIR (Ex. Ka-1) was lodged on 29.5.1983 at about 9:15 A.M. at P.S. Bilsanda, District Pilibhit.

4. On the basis of the report (Ex. Ka-1), Chik F.I.R. (Ex. Ka-4) was taken down at the police station and a case was registered vide G.D. entry (Ex. Ka-5). The Investigating Officer V.P.S. Rawat (PW-4), who was allegedly busy in the election duty of the Block Pramukhs, deputed Sub-Inspector Mathan Singh to proceed to the spot for preparing the inquest report.

5. Mathan Singh prepared inquest report (Ex. Ka-6) and the connected papers (Ex. Ka-7 to Ka-11) which were proved by PW4. The Investigating Officer (PW4) thereafter prepared the site plan denoting the place of occurrence (Ex. Ka-12) and the site plan from where body was recovered (Ex. Ka-15) including memos of recovery of blood stained earth etc: from the place of occurrence (Ex. Ka-13) and from where the body was recovered (Ex. Ka-16) as also with regard to recovery of "Tiklies' (Wad) of the cartridges found at the place of occurrence. After completing the investigation, the Investigating Officer (PW4) submitted a charge-sheet (Ex. Ka-17).

6. The injured Nand Lal was medically examined by Dr. G.M. Mohanti (PW-6) on 29.5.1983 at about 3:00 P.M. The injury report is on record as Ext. Ka-19. The post-mortem on the dead body of Kallu was conducted by Dr. H.K. Agarwal (PW-3) on 30th May, 1983.

7. On the charges framed the accused pleaded not guilty and prayed for trial. To prove the case, the prosecution examined as many as six witnesses. PW-1 Nand Lal and PW-2 Ram Bhajan were examined to establish the factum of the occurrence whereas Dr. H.K. Agarwal (PW-3) deposed with regard to the post-mortem conducted by him and Dr. G.M. Mohanti (PW-6) deposed in respect of injury sustained by Nand Lal. The I.O. (PW-4) and the Constable Rakesh Singh (PW-5) were also examined. PW-5 deposed to the effect that he had taken the dead body for post-mortem.

8. No evidence was led in defence.

9. Dr. H.K. Agarwal (PW3) who conducted the post mortem on the body of Kallu on 30th May, 1983 at about 2:45

P.M., found following ante-mortem injuries on the body of the deceased:-

"1. Fire arm wound of entry (seven) each size of 0.5 cm x 0.5 cm. over front and outer side of right upper arm in an area of 12 cm. X 5 cm. Blackening, tattooing and scorching absent. On exploration underneath tissue lacerated, fracture of lower 3rd of right humorous and communicating with wounds of exit.

2. Fire arm wounds of exit (seven) each size of 1 cm. X 1 cm. on inner aspect and back of right upper arm communicating with wound of entry. Margins everted.

3. Fire arm wound of entry (eight in number) each size of .5 cm x 5 cm. on front side and right side chest lower part and upper part of abdomen. No blackening, tattooing seen in an area of 18 cm. X 9 cm. On exploration underneath tissue badly lacerated (R)lung pleura, heart, left lung, pleura, pericardium lacerated. 3 medium size pellets removed- from right lung and one from heart.

4. Two fire arm wound of exit 1 cm. X 1 cm. on inner side of left side chest on anterior axillary fold line 7 cm. below fold line 7 cm. below fold. Two in number 1 cm. apart.

5. Fire arm wound of entry 1 cm. x 1 cm. on inner side of left side chest 5 cm. from nipple at 9 O' clock position.

6. Fire arm wound of entry 0.6 cm. x 0.5 cm. left upper arm upper 3rd. inner side. No blackening. No tattooing. Communicating with wound of exit 1 cm. x 1 cm. on outer upper 3rd. of left upper arm with fracture shaft humorous left.

7. Fire arm wound of exit 1 cm. x 1 cm. on left line and outer above iliac crest left.

8. Contusion 5 cm. x 2 cm. over upper 3rd. outer side left upper arm.

9. Fire arm wound of entry (five) over right scapular region each size of 0.5 cm. x 0.5 cm. No blackening. No tattooing. No scorching. Underneath tissue lacerated. On exploration communicating with wound of exit fracture scapula.

10. Five fire arm wound of exit each size of 1 cm. x 1 cm. on right supra clavical region and inferior clavical region in an area of 10 cm. x 6 cm.

Both lungs and heart were lacerated. 1 /2 litre of blood in chest cavity was present. Stomach was empty. Faecal matter was present in intestines.

On internal examination, membranes were found lacerated. The cause of death was due to shock and haemorrhage as a result of ante-mortem injuries noted in the post mortem report."

10. The injuries on Nand Lal (PW1) found in a medical examination conducted by Dr. G.M. Mohanti (PW6) on 29.05.1983, at 3 p.m., were as under:-

"1. Gun shot like wound of entry size . 3 cm. x .2 cm. x deep, probing not done on right scapular region, oval in shape. Shot is palpable, blackening present on the wound, tattooing around the wound present.

2. Gun shot like wound of entry size .3 cm. x .2 cm. x deep, probing not done on left side of back about 1 cm. from

the mid-line. Shot is not palpable. Wound is oval in shape. There is blackening and tattooing present.

3. Multiple gun shot like wounds of entry of size ranging .3 cm. x .2 cm. x deep. Probing not done to .5 cm. x .3 cm. x deep, probing not done in an area size 42 cm. x 22 cm. on front and back of left thigh extending to leg. Two shots are palpable. Shots oval in shape, blackening and tattooing is present around the wound.

4. Multiple gun shot like wounds of entry in area size 23 cm. x 22 cm. on the front and outer part of right thigh ranging in size from .3 cm. x .4 cm. x deep, probing not done to .5 cm. x .4 cm. x deep probing not done, shots are not palpable. Wounds oval in shape, blackening and tattooing found.

5. Gun shot like wound of entry size .4 cm. x .3 cm. x deep, probing not done on the right iliac crest region. Wound is oval shape. Shot is not palpable, blackening, tattooing present.

11. X-ray of the injuries of Nand Lal (PW1) was done but X-ray plates were not brought on record and secondary evidence was led in respect of X-ray report (Ex. Ka-18), which is as under:

"X-Ray left side Scapula & left side back of Chest

One rounded radio opaque foreign body shadows of metallic density on lower part left side chest near 10th thoracic vertebrae. No bony lesion seen. Lungs fields clear.

X- Ray Right Thigh

Multiple rounded radio opaque foreign body of metallic density on right thigh. No bony lesion seen.

X- Ray left Thigh

Multiple rounded radio opaque foreign body sahadows of metallic density on left thigh & around knee. No bony lesion seen.

X- Ray Rt Illiac crest.

Three rounded radio opaque foreign body shadows of metallic density on right pelvic bone. No bony lesion seen."

12. The testimony of the prosecution witnesses is being noticed and discussed in brief as under:-

13. **PW-1 Nand Lal** in his deposition on 12.7.1989 stated that Kallu (the deceased) was his uncle; on the day of the incident, on their way back from the jungle, going towards the south, they reached the Barhepura culvert of the canal, PW-1 was in the front, his uncle Kallu (the deceased) was following behind him and trailing Kallu was Ram Bhajan; that it was around sun-set; that on both sides of the culvert there were bushes; that from the north bush Surajpal Singh carrying a single barrel gun and Harnam Singh carrying a rifle emerged, whereas from the southern bushes Nathu Singh and Babu Singh, carrying single barrel guns, and Joginder Singh, carrying a Tamancha, came out and exhorted each other to take revenge for the murder of Mula and Puttu Singh and started firing. *(In his testimony, he identified the accused-appellants present in the Court).* He deposed that his uncle Kallu on being hit by gun shots immediately fell on the side and slipped into the canal. Whereas

PW-1 on being hit by gun shot jumped into the canal to save himself. On the other hand, Ram Bhajan (PW-2) ran towards the other side. It was deposed by him that he waded the canal and taking shelter behind the trees escaped towards the south and while he was escaping the accused chased him and fired at him which hit him but he entered the sugar-cane fields and hid himself and stayed there over night. In the morning, through one Chhadammi, resident of Urjahar, who had come to water his fields, a message was sent, consequently, help arrived and he was taken to the village. He specifically stated that he was hit by two shots. One hit him on the front and other on the back. He deposed that on account of the murder of Mula @ Rakshpal Singh and Puttu Singh, there was enmity. In that murder PW-1 was sentenced for life, whereas his brother, Ram Bhajan, was acquitted.

14. In the cross-examination, he stood by the statement given by him in the examination-in-chief. As regards the distance from which shots were fired he disclosed that as soon as the accused exhorted each other to take revenge, shots were fired and at that time the accused must have been at a distance of 16-17 feet. He also stated that when he jumped into the canal no shot was fired at him though accused also jumped into the canal. He also stated that when he climbed on to the eastern patri of the canal no gun shot was fired. He stated that he received one gun shot at his back near the mango tree but he could not say as to from where the gun shot was fired. He denied the suggestion that the accused had challenged him from behind the bushes. He denied the suggestion that at the time of the incident, it was dark and that he could not see the assailants and has named them on ground of enmity.

15. The other eye witness examined by the prosecution was **Ram Bhajan (PW-2)** who deposed more or less what was deposed by Nand Lal (PW1) his brother with regard to past enmity, the place and time of the occurrence, the assailants and the weapons they carried. He also identified the assailant, that is the accused present in court. He deposed that four shots hit his uncle Kallu and one hit his brother Nand Lal, who jumped into the canal and after wading it came out of the canal on the eastern side whereas PW-2 ran towards north side and jumped into the canal. He further deposed that his brother Nand Lal suffered one more gun shot injury on his back near the tree after he had emerged from the canal. PW2 stated that after escaping from the spot he reached house of Nathu Lal Gangwar and requested him to accompany him for lodging the report, who refused by saying that it had become dark and the "Thakurs' of the village had surrounded it from all sides and therefore he would go in the morning. PW2 deposed that in the morning when Chhadami went to water his field, his brother Nand Lal (PW1) was spotted who told him to inform at his house. Immediately, on receiving the news, PW2 reached the place and brought PW1 to the village. There they came to know that his uncle Kallu's body was lying tagged to a Khunta in the canal. On reaching the place, it was found that a lot of villagers were already there. Whereafter, the dead body was taken out of the canal and kept on its western Patri and, thereafter, the deponent went for lodging the report. He proved the FIR.

16. In his cross-examination, PW-2 categorically denied the suggestion that at the time of the incident it was dark. He stood by his statement that on account of darkness and fear nobody was ready to

accompany him for lodging the F.I.R immediately therefore it was lodged in the morning. He however admitted that when he reached the village he did not collect villagers by informing them about the incident because he had gone to Nathu Lal. Though he stated that 10-20 people had come but nobody could muster courage to lodge the report. He also stated that at the time of the firing, the accused were standing at a distance of 12 to 13 feet. He also deposed that he had shown the Investigation Officer the place from where the brother of PW-2 had come out of the canal and the place from where the firing took place.

17. **PW-3 Dr. H.K. Agarwal** who had conducted the post-mortem of Kallu proved the post mortem report and the ante mortem injuries found on the body of Kallu. He deposed that death was due to loss of blood and shock as a result of the ante mortem firearm injuries. And that the death could have occurred immediately on spot on 28.5.1983, on or about sun-set time though there could be a variance of about six hours in the estimated time of death.

18. **PW-4, S.I. V.P.S. Rawat**, who had conducted the investigation, proved the various steps, such as the G.D. entry of the FIR, inquest report, recovery memos, site plans, charge sheet, etc. He stated that on account of election of Block Pramukh, he was busy in maintaining law and order in the morning thus he could not visit the spot immediately and sent Sub Inspector (S.I.) Mathan Singh and fellow constables to do the needful. He proved the inquest report, etc by recognising their signatures. He stated that after discharging election duty, he reached the spot at around 4.30 pm and recorded the statement of informant-Ram Bhajan and inspected the place where the firing took place and prepared site plans, which were proved by him. He also proved the recovery memos of the blood stained earth as well as the Tiklis (wads) of the cartridges. He also deposed about preparation of site plan from where Kallu's body was found and the memo with regard to the recovery of the blood stained earth. He stated that the injured Nand Lal (PW1) was sent for medical examination by S.I. Mathan Singh with constable Kishan Pal. He stated that S.I. Mathan Singh has retired from service. He also stated that after recording of statement of Ram Bhajan, he enquired about the accused and they were found absconding. He stated that he recorded the statement of injured Nand Lal on 23.06.1983 in the Hospital and on 25.06.1983 the investigation was complete.

19. In the cross-examination, he stood by his deposition and denied the suggestion that case diary was filled at one go. He stated that by the time he had reached the spot, the body had been removed and sent. He stated that up to that time investigation was done by S.I. Mathan Singh. He stated that in the evening he had recorded the statement of Mathan Singh. A suggestion was given that there had been overwriting in the inquest report to add sections 147/ 148 IPC.

20. He denied the suggestion that he did not meet Nand Lal in the hospital. He stated that prior to 23.06.1983 he had knowledge about Nand Lal being admitted in the hospital but he has no knowledge as to when he was discharged. He, however, added that on 06.06.1983 he made an attempt to record the statement of Nand Lal but then he came to know that he is in Pilibhit Hospital. He stated that on 10.06.1983 he tried to record the statement of Nand Lal in the hospital but came to

know that he had left. He stated that he did not record the statement of the doctor who had discharged him.

21. In his cross examination he stated that there was no mango tree seen from where cartridge wads (tiklis) were recovered. He also stated that sugar cane field was at some distance. He stated that he did not visit the spot where the injured Nand Lal hid himself in the night. He admitted that in the site plan he disclosed only that spot where the injured Nand Lal received the gun shot injury. He also added that Nand Lal had not informed him that he had jumped into the canal and that he had informed Chhadami

22. Lastly, he denied the suggestion that he did not properly investigate the matter and filled up the case diary at one go.

23. **PW-5, Constable Rakesh Singh** stated that he was the Constable and had gone with Sub Inspector Mathan Singh along with other Constables to the spot for inquest and sealing of the dead body. He proved the inquest proceedings and also deposed about carrying of the body on the tractor, keeping the same at the Headquarter in a sealed condition and thereafter taking it for post mortem examination.

24. **PW-6 Dr. G.M. Mohanti** deposed in respect of the injury sustained by Nand Lal. In his opinion, they were fire arm injuries caused from a distance of around 4 to 5 feet and from different directions i.e. from the front as well as the back. The shots might be 2 to 3 in number. He ruled out the possibility of shots being from a distance of 15 feet or above. He also stated that on coming in contact with water there may be less or no blackening around the wound.

25. The incriminating circumstances borne out from the prosecution evidence were put to the accused persons before recording their statement under section 313 CrPC. Except for admitting the relationship between the deceased (Kallu) and the informant (PW2) as well as the injured (PW1) as also the enmity between the two sides, that is with regard to the previous murder of Rakshpal Singh and Puttu Singh, relatives of the present accused appellants, in which the victims of the present case were amongst the persons accused, and that some of them were convicted, the rest of the incriminating circumstances were denied by the persons accused including the surviving-appellant. However, existence of injuries sustained by the deceased and Nand Lal (PW1) were not stated to be false or to have sustained in some other manner. Although it was stated by the accused that they have no knowledge about it.

26. No evidence was led in defence.

27. On the basis of evidence adduced by the prosecution, after discussing the evidence at length, the court below held the accused guilty under Sections 302/149 (i.e. for murder of Kallu); 307/149 (i.e. for attempt on the life of Nand Lal (PW1) and Ram Bhajan (PW1); and 148 (for rioting with deadly weapon) and punished them accordingly as already noticed above.

28. We have heard Sri Rakesh Pati Tiwari, learned counsel for the surviving appellant no.5 (Jogendra Singh); Sri Deepak Mishra, learned A.G.A. for the State; and have perused the record.

29. The learned counsel for the appellants has assailed the judgement and order of the court below by claiming that the prosecution had failed to discharge its burden to prove the guilt beyond the pale of doubt. In support of the contention following points were raised and pressed:

(a) The FIR is highly delayed. The incident occurred in the darkness of night. No person could be identified. By guess work, on the basis of past enmity, accused were named.

(b) The conduct of PW2 (informant) not going to find out his brother (PW1) in the morning, and waiting till he is found by some other person, who has not been examined, to lodge the report, clearly reflects that he was not an eye witness. The prosecution story is a figment of his imagination after learning that some incident had occurred involving his brother and uncle. Hence, he is a completely unreliable witness. Moreover, he has not sustained any injury even though as per prosecution story the accused, multiple in number, fully armed, had surrounded the victims and had fired indiscriminately to finish them off. Absence of any injury on his body rules out his presence on the spot.

(c) The investigation could not collect any evidence to show that PW1 hid himself in the sugar cane field in the night. No site plan was prepared to show as to where the injured (PW1) hid himself in the night to save himself from the assailants.

(d) The injured witness (PW1) is not a reliable witness for the following reasons: (i) his statement under section 161 CrPC was recorded very late, that is after more than 20 days; (ii) that the story set up by him that he had jumped into the canal, after being shot, to save himself and, thereafter, he was chased by the accused and shot at from some distance and was hit near a tree is not substantiated by site plan as also by medical evidence because there appears blackening and tattooing around the wounds which would not be there if shots were fired from some distance, as is the case taken in his testimony, and blackening could not be there if the wounds were in contact with water; (iii) his presence with the deceased at the time of the incident is highly doubtful and is belied by the fact that the injuries sustained by him are from a distance of 4-5 feet whereas those sustained by the deceased were from a far greater distance as the wounds found on the body of the deceased had no blackening or tattooing around them, which throws possibility of the two injured persons receiving injuries at different places and may be in separate incidents.

(e) The prosecution has failed to examine material witnesses such as Nand Lal Gangwar, who was requested by the informant to accompany him to the police station to lodge the report in the evening/ night of the incident; and Chhadami, who found PW1 alive and hiding in the fields next day of the incident in the morning. It has been urged that by non-examination of these two witnesses, the delay in lodging the FIR has not been satisfactorily explained. Hence, an adverse inference ought to have been drawn against the prosecution.

(f) There is no recovery of any of the weapons of assault.

(g) That the incident allegedly took place in the jungle near the village, after sun-set, where there was no source of light, therefore there was no occasion to

recognise the assailants and even if few of them could be recognized, possibility of over implication on account of past enmity cannot be ruled out.

(h) The two eye witnesses of the incident are interested witnesses therefore, in absence of corroboration of their testimony by an independent witness, no reliance ought to be placed on their testimony.

30. **Per Contra**, the learned A.G.A. submitted that the motive for the crime was admittedly there. The delay in the FIR has been sufficiently explained inasmuch as it is a case where five persons, armed with firearms, indiscriminately pumped multiple shots at the deceased, uncle of the informant, and informant's brother, in front of the eye of the informant, and had given a chase to the escaping victims therefore, considering that the incident was around sun set time, followed by darkness, it is quite natural that the informant, to save his life, waited till dawn to muster courage to lodge the FIR. Under the circumstances, there was no fatal delay in lodging the FIR.

31. The learned AGA contended that as there is an injured witness to support the prosecution case, whose injuries have not been challenged either as being superficial or self inflicted and there is no suggestion that he suffered injuries in some other incident or at some other place, his testimony alone is sufficient to record conviction, particularly when nothing has come out from his cross examination to cast a doubt on his testimony and his testimony is duly corroborated by medical evidence as well as by recovery of blood stained earth, wads of cartridges etc from the spot. He further contended that even if there are lapses in investigation, the oral testimony of an injured eye witness even though he might be interested cannot be discarded. He also contended that the question of over implication does not arise as there are sufficient number of injuries found and were caused from different directions suggesting participation by multiple accused persons. He thus contended that conviction recorded by trial court be upheld.

32. We have given thoughtful consideration to the rival submissions and have perused the record carefully.

33. The first issue that arises for our consideration is whether the delay in lodging the FIR is fatal to the prosecution case.

34. Ordinarily, the delay in lodging an FIR by a person who is an eye witness of the incident throws possibility of him being not present at the scene of occurrence and of doing guess work to name those with whom he has enmity. But there is no hard and fast rule that in all cases the delay in lodging the FIR would become fatal and throw doubt on the prosecution case, particularly where there is explanation for the delay. Such explanation at times may be found embedded in the facts of the case. In a case of gruesome murder by use of firearms, with multiple assailants who are all geared up to finish off the victims, the survivor of the attack may look towards his own safety and await safer times to lodge the report than to immediately rush and report the incident.

35. In the instant case, the incident occurred at about sunset. There were five assailants, armed with firearm. They had surrounded the deceased, the injured (PW1) and the informant (PW2) and fired at them

indiscriminately thereby causing multiple gun shot injuries to the deceased and gun shot injuries to PW1 in front of the eyes of PW2. The assailants also gave chase to the escaping victims. As a gruesome incident took place at about sunset time, in the fading light, with the assailants being on the look out for the surviving victims, it is quite natural that the informant (PW2) would have been terrified and therefore could not muster courage to report the incident in the night. In the circumstances, if PW2 (the informant) waited for the next day morning to lodge report, the delay would not be fatal to the case. More so, because the prosecution case is not just supported by the informant but also by a person who is injured in the incident.

36. The issue that now arises for consideration is whether on ground of lapses in the investigation, such as: (a) delay in recording the statement of the injured; (b) not preparing site plan of the place where the injured hid himself in the night following the incident; (c) not effecting any recovery from the spot from where the injured hid himself; and (d) not effecting recovery of the weapons of assault, the prosecution case has been rendered unreliable and unworthy of acceptance. In this regard it be observed that investigation plays a vital role, particularly, when the prosecution case is dependent on circumstantial evidence. In a case which is based on ocular evidence of an injured witness, lapses in the investigation are not fatal to the prosecution evidence if the ocular evidence is cogent and reliable. As, in the instant case, the prosecution case places reliance on the ocular evidence and one of the eye witnesses to the incident is a person injured, lapses on the part of investigation in pursuing the investigation diligently, in our view, would not be fatal to the prosecution.

37. The next argument made on behalf of the appellant that by non examination of independent witness, namely, Chhadami and Nand Lal Gangwar, an adverse inference ought to be drawn against the truthfulness of the prosecution case is liable to be rejected for the following reasons. Firstly, it is a case where prior to the incident in question there existed strong enmity between the families of the assailants and the victims on account of a previous murder in connection with which the victims of the present case were prosecuted. In such circumstances, it is quite possible that independent fellow villagers may not have that degree of moral conviction to take sides and appear as witness for a person who had been previously a wrongdoer. Secondly, in a case of gruesome murder, by use of firearms, ordinarily, a neutral person does not wish to appear as a witness fearing wrath of the other side. Thirdly, it is not obligatory for the prosecution to multiply its witnesses. Thus, in a case, when the prosecution has an injured witness to support its case, it may choose not to multiply the witnesses.

38. In the case of ***Hari Obula Reddy and others v. The State of Andhra Pradesh : (1981) 3 SCC 675,*** a three-judges bench of the apex court, in paragraph 13 of its judgement, as reported, has held as follows:-

".... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that

interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source."

39. Similarly, in ***Jalpat Rai and others v. State of Haryana : 2011 (14) SCC 208,*** the apex court in paragraph 42 of its judgement, as reported, had observed as follows:-

"42. There cannot be a rule of universal application that if the eye-witnesses to the incident are interested in prosecution case and /or are disposed inimically towards the accused persons, there should be corroboration to their evidence. The evidence of eye-witnesses, irrespective of their interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable could be sufficient and enough to bring home the guilt of the accused. But it is reality of life, albeit unfortunate and sad, that human failing tends to exaggerate, over-implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime."

40. In ***Raju alias Balachandran and Others v. State of Tamil Nadu, (2012) 12 SCC 701***, the Apex Court in paragraph 29 has summed up as under:-

"29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh [AIR 1953 SC 364 : 1953 Cri LJ 1465 : 1954 SCR 145] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] in the following words: (Sarwan Singh case [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] , SCC p. 376, para 10)

"10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as

a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

41. On the basis of the law noticed above, what is clear is that it is not the requirement of law that to record a conviction there ought to be production of an independent witness to corroborate the testimony of an interested witness. If the testimony of an interested witness is reliable, that is the substratum of the story narrated by the witness is consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, it may be accepted, without seeking corroboration from any other source.

42. Therefore, now the question that arises for our consideration is whether the testimony of the witnesses, especially PW-1, is wholly reliable. PW1 is an injured witness. His injuries are proved by Dr. G.M. Mohanti (PW6). PW6 in his testimony stated that the injuries sustained by PW1 could be from 2-3 gun shots fired from different directions (front & back). The doctor examined PW1 at about 3 p.m. on 29.05.1983. The duration of the injuries were stated to be about 18 hours old which means that the injuries could have been sustained at about sunset time on the previous day, that is 28.05.1983, which is also the prosecution case. No suggestion has been given to the doctor as regards the injuries being self inflicted or fake.

43. In so far as the testimony of PW1 is concerned, it is straight forward and clear with no confusion. He has clearly disclosed the participation of all five accused by stating that the accused were hiding with firearms in the bushes and as soon as the victims arrived, they emerged and opened fire from a distance of about 16 - 17 paces. He stated that two gun shots hit him. One on the front and the other on the back. His uncle Kallu (deceased) fell on the spot and slipped into the canal whereas he ran and jumped into the canal. Five gun shot entry wounds were found on the body of the deceased. The testimony of PW1 indicates that he was walking ahead of the deceased, that is the deceased was trailing PW1, whereas, his brother, PW2, was trailing the deceased. This explains the presence of blackening and tattooing in and around the wounds received by PW1, as he was closer to the assailants. It also explains the absence of blackening and tattooing around the wounds received by the deceased, as he was at a greater distance from the assailants. Further, receiving of gunshot injuries by PW1 at the front as well as back lends credence to his story that initially after being hit he tried to escape and was chased and shot at by the assailants. Interestingly, in his cross examination no suggestion has been given to PW1 of he being not with the deceased or having not suffered gun shot injuries in the incident. The only suggestion given to PW1 is that the incident occurred in the darkness of night and the assailants could not be recognised and the accused-appellants were implicated on ground of past enmity. The said suggestion has been vehemently refuted by the witness.

44. It may be noted that in his statement in chief, PW1 described the time of the incident as sunset. This has been clarified in paragraph 22, during cross examination, as not complete darkness but

a time when one may have difficulty in recognising face. Much emphasis was laid by the learned counsel for the appellant on this part of the statement to highlight that because of darkness it was not possible to recognise the assailants. However, when we go through the entire statement of PW1 we find that there is not much cross examination of PW1 with regard to him being not in a position to recognise the assailants either on account of darkness or on account of the assailants not being known to him. The only suggestion that has been put is that in the darkness some other person must have fired but the accused persons have been named because of enmity. The said suggestion has been denied. Interestingly, in the cross examination, no suggestion has been put with regard to the victims having enmity with others. Further, it is a case where parties had been known to each other inasmuch as the victim side had faced prosecution at the instance of the accused side therefore it can safely be assumed that the victims were in a position to recognise the assailants without much difficulty. Otherwise also, as per the testimony, the accused party, before resorting to firing, had exhorted each other to take revenge of the previous murder of their family member, under the circumstances, keeping in mind that PW1 was given a chase and was hit by gun shots, in the front as well as the back, fired from a reasonably close distance, of about 4 to 5 feet, as stated by the doctor, PW1 had ample opportunity to recognise the assailants and name them, which he did and identified them too, in the court.

45. The next submission of the learned counsel for the appellant that according to the doctor if the wounds had come in contact with water blackening around the wound would not have been there and therefore, as blackening was found around the wounds received by PW1, the story set up by PW1 that he jumped into the water filled canal to save his life is belied, does not appeal to us for two reasons. Firstly, the doctor in his testimony had expressed absence of blackening around the wound as a possibility, if the wound had come in contact with water, and not as a rule. Secondly, whether the wounds suffered by PW1 came in contact with water flowing in the canal can be any body's guess. Because it is quite possible that even if the victim had jumped into the canal and waded through it, the depth of the water in the canal might not have been sufficient to reach the wound area inasmuch as the wounds / gun shot injuries were found at the region of thigh and above. Moreover, the duration of exposure to water may be a factor in lessening or obliterating the blackening around the wound. As it has come in the testimony of PW1 that he had ran across the canal to go across into the sugar fields, PW1's presence in the water might have been for a short period only thereby reducing the possibility of obliteration of blackening.

46. From the discussion made above, the testimony of PW1, who is an injured witness, is consistent and finds corroboration with medical evidence. Being an injured witness, his presence on the spot is certified by his injuries and as no suggestion has been put to him that he was not with the deceased at the time of the incident, in our view, his testimony is wholly reliable.

47. Now we may come to the testimony of PW2. His testimony is in line with the testimony of PW1 and corroborates the same. Even if we view the

testimony of PW-2 with a prism of suspicion, as his conduct in not coming out in the morning to find out his brother and in not immediately reporting the incident may not inspire confidence, though, it is well settled, each individual reacts differently to a given situation, the testimony of PW1 being wholly reliable, and he being an injured witness, is sufficient, in our view, to record and uphold conviction recorded by the court below on all the charges.

48. We may observe that no argument was advanced to dispute the place of occurrence which has been established by the prosecution by production of the I.O. who had disclosed about recovery of blood stained earth as well cartridge wads from the scene of occurrence. The number of injuries caused from firearms, used from different directions, corroborate the prosecution testimony as regards participation of five assailants with firearms. Even the time of the occurrence, that is on or about the time of sunset, could not be discredited in the cross-examination of either PW-1 or PW-2. Rather, the duration of the injuries found by the doctor corroborates the prosecution case.

49. Non examination of any independent witness does not dent the prosecution case because the incident took place on the outskirts of the village, near the jungle. At such a place, absence of an independent witness is quite natural. Moreover, since one of the survivors of the incident is a person who received gunshot injuries and he has consistently supported the prosecution case and his testimony is corroborated by medical evidence, the prosecution case is established beyond the pale of doubt. Further, no evidence was led by the defence. There was no effort made by the defence to discredit the prosecution case, by seeking production of, or by producing, Chhadammi or any other villager, to throw doubt with regard to the place of occurrence or the place of hiding of PW-1 so as to discredit PW1.

50. We have also examined the matter to rule out the possibility of over implication. In that regard we have noticed that there were in all five gun shot entry wounds on the body of deceased and a minimum of two gun shot wounds on the body of PW1 and they appeared to be from different direction and distance. Further, PW1 deposed specifically with regard to the participation of all the five assailants. No evidence has been led in defence to demonstrate that any one or more of the accused was at some other place at the time of occurrence. Under the circumstances, keeping in mind the testimony of PW1 attributing specific role to all the five appellants, it was duly established that the accused constituted an unlawful assembly whose object was to finish off the victims and with that avowed object they open indiscriminate fire at the deceased (Kallu), PW1 and PW2 and in the process succeeded in killing the deceased (Kallu) and causing injuries to PW1.

51. As regards the delay on the part of the Investigating Officer in reaching the spot, the same is explained by the Investigating Officer by deposing that he was busy in maintenance of law and order on account of elections on 29.5.1983 and therefore he had sent his subordinates. With regard to delay in recording the statement of PW1, under section 161 CrPC, suffice it to say that it would not be fatal to the prosecution case because it has been duly proved that PW1 had suffered injuries in the incident and was examined by the doctor on the next day itself. Further, no

suggestion has been put to PW1 that the injury was sustained by him in some other incident. As regards preparation of site plan, no question has been put to the Investigating Officer to discredit either the site plan prepared by him or the recovery of the wads of cartridges made by him from the spot. In addition to that no question has been put to the Investigating Officer with regard to non-recovery of weapons of assault. Otherwise also, it is well settled, when the prosecution case is established by reliable ocular evidence, it cannot be discarded on the ground of faulty or inefficient investigation.

52. In view of the detailed discussion made above, we are of the considered view that the prosecution has been successful in establishing the charges against the accused-appellants beyond the pale of doubt and there is nothing on record to provide them the benefit of doubt.

53. Consequently, the appeal is dismissed. The judgement and order dated 10.9.1991 passed by the Sessions Judge, Pilibhit in Sessions Trial No. 210 of 1983 is affirmed. The bail bonds of the sole surviving appellant (Jogendra Singh), if on bail, is hereby cancelled. He shall be taken into custody and made to serve out the sentence awarded by the court below.

54. Let a copy of this order be sent to the trial court for compliance.
